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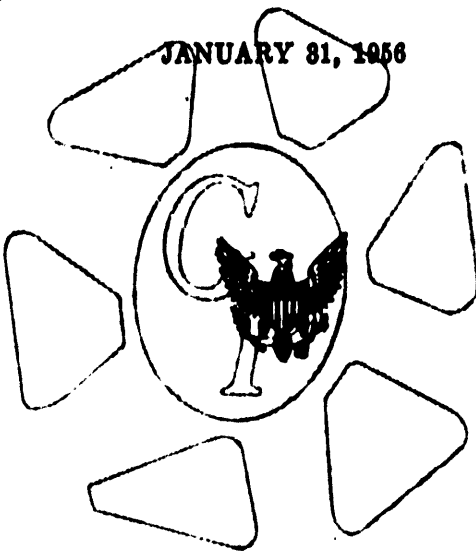
84th Congress }  
2d Session }

HOUSE COMMITTEE PRINT

# PRESIDENTIAL INABILITY

COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

JANUARY 31, 1956



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# PRESIDENTIAL INABILITY

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## INTRODUCTION

The existence of the problems of Presidential inability with their many ramifications and far-reaching consequences presents one of the most extraordinary facets of our political history. That remarkable-ness is accentuated not only by the absence of a solution but also by the knowledge that this situation has continued from the days of the Constitutional Convention. When John Dickinson, of Delaware, asked his fellow delegates in the Philadelphia Convention what was meant by the word "disability" and who would judge it the answering silence echoed through the years.

It appears that congressional interest in the problem presented by article II, section 1, clause 6 of the Constitution—that the powers and duties of the Presidency should devolve upon the Vice President when the President is disabled—was first stimulated by the lingering experience of President Garfield's death. The legislative recognition of that alarming incident consisted merely in an echo of the silence of the Founding Fathers. The questions remained unanswered.

Except for the sporadic and noneffective efforts of a few Members of Congress, the enigma of Presidential inability lay dormant in the vague phraseology of our Constitution. The protracted illness of President Wilson aroused once more that giant of uncertainty in our Constitution. The public apprehension and alarm produced several legislative proposals but historical silence was the only report of the Congress. Within a short span of time the pattern of lethargy which has dominated this situation had been reinstated nor has it been disturbed by the unsuccessful attempts to seek a solution in the form of studies by congressional committees.

The recent sudden illness of President Eisenhower has brought into proper focus once again the enormous and frightening implications of this problem. We believe, therefore, the people of this Nation will not tolerate a repetition of the silence and stagnation of past congressional action on this matter. To date providence has been patient and benevolent to our Government in spite of a blatant disregard of its responsibility on the part of the Congress.

In view of the precarious condition of present world affairs and the tremendous responsibility which world leadership has placed in our hands, it ill behooves us to tempt providence once more by inaction.

The time to strike at the heart of the problem is here. Clarification must supplant procrastination.

At a recent press conference, President Eisenhower, in answer to a reporter's inquiry for his opinion on the question of Presidential inability, is quoted as having said:

Well, when you are as closely confined to your bed as I was for some time, you think about lots of things, and this was one of the foremost in my mind.

I do believe that there should be some agreement on the exact meaning of the Constitution, who has the authority to act.

The Constitution seems to be clear that Congress cannot only make the laws of succession, but it can determine what is to be done, and it says, "In the case of so-and-so and so-and-so," but it does not say who is to determine the disability of the President. And we could well imagine a case where the President would be unable to determine his own disability.

I think it is a subject that, in its broadest aspects, every phase of it should be carefully studied by the Congress, advised with by the Attorney General, and any kind of advice they want from the executive department, and some kind of a resolution of doubt reached. I think it would be good for the country.

A preliminary analysis of the problem initiated several months ago at my direction as chairman of the Committee on the Judiciary, House of Representatives, reached the same conclusion as the President did. But the problem is far from simple; it involves intricate legal questions and constitutional issues.

In order to insure a broad and impartial approach to the problem a questionnaire on the subject matter was prepared and circulated among eminent jurists, political scientists, and public officials. The motive behind that step was to assemble authoritative opinions and data for later use—not only by the committee but also by all Members of the Congress.

In this document the suggestions and opinions of those who have replied are set forth. Another similar publication will be forthcoming in the near future containing additional news.

Further implementation of this project was the appointment of a special subcommittee to study Presidential inability composed of the ranking members of the Committee on the Judiciary. It will be the responsibility of this subcommittee to decide what future definitive steps and measures will be undertaken in the course of the study.

The initiation of this entire project was predicated upon the jurisdiction of the Committee on the Judiciary over Presidential succession and matters relating to the office of the President which jurisdiction is conferred thereon by the Legislative Reorganization Act and the Rules of the House of Representatives.

THE STUDY

CHAIRMAN CELLER'S LETTER OF TRANSMITTAL

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DEAR -----

Since the jurisdiction of the Committee on the Judiciary embraces constitutional questions and matters relating to the office of the President, I, as chairman of the committee, have concluded that it is imperative to direct the attention of the committee to a study of the delicate and vexing problem of Presidential inability arising from the inconclusive language of the Constitution.

I, therefore, have invited the consideration of the attached questionnaire by men eminent in the fields of political science and constitutional law. It is planned to compile the resulting answers and to publish them together as a House document.

It has been many years since this unresolved area has been seriously analyzed and it is my purpose, in this undertaking, to formulate such legislation as may be necessary to reach a sound resolution of this unanswered problem which has existed since the adoption of the Constitution. It is hoped that you will feel free to give your views, making such recommendation, explanation, and argument

as you deem fit. I hope you will not feel circumscribed by the questionnaire but will make such departures from it which, in your opinion, may be necessary.

Your conclusions may help to determine what subsequent action may or can be taken. Will you advise me of your willingness to cooperate with me in this study and let me know the approximate time I can expect to receive a reply to this questionnaire?

In appreciation, I am  
Sincerely yours,

EMANUEL CELLER, *Chairman.*

P. S.—I shall appreciate receiving from you at the time you answer the questionnaire a short biographical sketch which should include mention of published material.

## THE QUESTIONNAIRE

HOUSE OF REPRESENTATIVES, U. S.

COMMITTEE ON THE JUDICIARY

WASHINGTON, D. C.

84th Congress, 1st session

### QUESTIONNAIRE—PRESIDENTIAL INABILITY

I. What was intended by the term "inability" as used in article 2, section 1 clause 6, of the Constitution? Shall a definition be enacted into law? If so will you set forth a workable definition? Shall such a definition encompass physical and mental disability as well as the duration thereof?

II. Who shall initiate the question of the President's inability to discharge the powers and duties of his office?

- (a) The Congress.
- (b) The Vice President.
- (c) The Cabinet by majority vote.
- (d) Any other group, including independent agencies.
- (e) Shall (d) be of a continuing or temporary nature?

III. Once raised, who shall make the determination of inability?

- (a) The Congress.
- (b) The Vice President.
- (c) The Cabinet by majority vote.
- (d) Any other group, including independent agencies.
- (e) Shall (d) be of a continuing or temporary nature?

IV. Are there any constitutional prohibitions relative to questions II and III?

V. Shall dual authority, both to initiate the question and to determine the question, be vested in the same body?

VI. Shall the determination of disability set forth the—

- (a) Permanent nature of the disability?
- (b) Temporary nature of the disability?
- (c) If temporary, extent of?

VII. If temporary, who raises the question that the disability has ceased to exist? Once raised, who shall make the determination of cessation?

VIII. In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

IX. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

X. In the event of a finding of a permanent disability, does the language of the Constitution, namely, "—or a President shall be elected—" demand the immediate election of a new President? If so, would the election be for a 4-year term or for the unexpired term of the disabled President?

XI. Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?



ARTICLE II, SECTION 1, CLAUSE 6, THE CONSTITUTION OF THE  
UNITED STATES OF AMERICA

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.

REPLIES TO THE QUESTIONNAIRE

REPLY OF STEPHEN K. BAILEY, PRINCETON UNIVERSITY

DECEMBER 12, 1955.

HON. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN CELLER: I am gratified that you are planning to make a study of Presidential inability. It is, as you point out, a most "delicate and vexing problem." The replies to your questionnaire are made tentatively because any highly systematic answer to your questions would involve more time, study, and knowledge than I have at my disposal.

I. I do not know, and I am not sure that anyone knows, what the Founding Fathers really meant by the term "inability." I doubt that a definition should be enacted into law. In marginal cases the experts would probably quibble over any definition which received legal sanction.

II. My own feeling is that the initiation of the question of the President's inability to discharge the powers and duties of his office should come from a concurrent resolution of the United States Congress. Obviously, such a resolution could not be passed unless there was majority agreement that the issue should at least be looked into.

III. In order to remove the question of Presidential inability as far from partisan politics as possible, I should recommend that the Chief Justice of the United States Supreme Court be empowered by the concurrent resolution initiating the issue of Presidential inability to appoint an ad hoc body of 7 private citizens, not more than 3 from any one party and including at least 2 men of outstanding reputation in medicine and psychiatry. At least 5 members of said body after deliberation and investigation should agree on the President's inability, and even their certification of inability should be finally decided upon by the Supreme Court of the United States.

IV. These procedures would necessarily involve constitutional change.

V. No (see above).

VI. The determination should set forth (a), (b) and (c).

VII. The Supreme Court, again acting upon the recommendations of the ad hoc body referred to above in III.

VIII. In case of a temporary disability, the Vice President should succeed only to the powers and duties of the office.

IX. In case of permanent disability, the Vice President should succeed to the office itself.

X. I believe that in case of permanent disability, a new election should be called only if less than 2 years of a President's term had been served. In any case, the election should be for the unexpired term of the disabled President.

XI. I believe a constitutional amendment would be necessary to enact the above procedure.

At your request, I am submitting a short biographical sketch including an indication of some of my published materials.

Very sincerely yours,

STEPHEN K. BAILEY, *Director.*

## REPLY OF EVERETT S. BROWN, UNIVERSITY OF MICHIGAN

DECEMBER 28, 1955.

Hon. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
 House of Representatives, Washington, D. C.*

DEAR MR. CELLER: I am enclosing certain materials and comments which I hope may be pertinent to your study of Presidential inability. Since the historical background of the problem has been discussed in earlier committee hearings; in articles in various periodicals, including one by me in collaboration with Ruth C. Silva (copy submitted herewith); and elaborated at considerable length in Miss Silva's *Presidential Succession* (University of Michigan Press, 1951), I shall omit further comment on that phase of the problem.

It is not easy to discuss Presidential inability without going into the entire question of the executive branch of the Government. I have touched on a number of related questions in earlier books and articles listed in the enclosed bibliography. In the present instance, however, I shall attempt to confine my comments to the immediate questions raised in your questionnaire.

I have not entered upon a discussion of the manner in which inability of State executives has been cared for by constitutional and legislative provision. This phase of the problem will be treated by my colleague Professor Joseph E. Kallenbach, who has made a special study of it.

Sincerely yours,

EVERETT S. BROWN.

## PRESIDENTIAL INABILITY

By Everett S. Brown, professor of political science, University of Michigan

## ANSWERS TO QUESTIONNAIRE

I. (a) For the intended meaning of the term "inability" as used in article 2, section 1, clause 6, of the Constitution see: Everett S. Brown and Ruth C. Silva, *Presidential Succession and Disability*, *Journal of Politics* XI (February 1949), 236-256; and Ruth C. Silva, *Presidential Succession*, Ann Arbor, University of Michigan Press, 1951.

(b) A definition of "inability" should be enacted into law. Such a law should provide for both physical and mental disability, permanent and temporary. Temporary absence from the country is not necessarily an "inability"; however, the capture of a President in time of war could readily lead to a crisis in Government unless proper provisions were made for such an emergency.

II. In my opinion initiation of the question of Presidential inability should be made by the Cabinet and the Vice President. In case of physical disability only, the President himself might suggest that the Vice President act in his place.

If former President Hoover's proposal of an appointive chief assistant to the President, to relieve him of many unnecessary functions, were enacted into law, such an officer might be added to those already named to initiate the question of Presidential inability, since he would be in a favorable position to assist in the determination.

III. Determination of Presidential physical and mental inability might well be left to the Vice President, the members of the Cabinet, and the presiding officers of the House and Senate, after consultation with proper medical experts. The latter need not be required in case of enforced absence of the President from the country.

IV. I fail to see an insurmountable constitutional prohibitions relative to questions II and III.

V. See answers to II and III.

VI. I think it would be advisable to set forth the nature of the disability in all instances. It would allay doubts and fears in the public mind and dispense with many ill-founded rumors.

VII. If temporary, the question of cessation of disability should be raised by the agency mentioned in the answer to II.

Determination of cessation of temporary disability should be made by the agencies named in the answer to III.

VIII. In the event of temporary disability of the President, the Vice President succeeds to the powers and duties of the office.

IX. The same as in VIII.

X. I do not think an immediate election is required. If one were provided for, it would be preferable to have it for the unexpired term. To those who claim that the Constitution requires that such an emergency President be elected for a term of 4 years, attention might be called to the case of Senators. The Constitution provides that their election shall be for a term of 6 years, yet legislation and precedent have established 2 and 4 year terms for some Senators from States newly entering the Union, in order to maintain the division of Senators into 3 classes, one-third of whom go out of office every 2 years, as provided by the Constitution.

As a matter of historical fact, Congress by act of March 1, 1792, provided that the first Presidential term should be reckoned from the fourth day of March next succeeding the date of election. Since Washington was not inaugurated until April 30, the act of Congress shortened his first term by nearly 2 months.

XI. In my opinion any and all of the questions raised in the questionnaire could be settled by legislation.

#### PRESIDENTIAL SUCCESSION AND INABILITY

By Everett S. Brown, University of Michigan, and Ruth C. Silva, Pennsylvania State College

Senator Lodge, of Massachusetts, recently called the problem of Presidential disability to the attention of the Commission on Reorganization of the Executive Branch. As the Senator pointed out, twice a President of the United States has been in ill health and the fact of his infirmity has had a marked effect on national policy.<sup>1</sup> The Constitution provides that the powers and duties of the Presidency shall devolve upon the Vice President in case of the President's inability to discharge them, and that an officer designated by the Congress shall act as President in case of removal, death, resignation, or inability of both the President and Vice President.<sup>2</sup> The Constitution does not, however, expressly answer three major questions which arise in connection with inability: What is the status of one who acts as President because of the inability of the President? What constitutes inability to discharge the powers and duties of the Presidential Office? Who is to determine when an inability exists and when it ceases? The relationship of these questions to the general one of Presidential succession is such that none can be treated without first considering the more basic problems.

The Vice President, or the officer designated by the Congress, may be called to act as President either because of vacancy in the office of Chief Executive or because of inability of the incumbent. In the case of death, resignation, or removal, the Presidential Office is vacant; and, consequently, the problem of restoring the President to his powers does not arise. In case of inability, however, the Presidency is not vacant; and, therefore, the problem of reinstating the President is presented. This unavoidably raises questions relating to Presidential status and tenure: Does the successor become President? What is the status of the disabled President? Is the President to resume the exercise of Presidential power when his inability passes?

Soon after Tyler succeeded to the Presidency in 1841, Senator Allen, of Ohio, objected to establishing the precedent of the Vice President's becoming President upon the death of the latter, because he thought that it would unnecessarily complicate the situation on some future occasion when the President became disabled.<sup>3</sup> In the only two cases of Presidential inability to date, the Vice President was not called to act as President because of the fear that he would become President and thereby supersede the disabled President for the remainder of the term. As a result, the affairs of the executive branch were allowed to drift. In effect there was no Chief Executive. The problem of providing for the exercise of Presidential power during a period of inability would not be solved by enactment of a statute by means of which the disability could be decided. Unless the President's supporters were certain of his status following the inability, they would probably resist any attempt to establish inability, regarding it as equivalent to an action for removal of the disabled President from office. The first question, therefore, is whether or not one who acts as President becomes the President by virtue of the powers and duties devolved upon him.

Study of the records of the Federal Convention shows that it was never intended that the Vice President or designated officer should become President under the succession clause. When the draft Constitution went to the Committee of Style,

<sup>1</sup> Congressional Record, 80th Cong., 2d sess., vol. 94 (May 13, 1948);

Art. II, sec. 1, clause 6.

<sup>2</sup> Congressional Globe, 27th Cong., 1st sess., vol. 10 (June 1, 1841).

it contained two provisions dealing with Presidential succession, one providing that "the Vice President shall exercise those (the Presidential) powers and duties," and the other empowering Congress to designate an officer to "act as President" in certain cases. Each was modified by an adverbial clause limiting the tenure of the acting President to the duration of the inability. The Committee of Style, which was authorized to put the draft into clear and concise language but not to alter substantive provisions, substituted "the same" for "powers and duties" and "devolve" for "exercise"; so the Constitution, as reported by the Committee, provided that "the same shall devolve on the Vice President" and that the designated officer "shall then act as President."<sup>4</sup> All other records of the Convention similarly indicate the intended antecedent of "the same" as used in the succession clause to be "Powers and Duties of the said Office" rather than "said Office."<sup>5</sup> Thus the argument that the Presidential Office rather than its powers and duties devolves on the Vice President, who thereby becomes President, has no foundation in the records of the Constitutional Convention.

Again, it was the efforts of the Committee of Style at consolidation which resulted in combining the two succession provisions and in using the limiting clause, "until the Disability be removed," only once, instead of using it to modify each of the preceding clauses separately. The committee changed the semicolon to a comma, however, so the limiting clause would be part of a continuous sentence and, therefore, refer alike to the succession of a Vice President and an "officer" designated by Congress.<sup>6</sup> Other provisions of the Constitution lend support to this interpretation. They do not once say that the Vice President shall become President but rather that he shall act as President, that the Presidential powers shall devolve upon him, and that he shall exercise the office of President.<sup>7</sup> The delegates in the ratifying Conventions, and Hamilton in *The Federalist*, used the same guarded language.<sup>8</sup> If any of them had thought the President's successor would actually become the President, it would have been easier to have said "become President" than to have engaged in circumlocution.

Seemingly oblivious to the intent of the Constitution, all seven Vice Presidents, who have succeeded to the Presidency, have taken the Presidential oath and have been generally recognized as President of the United States. William Henry Harrison was the first President to die in office; and it was then decided that the Constitution provided that Vice President John Tyler should become the President and serve until the end of the term for which Harrison and he had been elected. Exactly how and by whom the decision was made is uncertain, but all evidence indicates that the Cabinet, whose ranking member was Daniel Webster, a constitutional lawyer of no mean repute, so decided.<sup>9</sup> Although Tyler thought

<sup>4</sup> See note 6, *infra*. For a more detailed consideration of the framing of the succession clause, see an unpublished doctoral dissertation, Ruth C. Silva, *Presidential Succession* (University of Michigan, 1948), ch. 1.

<sup>5</sup> Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, 1937), vol. 3, pp. 600, 623; vol. 2, pp. 140, 172, 186, 495, 499.

<sup>6</sup> The draft appears in the left column and the clause as reported in the right:

ART. X, SEC. 2: " \* \* \* and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and 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 removed."

ART. X, 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; (semicolon) and such Officer shall act accordingly, until such disability be removed, or a President shall be elected." *Ibid.*, vol. 2, pp. 578, 573.

ART. II, SEC. 1: "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, (comma) 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, (comma) and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." *Ibid.*, vol. 2, pp. 598-599, 624.

<sup>7</sup> Art. I, sec. 3, clause 6; art. II, sec. 1, clause 6; amendments XII and XX.

<sup>8</sup> Amendment proposed by the New York Convention, Jonathan Elliot, *The Debates in the Several States* (2d ed., Philadelphia, 1806), vol. 2, p. 408; Monroe and Madison, *ibid.*, vol. 3, pp. 487-490; Martin, *ibid.*, vol. 1, p. 378. H. C. Lodge (ed.), *The Federalist* (New York, 1862), No. 69, pp. 427-428.

<sup>9</sup> Silva, *op. cit.*, pp. 22-37; George Ticknor Curtis, *Life of Daniel Webster* (New York, 1870), vol. 2, p. 67 note. Thomas Ewing III, the grandson of Harrison's Secretary of the Treasury, wrote in a letter to the *New York Times*, Dec. 10, 1921: "Mr. Webster expressed the opinion that even though the President survived the period of inability and became capable of performing the duties of his office during the term for which he was elected, he would not displace the Vice President who had assumed the duties of that office." Then speaking of President Wilson's illness, Attorney Ewing said: "If that opinion is correct there could be no temporary displacement of the President. This of course adds greatly to the seriousness of the step in the event that the President has not died but is merely incapacitated." At the time Ewing wrote this letter, he possessed over 70 boxes, barrels, and suitcases of his grandfather's papers. These papers have been in the possession of the Library of Congress since November 1946, but have not been sorted, indexed, or made available for research purposes. Dr. Elizabeth McPherson, a member of the Library's staff, examined 6 letter books, 2,000 unbound letters, and a 65-page Journal covering the period of the elder Ewing's service in the Harrison-Tyler Cabinet, but found no reference to presidential succession. Whether the younger Ewing based his letter on these papers is not known; but correspondence with the Ewing family confirms that he was familiar with the papers.

himself qualified to exercise Presidential power without any oath other than the one he had taken as Vice President, he took the Presidential oath so doubt could not arise concerning the legality of his acts as Chief Executive.<sup>10</sup> Apparently Webster thought this was the proper procedure, because it was he who offered the resolution in 1850 for the two Houses to assemble for the administration of the Presidential oath to Millard Fillmore.<sup>11</sup>

Not all of Tyler's contemporaries approved of the decision that he had become President. Many of the newspapers at the time viewed him merely as the Vice President who was acting as President. They did not, however, object to his taking the Presidential oath, but no one argued that the taking of this oath actually made him the President.<sup>12</sup> Among those who agreed that Tyler had not become President were John Quincy Adams, and the man who hoped to be the power behind the throne during the regency of John Tyler, none other than Henry Clay himself.<sup>13</sup> Clay must have changed his mind, for he voted with the majority 8 weeks later when both Houses of Congress, over the strong opposition of John McKeon, William Allen, and Benjamin Tappan, recognized John Tyler as President of the United States.<sup>14</sup> Within a few weeks after Congress approved Tyler's succession, the whole matter was practically forgotten.

The precedent set by Tyler has since been confirmed six times. The status and tenure of Fillmore, Arthur, Theodore Roosevelt, Coolidge, and Truman have never been seriously questioned. At the time of Johnson's impeachment, however, his Presidential status was disputed; but nobody suggested calling a special election to choose a President who would displace him before the end of Lincoln's second term. The original resolution providing for the impeachment of Johnson styled him "Vice President and acting President of the United States." It seemed necessary, however, to recognize Johnson as the President in order to remove him;<sup>15</sup> but it was Senator Fessenden's conviction that he had become President, which saved Lincoln's successor from removal.<sup>16</sup> Actually the prece-

<sup>10</sup> James D. Richardson, *Messages and Papers of the Presidents, 1860-1897* (Washington, 1897), vol. 4, pp. 31-32; Herbert W. Horwill, *The Usages of the American Constitution* (Glasgow, 1926), pp. 70-71; Lyon Tyler, *The Letters and Times of the Tylers* (Richmond, 1885), vol. 2, p. 12; Samuel Tyler, *Memoir of Roger Brooke Taney* (Baltimore, 1872), pp. 295-296; Peter R. Levin, *Seven by Chance; Accidental Presidents* (New York, 1948), pp. 27-28.

<sup>11</sup> Webster's resolution provided that both Houses should assemble for the administration of the oath "prescribed by the Constitution to the late Vice President of the United States, to enable him to discharge the powers and duties of the office of President of the United States, devolved on him by the death of Zachary Taylor . . ." 8. Jour., 31st Cong., 1st sess. (July 10, 1850). Webster's phraseology, "late Vice President," implies that he thought Fillmore was already the President even though he had not yet taken the oath. The most nearly correct view probably is that the taking of the oath does not make anyone the President. It is Corwin's thesis that taking the oath by one elected to the Presidency does not make the man President, but is merely his first duty. Corwin thinks the man is already in office when he takes the oath, and points out that the Constitution says it is the President, not the President elect, who takes the oath. As Corwin mentions, the act of March 1, 1792, assumed that Washington became President on March 4, 1789, although he did not take the oath until April 30. Edward S. Corwin, *The President: Office and Powers* (New York, 1940), pp. 59, 148-149, 341. In any case, succeeding Vice Presidents must have thought the Presidential oath important, for all seven of them took it, and Arthur and Coolidge took it twice. *Harper's Weekly*, vol. 25, p. 600 (1881); *New York Times*, February 3, 1932.

<sup>12</sup> For example: *Harrisburg Intelligencer* (Whig) reprinted in the *Daily National Intelligencer*, April 12, 1841; *Richmond Enquirer* (Democrat) reprinted in the *Washington Globe*, April 12, 1841; *New York Evening Post* (Democrat) reprinted in *Niles National Register*, April 24, 1841.

<sup>13</sup> Charles Francis Adams (ed.), *Memoirs of John Quincy Adams* (Philadelphia, 1876), vol. 10, pp. 461-465; vol. 12, p. 176; Lyon Tyler, *op. cit.*, vol. 2, p. 30; Calvin Colton (ed.), *The Works of Henry Clay* (New York, 1904), vol. 2, pp. 355-356.

<sup>14</sup> *Congressional Globe*, 27th Cong., 1st sess., vol. 10 (May 31-June 1, 1841).

<sup>15</sup> If Johnson were the President, Chief Justice Chase would preside at the trial; and the President pro tempore of the Senate, Ben Wade, whose vote was necessary for conviction, would be a voting member of the court. If, on the other hand, Johnson were merely the Vice President, Wade would preside and whether he would have a vote or not was questionable. Although Wade would have become the acting President if Johnson had been removed, he not only sat as a member of the impeachment court, but he also voted for removal. David Miller Dewitt, *The Impeachment and Trial of Andrew Johnson* (New York, 1903), pp. 152, 280, 390-393, 553, 576.

<sup>16</sup> The chief charge against Johnson was that he had violated the Tenure of Office Act by removing Secretary of War Stanton, a Lincoln appointee, without the consent of the Senate. The act provided that such removals could not be made without senatorial consent, but an appointee's title to office expired 1 month after the expiration of the term of the President by whom the officer was appointed. If Johnson were still the Vice President, he had violated the law. On the other hand, if Johnson had become the President, Stanton's tenure had expired, and thus Johnson had not violated the act. Although Boutwell argued that Johnson was the President when the impeachment court was being established, he later argued that the term of President was 4 years, and that not the office and its term, but the powers and duties of the President, had devolved upon Johnson. He said Johnson had no term, and it was during Lincoln's second term that Stanton had been removed. Dewitt, *op. cit.*, pp. 367-369, 411, 424-425. Senator Fessenden's vote was necessary for removal. But the Senator from Maine thought Johnson had become President and, therefore, had not violated the Tenure of Office Act. Consequently, he voted for acquittal. Francis Fessenden, William Pitt Fessenden (New York, 1907), vol. 2, pp. 246-250.

dent according to which the Vice President becomes President was confirmed by the impeachment of Johnson as President.<sup>17</sup>

Such was the established rule of succession in 1881, when the first serious case of Presidential inability occurred. During the 80 days of Garfield's fatal illness, he performed but 1 official act, the signing of an extradition paper. The daily bulletins of his physicians are sufficient evidence that he was unable to perform the duties of his office. While the President was disabled, there was much urgent business calling for the immediate attention of the Chief Executive. There were mail frauds; there were officers to be commissioned; the country's foreign relations were deteriorating; but only routine business, which could be handled by the department heads without the President's supervision, received attention.<sup>18</sup> The question that most complicated the problem was whether or not Vice President Arthur would become the President for the remainder of the term if called to act in that capacity. Some respected legal opinion held that the Vice President would assume the office in case of inability just as in case of vacancy, and the powers and duties once devolved could not be returned to the President when the disability was removed.<sup>19</sup> Although the great weight of opinion favored the President's resumption of his powers and duties when he recovered,<sup>20</sup> the Cabinet was impressed by the arguments to the contrary.

When it appeared that Garfield would recover, the Cabinet met and discussed the inability question. There was unanimous agreement on the desirability of having Arthur act as President during Garfield's recuperation; but 4 of the 7 Cabinet members thought there could be no temporary devolution of Presidential power on the Vice President. In view of this conflicting opinion, the Cabinet concluded that it would be unfair to advise Garfield to invite Arthur to act as President without first presenting all the questions for the President's consideration, because it might mean that they were asking the President to abdicate for the rest of the term. All agreed that the President was too ill to have these questions presented to him. The cabinet thought the shock of taking any action on the matter might cause his death, so the question was dropped.<sup>21</sup> Garfield's demise made it unnecessary to solve the dilemma in 1881, and the problem was not raised again until Wilson fell ill in 1919.

Wilson's inability was probably more detrimental to the public interest than Garfield's, not only because it lasted for a longer period but also because it occurred during the struggle for the League of Nations. There can be no question that Wilson was unable to perform his Presidential duties much of the time from September 25, 1919, to March 3, 1921. During the special session of the 66th Congress, 28 acts became law owing to the President's failure to pass on them within the requisite 10 days.<sup>22</sup> Wilson did not meet his Cabinet for 8 months during his illness.<sup>23</sup> The Senate Committee on Foreign Relations was unable to get any action from the President on the matter of the Shantung settlement.<sup>24</sup> The Constitution says that the President shall receive the representatives of foreign states, but Viscount Grey, the British Ambassador, spent 4 months in Washington without seeing the President once.<sup>25</sup> At one time Senator Hitchcock, the Democratic leader in the Senate, thought he might be able to get the Republicans to compromise on the Versailles Treaty, but Wilson's physicians refused to let him see the President and, as Hitchcock said, he had to consult with the President before the Democratic Senators could do anything.<sup>26</sup> Although it was reported 5 days

<sup>17</sup> George Boutwell, *Reminiscences of 60 Years in Public Affairs* (New York, 1902), vol. 2, p. 113.

<sup>18</sup> George F. Howe, *Chester A. Arthur* (New York, 1934), pp. 152-153, 181; Boston Evening Transcript, August 25, 1881; New York Herald, September 1, 5, 1881; New York Times, August 11, 1881.

<sup>19</sup> For example: Theodore Dwight, *Presidential Inability*, No. Am. Rev., vol. 133, p. 436 (1881); Judge Dittenhofer, New York Herald, September 13, 1881.

<sup>20</sup> For example: Benjamin Butler, *Presidential Inability*, No. Am. Rev., vol. 133, p. 428 (1881); Thomas M. Cooley, *Presidential Inability*, *ibid.*, 422; Lyman Trumbull, *Presidential Inability*, *ibid.*, 417; George Ticknor Curtis, *Presidential Inability*, *Harper's Weekly*, vol. 25, p. 631 (1881); former Attorney General Jeremiah Black, Governor Littlefield of Rhode Island, and Governor Bigelow of Connecticut, New York Herald, September 6, 1881; Judges Lyman Trumbull and Elias Griswold, *ibid.*, September 9, 1881; former Attorney General Schoonmaker, *ibid.*, September 17, 1881.

<sup>21</sup> New York Herald, September 2, 1881; New York Tribune, September 2, 1881. On September 4, 1881, the New York Times reported that Secretary of State Blaine, Secretary of the Navy Hunt, and Secretary of War Lincoln thought the Vice President could temporarily act as President; but Attorney General MacVeagh, Postmaster General James, Secretary of the Treasury Windom, and Secretary of the Interior Kirkwood were of the contrary opinion.

<sup>22</sup> Lindsay Rogers, *The President's Illness*, *American Political Science Review*, vol. 14, pp. 87-88 (1920).

<sup>23</sup> David Houston, *Eight Years with Wilson's Cabinet* (New York, 1926), vol. 2, pp. 69-70; David Lawrence, *The True Story of Woodrow Wilson* (New York, 1924), p. 298.

<sup>24</sup> New York Times, October 14, 1919.

<sup>25</sup> Horwill, *op. cit.*, pp. 80-81.

<sup>26</sup> New York Times, November 30, 1919.

later that Hitchcock had seen the President 3 times,<sup>27</sup> it was plainly evident that there was an unable President in the White House. Many students of the period agree that public business in general, and the fate of the treaty in particular, were affected by the President's isolation from public opinion, from his advisers, and from congressional leaders.<sup>28</sup>

Public affairs were conducted much as they had been during Garfield's illness. Either Presidential powers and duties were not discharged or were handled in such manner as the Cabinet, the President's family and his personal entourage could devise. There seems to be almost unanimous agreement that state papers were given to Mrs. Wilson first. If she had any doubt as to the effect they would have on her husband, she submitted them to Dr. Grayson. If Dr. Grayson thought the President was strong enough to pass judgment on them without injuring his health, they were shown to him. If not, they were deferred or passed on to Secretary of the Treasury Houston, or a few others in whom Mrs. Wilson had confidence.<sup>29</sup> That this situation existed was rather widely known at the time; yet there was no serious movement for the devolution of Presidential power on Vice President Marshall.

The possibility of inviting Marshall to act as President was discussed several times. On March 1, 1920, the House Committee on the Judiciary held hearings on 3 bills and 1 proposed constitutional amendment for the declaration of such an inability. The hearings served only to bring out almost insurmountable constitutional problems, the most difficult of which was whether or not the President could be restored to his powers and duties when he recovered. Authorities were cited on both sides of the question, but the committee could reach no conclusion and reported none of the measures.<sup>30</sup> At another time, the Senate Committee on Foreign Relations sent Senators Fall and Hitchcock as a special subcommittee to interview the President to determine the truth or falsity of the many rumors that he was in no physical or mental condition to attend to important public business. They were with the President 40 minutes, found him in bed but mentally vigorous, and the visit came to nothing.<sup>31</sup>

The Cabinet also considered asking the Vice President to act as President; but the White House circle fought the move.<sup>32</sup> When Lansing suggested this possibility, Tumulty, the President's secretary, was indignant and reproached the Secretary of State for his lack of devotion to Wilson. Tumulty quotes himself as saying: "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to *ousting* him. He has been too kind, too loyal, and too wonderful to me to receive such treatment at my hands."<sup>33</sup> Tumulty's objection to the devolution of executive power on the Vice President seems to have been based on the thought that it would displace Wilson. The President apparently took the same view. Tumulty quotes Wilson as declaring on the occasion of Lansing's forced resignation: "Tumulty, it is never the wrong time to spike disloyalty. When Lansing sought to *oust* me, I was on my back. I am on my feet now and I will not have disloyalty about me."<sup>34</sup>

Because of the fear that a succeeding Vice President displaces the disabled President, the Cabinet, in the case of Garfield, and the White House circle, in the case of Wilson, decided on the basis of personal loyalty to the disabled President whether an inability existed or not, and on both occasions the decision was contrary to fact. The usage by which the Vice President is transformed into a President has practically nullified the constitutional provision for the administration of the executive branch of the Government when a President becomes incapacitated. It is important, therefore, to consider the reasoning by which the

<sup>27</sup> *Ibid.*, December 5, 1919.

<sup>28</sup> Charles Seymour (editor), *The Intimate Papers of Colonel House* (Boston, 1926-28), vol. 4, pp. 506-507, 509-512; Lawrence, *op. cit.*, p. 299; Edith G. Reid, *Woodrow Wilson* (New York, 1934), pp. 224-230; William Allen White, *Woodrow Wilson* (Boston, 1925), pp. 448-460; John K. Winkler, *Woodrow Wilson* (New York, 1933), pp. 286-299.

<sup>29</sup> Mrs. Wilson herself confirms much of this. Edith Bolling Wilson, *My Memoir* (Indianapolis, 1939), pp. 288-290, as does Houston, the Cabinet member in whom Mrs. Wilson had the most confidence; *op. cit.*, vol. 2, pp. 60-66. See also Irwin Hoover, *Forty-two Years in the White House* (Boston, 1934), pp. 105-106; Lawrence, *op. cit.*, pp. 283-309; Reid, *op. cit.*, p. 224-230; Winkler, *op. cit.*, pp. 287-288. See especially Joseph P. Tumulty, *Woodrow Wilson As I Know Him* (New York, 1921), pp. 437-438.

<sup>30</sup> Hearings on H. R. 12609, 12629, 12647, and H. J. Res. 297; House of Representatives Committee on the Judiciary, 66th Cong., 2d sess. (1920).

<sup>31</sup> *New York Times*, December 6, 1919. See also Hitchcock's account of this incident, in John M. Mathews and Clarence A. Berdahl, *Documents and Readings in American Government* (New York, 1928), pp. 111-113.

<sup>32</sup> Houston, *op. cit.*, vol. 2, pp. 37-39; Tumulty, *op. cit.*, pp. 443-446.

<sup>33</sup> Tumulty, *op. cit.*, p. 444. [Italic supplied.]

<sup>34</sup> *Ibid.*, p. 445. [Italic supplied.] In 1885, Wilson wrote that the Vice President's importance consists in that he may cease to be Vice President. *Congressional Government* (New York, 1885), pp. 240-241. See also Reid, *op. cit.*, p. 223.

precedent has been sustained in case of the President's death, and by what logic it has been extended to the case of his inability.

In substantiation of the thesis that the Vice President becomes President when there is a vacancy or inability in the superior office it is said that the Constitution itself provides that the Presidential office, not merely its powers and duties, shall devolve upon the Vice President.<sup>35</sup> The argument runs that not only is this true grammatically but that the framers of the Constitution intended it to be the case. In answer to this assertion, it can be pointed out that syntactically "the same" as used in the succession clause may refer to "powers and duties of the said office" as well as to "said office."<sup>36</sup> In reply to the contention that the framers of the Constitution intended the office as well as its powers and duties to pass to the Vice President, it is necessary only to point to the records of the Federal Convention.<sup>37</sup> Although the framers of the Constitution intended "the same shall devolve on the Vice President" to be equivalent to "the Vice President shall exercise those powers and duties," the difference in the language used in the two parts of the succession clause is frequently cited to buttress the proposition that the Vice President becomes President when called to act as such. It is claimed that in case of single vacancy, the office devolves upon the Vice President for the remainder of the term, but in case both the Presidency and Vice Presidency are vacant, the designated officer acts as President *ad interim*.

It has been asserted that the adverbial clause, "until the disability be removed, or a President shall be elected," modifies only the clause providing for an officer to act as President. Some have even gone so far as to say that the limiting clause is separated by a semicolon from the clause providing for the succession of the Vice President and refers, therefore, only to the officer who might be designated to act as President. In consequence, they argue, once the Vice President succeeds, he takes the office without limitation for the remainder of the term. It is absurd to hold that the adverbial clause, "until the disability be removed," limits the tenure of a designated officer who acts as President but does not apply to the Vice President who becomes President. As the New York Tribune asked editorially: What kind of sense does it make to say that, if the President becomes ill, the Vice President replaces him for the rest of the term; but if the Vice President, who has succeeded the President, becomes ill, also, he can assume the exercise of presidential power when he recovers?<sup>38</sup>

Some have tried to escape this conclusion by arguing that the office devolves on the Vice President in case of vacancy in the Presidency, but in case of disability only its powers and duties devolve on him for the duration of the inability.<sup>39</sup> The difficulty is that the Constitution makes no distinction between the status of one who succeeds because of vacancy and of one who succeeds because of inability. The same thing devolves in both cases.<sup>40</sup> Others have tried to evade this difficulty by saying the Vice President becomes President in case of inability just as in case of vacancy, but that he ceases to be President when the disability is removed.<sup>41</sup> The trouble with this position is that it creates the anomaly of two Presidents at once or necessitates the removal of the disabled President. It also requires the removal of the second President at the termination of the first President's inability;

<sup>35</sup> For a general exposition of the thesis that the Vice President actually becomes the President, see for example: Wise and Walker, *Congressional Globe*, 27th Cong., 1st sess., vol. 10 (June 1, 1841); Jones, *Congressional Record*, 47th Cong., 1st sess., vol. 13 (December 16, 19, 1881); Hannis Taylor, *Congressional Record*, 65th Cong., 3d sess., vol. 57 (December 3, 1918); Justice Blatchford in *Merriam v. Clinch*, 17 Fed. 68, 70. See also Dittenhoefer and Dwight, cited in note 10, *supra*.

<sup>36</sup> It is a rule of Latin grammar that the immediately preceding noun is the antecedent of the relative which follows, in which case "the same" would refer to office. Accepted English usage, however, does not always conform to this rule, nor did it in the period when the Constitution was written. In English the antecedent is frequently the last grammatical unit used as a substantive, in which case the antecedent would be "powers and duties of the said office." Sir James Murray, *A New English Dictionary on Historical Principles* (Oxford, 1889-1928), vol. 8, pt. 2, p. 75.

<sup>37</sup> For a general exposition of the thesis that the successor does not become President but merely acts as such, see for example: McKeon, Allen, Tappen, *Congressional Globe*, 27th Cong., 1st sess., vol. 10 (May 31, June 1, 1841); Maxey, *Congressional Record*, 47th Cong., 1st sess., vol. 13 (December 14, 1881); Lapham, *Congressional Record*, 47th Cong., 2d sess., vol. 14 (January 6, 1883); Henry E. Davis, *Inability of the President*, S. Doc. 308, 65th Cong., 3d sess.; John B. Leavitt, *A Solution of the Presidential Inability Problem*, *American Bar Association Journal*, vol. 8, pp. 189-190 (1922).

<sup>38</sup> August 16, 1881.

<sup>39</sup> See for example: Cooley, *op. cit.*, pp. 122-124; George Tieknor Curtis, *Presidential Inability*, *Harper's Weekly*, vol. 23, p. 583 (1881); J. Alexander Fulton, *Presidential Inability*, *Albany Law Journal*, vol. 24, pp. 286-287 (October 8, 1881); the colloquy between Representatives Walsh and Fess, *Hearings, op. cit.*, p. 40.

<sup>40</sup> None of the various drafts of the Constitution distinguished between the status of one who succeeds in case of vacancy and of one who succeeds because of inability, nor is there anything in the records of the Convention to indicate that such a distinction was intended. All of the records show that the devolution of power in case of inability was intended only for the duration of the inability. Farrand, *op. cit.*, vol. 3, p. 600; vol. 2, pp. 172, 186, 493, 499, 532, 535, 573, 596-599, 659.

<sup>41</sup> See for example: Judge Griswold, *New York Herald*, September 9, 1881.



yet the only method for removal of a President from office is impeachment by the House and conviction by the Senate.

If one holds that a succeeding Vice President does not become President, he is not troubled by these inconsistencies. He does not have to explain why seven "Presidents" have had a term of less than 4 years while the Constitution provides a 4-year term for the President unless he dies, resigns, or is removed before the expiration of that term. There is no need for distinguishing between a Vice President upon whom Presidential power devolves and an officer who acts as President. There is no need for distinguishing between vacancy and inability. In all cases the successor merely acts as President ad interim. This view greatly simplifies the problem of handling cases of disability because it allows the Vice President to act as President for the duration of the inability without displacing the President or without causing the anomaly of two Presidents. It allows the Vice President to discharge the presidential functions as a part of his Vice Presidential duties and to do so under his oath as Vice President. As Senator Lapham said in 1883, the Vice President commits himself solemnly to discharge all the duties of the office of Vice President, one of which is to perform the functions of the Presidency when they devolve upon him because of vacancy or inability in the superior office.<sup>42</sup>

The objection to this interpretation of the succession clause is that the Constitution vests executive power in the President and thus by implication forbids its exercise by anyone who is not actually the President. The Constitution commands that the President shall take care that the laws be faithfully executed. Specific grants of executive power made by the Constitution are made to him. Attorney General Caleb Cushing thought the President, the man holding the presidential office, and he alone, could exercise the executive powers specifically granted in the Constitution; that the act of signing and vetoing bills was a personal act of the President and could not be exercised by any other.<sup>43</sup> Although the Supreme Court has upheld the delegation of certain powers by the President to the department heads and has said that their acts are presumed to be his and are binding within the sphere of the President's legal and constitutional authority,<sup>44</sup> the courts have denied anyone the right to exercise for the President a power which from the nature of the case requires the President's personal judgment.<sup>45</sup> A study of the cases in which the delegation of executive power has been upheld will show that in every case, the power in question was one granted to the President by statute. Not once has the Court upheld the delegation of power directly vested in the President by the Constitution. As Professor Corwin says, the Constitution "knows a single executive power, that of the President, whose duty it is to see that the laws be faithfully executed, a duty which, legally, it is his obligation and power to execute personally."<sup>46</sup>

The argument that the vesting clause, as interpreted by the courts, requires one to become President in order to exercise those powers vested in the President alone is not unanswerable. 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, executive.<sup>47</sup> 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

<sup>42</sup> Congressional Record, 47th Cong., 2d sess., vol. 14 (January 6, 1883). The Constitution requires the President to take the oath; but in the case of an acting President one may ask whether his taking the oath is a legal obligation or mere custom. It seems to be assumed that the taking of the Presidential oath is a prerequisite to the exercise of Presidential power and that this oath transforms a Vice President into a President; but it is contended at the same time that the officer designated by the Congress would not become the President although, presumably, the same oath would be a prerequisite to his exercise of Presidential power also. See note 11, supra.

<sup>43</sup> Op. Att. Gen. vol. 7, pp. 464-470 (1855).

<sup>44</sup> *Wilcox v. Jackson*, 13 Pet. 498, 513 (1839); *United States v. Ellason*, 16 Pet. 291, 302 (1842); *Williams v. United States*, 1 How. 290, 296-297 (1843); *Confiscation Cases*, 20 Wall. 92, 109 (1874); *Wolsey v. Chapman*, 101 U. S. 765, 769-770 (1879); *Funkle v. United States*, 122 U. S. 513, 557 (1887); *United States v. Fletcher*, 148 U. S. 84, 88-91 (1893); *United States ex rel. French v. Weeks*, 259 U. S. 326, 334 (1922); and *Caleb Cushing*, op. cit., pp. 453-460.

<sup>45</sup> *Ex parte Field*, 9 Fed. cas. 1, 5 (1862); *Funkle v. United States*, 122 U. S. 513, 557 (1887); *United States v. Page*, 157 U. S. 673, 680-681 (1891); *United States v. Fletcher*, 148 U. S. 84, 88-91 (1893).

<sup>46</sup> Corwin, op. cit., pp. 76-82.

<sup>47</sup> Farrand, op. cit., vol. 1, pp. 21, 63, 70, 72, 73, 79, 88, 90, 92, 93, 96, 105, 106, 109, 225, 230, 236, 244, 247, 254, 261, 266, 272, 292; vol. 2, pp. 22, 29, 100-101, 116, 132, 134, 135, 145, 158, 171, 185, 401, 572, 597, 657; vol. 3 pp. 132, 347; vol. 4, pp. 17, 46.

possible.<sup>48</sup> 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.

If it is recognized that the Vice President does not become the President in case of the President's disability, the problem of what constitutes inability is less formidable, since the disabled President is not thought to have forfeited his office. Nearly all of those who hold that the Constitution provides only for an inability of a permanent character extending throughout the remainder of the term hold also that, once the inability is established, the Vice President becomes the President for the unexpired portion of the term. If the Vice President actually displaces the incapacitated President for the duration of the term, only the most extended disabilities should be held to fall within that class of disabilities which devolves presidential power on the Vice President. If the Vice President merely acts as President for the duration of the inability, however, restriction to disabilities extending throughout the entire term seems unnecessary. Even if this limitation on the meaning of inability is ruled out, there still is no unanimous agreement on its definition. Some hold it is limited to mental incapacity, while others believe it covers any disability whatever the cause.

During Garfield's illness there was an impressive body of opinion which held that the only disability recognized by the Constitution was intellectual incapacity. Theodore Dwight, professor of constitutional law at Columbia College, applied the common law which defined the term as mental inability. He said that it was such an incapacity as a civil court would recognize as unfitting a man to make a grant, but not including physical disability such as an arm injury making it necessary to have a deputy sign for him.<sup>49</sup> Former Senator Eaton, a recognized authority on the Constitution, stated that the succession clause provided for no disability of which the President could be aware, and was amazed at the suggestion that the President could decide his own disability. The "inability," he held, must be one such as insanity, which is patent to everyone except the President. As long as the President possesses reason, said Eaton, he is not disabled in the constitutional sense.<sup>50</sup> Secretary of the Interior Kirkwood likewise thought the Constitution provided only for mental inability, an opinion with which Senator McDonald of Indiana, Governor Cullum of Illinois, and Judge Trumbull agreed.<sup>51</sup>

There is an equally respectable body of opinion which holds that inability is not restricted to mental incapacity but that if the public interest suffers because the President is unable to exercise his powers, whatever the cause, a case of inability exists. Benjamin Butler, writing with reference to Garfield's illness, said that inability is obvious to any right thinking person. If an emergency arises and the President is unable to act, the Vice President is to assume presidential power.<sup>52</sup> Among those who have thus broadly defined "inability" are Congressman George M. Robeson, Judge Elias Griswold, Senator Elbridge G. Lapham, George Ticknor Curtis, and Attorney John Brooks Leavitt.<sup>53</sup> There is an abundance of conflicting opinion on the meaning of the term, but none is authoritative. The records of the Federal Convention and the commentators on the Constitution throw no light on the question. Since there are no authorities to whom one can turn for a definition of "inability," the term must be defined on the bases of general principles of law and rules governing constitutional interpretation.

To restrict the meaning of inability to mental incapacity would deprive the United States of a Chief Executive in case of the President's physical disability, of his capture by the enemy in time of war, and on other occasions when the President is mentally competent yet physically unable to exercise his powers. A definition of inability which fails to provide for the exercise of Executive power at all times is contrary to the legal principle that Executive power is a continuing one, never ending, never dormant, never allowed to lapse, and that there must be someone at all times to exercise the power.<sup>54</sup> The courts say that, where

<sup>48</sup> *Schick v. United States*, 195 U. S. 65, 66 (1904).

<sup>49</sup> Dwight, *op. cit.*, pp. 436-439.

<sup>50</sup> *New York Times*, September 2, 1881.

<sup>51</sup> Kirkwood, *Boston Evening Transcript*, July 16, 1881; McDonald, *ibid.*, August 19, 1881; Cullum and Trumbull, *New York Herald*, September 9, 1881.

<sup>52</sup> *Loc. cit.*, 428-430. See also Harry J. Cole, "To What Extent Can the President of the United States Perform the Duties of His Office While Abroad," *Mass. Law Quar.*, vol. 4, pp. 180, 191-193 (1919).

<sup>53</sup> Robeson, *New York Tribune*, September 2, 1881; Griswold, *New York Herald*, September 9, 1881; Lapham, *Congressional Record*, 47th Cong., 2d sess., vol. 14 (January 6, 1883); Leavitt, *loc. cit.*, p. 190 and his letter to the *New York Times*, December 6, 1921; Curtis, *op. cit.*, p. 583.

<sup>54</sup> *Barrett v. Duff*, 114 Kans. 220, 223 (1922); *Ex parte Crump*, 135 Pac. 428, 433-436 (1913); *Ex parte Hawkins*, 136 Pac. 991, 993 (1918); *In re an Act Concerning Alcoholic Beverages*, 130 N. J. L. 123, 129 (1943).

words admit different meaning, the one consonant with the object in view is to be selected, that words are to be taken in their natural and obvious sense and not in a sense unreasonably restricted, and that the Constitution must receive a practical construction.<sup>55</sup> These well established rules point to a definition of "inability" which covers all cases in which the President is in fact unable to exercise a power which the public interest requires to be exercised. The cause and duration of the inability are immaterial; the question is one of fact.

This conclusion would mean that some illnesses and absences are disabilities while others are not. In time of war, for example, an illness of a few days may be more serious than one of several months at another time. With the development of rapid communication and transportation, absence would not usually be an inability in fact. Although the records of the Philadelphia Convention show that the Vice President was intended to exercise presidential power during the President's absence, usage has established that mere absences from the United States is not a disability within the meaning of the Constitution.<sup>56</sup> This is not to say, however, that some absences might not be disabilities. The answer in a particular case would depend on the facts. Even if it possesses the power Congress probably cannot define inability before its occurrence in such a way as to cover every contingency.<sup>57</sup> The most Congress can do is to declare that the term "inability" shall cover all cases in which the President is in fact unable to exercise the powers and discharge the duties of his office. The only effect of a declaration would be to put the congressional approval on well-established principles of law and constitutional interpretation, and to guide those who must decide if an inability exists in a particular case.

The final problem concerns who shall decide when a disability on the part of the President exists. The records of the Constitutional Convention do not reveal the intention of the framers of the succession clause on this subject. John Dickinson raised the question, but none of his colleagues offered an answer.<sup>58</sup> In 1881, when President Garfield was incapacitated, the great weight of opinion favored the theory that the successor is to determine when the President is disabled. Adherents of this position say that the Vice President is obligated to exercise the power and perform the duties of the Presidency, just as it is his duty to preside in the Senate, and no enabling action by the courts, the Congress, the Cabinet, or the President is necessary.<sup>59</sup> Judge Trumbull said there is no need for providing a formal means of determination. In Trumbull's opinion, the inability must be so notorious that no one can reasonably doubt its existence. In such a case, he said, the Vice President is authorized to assume the Executive power if important public business requires Executive action. When these conditions exist, continued the Judge, the Cabinet should notify the Vice President just as in case of the President's death, but there is no constitutional requirement for this notification. It is only custom in case of the

<sup>55</sup> *Aldrich v. Kinney*, 4 Conn. 380, 385 (1822); *People v. Dawell*, 25 Mich. 247, 261 (1872); *Railroad Co. v. Periton*, 18 Wall. 5, 31 (1873); *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S. 601, 618 (1895).

<sup>56</sup> The succession clause as referred to the Committee of Style provided for five cases: removal, death, absence, resignation, and inability. Farrand, op. cit., vol. 2, p. 575. The provision for the exercise of Presidential power during the President's absence was deleted by the committee; and there is no record that the Convention was aware of this change. *Ibid.*, vol. 2, pp. 598-599. Since absence is not specifically mentioned in the Constitution, the question is whether or not it is covered by the term "inability." For a consideration of this question, see Silva, op. cit., pp. 146-155.

<sup>57</sup> There has never been unanimous agreement on the power of Congress to deal with inability. One position is that the only power granted to Congress is to declare what officer shall act as President in case of vacancy or inability in both the Presidency and Vice Presidency, and under the rule of *inclusio unius, exclusio alterius*, Congress has no other powers in the field of presidential succession. See W. W. Willoughby, *The Constitutional Law of the United States* (New York, 1929), vol. 3, pp. 1467-1468; Butler, op. cit., pp. 431-433; J. Hampden Daugherty, *Presidential Succession Problems*, Forum, vol. 42, pp. 523, 525 (1909); Davis, loc. cit., pp. 13-15; Urban Lavery, *Presidential Inability*, Am. Bar Assoc. Jour., vol. 18, pp. 13-17 (1922).

The other position is that the elastic clause gives Congress power to implement the inability clause, since this is a power necessary and proper to carry into execution the Executive power and guarantee that it shall not become dormant. See John Randolph Tucker, a strict constructionist, *The Constitution of the United States* (Chicago, 1899), vol. 2, p. 713; Cooley, op. cit., pp. 425-427; Curtis, op. cit., pp. 683, 681; Judge Shellabarger and Governor Long, *New York Herald*, September 5, 1881; former Attorney General Schoonmaker, *Ibid.*, September 17, 1881; Congressman Robeson and former Vice President Colfax, *New York Tribune*, September 2, 8, 1881. Representative McArthur thought the elastic clause gave Congress the power to define inability just as it gave Congress the power to define "interstate commerce" and "intoxicating liquor"; hearings, op. cit., p. 35.

<sup>58</sup> Farrand, op. cit., vol. 2, p. 427.

<sup>59</sup> For example: Butler, loc. cit., pp. 431-433; Davis, loc. cit., pp. 13-15; Governor Hendricks of Indiana, *New York Herald*, August 21, 1881; Governor Long of New York and Judge Shellabarger, *Ibid.*, September 8, 1881; former Attorney General Schoonmaker, *Ibid.*, September 17, 1881; Representative Robeson, *Boston Evening Transcript*, September 2, 1881; former Senator Eaton of Connecticut, *New York Times*, September 2, 1881; Senator Garland, *Congressional Record*, 47th Cong., 1st sess., vol. 13 (December 15, 1881); Senator Lapham, *Congressional Record*, 47th Cong., 2d sess., vol. 14 (January 6, 1883).

President's death and desirable in case of inability. It is extralegal and adds nothing to the Vice President's right to exercise Presidential power.<sup>60</sup>

Trumbull is probably correct in saying that the decision belongs to the successor in the first instance. Since the duty of acting as President under certain conditions of fact is imposed upon him, his official discretion extends to the determination of whether the condition exists or not. It is a well-established rule of law that in contingent grants of power, the one to whom the power is granted is to decide when the emergency has arisen. Thus the Vice President or the officer designated by law to act as President is constituted the judge of the Executive's inability in the first instance and is bound to act according to his interpretation of the facts. Someone must decide whether the President is disabled; and, since the Constitution mentions only the successor, he is the judge of the facts.<sup>61</sup> If past experience can be taken as a reliable indication of the attitude of future successors, the danger of their usurping the President's powers on the pretext of inability is slight indeed. The judgment of both Vice Presidents Arthur and Marshall was conditioned by their sense of propriety. These two cases indicate that the real problem is not how to guard against the successor's abuse of the power, but how to relieve him of the embarrassing duty of taking the initiative.

It seems almost certain that no court has power to issue a writ of mandamus to the Vice President, or designated officer, directing him to act as President during the latter's inability, because a court can only order the performance of a ministerial function.<sup>62</sup> Perhaps the courts can pass on the validity of some executive action taken by the successor, and indirectly on the inability of the President, if properly raised in a case involving individual rights;<sup>63</sup> but this would do nothing to alleviate the Vice President's delicate position in making the determination in the first place. Whether Congress has power either to determine actual inability or to provide a means for deciding such cases is questionable. Opinion on the matter is divided, but the weight of opinion seems to be that Congress has no such power. Congress is given the power to name a successor to act as President after the Vice President and this probably excludes all other congressional power to deal with Presidential succession.<sup>64</sup>

The Congress could relieve the successor of the embarrassment of taking the initiative, however, by passing a concurrent resolution requesting him to act as President or by authorizing some officer or officers to enquire into the President's inability and report thereupon to the successor. The actual decision would still rest with the successor, where the Constitution vests it, and his decision would not await or be bound by the report. The investigation could properly be made by the Cabinet, because the Cabinet consists of the President's appointees who would not be eager to displace him, and the Cabinet is in the best position to know the facts. Once it is recognized that the successor does not supersede a disabled President for the remainder of the term, the President might usually invite his successor to act for him for the duration of his inability. But if the President could not or would not do so, the successor should decide on the President's inability with or without a report from the Cabinet.

This would answer the questions John Dickinson raised in the Constitutional Convention: what is the extent of the term "disability" and who is to be the judge of it? Not only can the inability problem be thus solved, but it can be solved without resort to the difficult process of constitutional amendment.

<sup>60</sup> Trumbull, *loc. cit.*, pp. 420-421.

<sup>61</sup> *Martin v. Scott*, 12 Wheat. 19, 31-32 (1827); *The Aurora v. United States*, 7 Cranch 382 (1813); *Field v. Clark*, 143 U. S. 649, 682-694 (1891); *Hampton and Co. v. United States*, 276 U. S. 391, 405-410 (1928). See also *Disability of the President*, Law Notes, vol. 23, pp. 141-142 (1910).

<sup>62</sup> *Gaines v. Thompson*, 7 Wall. 347 (1869); *Dudley v. James*, 83 Fed. 345 (1897); *Mississippi v. Johnson*, 4 Wall. 475 (1867); *Carrick v. Lamar*, 116 U. S. 423 (1886). See also Cole, *loc. cit.*, p. 194.

<sup>63</sup> In cases in which individual rights depend on executive action, the individual has the right to resort to the law for a remedy. *Marbury v. Madison*, 1 Cranch, 137, 170 (1803); *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 326 (1891); *In re Cooper*, 143 U. S. 472, 503 (1892). But the question must arise in a case involving actual litigants. *Clough v. Curtiss*, 134 U. S. 361, 372 (1890). On the other hand, the courts might decide that the question was political and submitted to the successor's discretion alone. If the courts decide this, they will hold that they are bound to follow the successor's decision. *Luther v. Borden*, 7 How. 1 (1849).

<sup>64</sup> See note 57, *supra*. It is a well-established rule of construction that enumeration in the Constitution of certain powers denies all others unless incident to an express power and necessary to its execution. *United States v. Harris*, 106 U. S. 629, 635-636 (1883); Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833), vol. 3, sec. 1243. See note 57, *supra*.

## REPLY OF EDWARD S. CORWIN, PRINCETON, N. J.

DECEMBER 7, 1955.

Hon. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
 House of Representatives, Washington, D. C.*

DEAR MR. CELLER: Enclosed you will find two copies of my answers to the questionnaire which you submitted to me in your favor of November 29.

Under another cover I am sending you a copy of National Review which contains my answers to a somewhat similar questionnaire submitted to me recently by the editor of that publication.

I am unable at the present writing to provide a short biographical sketch. You can easily have one compiled from the current Who's Who in America.

I shall be happy to be kept abreast of the committee's deliberations.

Sincerely yours,

EDWARD S. CORWIN.

QUESTIONNAIRE ON PRESIDENTIAL INABILITY FOR HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON THE JUDICIARY

1. What was intended by the term "inability" as used in article 2, section 1, clause 6, of the Constitution? Shall a definition be enacted into law? If so, will you set forth a workable definition? Shall such a definition encompass physical and mental disability as well as the duration thereof?

*Answer.*—On account of the variety of human circumstances capable of affecting such a question, I greatly doubt the possibility of framing a sure-fire definition of Presidential "inability." In fact, such a definition might easily operate to embarrass determination of the matter in many actual situations.

2. Who shall initiate the question of the President's inability to discharge the powers and duties of his office?

- a. The Congress
- b. The Vice President
- c. The Cabinet by majority vote
- d. Any other group, including independent agencies
- e. Shall (d) be of a continuing or temporary nature?

*Answer.*—It is undoubtedly within the power of the Vice President to do this, since he is the one upon whom rests the constitutional duty to take over the powers and duties of the office of President when the President is incapable of discharging the same; and clearly anybody which may be authorized by Congress to determine whether "inability" exists in fact ought to have the right to raise the question.

3. Once raised, who shall make the determination of inability?

- a. The Congress
- b. The Vice President
- c. The Cabinet by majority vote
- d. Any other group, including independent agencies
- e. Shall (d) be of a continuing or temporary nature?

*Answer.*—Somebody designated by Congress whose determination of the matter may be fairly expected to be accepted as conclusive; e. g. the Cabinet or the National Security Council, enlarged perhaps by the Chief Justice et al.

4. Are there any constitutional prohibitions relative to questions 2 and 3?

*Answer.*—No constitutional prohibitions are pertinent to questions 2 and 3 so long as it is kept in mind that it is the Vice President and nobody else upon whom the duty falls to take over the powers and duties of a disabled President.

5. Shall dual authority, both to initiate the question and to determine the question, be vested in the same body?

*Answer.*—There is no reason why not, one purpose of such an inquiry being to enlighten the Vice President as to his constitutional duty and to protect him from imputations of overambition and rashness.

6. Shall the determination of disability set forth the—

- a. Permanent nature of the disability?
- b. Temporary nature of the disability?
- c. If temporary, extent of?

*Answer.*—Yes, if Congress so desires, its power under "the necessary and proper" clause to inquire or to authorize inquiries into situations which involve a widespread public interest being practically unlimited. The classic instance is its creation in February 1877 of the Electoral Commission, which by deciding the presidential election of 1876, possibly averted a civil war.

7. If temporary, who raises the question that the disability has ceased to exist? Once raised, who shall make the determination of cessation?

*Answer.*—The President may undoubtedly raise the question, which should be determined by the same body as found him previously to be disabled.

8. In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

*Answer.*—See question 9.

9. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

*Answer.*—These questions (along with the 7th) call attention to the ambiguity of the term "the same" in section 6: does it refer to "the powers and duties of the said Office," or the Office itself. On account of the fact that hitherto all Vice Presidents have succeeded to "the powers and duties" of the Presidency in consequence of the death of the President, they have also succeeded to the office itself. "Office is a public station \* \* \* The term embraces the idea of tenure, duration, emolument, and duties." *United States v. Hartwell* (6 Wall. 385, 393 (1868)). But succession on account of the temporary "inability" of the President is obviously something different and would not, necessarily, signify succession to the office of President and hence could, and to my mind should, terminate with the disability which gave rise to it.

10. In the event of a finding of a permanent disability, does the language of the Constitution, namely, " \* \* \* or a President shall be elected \* \* \*" demand the immediate election of a new President? If so, would the election be for a 4-year term or for the unexpired term of the disabled President?

*Answer.*—The clause of section 6 beginning "and the Congress" deals with the situation which exists when there is neither a functioning President nor a functioning Vice President. It has been dealt with in a series of so-called succession acts, the one now in force having been enacted in 1947. The election referred to is undoubtedly the next regular presidential election, Congress never having been empowered to provide for any other.

11. Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?

*Answer.*—No constitutional amendment seems to me to be required to enable Congress to do anything above suggested for it to do.

## REPLY OF CHARLES FAIRMAN, LAW SCHOOL OF HARVARD UNIVERSITY

DECEMBER 27, 1955.

Representative EMANUEL CELLER,  
Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.

DEAR MR. CELLER: I respond to your letter of November 20, wherein was enclosed a questionnaire on Presidential inability.

The committee has in view a study of the delicate and vexing problem of Presidential inability. In the context of this present moment, one thinks of inability resulting from impairment of the President's health. In addition to the case of President Eisenhower, the instances of President Garfield's lingering before death and of President Wilson's long illness come to mind.

At the outset, however, I would invite attention to another danger, one that should be anticipated as an incident of any atomic attack made upon this country. The problem of providing for effective Presidential leadership and for the maintenance of an adequate Congress, notwithstanding casualties and notwithstanding the impracticability of conducting regular elections, seems to me even more important than that of providing for an inability resulting from illness. We know that the country can carry on, somehow, even though the President lies ill: that problem should be met, but still the matter is not so critical as a possible knockout of national governmental leadership, perhaps both executive and legislative, by a hostile power.

So I urge that, when the committee studies legislation and the possible need for a constitutional amendment, it consider the entire problem of providing for continuity of governmental leadership under all contingencies. There is one entire problem: Better to envisage it as a whole than to think only of the aspect that President Eisenhower's illness has suddenly brought to mind.

The matter of Presidential leadership and the maintenance of an adequate Congress in the event of an atomic attack is discussed in a paper on Government

Under Law in Time of Crisis, which I prepared for Harvard Law School's Marshall Bicentennial Conference. I enclose a copy, and invite attention in particular to sections II and III.

Considering the matter of Presidential inability in this larger framework, I come to the points raised in the questionnaire.

I. "Inability to discharge the powers and duties of the said office," (art. II, sec. 1, clause 6). In the Constitutional Convention, Mr. Dickinson asked, "What is the extent of the term 'disability' and who is to be the judge of it?" 2 Farrand's Records of the Federal Convention, 427. These questions went unanswered.

I have not undertaken extended research to uncover what may have been said about the construction of "inability" in the course of our constitutional development. I doubt whether such research would lend much aid to understanding. Here the question is not of finding the meaning in 1787 of some old term of law, but rather of applying the constitutional provision in any future eventuality. The words, it seems to me, aptly express the essential thought; the difficulty lies rather in the application. It is "inability" to discharge the "powers" and "duties" of the "office": these words contemplate a factual situation wherein the incumbent has become unable effectively to discharge the tasks a President must discharge. One looks on the one hand to the actual impairment that has occurred, in relation, on the other hand, to the tasks of the office. Consider first the impairment. The President may have been stricken by sickness. Sickness has many forms. It might, as with a heart attack, place the President in such a condition that, in order to protect his life, he must be relieved from all work for an indefinite period of time. How long? The duration might be so indefinitely long that—in relation to the tasks of the office—the President would have become unable, for a considerable period at any rate, to discharge his office. The sickness might strike at essential powers—to see, to hear, to speak, to move, etc.—to such a degree as to impair his ability to perform his tasks, to the point of producing "inability." The President might lose his mind, or suffer such loss of mental vigor as would amount to inability. Very certainly the Constitution contemplates the continued possession of full capacity to deliberate and decide. The President might fall under the power of the enemy—or be kidnaped—or be lost, as in the disappearance of an airplane. Inability is a compendious expression.

Next, it is "Inability to discharge the powers and duties" of the office. It should be recognized at once that the actual magnitude of the office, and the degree of attention required to discharge its powers and duties, has increased through the years, and varies, too, with the demands of the moment. Washington, Adams, and Jefferson could retire from the seat of government for considerable periods and yet, communicating by means of horse and boat, could effectively direct the administration. Today the powers and duties require a more prompt and constant attention. Consider how the actual demands vary with conditions of the moment. An enormous danger, sudden and unforeseen, would call for crucial decisions to be taken at once: If the President were so circumstanced as to be unable to act then and there it might amount to inability, even though under normal conditions the Executive might have carried on according to standing orders.

The Constitution contemplates that the executive branch of the Government shall at all times be effectively led by the President. Inability is a practical concept—an impairment such that the powers and duties cannot effectively be discharged.

I urge that no attempt be made to enact a definition into law. The text accurately expresses the constitutional concept. It is not for Congress to enlarge or to contract—and in any event the Constitution's own words would remain the test. It is for Congress to provide the means for ascertaining inability in any doubtful case. It is to that matter that the committee's questions turn.

II. Who shall initiate the question of inability?

I suggest, first, that the "inability" might be self-evident. Suppose, for one example, that the President were captured and held as a prisoner of the enemy. (Recall that a President, in the prosecution of his duty, might need to go overseas in time of war, and might come into proximity to hostile forces.) In such a case, surely there would be no need to initiate the question: There could be no question but that "inability" had occurred. So, too, no doubt, if the person in the Presidential Office totally lost his mind and had been committed.

Again, it is conceivable that the President himself might authentically determine his own inability. He might suffer such an impairment of strength as would leave him competent to form an accurate judgement to the effect that he was no longer competent to discharge the powers and duties of his Office. (This is *not* on any

theory that he would be ceding a property right, as when one grants Blackacre: the Presidential Office is not the subject of ownership or of grant.) If the one who bears alone the responsibility of the office were solemnly to declare, I find I am no longer competent to discharge it—that certainly should settle the matter. (Of course, the President could resign if he chose—but the hypothesis above is otherwise.)

The various suppositions above should not be dismissed as fanciful: when one considers legislation to meet eventualities, one should reckon with every conceivable eventuality and seek a complete solution.

Consider the less unlikely situations, where "Inability" or no was a matter to be determined by inquiry. Here let us recur to the Constitution. It provides that "in Case of \* \* \* Inability," etc., "the Same shall devolve \* \* \*" (No matter, for the moment, what is the antecedent of "same"—whether it is the Office, or only its powers and duties. In any event, at least the powers and duties *shall devolve*.) Mark, the provision is not permissive and optional: if in truth there is inability, then the powers and duties *shall devolve* by the Constitution's own command. So any initiating and any determining will only be the means for carrying out the peremptory provision.

Evidently the Vice President should be able to set the inquiry in motion, for he is under a solemn duty to rise to the occasion if inability occurs. It would not do for him to refrain on the ground that "nobody has yet told me": the Constitution has spoken directly as to what shall be done, although it has not provided the means. The Vice President, at a moment when the President is ill, is, however, in a delicate position, where he well may hesitate to take the initiative.

The Cabinet, too, should be able to set the inquiry in motion. The principal officers of the executive departments would be peculiarly well situated to know when the Chief was no longer giving effective direction. It should be recognized, realistically, however, that the natural tendency of a staff is to cover up their Chief's inadequacy and to pretend hopefully that all goes well. So if the Cabinet took the initiative in alleging inability, that would show pretty certainly that that condition had arrived; but the natural reluctance to act should be foreseen. Surely a mere majority of the membership should suffice.

Initiative should also lie within the Congress. It is the great representative assembly, the bearer of residuary powers in the American Government. It might, however, be impracticable for the Congress to act: the apparent "Inability" might occur when the Congress was in adjournment, and the hypothesis excludes a calling of a special session by the President. The statute should, I believe, provide that certain designated leaders of the Houses of Congress would be authorized to initiate an inquiry into "Inability."

### III. Once raised, who shall determine the question of "Inability"?

What is to be desired, as most in accord with the Constitution's concept, is an objective determination of "Inability" to discharge "powers and duties"—a judgment whether the incumbent remains competent, notwithstanding apparent impairment, physical or mental. The inquiry, it seems to me, is somewhat comparable to one to determine whether a person is, or was, competent to act *sul juris*. That is a familiar type of judicial question. The inquiry is, it seems to me, to be distinguished, rather than to be analogized to the process of impeachment. The impeachment process is derived from ancient historical roots: an officer is accused of wrongdoing; traditionally it is a matter for political bodies, the lower and upper branches of the legislature; the object is to purge the public service. Impeachment is accusatory, unfriendly, a matter of culpability as viewed through the eyes of persons performing representative and political functions. An inquiry into "Inability," on the other hand, would be concerned with actual capability, physical and mental, to discharge the tasks of office. The inquest would be calm in mood, friendly and sympathetic; it would proceed in a spirit of sorrow and not of indignation. It would not in a true sense be adverse, the Public versus the Incumbent. So I would not analogize to impeachment: that is an unsound comparison and puts the problem in a false setting.

The foregoing analysis does not rest on any assertion that Senators and Representatives would approach the inquiry with partisan or self-seeking motives. It rests rather on the thought that the extraordinary function to be performed is more like the function of judging than it is like the functions of the Congress. A Congress composed of two Houses, with 96 and 435 members, respectively, is ill-suited to taking the testimony of physicians or other witnesses who had observed a stricken President, to take an obvious example.

Furthermore Congress might not be in session. If it were adjourned, how could it be summoned when, by hypothesis, "Inability" had already occurred?



Suppose the contingency most to be dreaded, an atomic attack upon this country: it might be impossible to assemble; there might not even survive a quorum of each House, at a moment when instant action was requisite. The body charged with determining "Inability" should be one certainly capable of convening and deciding promptly.

If, as has been argued, the task is most like judging, where should it be lodged? One thinks, in particular, of the Supreme Court. But the jurisdiction of the Supreme Court has already been defined, by article III, section 2, clause 2—and the determination of "Inability" is not within that enumeration. It is familiar that the Court's jurisdiction may not be extended to other matters by statute: *Marbury v. Madison* (1 Cranch 137 (1803)). To vest this extraordinary jurisdiction in the Supreme Court would thus require a constitutional amendment. If it seemed good to Congress to propose an amendment to make provisions for the incidents of an atomic war, then one provision might well make the Supreme Court the judge of Presidential "Inability." If an amendment is not to be sought, then a satisfactory alternative is next to be considered.

Congress might provide that the question of "Inability," when properly raised, would be determined by an extraordinary Commission—the statute providing how such Commission would be constituted. The statute might provide that the Commission should include the Chief Justice—who might well be designated as the one to call the Commissioners together—and the Associate Justices. It might be provided that, for want of the requisite number, active judges of the inferior courts be summoned, in order of seniority, as was found practicable. If Congress thought it desirable to include some of its own members in the extraordinary Commission, that might be done. For example, the two available senior members, majority and minority, of each Committee on the Judiciary. (It seems evident that the Speaker and the President pro tempore of the Senate should be excluded from serving as judges of Presidential inability, inasmuch as they themselves stand high in the order of succession.)

We have had considerable experience in the course of our history, with judges serving as Commissioners—sometimes in accordance with a statute, sometimes merely by Presidential appointment. The most memorable example, for present purposes, is the Electoral Commission created under the act of January 29, 1877 (19 Stat. 227), on the occasion of the disputed election. Five Justices served on that extraordinary body. While it is to be conceded candidly that the use of the incumbents of judicial office as Commissioners to perform tasks outside the courts of law is generally to be avoided, that remedy is here suggested for want of a more appropriate solution. There are a good many instances that may be drawn in precedent. It is confidently to be expected that, in the event an apparent case of "Inability" did arise, the judges called by the statute to serve as Commissioners would proceed to act. Their determination would carry greater assurance of objectivity than could be obtained by any other means that occurs to the writer.

#### IV. Constitutional prohibitions.

The limitation on the Supreme Court, drawn from article III, has been mentioned above.

#### V. Dual authority in a single body?

Even supposing, that to be objectionable, it has been avoided by the method proposed above.

#### VI. Determination of permanent or temporary nature of disability.

Evidently the sorts of disability that would give trouble are such as could not at the moment be determined to be more than temporary. One can conceive of nonfatal impairments that could be found to be permanent, such as incurable insanity; but as to sickness, a wounding, disappearance, or capture—how could it be said in advance that the disability might not be removed?

#### VII. Determination of cessation of disability.

The President seeks to resume the powers and duties of his office. If the temporary place-holder steps aside, that is the end of the matter. But suppose it is not apparent that the disability has ceased, and suppose that accordingly a determination of the matter is in order. The body selected to make the determination—question III supra—would be the appropriate body to determine whether the disability was at an end.

#### VIII. In case of temporary disability, does the Vice President succeed to the Office, or only to its powers and duties?

It would seem a contradiction in terms to have at one moment two Presidents—the one temporarily disabled, the other in office. It seems to me that a Vice President acting in the Presidential Office during the temporary "Inability" of the President would be only the Acting President. It must be conceded that, as

a mere matter of grammar, the words "the Same" in article II, section 1, clause 6 makes no distinction between death and resignation on the one hand and "Inability"—which might be temporary—on the other. The sense of the matter, however, should be evident. When the elected President is definitively out of the office—as by death, or resignation, or an inability that patently is permanent—the Vice President would enter upon the office definitively. In practice, we have known only the case of death—and practice has firmly established that the Vice President becomes President. In envisaging an inability that might be removed, the situation of the place-holder would evidently be otherwise: he would serve as Acting President.

IX. In case of permanent disability, does the Vice President succeed to the Office?

For reasons given above, I would reply "Yes." Presumably the public good would not be served by withholding from the definitive successor to the powers and duties the added moral authority that goes with the title of "President." If he is the only President we are going to have for this 4-year period, it is better to accord him all that makes for strength.

X. Construction of the phrase, "or a President shall be elected."

The earliest statute on Presidential succession, of March 1, 1792 (1 Stat. 239), made the line run to the President pro tempore of the Senate and then to the Speaker, and provided that if both of those offices were vacant, electors should be chosen to elect a new President and Vice President. This was the work of the Second Congress—whose members were close to the drafting of the Constitution. Yet that statute went in the teeth of the consideration that thereby the Presidential term would have been out of accord with the Constitution's synchronizing of Presidential and congressional terms. The act of 1792 remained the law until 1886.

For practical reasons set out in the paper on "Government Under Law in Time of Crisis," cited early in this letter, it is believed important to maintain the view which the act of 1792 recognized: that it is within the power of Congress to provide for the choice of a new President, in case both President and Vice President are lost. In particular, in the event that war came and that the Presidential Office became vacant, it would be most important to find a new President best qualified to lead the Nation.

My response to question X is that the language of the Constitution does not demand an immediate election, but does recognize the power of Congress to provide for the choice of a President to fill out the term; and that the synchronization of Presidential and congressional terms should not be broken.

XI. Legislation, or constitutional amendment?

The foregoing discussion has indicated throughout what can be done by statute, and what would require a change in the Constitution. The method for determining "Inability" recommended above could be provided by legislation. If, however, the more inclusive problem of providing for governmental continuity during an atomic war is to be considered, then at some points it will be found that constitutional amendment is involved. I urge that Presidential succession—and provision for the continuity of Congress as well—be viewed in this larger perspective.

Sincerely yours,

CHARLES FAIRMAN,  
*Professor of Law.*

REPLY OF DAVID FELLMAN, THE UNIVERSITY OF WISCONSIN

DECEMBER 12, 1955.

Congressman EMANUEL CELLER,  
*House Office Building, Washington, D. C.*

DEAR CONGRESSMAN CELLER: I am writing in response to your letter of November 29, in connection with your questionnaire on Presidential inability. It is interesting to note that the questions raised therein are almost identical with those raised by Chester A. Arthur in his first annual message to Congress, December 6, 1881. See Richardson, Messages and Papers of the Presidents (vol. 8, p. 65). His questions arose from the fact that President Garfield was utterly incapacitated for some 2½ months before his death. He was shot on July 2, 1881, and died on September 19. Mr. Arthur did not undertake to discuss, much less to answer, the questions he raised.

Before coming to your specific questions, I want to make the preliminary point that the British have a specific procedure for determining the disability of a reigning sovereign, and that we can learn much by examining it. It is, of course, in any system of government a delicate problem which is extraordinarily difficult to resolve, and any solution is bound to be something less than perfect, but nevertheless the problem is not insoluble by any means.

The British statute was adopted on March 19, 1937, and is entitled the Regency Act of 1937. (The citation is 1 Edw. 8 & 1 Geo. 6, ch. 16.) This statute was the result of apprehensions, which Parliament itself acknowledged, arising from the illness of George V in 1928 and in January 1936. Those sections of this act which deal with a regency while the sovereign is under 18 years of age need not concern us here. But section 2 of the act is pertinent. It reads as follows:

"(1) If the following persons or any three or more of them, that is to say, the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice of England, and the Master of the Rolls, declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the Sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions or that they are satisfied by evidence that the Sovereign is for some definite cause not available for the performance of those functions, then, until it is declared in like manner that his Majesty has so far recovered His health as to warrant His resumption of the royal functions or has become available for the performance thereof, as the case may be, those functions shall be performed in the name of and on behalf of the Sovereign by a Regent."

Section 6 of the act is also pertinent. It reads as follows:

"(1) In the event of illness not amounting to such infirmity of mind or body as is mentioned in section two of this Act, or of absence or intended absence from the United Kingdom, the Sovereign may, in order to prevent delay or difficulty in the despatch of public business, by Letters Patent under the Great Seal, delegate, for the period of that illness or absence, to Counsellors of State such of the royal functions as may be specified in the Letters Patent, and may in like manner revoke or vary any such delegation."

Subsection (2) of section 6 designates who shall serve as counsellors of state: the wife or husband of the Sovereign (if the Sovereign is married) and the four persons next in line of succession to the Crown. This portion of the statute was amended on November 11, 1943 (6 and 7 Geo. 6, ch. 42) to provide that the heir apparent shall be one of the counsellors of State if over 18 years of age.

I should like to focus attention on the principal features of this statute, particularly in the light of the questions raised in your questionnaire.

1. A committee of five is created to make the decision concerning the Sovereign's disability.

2. The committee need not be unanimous, but may act by majority vote.

3. One member of the committee is the Sovereign's wife or husband; two are high-ranking judges holding office for life, the Lord Chief Justice, who is the presiding judge of Queen's Bench, and the Master of the Rolls, who presides over the court of appeals; the Lord Chancellor is at once a Cabinet minister, the presiding officer of the House of Lords, head of the judicial system, and a leading figure in the majority political party; the Speaker of the House of Commons presides over the elective body of Parliament, but it is important to note that unlike our Speaker in the House of Representatives, the English Speaker is a nonpartisan presiding officer who enjoys something approaching life tenure, since he is usually reelected to the House of Commons by his constituency without opposition, and is reelected to the Speakership by the House, whatever may have been his original party affiliation, and whatever may be the party situation in the House itself. Thus, of the five persons who are eligible to serve on this committee, only the Lord Chancellor may be regarded as a party man. But it is important to note, in this connection, that the Sovereign is not a party man either.

4. The committee is required to make a finding of inability in writing on the basis of evidence which must include the evidence of physicians. The number and identity of the physicians are not specified.

5. The statute covers infirmity of both mind and body.

6. Incapability of performing the royal functions is not defined.

7. The possibility that the Sovereign may be incapable for some reason other than infirmity of mind or body by not being available to perform his functions is also taken into consideration. What might lead to such unavailability is not specified. Presumably capture by a foreign enemy would be an example.

8. The statute recognizes that the Sovereign may overcome his disability by becoming well, and the committee declares that he has recovered his health so as to warrant resumption of the royal functions in the very same way that it acts to make a finding of disability.

9. In the case of less serious illness, or absence from the kingdom, the Sovereign may delegate such powers as may be necessary to carry on the public business to a group of five counsellors of state, his spouse and the four people next in the line of succession, but he may revoke the delegation in the same manner that he made it.

I come now to the questions put down in the questionnaire.

I. I do not know what the authors of the Constitution intended by the term "inability," except that they obviously intended to have the Vice President serve as Acting President during a period of Presidential disability. Disability was never defined, and was mentioned only once in the debates of the Constitutional Convention. A search of the Records of the Federal Convention, edited by Max Farrand (New Haven: Yale University Press, rev. ed., 1937), does not yield much. It is of interest to note that on August 27, according to Madison's Notes, Mr. Dickinson expressed the thought that the section under discussion was "too vague." He asked: "What is the extent of the term 'disability' and who is to be the judge of it?" But so far as we know no one answered the questions, and the matter was then postponed. All other references to the disability clause are in the successive drafts of the document as it developed in the deliberations of the Convention. So far as I can discover, there is no evidence that the Convention ever discussed the questions raised by Mr. Dickinson. Whether anything was said on this subject in the State ratifying conventions I do not know, but I have not searched the records on this point. Perhaps someone should do just that.

I think it would be extremely unwise to try to define the term "inability" in legislation. Any attempted definition would, I believe, do more harm than good, and the more prolix the definition, the worse it would be. Any attempt to spell out just what is meant by disability would either be tautological, repetitious, or misleading, and in any event, a sure basis for unnecessary disputation. But the law is full of undefined and undefinable terms, e. g., "reasonable man," "due process of law," "right and equity," etc. But certainly commonsense dictates that disability may be due either to bodily or mental infirmity, and if there is any possible doubt about it, then the law should say as much. It is certainly common knowledge that mental disability occurs, and that it can be as crippling as physical disability. If a special group or committee is created to make a finding of disability, the law should provide that (1) the finding should be in writing; (2) the finding should be based on evidence; (3) the evidence should include the testimony of physicians.

Clearly the Constitution contemplates that the President may get over his disability, since it uses the phrase "until the disability is removed." Obviously a sick man may get well, and the law should be clear on this point, that the President resumes all of his powers when his disability is ended.

II. I think any member of the group or committee which would be authorized by law to determine the question of the President's inability to discharge the powers and duties of his office should be eligible to initiate the question. I do not believe Congress should undertake to perform this function, mainly because the question may arise suddenly when Congress is not in session. Nor do I believe that such a numerous assemblage of men and women is equipped to make a specific decision bearing upon the qualifications of a single person upon the basis of evidence. I should think it highly improper to entrust the Vice President with the initiative, since his personal stake in the decision precludes general confidence in the objectivity of any affirmative step he may take. Since the Cabinet is made up of personal appointees of the President who serve at his pleasure, I would regard the Cabinet as wholly unsuitable to make a decision of the sort under discussion. So far as the Cabinet is concerned, the cards are stacked so heavily in favor of one disposition of the issue and against the other that an objective answer based entirely upon pertinent evidence cannot be expected in all cases.

III. I think Congress ought to provide for a procedure to deal with the problem of Presidential inability. For the reasons given above, the decision should not, in my judgment, be entrusted to Congress, or the Vice President, or the Cabinet. I suggest the creation by statute of a special continuing committee which would be empowered to make the critical decision of inability. While I have not given a great deal of thought to the matter of the makeup of the committee, and further

reflection might suggest a somewhat different composition, I would tentatively suggest, as a basis for further discussion, as follows:

1. The committee should be very small, so that it can act expeditiously and decisively. I suggest a committee of five.
2. The members of the committee could very well be the following:
  - (a) The President's spouse, or if there is none, the next of kin, providing he or she is an adult.
  - (b) The Chief Justice of the United States.
  - (c) The senior Associate Justice of the Supreme Court of the United States.
  - (d) The leader of the President's political party in the Senate.
  - (e) The leader of the President's political party in the House of Representatives.

Thus, such a committee would include a member of the President's family, 2 life-tenure Justices holding positions of great prestige and public confidence, and 2 ranking Members of the Houses of Congress. I would insist that members of the political party in opposition to the President should not be put in the position of participating in the decision that the President is unable to discharge the duties of his office. I think there will be greater public confidence in the participation of two important members of the President's own party. Our situation is quite different from that of Great Britain, whose Sovereign is required to be nonpartisan. Our President is always a partisan, and it is right that he should be a party man, since our governmental system rests upon the foundation of the party system. It is therefore altogether proper that leaders of his own party should share directly in the responsibility of making a decision of Presidential inability. Leaders of the opposition party would necessarily act under a heavy cloud of suspicion about their motives if they had a hand in the matter, however much their opinions are grounded in objective, weighty, and reliable evidence.

IV. I think a statute of the sort I have discussed in II and III is perfectly constitutional. An act of Congress seems to be fully justified by the language and purposes of article II, section 1, clause 6, of the United States Constitution.

V. As I have indicated, I believe that the same body ought to have authority both to initiate the question and determine its merits. I see no reason for setting up any ponderous or complex machinery. On the contrary, there is every good reason to keep the procedure uncomplicated, so that a small group of responsible people commanding public confidence can move swiftly and decisively. It might be wise to authorize the Chief Justice to take the initiative of setting the machinery in motion, but I do not see why any one of the five important people who would serve on the committee could not request a meeting of the committee for the purpose of making a decision. For example, under some circumstances the President's wife may very well be the most suitable person available to raise the question of inability. I am sure that no one of the five persons I have in mind for service on this committee would initiate action irresponsibly, partly from the very nature of their positions, and partly because the public would not stand for irresponsibility in this connection.

VI. The committee should be free to declare that the President is permanently disabled, if the facts warrant such a finding. Certainly it is common knowledge that there is such a thing as permanent disability. And there is no reason to believe that a committee constituted as I have suggested would make a finding of permanent disability if it were at all possible to avoid doing so. If the disability is temporary, the committee should be authorized, by the same procedure utilized to make a finding of disability, to make a finding that the President is sufficiently well to resume his duties and functions.

VII. If the disability is temporary, I think, as I have indicated, that any member of the committee should be authorized to raise the question that the disability has ceased to exist. Once the question has been raised, it should be determined by a majority vote of the committee. As in the case of findings of disability, a finding that the disability has ended should be made in writing, on the basis of evidence, including the evidence of physicians.

VIII. The question whether, in the event of a finding of temporary disability, the Vice President would succeed to the powers and duties of the office, or to the office itself, is in my judgment the critical question on the list. For there is a wide gulf between what I think was the plain intention of the framers of the Constitution and actual practice in the several instances when Vice Presidents took over upon the death of a President. The Constitution declares, in article II, section 1, clause 6, 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 said Office, the same shall devolve on the Vice President \* \* \*." Clearly, the term

"the same" refers to "the powers and duties of said Office." If it was intended that the Vice President should become President, it would have been a simple matter to say so, as it is said in section 3 of the 20th amendment. This view is supported by other language in the Constitution. Thus, in the same paragraph it is provided that in case both the President and Vice President are unavailable for the Office, Congress shall declare "what officer shall then act as President." This language is consistent with the previous part of the paragraph; it does not say that this officer shall be President, but only that he shall act as President, "until the disability be removed, or a President shall be elected." Note that this clause does not say, "until another President shall be elected," or "until the next president shall be elected," but only "until a President shall be elected."

All other pertinent clauses in the Constitution are consistent with the language of article II, section 1, clause 6. The 12th amendment, taking note of the fact that it might happen that neither the electoral college nor the House of Representatives may succeed in electing a new President in time, provides that "the Vice President shall act as President, as in the case of the death of other constitutional disability of the President." Article I, section 3, clause 5, of the Constitution provides that the Senate shall elect a President pro tempore who shall preside in the absence of the Vice President, "or when he shall exercise the Office of President of the United States." Note that it does not say, "when he shall have become President," which would have been very easy to say, if such had been the intention of those who wrote the Constitution.

The language of the Constitution, that the Vice President succeeds to the powers and duties of the President, or acts as President, or exercises the office of President, supports the view that it was not intended that he should become President. Furthermore, this is consistent with the requirements of a situation where the President's disability is only temporary. Obviously it makes more sense to say that for the duration of such a disability the Vice President shall act as President, than to say that for this period of time he shall be President, for in the latter event we would have two Presidents at the same time, which is ridiculous. But it makes sense if, while the President is too sick to discharge his duties, we have an Acting President in the person of the Vice President. Of course no such problem is posed if the President dies, or resigns, or is removed from office by impeachment, for in such cases he ceases to be President at all, and no difficulty arises if the succeeding Vice President becomes President. The real harm has been that because he is now regarded as becoming President, a solution of the problem posed by temporary Presidential disability has been frustrated.

It is only constitutional custom which decrees that when the Vice President takes over, he becomes President. This custom, of course, is due to the fact that in the seven instances where the Vice President has taken over, he did so on the death of the President. The Presidency has never been vacated in any other way. It will be recalled that when President William Henry Harrison died, on April 4, 1841, only a month after his inauguration, and Vice President John Tyler succeeded him, there was considerable debate over the question whether Tyler became President or only Acting President. But Tyler had no doubt about it, and from the outset insisted that he was the President. The country accepted the decision, and thus every succeeding Vice President who went to the White House on the death of the President became President in the full sense of the term. Thus, when President Roosevelt died, Vice President Truman became President of the United States, and as every preceding Vice President in the same situation did, he took a separate oath of office when he assumed the Presidency. This point is fully canvassed in Herbert W. Horwill, *The Usages of the American Constitution* (Oxford University Press, 1925), chapter III, Accidental Presidents.

Custom has established the proposition that when a President dies the Vice President becomes President. But since we have no custom dealing with a situation created by the temporary disability of the President, I think it is altogether reasonable if a distinction is made by legislation between the two situations. We can continue on the assumption that in case the President dies, the Vice President becomes President, while at the same time we provide that in case of a temporary disability he shall serve only as Acting President, and that upon his recovery the President will reassume the powers and duties of his office. Legislation to this effect would be clearly consistent with the language and intent of article II, section 1, clause 6. As Acting President the Vice President would have all the powers of the office, such as the veto and appointive powers, but he would have to relinquish these powers upon the recovery of the President.

IX. If a finding of permanent disability is made, I should think the Vice President would succeed to the office itself, and not merely to its powers and

duties, just as he succeeds to the office if the President dies, as is now decreed by our "unwritten Constitution." It may of course be assumed that the committee which is authorized to make findings of disability will in the nature of things be extremely reluctant to make a finding of permanent disability, and that so long as any ray of hope exists the country would expect that the disability be regarded as temporary, if it is at all possible so to designate it. However, there is such a condition as permanent disability, and in that event I would think the existing constitutional custom would control. There does not seem to be any very good reason why it should not.

X. In the event of a finding of permanent disability, I believe the language of the Constitution, "or a President shall be elected", does not require but only authorizes the immediate election of a new President. Clearly this clause permits Congress to say, for example, that if as much as 2 years of the term still remain, there shall be a new election. Whether Congress ought to use this power, and provide for special elections, is therefore, in my judgment, a matter of policy and not of constitutional principle. My own feeling is that in the light of our complicated State and Federal laws dealing with elections, the pattern of primary selections, the structure of party conventions, etc., our institutions are not geared to holding presidential elections except according to the sequence of events that occur according to the normal rhythm of the Constitution. But if there should be a special election, I should think that it would be merely for the unexpired term of the disabled President, for otherwise, the sequence of events upon which the Constitution operates would be disturbed.

XI. I believe that Congress has authority to enact legislation on all the questions raised here under the Constitution as it now stands, and that constitutional amendments are not necessary. Such legislation, based upon the language and purposes of the relevant constitutional clauses, would be justified by normal canons of constitutional construction.

I would like to add several thoughts:

1. If legislation on this subject is to be drafted, attention should be given to the fact that a Vice President serving as Acting President may also become unable to discharge the duties and powers of the position. The legislation should therefore extend to anyone serving as Acting President, whether it be the Vice President, or the Speaker of the House of Representatives, or the President Pro Tempore of the Senate, or anyone else.

2. State constitutions usually provide for the contingency that the Governor may be so ill as to be unable to discharge his duties, and the Lieutenant Governor is authorized to act as Governor. This has happened often. The experience with gubernatorial disability must by now be a considerable one, in the aggregate, and perhaps there is much we may be able to learn from such experience. I suggest that the committee staff make a study of gubernatorial disability, or, alternatively, the Legislative Reference Service can be requested to do so. Such a study might very well shed a great deal of light upon the problem, and tell us something about what the American people are willing to put up with. I know of no such study available in print today.

3. If legislation is prepared on this subject, I believe it would be wise to take into the account the possibility that the President may be unable to discharge his duties for some reason other than illness. That is to say, in the larger sense the problem is one of unavailability as well as one of inability in the medical sense. I do not believe that it would be either wise or necessary to try to spoil out the situations that might conceivably arise in which the President would be unable to discharge the duties of his office. It is sufficient if the statute made some provision on the subject, so that the necessary adjustments can be taken legally, and with a minimum of dispute or lost motion when necessary. Suppose, for example, a President were kidnaped, or captured by an enemy army? I do not anticipate either of these things ever happening, but since it is at least theoretically possible for the President to be unavailable for a variety of unforeseen and perhaps unforeseeable reasons, the statute ought to cover such contingencies. It can be done in a simple phrase, as it is done in the English Regency Act.

If I can be of any further service to the committee, please do not hesitate to call upon me.

Sincerely yours,

DAVID FELLMAN,  
Professor of Political Science.

## REPLY OF THOMAS K. FINLETTER, ESQ., NEW YORK, N. Y.

JANUARY 4, 1956.

Hon. EMANUEL CELLER,

*Chairman, Committee on the Judiciary of the  
House of Representatives on Presidential Inability,  
House of Representatives, Washington, D. C.*

DEAR MR. CHAIRMAN: You were kind enough to write me on November 29 enclosing a copy of the questionnaire of the Committee on the Judiciary of the House of Representatives on Presidential Inability. This letter is my reply to the questionnaire.

I. What was intended by the term "inability" as used in article 2, section 1, clause 6, of the Constitution? Shall a definition be enacted into law? If so, will you set forth a workable definition? Shall such a definition encompass physical and mental disability as well as the duration thereof?

I believe that the Philadelphia Convention deliberately did not define the word "inability." The quality of the debates in the Convention was so high that I cannot believe it was an oversight that they failed to be more specific than they were. Indeed, even in hindsight after this long period of time, after more than a century and a half of experience, it seems to me wise not to attempt a definition.

My answer to the second sentence of question I is that I recommend against a definition being enacted into law. Disability is a relative term. There are, of course, rare cases where there is no doubt that a man is disabled and in every likelihood will continue to be disabled. If such a case were to arise I believe that it would be so generally recognized in the country that the President was in fact permanently incapable of performing his duties that there would be no question in the minds of anyone but that the provisions of clause 6 should take effect. In that case a congressional definition of the term "inability" would add nothing.

The more usual case, however, would be where there would be doubt whether the President (a) was at the time incapable of performing his duties, or (b) might recover from the inability; and there are so many variations within these two possibilities, as well as so many possible variations of circumstances and of personality, that I believe it would be unwise to try to cover all the possible situations by a written definition.

Nor do I think the situation can be met by setting up some expert person or body to make the decision as to "inability."

II. Who shall initiate the question of the President's inability to discharge the powers and duties of his office?

- (a) The Congress.
- (b) The Vice President.
- (c) The Cabinet by majority vote.
- (d) Any other group, including independent agencies.
- (e) Shall (d) be of a continuing or temporary nature?

Question III bears on the same point. It reads as follows:

III. Once raised, who shall make the determination of inability?

- (a) The Congress.
- (b) The Vice President.
- (c) The Cabinet by majority vote.
- (d) Any other group, including independent agencies.
- (e) Shall (d) be of a continuing or temporary nature?

I have suggested that the inability of the President should be established by public opinion and that the inability should not be held to exist except when the facts were so obvious that there would be a general recognition by the people that the President was incapable of performing his duties. There are, however, certain acts which by the Constitution or by congressional legislation must be performed by the President, and if the President is disabled these acts cannot be performed, as was the fact for a while in the case of President Wilson.

I suppose that for a while such a situation might be tolerated but if it continued too long public opinion would develop rapidly, I should think, and would demand that "something be done." At this point it would seem to be the responsibility of the Vice President to move or not to move, depending upon the circumstances. Of course, if the President himself were capable of taking the decision that he was not capable of carrying out his duties it would be appropriate for him to so state and to delegate, temporarily, his responsibilities to the Vice President. But under most circumstances of inability it is likely that the President would not be capable of this action; and the responsibility should then fall upon the Vice President. He is the officer designated by the Constitution to act in case



the President cannot. I should not think that any other person or body should initiate the question or make the decision. The Congress, it seems to me, would be barred therefrom by the principle of the separation of powers. And I should think that if the Congress attempted to act and the Vice President disagreed with the action of the Congress the Vice President should prevail.

Nor do I believe that the Cabinet has any constitutional status to act. I realize that it was proposed at the time of President Wilson's illness that the Cabinet be given this power by an act of Congress. Nevertheless, I should have considerable doubt about the constitutionality of any such law if it were passed.

The same comment applies to subsection (d) of question II. I should not think that an independent agency should be given this power any more than the Cabinet.

There is one other possibility which may be mentioned and that is a determination of the question by the Supreme Court of the United States. This, it seems to me, might arise in the ordinary course of litigation. If, for example, the Vice President, believing an inability existed, performed some act as President the validity of his act might be challenged by some individual litigant. If the question then reached the Supreme Court of the United States I should think that a decision as to whether or not an inability existed would have to be made by the Supreme Court.

There is the further question whether original jurisdiction might be given to the Supreme Court to decide by way of declaratory judgment whether inability existed.

This question seemingly has been put to rest by *Marbury v. Madison* (1 Cranch, 137 (1803)) which held that the original jurisdiction of the Supreme Court as described in article 3, section 2, clause 2 (which does not include the right to determine the succession to the Presidency) cannot be enlarged by congressional legislation.

Nor, aside from obvious practical objections, may the inferior Federal courts decide upon the succession by way of a declaratory judgment. Their jurisdiction is limited by article 3, section 2, clause 1, to "Cases" and "Controversies," and I would not think that the matter of the Presidential succession was one or the other.

IV. Are there any constitutional prohibitions relative to questions II and III?

Article 2, section 1, clause 6, may be divided into two parts. The first part deals with the inability of the President and says that if the President cannot act the Vice President should succeed. Nothing is said in this part of the clause about action by Congress. The second part of clause 6 deals with the case where both the President and the Vice President cannot act and gives to Congress the right to determine who shall succeed.

Congress thus is given the power to act in the case of the disability of both officials but nothing is said about Congress in the case where it is the President alone who is disabled.

From this I think it may be argued that there was an intent on the part of the Philadelphia Convention that Congress should act in the case of the inability of both officials but should not have the power to act with respect to the succession where the disability was that of the President alone.

But apart from any inference that may come from clause 6, a definition by the Congress of the word "inability" might be open to the conclusion that it would constitute an invasion of the term of the Presidency and therefore violate the principle of the separation of powers. This is of course an argument on principle without reference to the facts of any particular case and I realize that a decision of the Supreme Court on an actual case might well be influenced by the circumstances at the time. Nevertheless, I do think that the constitutional argument is an important one against any attempt to define the term "inability."

V. Shall dual authority, both to initiate the question and to determine the question, be vested in the same body?

I have suggested above that neither authority be vested in any body.

VI. Shall the determination of disability set forth the—

- a. Permanent nature of the disability?
- b. Temporary nature of the disability?
- c. If temporary, extent of?

If the President or the Vice President were to assert that an inability existed it should be recognized that the disability, no matter how serious it might appear at the moment, might prove to be temporary.

VII. If temporary, who raises the question that the disability has ceased to exist? Once raised, who shall make the determination of cessation?

The proper person, I should think, should be the President.

VIII. In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

My understanding is that it is now well established that in the case of death, the Vice President succeeds to the office. The same, I suppose, would apply to a case of resignation, for that is a definitive act. I should think that there would be ground for arguing that in the case of the succession of the Vice President by reason of the inability of the President to act, the Vice President would succeed only to the powers and duties rather than to the office. This for the reason that there is always the possibility that the President would recover.

IX. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

I should incline to the same view in the case of a permanent disability. There is always the possibility that a disability which seems to be permanent would prove in fact not to be so.

X. In the event of a finding of a permanent disability does the language of the Constitution, namely, "\* \* \* or a President shall be elected \* \* \*" demand the immediate election of a new President? If so, would the election be for a 4-year term or for the unexpired term of the disabled President?

In the proceedings of the Federal Convention on Friday, September 7, 1787, the words "until the time of electing a President shall arrive" were stricken from the language of what later became article II, section 1, clause 6, and the present words, "or a President shall be elected," were substituted. The former language, Madison argued, would prevent a supply of the vacancy by an intermediate election of the President and Madison wanted to allow for such an intermediate election. This motion was agreed to, was later confirmed by an amendment to the report of the Committee on Style on September 12, 1787, and again by the Convention on September 15, 1787.

Nevertheless, it seems that even in the case of a permanent disability of the President the Constitution does not call for the immediate election of a new President. There are two reasons for this. One, that I think the words "or a President shall be elected," may be interpreted as permissive and not mandatory; and two, I should think that this whole second part of clause 6 applies only to the case where there is a disability both of the President and the Vice President. Section 3 of article 20 seems to support this view.

XI. Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?

I think that a constitutional amendment would be necessary to give original jurisdiction to the Supreme Court on this subject or to authorize the Congress to determine the conditions which would constitute inability of the President to discharge the powers and duties of his office.

Very sincerely yours,

THOMAS K. FINLETTRE.

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### REPLY OF JAMES HART, UNIVERSITY OF VIRGINIA

DECEMBER 15, 1955.

HON. EMANUEL CELLER,  
*Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

DEAR MR. CELLER: In reply to your letter of November 29, 1955, I indicated by a brief note that I should be glad to cooperate with you by preparing a memorandum on presidential inability.

In the meantime I have given the subject intensive study, and I enclose herewith the resulting memorandum together with the brief biographical sketch which you requested.

I should be glad to have you publish my memorandum in a House document on the subject.

I am glad that you have undertaken an analysis of what you well call this delicate and vexing problem, and I can only hope that my memorandum may be of assistance.

If I can be of any further aid in the matter, please let me know.

Respectfully yours,

JAMES HART,  
*Professor of Political Science.*

## MEMORANDUM ON PRESIDENTIAL INABILITY

By James Hart, professor of political science, University of Virginia

On this subject the Constitution is not only ambiguous about what is to happen but also incomplete in not indicating who shall decide that it is to happen. But there is no rule of construction that an ambiguous provision may not be carried out until it is clarified by amendment. Those who operate under a provision must attribute meaning to it as best they may. It must thus be assumed that the framers meant only to lay down principles and to leave it to the law to provide the details and procedures. Insofar as meaning has not been supplied by practice, it may be supplied by Congress in the exercise of its delegated power to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the President as an officer of the Government.

Congress may enact a permanent statute or it may legislate for a particular case of inability after it arises. In the latter event the mental condition of the President might prevent his acting upon the bill; and even if Congress could have it technically presented to him and assume that it became law after the 10-day period, circumstances are readily conceivable in which the delay of a week and a half would be dangerous.

But Congress might not be in session. It might have adjourned *sine die*; and the time for the next annual session might be months away. What if in that situation the President's mental condition prevented his signing a proclamation to call a special session?

It does not follow that a permanent law is absolutely necessary. For in the situation imagined leading statesmen and citizens of both political parties would presumably persuade the Vice President that it was his duty to "exercise the office" of President. In less acute situations, moreover, instances might well occur in which it would be better to muddle along for a while or even indefinitely rather than substitute the Vice President. We have muddled along in the past instances without disaster.

On the whole, however, it would seem better to have an orderly procedure prescribed in advance by law, if it is one which could be expected to produce a finding of inability if that were necessary, but not otherwise.

What should such a law provide?

The term "inability" is clarified by the later use in the same clause of the term "disability" as a synonym. The reasonable meaning is clear in general; and it may be doubted whether a definition should be spelled out in the statute. The attempt to define in specific terms types of situations in an area where every case is apt to be *sui generis* might cause trouble by failing to anticipate some future situation. On the other hand, any general language would probably have to be so very general as not to be more of a guide than common understanding now is. An agency such as that proposed below should have the opportunity to use its own best judgment unhampered by the words of a legislative definition and guided only by the general intent of the Constitution.

The same objection arises with respect to writing a definition of the duration of an inability.

The important function of a permanent statute is to vest in some particular body responsibility for investigation and factfinding. To whom should this responsibility be given? Not to Congress, which might have adjourned not to convene for months unless called by a President who might be unable to sign the necessary proclamation. Not to the Vice President, the principal party in interest, because his motive would not be above suspicion, and for that very reason he would probably hesitate to take the initiative even when it ought to be taken. Not to the Cabinet, which is composed of subordinates of the President who would have strong inhibitions against taking the initiative. Not to the courts, to whose process the President is not amenable in *quo warranto* proceedings.

No existing agency appearing to be suitable, it would be for Congress to create one by law. It might be called the Commissioners on Presidential Inability.

These commissioners should not be appointees of the President. Congress should vest their appointment in the Supreme Court of the United States, under its authority to vest the appointment of inferior officers in the courts of law. The term "inferior officers" is not defined by the Constitution; and within the limits of reason the matter is left to Congress. It could so classify commissioners who would have no power at all except in special circumstances to make findings of fact and do other things incidental thereto. Congress is authorized to vest in the courts of law the appointment of "such inferior officers, as they think proper." These will normally be the officers attached to the courts; but the language is broad enough to allow Congress to include others for appropriate reasons.

The qualifications of the commissioners should be stated in general terms which would indicate that the Supreme Court is to take from private life persons whose character and judgment shall have won for them the respect of the Nation. The Court could be depended upon to carry out the spirit of such a provision.

There should be three commissioners, who should serve for life unless sooner removed by the Supreme Court for inability or other cause. All three would be required for a quorum; and they should make their findings by a majority vote.

At first glance it might seem desirable to have one body initiate and another determine. But in this matter the question of when to raise the question should be handled with the same judicial discretion as the question of how to decide it. The commissioners should be authorized to investigate upon their own motion with or without the formal or informal suggestion of others and to make findings. Their composition would cause them to act when that became necessary and not to act unless it did become necessary. This arrangement would also facilitate haste when haste became essential.

At the outset it might be impossible to determine whether an inability was temporary or permanent. There should be no such finding as one of temporary inability, but only a simple finding of inability, a finding of permanent disability, and a finding that the inability has been removed. The original finding might be one of inability or of permanent disability; and a finding of inability might be superseded by a finding that the inability had been removed or by a finding of permanent disability. But a finding of permanent disability should be made only after a recital that the President appears beyond a reasonable doubt to be permanently disabled. It should be provided that a finding of the commissioners may not be questioned in any other place, and that a finding of permanent disability may not be reversed or modified by the commissioners themselves prior to the end of the unexpired term.

The terms inability and disability, as used in the Constitution, are understood to be synonymous; and the terms "inability" and "permanent disability" are to be contrasted in the statute only to distinguish sharply between an inability which may or may not prove to be permanent and one which is found beyond a reasonable doubt to be permanent, and between the different consequences in the two cases.

In the event of a finding of inability, the act should provide that the Vice President should exercise the office of President under the title of President pro tempore (or Acting President, if that be preferred) of the United States of America. The President would remain President. The analogy would be exact with those laws which provide that an Under Secretary becomes the Acting Secretary of an executive department in the absence of the Secretary. Just as the Under Secretary remains Under Secretary while serving as Acting Secretary, so the Vice President would remain Vice President. He would, however, devote his whole time to exercising the office of President, leaving the President pro tempore of the Senate to be the Presiding Officer of the Senate, as article I, section 3, clause 5, contemplates.

The phrase in article II, section 1, clause 6, "until the disability be removed," refers grammatically to the further succession beyond the Vice President; but the intent seems reasonably to apply it back also to the succession of the Vice President. If an inability turns out to be genuinely temporary the President should by a finding of the commissioners be restored to his authority.

Only when the commissioners concluded, of course upon the basis of expert medical advice, that there was a permanent disability beyond a reasonable doubt, would it be authorized so to find; and then the Vice President would become President, the Vice Presidency would become vacant, and the person found to be permanently disabled would cease to be President. Nor could this finding or its consequences be reversed or modified during the remainder of the term.

Now it cannot be conclusively shown what the intent of the framers was, if they had a clear intent. It is a matter of giving language a reasonable meaning which acceptably reconciles the pertinent clauses, so far as possible. It is now established by constitutional practice that upon the death of the President the Vice President becomes President and the Vice Presidency becomes vacant. This practice would presumably be followed also if the President resigned or were removed. In all three cases the Presidency is ipso facto vacant. But inability is a different matter. The Constitution clearly envisions removal of the inability and hence the Vice President could hardly become President prior to a determination of permanent disability. A strong argument can be made that in article II, section 1, clause 6, the antecedent of "the same" is "office" rather than "powers and duties," for the simple reason that it is elsewhere said 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. This he would do as President pro tempore of the United States from the time an inability were found until the end of the unexpired term, unless in the meantime there were a finding that the inability had been removed or that there was a permanent disability.

What might seem dubious is for the Vice President ever to become President, instead of becoming only President pro tempore of the United States, in any of the cases of succession. That, however, is the very point which has been settled by practice in the case of the death of the President. Instead of undoing this settled practice, it seems both wise and legitimate to extend it by analogy to the case of permanent disability. In defense of the reading here advocated, it may be suggested that the admitted imprecision of the constitutional language derives precisely from the framers' having provided in the same sentence for two types of situation in which the Vice President is to exercise the office of President: one in which a clear-cut vacancy has occurred, and the other in which the man whose office he exercises may later have a claim to resume its exercise.

After a finding either of inability or of permanent disability, the Vice President, before he enter upon the execution of the office of President, should be required to take the presidential oath or affirmation prescribed by the Constitution.

The phrase, "or a President shall be elected," refers grammatically to the further succession beyond the Vice President, but should reasonably be applied back to succession of the Vice President. In the event of a finding of permanent disability, this language would not demand the immediate election of a new President. It has not led to an immediate election in the case of the death of the President. I take it to refer to the next regular election of a President whose 4-year term would begin at the end of the unexpired term, or possibly also to a special election to fill out the unexpired term, if Congress should provide for such a special election. I should think, however, that Congress ought not to do so, at least until the succession passed beyond the Vice President, unless it seemed desirable to do so in a particular case. Extra presidential elections are certainly to be avoided except for urgent reasons. Even if Congress provided for a special election, however, it could not give the person elected a 4-year term; for that would upset the time schedule clearly intended by the Constitution to produce a fixed relationship between the terms of Presidents, Senators, and Representatives.

This memorandum does not attempt to deal with succession beyond the Vice President; but of course the Commissioners on Presidential Inability would be empowered to make such findings of inability as might be involved.

I do not call what follows a draft of my proposed statute, but only a sketch from which a draft might be made; but I may say that I prefer the direct draftsmanship of the laws of the first session of the First Congress to the too refined complexities of modern statutes.

*Be it enacted, etc.,* (1) That three commissioners, to be known as the Commissioners on Presidential Inability, shall be appointed by the Supreme Court of the United States from among those private citizens of the United States whose character and judgment shall have won for them the respect of the Nation. The terms of the commissioners shall be for life, unless they be sooner removed by the Supreme Court for inability or other cause.

(2) The commissioners are hereby charged with the responsibility and competence of investigating, upon their own motion with or without the formal or informal suggestion of others, whether there exists a case of (a) inability under the Constitution of the President of the United States to discharge the powers and duties of his office, or of (b) permanent disability under the Constitution of the President of the United States, and, if they conclude after such investigation that such inability or permanent disability exists, of so finding.

(3) Upon a finding by the commissioners of inability, the Vice President of the United States shall forthwith exercise the office of President under the title of President pro tempore of the United States of America; and while the Vice President so serves the President pro tempore of the Senate shall be the presiding officer of the Senate.

(4) After a finding by the commissioners of inability, they shall have the further responsibility and competence of investigating, upon their own motion with or without the formal or informal suggestion of others, whether the said inability has been removed, and, if they conclude after such investigation that the said inability has been removed, of so finding; and upon their so finding the Vice

President shall forthwith cease to be President pro tempore of the United States of America, and the President of the United States shall resume his office and the full exercise thereof.

(5) A finding by the commissioners of inability may not be questioned in any other place, but may be superseded by a finding by the commissioners themselves that the inability has been removed or by a finding by the commissioners themselves of a permanent disability, but not otherwise.

(6) A finding of permanent disability may be made by the commissioners in the first instance or by way of superseding a prior finding by them of inability, but shall be made only after the recital by the commissioners that the President of the United States appears beyond a reasonable doubt to be permanently disabled.

(7) Upon a finding by the commissioners of permanent disability, the Vice President of the United States shall become President of the United States, and shall remain President for the remainder of the unexpired term, except in case of his death, resignation, removal, or inability, unless the Congress shall have provided, or shall thereafter provide, for a special election to fill the unexpired term. At the same time the Vice Presidency shall become vacant, and the person found by the commissioners to be permanently disabled shall cease to be President of the United States.

(8) A finding by the commissioners of permanent disability may not be questioned in any other place, nor shall it be reversed or modified by the commissioners, but shall stand until the end of the unexpired term.

(9) Whenever in case of inability the Vice President shall exercise the office of President under the title of President pro tempore of the United States of America, and whenever in case of permanent disability the Vice President shall become President, he shall, before he enter upon the execution of the said office, take the Presidential oath or affirmation prescribed by the Constitution.

(10) (In appropriate legal language the Commissioners on Presidential Inability should be authorized to make such other decisions as may be necessary and proper as incidental to the responsibilities and competencies vested in them by this act. They should be empowered to make their investigations informal or to hold formal hearings, to conduct public or confidential proceedings, to subpoena and administer oaths to witnesses, and to call for relevant books, papers, and documents. It should be made the express duty of all officers of the United States to give such testimony and to furnish them such information and such books, papers, and documents, as may be relevant to their investigations. A quorum should consist of all three commissioners; and in deciding all questions they should act by a majority vote.)

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## REPLY OF ARTHUR N. HOLCOMBE, HARVARD UNIVERSITY

DECEMBER 19, 1955.

HON. EMANUEL CELLER,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN CELLER: Herewith are my answers to your questionnaire on Presidential inability, as promised in my letter to you dated December 17.

1. The intention of the framers of the Constitution, I believe, was to make clear the power of the proper authorities to provide, when necessary, for the performance of the duties of the office of President by some other person than the President himself. The omission of a definition of the term "inability," as used in article II, section 1, clause 6, was deliberate. The framers, conscious of their inability to anticipate all the different circumstances in which the President might be unable to perform the duties of his office, intended that each case should be decided as it might arise in the light of reason. The important questions are those which you yourself raise in the questionnaire under the second heading thereof. Before answering these questions, however, I wish to add to my answer to question No. 1 that, in my opinion, it is not desirable that a more precise definition of "inability" be enacted into law. I believe that the framers showed sound judgment in refusing to try to anticipate all the contingencies that might arise in a distant and uncertain future. We should not be improving their work but impairing it if we should undertake to do what they so wisely refused to attempt.

2. The person who should initiate the question of the President's inability to discharge the power and the duties of his office is the Vice President. He might be prompted to raise this question by a request from the Cabinet or a resolution of the Congress, but in my opinion that is not necessary since it is the duty of the Vice President to act in case of the President's inability. It is clear that it is his duty to raise the question if in his opinion such action may be necessary.

3. While the Vice President should raise the question, he certainly should not make the final determination of inability. In my opinion it is the Congress which should make the final determination. It can do so quite informally simply by consenting to recognize the Vice President as the proper person with whom it should deal in matters involving the exercise of the Executive power under the Constitution. I see no reason why either the Cabinet or any other group, including independent agencies, should be consulted except in an informal manner by way of courtesy.

4. I do not know of any constitutional prohibition relative to questions No. 2 and No. 3 except those implied in the basic principles of the separation of powers. The question whether the Vice President should discharge the powers and duties of the office of President seems to me to be a political question. There would be no reason, therefore, for appealing to the Supreme Court from a decision by the Congress. The decision of the Congress to recognize or not to recognize the Vice President as acting for the President would seem to me to be final and not subject to any appeal except such as might be taken to the people of the country at the next ensuing general election.

5. I see no reason why the Congress should not initiate the question as well as make the final determination, if the Vice President fails to act in good season. The real difficulty is, of course, a practical one. The Congress may not have confidence in the Vice President, as perhaps was the case at the time of President Wilson's illness, and it is not permissible under the Constitution to set the Vice President aside and put some other person in his place merely on the ground of lack of confidence in his capacity to perform the duties of the office of President.

6. I see no reason for recognizing any disability in advance as permanent, except in the case of death. In other cases, it is a fair presumption at the outset that the disability may happily be only temporary.

7. The answer to this question I think is the same as the answers to No. 2 and No. 3. The Vice President may raise the question whether disability has ceased to exist, but, whether he does or not, in my opinion it is the Congress which should make the determination of cessation. Of course, there is the possibility that the President himself may raise the question. In that case, also, if there should be a difference of opinion between him and the Vice President, it would be the Congress that would eventually have to decide whether the disability had ceased to exist. I draw this conclusion from article I, section 8, clause 18.

8. My belief is that the Vice President succeeds to the powers and duties of the office and not to the office itself in the event of the President's temporary disability. There was originally strong support for the opinion that this would be the case also in the event of permanent disability, but general acquiescence in the action of Vice President John Tyler in claiming the office of President after the death of William Henry Harrison has settled the point that in case of permanent disability the Vice President may succeed to the office itself.

9. I think this question has been settled at least by implication by the precedent established by John Tyler.

10. I do not think the Constitution requires the immediate election of a new President under the indicated circumstances. My belief is that the Congress has power to provide by law for this contingency.

11. Congress happily possesses a general but limited authority to enact legislation necessary and proper to resolve any and all of these questions, subject to review by the Supreme Court of the necessity and propriety of such legislation as Congress might enact. I do not believe that any constitutional amendment is necessary in order to perfect the provisions of the Constitution relating to this matter as they came from the hands of the framers.

Respectfully yours,

ARTHUR N. HOLCOMBE,  
*Professor of the Science of Government, Emeritus, Harvard University.*

REPLY OF HON. HERBERT HOOVER, FORMER PRESIDENT OF THE  
UNITED STATES OF AMERICA

THE WALDORF-ASTORIA TOWERS,  
New York, N. Y., December 8, 1955.

Hon. EMANUEL CELLER,  
Chairman, House of Representatives Committee on the Judiciary,  
Washington, D. C.

DEAR Mr. CELLER: I have your inquiry of November 29.

It is my understanding that under article II, section 1 of the Constitution, the Congress has the power to determine who shall take over the Executive powers in case of the inability of the President to serve.

In my view the determination of disability and its termination should rest with the Cabinet, and the Executive powers should be executed by the Vice President during any such period.

Yours faithfully,

HERBERT HOOVER.

REPLY OF MARK DEW. HOWE, LAW SCHOOL OF HARVARD  
UNIVERSITY

JANUARY 19, 1956.

Hon. EMANUEL CELLER,  
Committee on the Judiciary,  
House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN: Since receiving your questionnaire on Presidential inability I have been turning the problem over in my mind. It is not, I am sorry to say, a question on which I feel myself peculiarly qualified to speak and my thoughts, accordingly, are essentially casual. Because you have asked for an expression of my views, however, I shall do my best to formulate them.

Of basic importance, in my judgment, is recognition of the fact that any attempt to find a single answer to the unpredictable contingencies of the future would be seriously mistaken. This principle leads me to believe that it would be most unfortunate to attempt by any means to define "inability." It seems to me that it is better to preserve the vagueness of the constitutional provision than to attempt to achieve an undesirable, and perhaps an unattainable, precision. It seems to me, for instance, that an "inability" which might present major problems if it should occur at the beginning of a President's term of office might involve no truly significant issues for the Government if it should arise during the concluding months of his administration. To produce a single definition and to seek a single answer for problems which the accidents of time make essentially different would seem to me most unfortunate. I should, therefore, be opposed to an effort to define "inability" by statute, constitutional amendment, or otherwise.

To say this, however, is not to say that no action is desirable at the present time. In my judgment it is desirable that Congress by joint resolution or by statute, but in any case with the President's concurrence, should assert one basic principle concerning the problem of "inability." That principle is that the power to inquire and ultimately to decide whether "inability," temporary or permanent, exists, is to be exercised by the Congress. In my judgment the Vice President is clearly disqualified for interest from initiating or determining this issue. I realize that the size of the Cabinet would, on the face of it, make it a more appropriate body than Congress to determine whether the President is able to execute his powers. On the other hand, I believe that the intimate association between the President and his Cabinet makes it an inappropriate body to decide the matter. I should see no reason why the Cabinet might not initiate congressional action, but I take it that no statute or resolution need assert that right. I believe it important, however, that Congress should, before the issue arises, assert its responsibility to determine the fact of "inability" and its determination that the consequences of "inability" will be resolved by congressional action, within the Constitution, in the light of circumstances as they exist when action is required.

From what I have said I take it that you will understand that I believe that it would be unwise to attempt in advance to state by whom the President's powers are to be exercised during his "inability." A solution appropriate when the Nation is at peace might be totally inappropriate when it is at war. As I have



already suggested, the course advisable at the beginning of a President's term of office might well be entirely unsuitable if his "inability" should occur near the end of his term.

Behind my particular answers to your questions lies a strong conviction with respect to our constitutional system. That is the belief that the framers of the Constitution showed great wisdom in their fidelity to generalities. I feel sure that if we now seek to provide rules for matters which they preferred to dispose of by principle we will jeopardize the future. It is far wiser to leave some questions unsettled for in doing so we preserve for later generations the power to resolve their own problems in accordance with their own needs. I should allow this principle to govern action with respect to the problem of the nature of the Vice President's powers when the Congress has determined that the President is permanently or temporarily disabled. I therefore believe it unwise to seek a present resolution of the 8th, 9th, and 10th questions presented in your questionnaire.

From everything that I have said you will realize that I believe that the Congress possesses today the sole power which it seems to me to be desirable for it to exercise. That is the power to assert an exclusive authority over the matter of a President's "inability." I believe that such an assertion of authority, concurred in by the President, would serve usefully to clarify an important issue and would do so without imposing unfortunate limitations on an authority which should be largely unlimited.

Respectfully yours,

MARK DEW. HOWE,  
*Professor of Law.*

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### REPLY OF RICHARD G. HUBER, TULANE UNIVERSITY

DECEMBER 22, 1955.

CHAIRMAN, COMMITTEE ON THE JUDICIARY,  
*House of Representatives, United States Congress,*  
*Washington, D. C.*

DEAR SIR: I understand a subcommittee staff of the House Judiciary Committee is studying the problem of who judges—and should judge—an ailing President's fitness to carry out his duties. I am writing a few comments on the question—comments that are basic and have perhaps already been considered by your staff.

I suppose the first question—who judges at present under the Constitution—is clear enough in theory, since the President essentially is the only one with the power. On the other hand, experience has shown that an ailing President is often not capable of making the decision—or is kept from stepping aside by those few who have access to him at this time. The result is obviously unsatisfactory.

Quite probably the solution of the problem of the incapacitated President must be solved by constitutional amendment, if a pattern of solution is desired. Any amendment, however, should first of all consider the separation of powers within the Federal Government. This means, it seems to me, that the decision on the capacity of the President should not be made either by the judicial or legislative branch of government. The Supreme Court, furthermore, is not equipped to solve a problem such as this which is basically political and medical in nature. It seems to me also that Congress—or any part of it—would not have sufficiently close contact with the President and his execution of the duties of his office to be able to make a decision except where the decision was obvious. In close cases, even if Congress were making a decision on evidence presented to them, the possibility of political considerations predominating in the decision, or the fear of it, makes Congress a poor choice to make this decision even assuming they can judge better than the Supreme Court as to the actual power of the President to carry out his essential duties.

A third possibility would involve the creation of a separate body—probably appointed by Congress—consisting of medical experts and experienced administrators. Any such body, however, tends to complicate government and would seem foreign to our present government system, except by possible analogy to the electoral college.

The remaining possibility, of course, is that this decision be made within the executive branch of Government itself. This branch will certainly be the first to realize the actuality of any loss of capacity by the President. But, as before stated, this should not mean that certain persons close to the President should make decisions in place of the President. This problem really seems to tie in

with the question of constitutional delegation of Presidential power. Basically the problems of the Presidency are exceedingly heavy for any one man to handle, even if in the best of health. And the question of temporary or partial loss of capacity of the President to govern is part of this same problem—merely that the job which is already beyond the capacity of the individual President is now markedly so, perhaps to the point where the President cannot even make major decisions.

Within the present framework of our Government, the Vice President is the only elective official other than the President that is even partly connected with the executive branch. It would seem that whoever directs the Government—or parts of it that are beyond the capacity of the President to handle—should be responsible for those acts to the electorate. Thus one solution within the present setup is to make the Vice President a sort of chief administrative officer of the Government, and remove from him his duties as presiding officer of the Senate. Duties carried by the executive department could then at least be divided between two men and, if one's capacity to govern diminished the other could take up the slack. This suggestion, of course, would require a considerably different approach to selection of Vice Presidents, but that is not a constitutional problem.

Another possible solution is the one favored in many European countries—although foreign to our present governmental setup. That is to have a head of State who does not govern but carries out the routine duties that our President still has to carry in addition to his policymaking burdens. Such a Head of State could be elected or could be appointed by the President with the advice and consent of the Senate, or could be appointed by Congress. Election would seem unnecessary and perhaps even unwise, since the qualifications of the man selected for this job would be best judged by those in the Government rather than the electorate. This does not solve the question of judging the President's capacity to govern at all, however, even if it does make it more possible for the President to carry on his important duties. Consequently, it seems best that the President and Vice President form an administrative team, with the President in the leadership position but the Vice President able to make any or all decisions in the case of Presidential incapacity and responsible to the electorate both for the decision as to incapacity and for the decisions he makes while acting on the policy level.

This letter is too short to explain my views in detail but it is certainly very long for a busy Congressman to read. I apologize for its length, certainly.

Respectfully,

RICHARD G. HUBER.

## REPLY OF JOSEPH E. KALLENBACH, UNIVERSITY OF MICHIGAN

JANUARY 23, 1956.

HON. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
United States House of Representatives, Washington, D. C.*

DEAR MR. CELLER: I am enclosing herewith two copies of a statement I have prepared in response to your questionnaire on Presidential inability.

You will note that my statement is in two parts. Part I is devoted to a consideration of the general question, with emphasis being placed on State practice in dealing with the similar problem of gubernatorial inability. Part II deals more specifically with the questions raised in the questionnaire.

I have not undertaken to draw up a draft bill on the matter; but I have indicated my belief that a congressional statute on the subject would be desirable and I have indicated in some detail the nature of the provisions which I think should be incorporated in it.

Thanking you for the opportunity to express my views on this important subject, I am,

Very sincerely,

JOSEPH E. KALLENBACH.

## PRESIDENTIAL INABILITY TO EXERCISE THE POWERS AND DUTIES OF HIS OFFICE

### PART I

Implementation of the clause in article II, section 2, of the Constitution providing for devolution of the powers and duties of the President upon the Vice President, in the event of disability of the former, remains one of the unused and inoperative provisions of our Constitution. To date the only instances of actual devolution

of Presidential powers and duties have occurred as a result of the death of an incumbent President. In this connection, for reasons which need not be noted here in detail, usages have been established that the succeeding Vice President "becomes" President and ceases to occupy the office of Vice President, rather than becoming a Vice President exercising the powers and discharging the duties of the Presidency in the capacity of an Acting President; and that his incumbency in the office of President continues until the term for which the President has been originally elected ends.<sup>1</sup>

These usages have unfortunately given rise to doubts and questions of a constitutional nature which have, in part, been responsible for rendering ineffective the inability clause in the succession arrangements. On at least two occasions, viz., during the Garfield and Wilson administrations, conditions arose which undoubtedly warranted an application of the inability clause in the succession plan. There have been other instances, the latest of which came about last September when President Eisenhower suffered a temporarily disabling heart attack, when the inability clause might have been applied had there not been grave doubts regarding the manner of implementing it and its effect upon the official status of the two persons most immediately concerned, the President and the Vice President.

In approaching this problem, certain general considerations must be kept prominently in mind. The tremendous power and great prestige which have come to be attached to the office of President of the United States dictate that the powers and duties of this office, which carry with them an almost immeasurable importance to the Nation and even to the world, should not be subjected to a rule which for light and transitory causes would involve its shifting from hand to hand. Only a situation involving the gravest kind of emergency warrants the devolution of the constitutional powers and duties of this great office, temporarily or otherwise, upon a substitute for the elected President. On the other hand, a cessation, by default, for an extended period of time, of active functioning of the Presidency is intolerable to the Nation and to the world. The chief executiveship of the United States supplies too much of the energizing and directive force in our governmental system and requires policy decisions, almost from day to day, of too much consequence, to permit a vacuum to exist in this part of the governmental organization. Furthermore, disputes as to who may rightfully exercise the constitutional powers and duties of the office in a situation wherein the President's capacity to act is in question must be guarded against and obviated, so far as possible. These considerations point to the desirability of taking appropriate steps to implement and perfect these constitutional arrangements, during a period of relative calm, rather than to face the problem when it presents itself as an emergency situation which must be dealt with in an atmosphere of crisis.

The intentions of the framers regarding the meaning and purpose of the inability clause cannot be clearly ascertained from the records of the debates in the Convention of 1787. This provision was given comparatively little attention by them. Formulation of a constitutional plan governing succession came relatively late in the proceedings. The provisions ultimately adopted, as was also the case with those relative to selection, tenure and removal of the President, reflected a slowly maturing realization that the arrangements included on this point should insure, in some degree at least, executive independence from the legislative branch. How far this independence should carry with respect to the implementation of the inability clause they did not make entirely clear.

According to Madison's Journal, the succession issue was first dealt with in the tentative draft of a Constitution reported by the Committee of Detail on August 6. Following the outlines of Hamilton's ideas of a proposed Constitution which the Committee had at hand for reference, the draft carried a clause stating that in the event of removal, death, resignation or disability of the President, the President of the Senate should exercise the powers and duties of the office "until another President be chosen, or until the disability be removed."<sup>2</sup> This was an entirely logical proposal in view of the fact that at that point in its proceedings the Convention was committed to the principle of legislative selection of the President. The framers evidently were influenced in this matter by the prevailing practice of the States. In most of the eight States which at that time provided for legislative election of the governor, his temporary successor was either the presiding officer of the upper legislative house or the council, as it was called in some of these States, or one of its members to be named for this purpose.

<sup>1</sup> The most complete and exhaustive study of these and related questions can be found in Ruth C. Silva's *Presidential Succession*, University of Michigan Press (1951).

<sup>2</sup> Documents Illustrative of the Formation of the Union of the American States (C. C. Tansill, ed.) (1927), p. 479.

When this clause of the tentative draft was taken up for consideration on August 27, Gouverneur Morris, champion of the principle of executive independence of the legislative branch, objected to it. He suggested instead that the Chief Justice be made the provisional successor.<sup>3</sup> At this point in the proceedings the idea of an executive council on which the Chief Justice would sit was still under serious consideration by the Convention. Morris preferred that a member of the contemplated body of official advisers to the President, even though he was a judicial officer, should be the succeeding officer, rather than to have the succession fall upon the head of one of the legislative houses. Madison added as a further objection to the committee's proposal that the Senate might be tempted to delay the choice of a new President while its own presiding officer was in possession of the veto power. He suggested that the Presidential powers should devolve upon the contemplated executive council as a whole. Dr. Williamson, of North Carolina, evidently mindful of the possibility of illness and of occasional absences of the President from the seat of government, pointed out that fuller provision should be made for "occasional successors;" while John Dickinson, of Delaware, objected to the vagueness of the term "disability," and raised the question who should be the judge of it.<sup>4</sup>

No one offered support for the committee's proposal, and a motion to postpone consideration of it carried. This action had the ultimate effect of referring this feature of the Committee of Detail draft to a Committee on Postponed Matters and Unfinished Business for further study and report. The solution advanced by this body on September 4 was a proposal to create the office of Vice President to provide a first successor to the President, with the Vice President to be the ex officio President of the Senate. "Disability" as an occasion for succession was changed to "inability," and "absence" was added as another circumstance in which the succession rule should operate.<sup>5</sup>

The proposal to establish as the immediate successor to the President a Vice President, to be chosen in the same manner as the President, was accepted by the Convention. On Randolph's motion a clause was included authorizing Congress to provide for succession beyond the Vice President in case of the "death, resignation or disability" of both the President and Vice President, the succeeding officer to serve "until the time for electing a President shall arrive."<sup>6</sup> At Madison's suggestion, a change in the wording of Randolph's proposal was made. The change caused the clause added to state that a successor should serve "until the disability be removed, or a President shall be elected." Madison's evident purpose in proposing this textual change was to make clear that Congress might provide for an interim election to fill a permanent vacancy, and to clarify the point of the duration of service of an acting President in the event of disability of both the President and Vice President. Adoption of Randolph's proposal as thus modified resulted in some ambiguity, since as then provided a Vice President was to succeed in case of the "death, removal, resignation, inability or absence" of the President, but the next officer in line was to succeed in the event of the "death, resignation or disability" of both the President and Vice President. In an evident attempt to eliminate this ambiguity the final draft subsequently prepared by the Committee on Style and Arrangement omitted reference altogether to "absence" as an occasion for operation of the succession rule and substituted "inability" for "disability" in the clause referring to the succession beyond the Vice President. These changes were not commented on when the succession clause of the completed draft was reviewed. The term "inability" may have been judged by the Committee on Style to be more comprehensive than "disability" and to include both absences and temporary physical disabilities. On the other hand, the reference to "absence" as an occasion for operation of the succession rule may have been deliberately omitted because it was feared that it might impose undue limitation upon the movement of the President from the seat of government and give rise to unnecessarily frequent shiftings of the powers and duties of the Presidency to the Vice President.

There is little or nothing in this history of the formulation of the inability clause that suggests the proposition, later advanced, that in the event the powers and duties of the Presidency devolve upon a Vice President, he must be regarded as the permanent occupant of the office, displacing the President for the remainder

<sup>3</sup> *Ibid.*, p. 621.

<sup>4</sup> *Ibid.*, p. 722.

<sup>5</sup> *Ibid.*, pp. 660-661.

<sup>6</sup> *Ibid.*, p. 680.

of a term in all instances when the succession rule should operate. It seems very unlikely that they intended to make the Vice President the permanent successor to the President in the event of the latter's "inability," while a successor to the Vice President in the event of his "inability" should be regarded as a temporary successor serving only until the Vice President's "inability" should be removed.

Undoubtedly the framers, in devising these arrangements relative to succession, were greatly influenced and guided by the example and experience of the States in their provisions for succession to the office of State governor. Provision for a "deputy governor" or some other-styled temporary substitute for the colonial governor was a common feature of the colonial systems. In Rhode Island and Connecticut, where colonial charters dating from 1663 and 1662, respectively, continued to serve as State constitutions during and after the Revolution, the deputy governor was authorized to serve as governor in the event of the governor's inability occasioned by "sickness, absence or otherwise."<sup>7</sup> All of the other original State constitutions carried clauses making provision in some way for gubernatorial succession. In most of the States succession to the powers and duties of the governorship was provided for in the event of the governor's "absence" from the State or during his "inability," in language which indicated that there could be a temporary devolution of authority to the succeeding officer under these conditions.<sup>8</sup>

It may be assumed that the framers, who were aware of such State constitutional arrangements regarding temporary succession to the powers and duties of the governor by a designated officer, intended to establish a system under which the Vice President, as the officer next in line for the Presidency, should exercise the powers and duties of that office either in case of a temporary, "occasional" inability or a permanent disability, as well as in case of the President's death, resignation or removal. In the event of a permanent vacancy in the office occasioned by death, resignation, or removal of the President, it is not altogether clear whether or not they expected that Congress should arrange for election of a new President. It does seem clear, however, that they intended to give Congress the option of making provision for a special election of a new President in the event that an officer other than the Vice President should succeed to the powers and duties of the Presidency under the terms of supplementary congressional legislation.

Since the States are confronted by a similar problem of succession to the office of governor in case of "inability" of the incumbent, and the national constitutional provisions on this point may be assumed to deal with the matter in a manner similar to that employed by the States, a survey of State practices should shed light on how the problem could and should be handled at the national level. In view of the fact that the framers were admittedly influenced by State practice in the provisions made on other points relative to the executive office, it is a reasonable assumption that the practice of the States with regard to their arrangements for succession in the event of gubernatorial "inability" should serve as a guide to interpretation of the corresponding national constitutional provision.

Currently the constitutions of 46 States contain language which clearly or implicitly indicates that in the event the governor is unable to exercise powers and discharge the duties of his office, there shall be a temporary devolvement of them upon the officer next in the line of succession. Twenty-eight States also explicitly or implicitly provide for a temporary succession in case of the governor's absence

<sup>7</sup> The *Rhode Island Charter of 1663* provided: "And further, we will, and by these presents, for us, our heirs and successors, doe ordeyne and graunt, that the Governor of the sayd Company, for the tyme being, or, in his absence, by occasion of sicknesse, or otherwise, by his leave and permission, the Deputy-Governor, for the tyme being, shall and may from tyme to tyme, upon all occasions, give order for the assemblinge of the sayd Company and callinge them together, to consul and advise of the businessse and affaires of the sayd Company."

In similar language the *Connecticut Charter of 1662* stated:

"Wee will and doe Ordaine and Graunt that the Governour of the said Company for the tyme being, or, in his absence by occasion of sicknes, or otherwise by his leave and permission, the Deputy-Governour for the tyme being, shall and may, from tyme to tyme upon all occasions give Order for the assembling of the said Company and calling them together to consult and advise of the businessse and Affairs of the said Company."

<sup>8</sup> Only the constitutions of Pennsylvania and Maryland contained language indicating that the succession rule should operate only in the event of a permanent vacancy in the office of governor. The *Pennsylvania Constitution of 1776* provided that all vacancies in the Executive Council (which elected one of its own members to be "President" of the Commonwealth) that might happen by death, resignation, or otherwise, should be filled at the next regular election, unless a special election was called. The *Maryland Constitution of 1776* made provision for temporary exercise of the governor's powers by the "first named of the council" (senate) and required appointment of a new governor by the general assembly, in the event of the death, resignation, or removal of the governor out of the State.

from the State.<sup>9</sup> Upon a governor's return to the State he automatically reassumes the powers of his office.<sup>10</sup> In addition, there are at least 14 States in which the language of the constitution clearly indicates or has been interpreted to mean that a temporary devolution of the governor's powers upon the succeeding officer occurs upon the voting of impeachment charges against the governor, with the outcome of the subsequent trial being determinative of whether he reassumes those powers and duties or not.<sup>11</sup> In all these situations there is clearly indicated a circumstance in which a temporary devolution of official powers and duties of the governor may occur, without his permanently surrendering his right to the office for his elective term. During the time his powers are being exercised by the officer next in line, he remains governor, but the powers and duties of the office are temporarily in the hands of another.<sup>12</sup>

Instances in which a temporary devolution of gubernatorial powers has occurred through operation of the rule regarding absence from the State are so numerous and common as to require no documentation. Mere notification of the officer next in line of succession of an impending absence by a governor suffices to cause the powers and duties of his office to devolve upon his successor, and this is the common procedure followed. State courts have on occasion held, however, that such notification is not a required step in causing the devolution to occur, and that the rule operates automatically upon the given fact of the governor's leaving the boundaries of the State.<sup>13</sup>

There have also been a number of cases of temporary or tentative devolution of gubernatorial powers because of the illness or physical incapacity of the occupant of the governor's office. One such instance occurred in New Hampshire shortly before the adoption of the Constitution. Meshech Weare, the first executive under New Hampshire's constitution of 1784, was unable to take the oath of office at the beginning of his term, and the president of the senate, Woodbury Langdon, the officer next in line, exercised for a short time the powers of the governorship in his stead. The next year Langdon again exercised the powers of the governorship during another period of illness by Weare.<sup>14</sup> These precedents were cited by the supreme court of New Hampshire in 1890 in a case arising in that State in which, acting upon a request from the Attorney General made with the acquiescence of Governor Goodell, who was ill, it issued a writ of mandamus to the president of the senate directing him to assume the powers and duties of the governorship during the period of the incumbent's illness.<sup>15</sup> Governor Goodell subsequently recovered and resumed the powers and duties of his office for the remainder of his term. In still another more recent New Hampshire case, the Supreme Court rendered an advisory opinion to resolve a question concerning what

<sup>9</sup> The Oklahoma constitutional provision, which provides for succession of the Lieutenant-Governor in the event of the Governor's "removal from the State," was held applicable to an occasional absence from the State in *Ex parte Crump*, 10 Okla. Cr. 133, 135 Pac. 428 (1913). In Alabama the succession rule operates only in case the Governor is absent for 20 days or longer. The Louisiana Supreme Court has construed the absence clause of that State's constitution to apply only in case the absence actually interferes with the Governor's performance of his duties. *State ex rel Warmouth v. Graham*, 26 La. Ann. 568 (1874).

<sup>10</sup> Cf. *People ex rel Tennant v. Parker*, 3 Neb. 409 (1873); *Ex parte Hawkins*, 10 Okla. Cr. 396, 136 Pac. 991 (1913).

<sup>11</sup> Cf. *State ex rel Trapp v. Chambers*, 96 Okla. 78, 220 Pac. 890 (1923); *Opinion of the Judges*, 3 Neb. 463 (1873); *People ex rel Robin v. Hayes*, 149 N. Y. Supp. 250 (1914). See also *In the Matter of the Executive Communication Filed the 17th Day of April, A. D. 1872*, 14 Fla. 289 (1872).

<sup>12</sup> On this point the Supreme Court of Oklahoma has said: "Such absence from the State is an abdication for the time being of the constitutional functions of his office, and the effect of that absence is to suspend his constitutional functions. He does not cease to be Governor by his temporary absence from the State. His vested right of tenure in the term of office attaches to his person and is distinct from his executive functions; it goes with him, but his constitutional functions of his office belong to the public and are confined to the State and cannot be exercised out of the State; when he leaves the State, the constitutional functions of his office devolve pro tempore upon the Lieutenant Governor; and when he returns to the State, ipso facto, he resumes all of the powers, functions, and duties of his office, and the Lieutenant Governor, theretofore administering the executive functions temporarily under the Constitution, ceases to be Acting Governor.

"The true distinction is founded upon the difference existing in the nature of things between a personal vested right of tenure in the term and the functions of the office created in the interest and for the benefit of the public. We think that this is the unmistakable meaning of the language used, and that this construction is alike supported by reason, common sense, public policy, known political truths, and the contemporaneous and practical construction of the respective departments of our State government, and is conformable to the history of every State in the Union." *Ex parte Crump*, 10 Okla. Cr. 133, 135 Pac. 428 (1913), at pp. 152-153.

<sup>13</sup> See *Walls v. Hall*, 202 Ark. 999, 154 S. W. (2d) 673 (1941); *Ex parte Hawkins*, 10 Okla. Cr. 396, 136 Pac. 991 (1913); *Montgomery et al v. Cleveland*, 134 Miss. 132, 98 So. 111 (1923); *State ex rel Attorney General and Case v. Barrow*, 29 La. Ann. 243 (1877). Absence of the governor on official business, or for a brief period of time does not necessarily entitle the officer who acts in his place, rather than the governor, to receive the salary attaching to the office of governor under a constitutional provision which states that the salary and emoluments shall be received by the person exercising the powers and duties thereof. See *State ex rel Warmouth v. Graham*, 26 La. Ann. 568 (1874); *State ex rel Crittenden v. Walker*, 78 Mo. 139 (1883).

<sup>14</sup> These incidents are noted in the court's opinion in *Attorney General v. Taggart*, 60 N. H. 362, 29 Atl. 1077 (1890).

<sup>15</sup> See the case cited in note 14, above.

officer should assume the powers and duties of the governorship in the face of an impending absence of the governor and the illness of his immediate successor.<sup>16</sup>

Other instances of the operation of the inability rule because of illness have occurred in Alabama, Arkansas, Oregon, and Illinois. Gov. William J. Samford by reason of illness was unable to take the oath of office as Governor of Alabama at the beginning of his term on December 1, 1900. The president of the senate, William D. Jelks, the next successor under the Alabama constitution at that time, took the oath as governor and served until December 26, 1900, when Samford, having sufficiently recovered, took over the office. The next year on June 11, Samford died and was succeeded for the remainder of his term by Jelks, Jelks was subsequently elected governor in his own right, but during his term he also became ill, and was absent from the State from April 25, 1904, to March 5, 1905, undergoing treatment for his illness. During this time the lieutenant governor, R. M. Cunningham, acted as governor. Upon recovery of his health, Jelks returned, resumed the powers and duties of his office, and finished out his term as governor.<sup>17</sup>

In Arkansas in 1907, Governor John S. Little suffered a nervous breakdown about 1 week after assuming office. The powers and duties of the office for the remainder of his term were exercised by the occupants of the offices of president of the senate and president pro tempore of the senate. Little did not resign and continued to be regarded as the governor for his full term.<sup>18</sup> A somewhat similar situation occurred in Oregon in 1910-11. Following the death of Governor Chamberlain, Frank M. Benson, as secretary of state, succeeded to the office of governor. Benson subsequently became incapacitated on June 17, 1910, and the president of the senate, Jay Bowerman, served as acting governor in his place until the completion of the regular term on January 8, 1911.

The incident involving Gov. Henry Horner, of Illinois, in 1940, is illustrative of the fact that an assertion of a claim of authority to exercise the powers and duties of the office of governor by the next succeeding officer on the ground of physical incapacity of the incumbent is not in itself sufficient to bring about a devolution of these powers. Governor Horner had suffered a heart attack in November 1938, and thereafter he was from time to time incapacitated in some degree by high blood pressure and threatened recurrence of heart trouble. On April 8, 1940, Lt. Gov. John Stelle, citing the fact of the Governor's illness and confinement to his bed and asserting that his powers were actually being exercised by a "bedside cabinet," laid claim to the powers and duties of the governorship. A statement was issued over Horner's signature denying Stelle's assertions and maintaining his own right to continue as governor. For a period of approximately 3 weeks Stelle continued to maintain his position; but eventually, as other State officers ignored his pretensions to the office of governor, he desisted. Later, in October, when Horner's condition became critical and he fell into a coma, his secretary issued a statement announcing to the secretary of state and the State auditor that Horner was unable to act, and requesting that the Lieutenant Governor assume his powers until Horner should recover or his term should end. The transfer of power to Lieutenant Governor Stelle occurred immediately, but the death of Governor Horner the next day eliminated the question of his right to eventual resumption of power.<sup>19</sup> The incident vividly underscores the need for a regularized procedure for determining when a situation has arisen calling into play the inability clause in the event of physical incapacity of the incumbent chief executive.

Three States have adopted constitutional provisions designed to establish such a procedure. The constitution of Mississippi adopted in 1890 was the first to contain a provision of this nature. It states in article V section 131 that should a doubt arise as to whether a vacancy has occurred in the office of governor or as to whether any one of the disabilities mentioned therein exists or shall have ended the secretary of state shall submit the question to the supreme court for an authoritative determination. The Alabama constitution of 1901 contains a somewhat similar provision but it is of a more limited scope. It provides in article V section 128 that upon request of any two of the officers named in the line of succession to the governorship the supreme court of the State shall determine whether the mental condition of the governor permits him to continue in the office of governor or permits him to resume it if he has been found to be temporarily incapacitated because of unsound mind. The last State to adopt a constitutional provision on the general problem of gubernatorial incapacity was New Jersey,

<sup>16</sup> *Opinion of the Justices*, 87 N. H. 489, 177 Atl. 655 (1935).

<sup>17</sup> Cf. Marie Bankhead Owen, *Our State Alabama*, Alabama State Department of Archives and History, Historical and Patriotic Series No. 7 (1927), pp. 360-367.

<sup>18</sup> He is listed as the governor of the State from 1907 to 1909 in the *Arkansas Handbook*.

<sup>19</sup> Cf. *New York Times* for April 8, 9, 28, May 1, October 6, 7, 8, 1940.

which included such a provision in its constitution of 1947<sup>20</sup> outlining a procedure for judicial determination of the inability of the governor to discharge the duties of his office. The New Jersey provision unlike that of Mississippi and Alabama, looks toward a permanent vacation of office upon a judicial finding of incapacity. The question of gubernatorial incapacity may be presented for determination by the supreme court by passage of a concurrent resolution by a two-thirds majority in each house of the legislature. The grounds upon which a vacation of office may be declared are (1) failure of a governor-elect to qualify within 6 months of the beginning of his term; (2) continuous absence from the State for 6 months or more; or (3) inability to discharge the duties of his office by reason of mental or physical disability for 6 months or more.

The inferences that are warranted from this review of State practice and experience with regard to the problem of gubernatorial disability and its bearing upon the problem of Presidential inability are rather obvious. 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 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.

State experience suggests also that there cannot be such a thing as a partial devolution of the powers and duties of the Chief Executive at the discretion of the incumbent. Unless there is constitutional provision to the contrary,<sup>21</sup> the devolution of powers and functions upon the succeeding officer is complete. The succeeding officer, and only he, may in this circumstance exercise any and all powers vested in the Chief Executive by the Constitution or laws.<sup>22</sup> Finally, State experience suggests also that there is need for a formalized procedure for making an authoritative determination of the facts in a circumstance when the inability of the Chief Executive is such that he cannot or will not allow the mandate of the Constitution to be effectuated with respect to the temporary devolution of his powers and duties.

With respect to Presidential inability of an incapacitating nature, three modes of action need to be made available for dealing with it. If the disability is of such nature as to appear to the President himself to be of an indefinite duration, with little or no hope of his recovery from it, he should have the opportunity to remove himself from office permanently by voluntary act. This option has been given him in the constitutional provision recognizing his right to vacate his office by resignation. This constitutional provision has been implemented by a congressional act of a directive character, indicating the manner in which a resignation is to be given and designating the officer to whom it shall be sent.<sup>23</sup> Secondly,

<sup>20</sup> Art. V, sec. 8.

<sup>21</sup> For example, the constitutions of Michigan and New York and several other States except from the automatic rule of devolution of power in case of the governor's absence from the State, his powers of command over the military forces of the State when the governor temporarily absents himself in the performance of his military duties.

<sup>22</sup> Cf. *Ex parte Hawkins* (10 Okla. Cr. 396, at p. 400): "During his (the governor's) absence, or inability to act, the lieutenant governor is vested with all the powers of governor. The business of the people requires that a governor should always be in the State to approve bonds, honor requisitions, make appointments, quell riots, fill vacancies, and transact all other business which pertains to this office, without expense or delay to the people, or interruptions in the administration of justice. . . . The constitution provides that there shall always be someone within the State clothed with power to perform the duties of chief executive. The constitution must be obeyed, let it please or displease whom it may. There is nothing more ridiculous than to contend that the governor, as a matter of whim or caprice, can leave the State to attend banquets, or play golf, in other States, or for any other purpose, and say to those who have business with his office: 'Wait until it suits my convenience to return.'"

<sup>23</sup> Title 3, ch. 1, sec. 20, United States Code (1952). This legislation was originally enacted as a part of the Presidential Succession Act of 1792. Cf. the note by Everett S. Brown in the *American Political Science Review* vol. 22, (August 1928), pp. 732-733. No President, of course, has ever resigned for any reason; but it might be noted that there have been several instances of resignations of governors for reasons of ill health. The most recent case appears to have been that of Governor O'Toole, of Montana, who resigned on April 1, 1908.



if the President regards his inability to be, possibly or probably, of a temporary nature, he should be allowed to voluntarily relinquish the powers and duties of his office, for the duration of his inability, to the officer whose constitutional duty it is to exercise them during his incapacity to do so. These two modes of dealing with the inability problem could be expected to cover practically all situations that might arise involving Presidential disability.

However, a third contingency is conceivable. The President's inability may be of such a nature that he is himself unable or incapable of making the decision to effect a temporary devolution of his powers and duties upon his successor. Such a situation might arise, for example if his inability resulted from an illness so incapacitating that he could not be expected to exercise judgment in a matter so grave without endangering his life; or his mental capacities might be so impaired that he would not be competent to make such a judgment. It is even conceivable that, as a result of war or revolution, his being held in duress would impose a bar to his free exercise of his will. To deal with a situation of this kind, a Federal statute should be enacted authorizing the officer upon whom the constitutional responsibility for acting as President devolves in the event of presidential inability to obtain authoritative advice regarding the necessity for his assuming temporarily the powers of the Presidency. The advice received by him in this contingency could not be made conclusive upon the succeeding officer, nor could the statute authorizing him to obtain such advice make it mandatory that he seek it. It would, however, arm him with an authority to secure a political sanction for exercising his constitutional power and duty which should tend both to restrain him against taking precipitate action and to induce him to act if the public necessities require him to do so.

## PART II

In the light of foregoing considerations, my answers, more specifically, to the questions raised in the questionnaire on presidential inability are as follows:

I. The term "inability" as used in article II, section 1, clause 6 of the Constitution was intended to cover any contingency which might render the President incapable of intelligently, responsibly, and effectively discharging the powers and duties of his office. Whether absence of the President from the seat of government or his leaving the territory of the United States were meant to be covered by the term "inability" is debatable; but precedent and usage have established that these circumstances do not, in themselves, give rise to an inability requiring devolution of executive powers and duties upon the succeeding officer.<sup>24</sup> I see no compelling reason to challenge the established usage in this regard, particularly in view of the fact that modern means of communication and transportation have largely nullified any element of disability involved in the mere fact of the President's being away from the seat of government. It is conceivable, however, that a circumstance may arise in which the fact that the President is under a compulsion for some reason or other to be absent from the seat of government for an indefinitely long period of time may be a factor to be weighed in making a determination on whether he is unable to discharge the powers and duties of his office.

I think that a congressional statute, in the form of a joint resolution embracing the essence of the constitutional terminology relative to devolution of presidential power in the event of presidential disability and expressive of the sense of Congress, should be enacted. It should be permanent, rather than ad hoc, in nature. It should define presidential inability, but only in the broadest terms. Any definition more or less restrictive than the language of the Constitution itself is beyond the power of Congress to enact. Hence the statute should more fully express congressional accord with the constitutional rule that there shall be a devolution of presidential power upon the Vice President, or any other officer properly in the line of the succession, in the event of an inability of the President. "Inability," in the constitutional sense, has reference to a mental or physical condition or any other condition, which prevents the actual exercise of the powers and duties of the office of President as the public interest and necessities require. It is my opinion that Congress has authority under the necessary and proper clause to reinforce the constitutional provision on this point by legislation of this nature. The constitutional provision is self-executing; but a declaratory act by Congress, recognizing the constitutional rule, would give further moral and political sanction to the act of a President who, because of an inability which impairs his freedom to exercise the powers of his office in the manner required by the national public interest,

<sup>24</sup> Cf. *Silva*, op. cit., pp. 92-98.

permits and recognizes a devolution of presidential powers upon the person named by the Constitution or laws as his substitute in this type of contingency. Beyond these limits the statute should not attempt to go in defining and delimiting the term "inability." "Inability" is a matter of fact. It is my belief that Congress lacks authority to circumscribe in any way the term as it is found in this clause of the Constitution. It may not delimit the causes from which inability may be deemed to arise, or prescribe a period of time during which the inability must persist before the devolution of presidential power may occur. Nor may it specify a minimum or maximum period of time during which the devolution of presidential power shall be deemed effective. The Constitution indicates that it shall be effective for the duration of the period of actual inability of the President, and Congress cannot alter the constitutional rule on this point.

II, III, IV, and V. The declaratory or directive statute should, in the first place, make manifest the sense of Congress that a President in the event of his inability to exercise the powers and duties of his office, may so declare on his own initiative, and thus cause the powers and duties of his office to devolve upon his constitutional successor for the duration of his inability. As in the case of the statute implementing the resignation clause the statute might well direct that the President's intent to recognize such a devolution of powers shall be formulated in writing and signed by him; that it be directed to the officer upon whom the duty of acting in his place falls, normally the Vice President; and that copies of it be sent also to the heads of the other coordinate branches of the Government, viz., the President pro tempore of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Court, as an official notification to the heads of the other branches of the National Government that the devolution of powers has occurred, and has his sanction. The directive statute should provide further that in like manner the President should officially inform the person acting in his place, and the heads of the other branches, of his intent and ability to resume his official powers and duties, when and if the removal of the cause of his inability has made possible his resumption of his official powers and duties as President.

A provision of this character in a statute, it may be argued, lies beyond the competence of Congress to enact, inasmuch as it relates to a matter upon which the Constitution is already final and determinative. It may be argued that the devolution of power upon the Vice President is automatic and self-executing in the event of the President's inability, and only the Vice President has the authority to act in order to implement this provision of the Constitution. The answer to this is that a statute of Congress can be directive and declaratory of the sense of Congress, as well as mandatory. By placing itself "on record" in this manner, the Congress will be indicating its acquiescence in and support of the principle underlying the constitutional arrangement for a temporary devolution of power upon the Vice President. It will be normalizing the procedure by which this may be accomplished, without in any sense seeking to limit the discretion of either the President or the Vice President in their discharge of their duties and obligations as constitutional officers as they see them.

A more difficult problem is presented in case the President is actually unable to discharge the powers and duties of his office, and is at the same time unable and/or unwilling to express acquiescence in the Vice President's assuming the powers and duties of his office. As the Constitution now stands, both the right and the obligation to assume the powers and duties of the Presidency are vested in the Vice President. He cannot escape them, nor can Congress, by statute, circumscribe his authority to exercise his constitutional duty as he sees it. In my opinion, however this does not foreclose Congress from including in the implementing statute a section setting up a procedure by which the Vice President may seek, or be given, advice and political support in making a determination of what his course of action should be in a situation involving a question of Presidential inability.

Neither the Congress nor the Supreme Court is an appropriate body, under our system of separated powers, to officially initiate inquiry into the question of a President's inability; although it would clearly be within the province of Congress, at any time, to pass a concurrent resolution expressing its attitude in a situation giving rise to this question. The officers who are immediately concerned in such a situation, and who, by implication, are recognized as having a right to raise this question, are those who are named by the Constitution and by the Presidential Succession Act as officers upon whom the duty of acting as President may fall. These officers, under current arrangements, are the Vice President, the Speaker of the House, the President pro tempore of the Senate, and the 10 department heads

of Cabinet rank.<sup>26</sup> The statute should provide, therefore, that in the event of the President's being in a condition giving rise to a question of his ability to exercise the powers and duties of his office as required by the Constitution, accompanied by an inability on his part to request a temporary assumption of those powers and duties by the appropriate succeeding officer, that officer (normally the Vice President) may request and require the collective advice and recommendation of the other officers in the line of succession regarding his course of action. For that purpose he should be authorized to assemble these officers as a special Advisory Council. Similarly any 1 (or perhaps it should be any 2) of the members of this Advisory Council should be authorized to initiate and present to it the question of whether the circumstances are such as to warrant and require that the officer next in the line of succession to the President act as President.

The Advisory Council, so constituted, should be given the authority to examine into all relevant facts; to consult expert medical opinion in case the President's alleged inability arises from mental or physical infirmities; and by majority action, to make findings relative to the condition of the President based on such evidence as may be available to it. If it finds that the President is unable to exercise the powers and duties of his office in the constitutional sense, it may by majority action, advise and recommend that the officer upon whom the duty of acting as President would devolve under the Constitution or laws, should assume forthwith the powers of Chief Executive. Its advice and recommendation to this effect could not be made binding and controlling upon the officer to whom it is directed; but it would mobilize moral and political support for his acting in the manner recommended.

The statute should provide further that the succeeding officer should notify in writing the heads of the other branches of his intent to assume the constitutional powers and duties of the Presidency during continuance of the President's inability. His notification should set forth the findings and recommendations of the factfinding group as evidence of the basis of his action, if he is acting upon the basis of such a recommendation.

VI. The determination which the above-described Advisory Council should be authorized to make must necessarily be limited to a finding that the President has incurred a disability of a character that warrants the assumption of his constitutional powers and duties by the next officer in the line of succession. In other words, it can go only so far as to make a finding that, in its judgment, circumstances have arisen justifying the operation of the constitutional rule. It cannot be invested with authority to pass upon the "permanent" or "temporary" nature of the inability; and it can find an inability to exist only if there is an inability in the constitutional sense, i. e., one which impairs the President's freedom and ability to exercise the powers and duties of his office in the manner which the public interest requires and necessitates. The devolution of powers in such a situation must be complete; hence the Advisory Council could not recommend a partial devolution of the powers of the office in order to accommodate a partial disability of the President. There should be no authority to specify that the disability is to be deemed "permanent" or only "temporary;" for this would involve the establish, by statutory arrangement, of a procedure by which a President could, in effect, be removed from office in case the inability is found to be permanent. The power to authorize such a finding does not lie in Congress, since the impeachment procedure, by implication, is the sole and exclusive provision of the Constitution on the point of removal of a President. Furthermore, to authorize a body of this character to make a determinative finding on the permanent or temporary character of a President's inability would amount to a restriction upon the judgment of the succeeding officer regarding what he alone has final authority to decide, i. e., his constitutional duty to exercise the powers and functions of the President only during that time in which the President is actually unable to exercise them.

VII. The statute, as I have indicated, should merely recognize the right of the succeeding officer to exercise the powers and duties of the Presidential office during the period when the President is unable to do so. It should not attempt to set limits in terms of possible causes of inability or the duration of an inability. Hence every inability in the constitutional sense should be treated alike, as one which in the course of events may disappear by reason of removal of its cause or causes. In providing for determination of when a Presidential inability has ceased and

<sup>26</sup> For a variety of reasons, constitutional and practical, I question the propriety and wisdom of placing the presiding officers of the two Houses of Congress in the line of the presidential succession. Cf. my article, "The New Presidential Succession Act," *American Political Science Review*, vol. XLII (October 1947), pp. 931-941. However, since these officers are presently included in the line of succession, they should logically be included in the plan which is proposed for dealing with this aspect of the inability problem.

the temporarily displaced President may reassume his role as President, the officers most immediately concerned, viz, the President and the officer who has temporarily assumed the powers and duties of the Presidency, must be recognized as the ones empowered by the Constitution to make the decision. If these officers fail to reach an accommodation of their views on the point, there is nothing that Congress can do, by statute, to provide for an authoritative and immediate resolution of the issue. Eventually it might fall to the courts to pass upon this question, if there came to be rival claimants to Presidential powers. Such an issue might have to be met and decided judicially in a concrete case which turns upon a question of which claimant's acts shall be recognized as those of the lawful Chief Executive.

I see no reason, however, why Congress may not, by statute, provide by way of directive, that the President or any officer in the line of the Presidential succession who assumes Presidential powers under the succession rule may refer the question of the removal or cessation of his disability to the above-described Advisory Council in order to obtain its recommendation and political sanction for the President's resumption of his official powers and duties. The obtaining of such advice cannot be made mandatory upon him, nor can the findings and recommendation of the Advisory Council be made finally determinative of his right to resume the powers and duties of the office of President. Compliance with such a procedure would, in my opinion, practically eliminate the possibility of the rise of a dispute between him and his temporary substitute over whether the powers and duties of the Presidency should be returned to the President. It would provide a moral and political sanction for any action taken in conformity therewith.

VIII. Any succession by the Vice President to the Presidency, as I read the Constitution, is only to the powers and duties of the office of President. Whether his succession occurs by reason of the death, resignation, removal, or inability of the President, he becomes merely a Vice President acting as President; he does not become President. I think it unfortunate that the usage was introduced, in connection with Tyler's succession, that the Vice President vacates the Vice Presidency and becomes President in the event of the death of the President. There is no difference in his status when he exercises the powers and duties of the Presidency under the one circumstance and the other. The pernicious consequence of the usage has been to raise uncalled-for doubts and to give rise to quibbles about whether the President can relinquish his powers and duties temporarily or only permanently. If the usage that the Vice President becomes President were restricted to those situations where the vacancy has become permanent by reason of death, resignation, or removal, it would do no great harm. To hold that a Vice President who takes over because of inability of the incumbent President succeeds to the office and permanently ousts the incumbent President defeats the original purpose of the constitutional provision. It is converted into a special kind of removal or ouster process, which was never intended by the framers, in my opinion. Logic dictates that there cannot be two Presidents at the same time; but this does not mean that there cannot be a President who is recognized as temporarily unable to exercise the powers and duties of his office, and a Vice President who is exercising, ad interim, the powers and duties of the office of President.

I think some of the difficulties about this problem would evaporate if Congress were to provide, by law, that the salary and certain of the emoluments attaching to the office of President should be received by any person exercising the powers and duties of that office by reason of the death, resignation, removal, or inability of the incumbent for the period of time he shall so act. Present salary legislation refers only to the President and the Vice President.<sup>30</sup> Many State constitutions provide for compensation of the succeeding officer at the rate received by the Governor during the time he exercises temporarily the powers and duties of the governorship; and other States supplement their constitutions by statutes to this effect. I suspect that if such a statute had been in effect at the time of Tyler's accession to Presidential powers and duties in 1841, the usage that the Vice President becomes President in the type of situation then presented might never have become established. Tyler might well have been content with the title of Acting President for the remainder of the term if it had been clear that he would have been treated in other respects as if he were the President.

IX. For reasons already given, I believe that in no case should the Vice President be deemed to have become President by reason of either a permanent or temporary inability of the President to exercise his powers and duties. The only

<sup>30</sup> Cf. title 3, ch. 2, sec. 102-104 U. S. Code (1952).

situation in which this should be deemed to occur is that provided for in section 3 of the 20th amendment, wherein it is stated that: "If at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President." The remainder of that section, it might be observed, clearly controverts the proposition that a Vice President can never act as President unless he becomes the permanent occupant of the office for the remainder of his term.

X. The position I have already outlined makes this question irrelevant, since it is my belief that no distinction should be made between a permanent and a temporary disability of a President or of any succeeding officer. My view of the constitutional provision regarding succession arrangements is that Congress may, if it chooses, provide for election of a succeeding officer for the remainder of the regular Presidential term in the event that the succession, by reason of the death, resignation, or removal of both the President and the Vice President, should fall upon any officer named by law to the line of succession. In view of the complexities of the presidential nominating and election system, I have serious doubts about the advisability of making provision by law for electing, in the normal manner by which the President is chosen, an officer to succeed for the remainder of the regular term. Since the officer so elected could be chosen and designated as the Acting President, I see no constitutional obstacle to his being chosen for less than full 4-year term for which a President is elected. For that matter, Congress could, no doubt, provide for his being elected in some other manner than that by which the President is chosen, if it so desired.

XI. As I have indicated, I believe that Congress can, and should, by law act to resolve some of the doubts and confusion about what should be done with reference to situations involving Presidential inability. The statute, permanent in character, and following lines I have suggested, should be directive or declaratory in character, and not mandatory. Even though the procedures therein outlined could not be made mandatory upon the officers most intimately involved, that is, the President and his immediate potential successor, it would no doubt be respected and observed by them. If Congress desires to set up a procedure which will be mandatory, one in which findings and determinations that are legally binding upon the officers directly involved can be made, I believe, resort to a constitutional amendment, would be necessary.

## REPLY OF JACK W. PELTASON, UNIVERSITY OF ILLINOIS

JANUARY 5, 1956.

HON. EMANUEL CELLER,  
*United States House of Representatives,*  
*Washington, D. C.*

DEAR CONGRESSMAN CELLER: Enclosed is a memorandum in response to your letter and questionnaire. I hope that it may be useful to you and your committee. I also enclose the biographical sketch you asked for.

Sincerely yours,

JACK W. PELTASON.

### PRESIDENTIAL INABILITY

The Constitution stipulates: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice President \* \* \*." Does inability include lack of constitutional qualifications? Or is it limited to mental or physical disability? The framers left us no clue as to how they intended the word to be interpreted and no Federal court has had occasion to define it. The dictionary tells us that "inability" is the quality or state of being unable; insufficiency, as of power, strength, or resources. The definitions attempted by State courts are not of much help either.

State judges have defined the term broadly. For example, in a Texas Supreme Court decision the mayor was held "unable" to decide an action brought before him because of his interest in the subject matter and therefore under the terms of a statute the president pro tempore of the council was to perform his duties and receive his salary.<sup>1</sup> Similarly, the California courts broadly construed the term

<sup>1</sup> *Riggins v. Richards*, 77 S. W. 946 (1904).

and said that it implied, "lack of power \* \* \* to perform; it may suggest lack of means, lack of health, lack of training, or the like."<sup>2</sup> The problems inherent in applying such a broad concept of inability to the Presidential office are too obvious to need comment.<sup>3</sup>

The dictionary distinguishes inability from disability by saying that the former "suggests inherent lack of power to perform something" and the latter "now commonly implies some loss of needed competency or qualifications." But when the framers substituted inability for disability in later drafts of the Constitution, they did so for stylistic reasons and intended no substantive change.<sup>4</sup> Disability is the word most frequently used in State constitutions to describe a condition when the gubernatorial office is to devolve upon some other person. How have the State courts interpreted "disability"?

One group of decisions would restrict disability to exclude lack of legal or constitutional qualifications, especially those discovered after the incumbent had taken office. In 1889, for example, the West Virginia Supreme Court held that disability was a personal quality attaching to the Governor and did not cover the failure of the legislature to declare which candidate had received a majority of the votes. Hence, the newly elected lieutenant governor should not take over, but the old Governor should continue in office until his successor had qualified.<sup>5</sup>

In 1891 the Supreme Court of Nebraska ruled that the disability clause covered only disabilities which occurred after the commencement of the Governor's term of office and did not apply when there was a failure to elect a Governor because of the ineligibility of the person receiving the most votes for the office.<sup>6</sup>

On the other hand, the North Dakota Supreme Court has given disability an expansive meaning to include lack of qualifications. In 1934 when the governor was convicted of a Federal felony, the court held that he ceased to be a qualified elector and thus lacked a qualification in order to be governor.<sup>7</sup> The next year the same court held that the governor was disabled because he lacked the residential requirement. The judges ruled that it was of no significance whether the disability was discovered after the incumbent had assumed office.<sup>8</sup>

Thus the contradictory holdings of the few State decisions offer little guidance in determining the scope of the inability clause. Yet it is clear that a constitution should provide for all contingencies. It would, therefore, be sensible to define inability broadly to insure that the Presidency will always be occupied by a person able to discharge his duties. Death, resignation, removal by impeachment are provided for. So, too, does the 20th amendment provide for the failure of a President-elect to qualify. Since it is highly questionable if the issue of qualification should be, or could be, raised after an incumbent takes office, it would appear that lack of qualification can safely be excluded from the coverage of the inability clause. But all eventualities other than those elsewhere provided for should be included.

Any attempt to define inability would be unwise. Inability is more than a condition, it is a judgment. It is a judgment that cannot be made in advance. It depends upon the particular demands at the particular time. Under some conditions, pneumonia might render the President unable to discharge his duties. At other times, the demands might not be so pressing; a delay in Presidential action might not result in a failure to discharge his responsibilities.

Inability is as precise as any word that might be chosen. What we need is agreement about who has the responsibility to determine whether a particular incumbent is in fact disabled. As it stands a case can be—and has been—made for the President, the Vice President, the Congress, and the Supreme Court.

#### WHO DECIDES?

In the only three instances where there has been widespread concern about Presidential disability, the President's actions have been decisive. In the 1919-20 crisis the President's official family successfully resisted several serious attempts to raise the issue of disability, attempts supported by powerful Senators and the Secretary of State. On the other hand, if a President should declare that he is unable to discharge his duties, his decision probably would not be questioned.

<sup>2</sup> *Telefilm, Inc. v. Superior Court*, 194 P. 2d 542, 547 (1948); 201 P. 2d 811 (1949).

<sup>3</sup> For other cases in which inability has been broadly construed, see 20 Words and Phrases, p. 366.

<sup>4</sup> Irving G. Williams, *The American Vice-Presidency*: New Look. New York: Doubleday & Company, Inc., 1954, p. 56.

<sup>5</sup> *Carr v. Wilson*, 9 S. E. 31, 33 (1889).

<sup>6</sup> *State v. Broady*, 48 N. W. 739 (1891).

<sup>7</sup> *State v. Langer*, 256 N. W. 377, 383-384 (1934).

<sup>8</sup> *State v. Moodie*, 258 N. W. 558, 567 (1935).

(What would happen if the President should decide that his disability had been removed and the Vice President thought otherwise? This can be predicted with far less confidence.)

In the States too the chief executives have had a decisive voice in deciding their own inability, especially that which grows out of illness. The disability clause has removed governors against their wishes only when the disability is thought to stem from lack of legal qualifications. For example, in 1938 Illinois Lieutenant Governor Stelle was unable, despite persistent efforts, to convince the legislature or the courts that Governor Horner's illness disabled the governor. For over a year the lieutenant governor tried. He was not successful (except during Horner's absence from the State). Finally, the governor's secretary filed a certificate of disability with the secretary of state—the next day the governor died.<sup>9</sup>

Many have argued that the Vice President is the one to determine the existence of Presidential disability.<sup>10</sup> However, modesty, embarrassment, and unwillingness to assume this responsibility have characterized the actions of Vice Presidents. Despite pressures, they have played a self-effacing role. The heirs-apparent of governors have not been so hesitant and State courts have recognized the lieutenant governors' right to raise the issue of disability.

If Federal judges were to follow State precedents they might, like the Supreme Court of New Hampshire, hold that "the existence of an executive vacancy is a question of law and fact within the judicial jurisdiction."<sup>11</sup> Although the court recognized that a judicial decision was not essential to the assumption of office by the lieutenant governor, they asserted that a court ruling was a convenient mode of avoiding embarrassment and doubt, and of resolving the controversy. Willoughby, the celebrated commentator, although recognizing that the Vice President had the initial responsibility, was of the opinion that the constitutionality of the Vice President's action could be tested in the courts.<sup>12</sup> Federal judges have been more reluctant than State judges to assert jurisdiction and the Presidential Office has an immunity from judicial proceedings not granted to governors, but a case could be arranged to raise the facts of disability so the judges too might "get into the act."

Congress' right to establish disability stems from the necessary and proper clause which gives Congress the power to pass laws in order to enable the Vice President to execute his duties. Although it might be argued that this gives Congress the authority to provide procedures to determine disability rather than to decide a particular incumbent's disability, Congress could act in two steps. First, it could provide that the fact of disability is to be established by a joint or concurrent resolution of Congress, and then rule that the incumbent was disabled. Certainly such a determination would be given great weight.

Thus unless the responsibility for determining disability is clearly given to a single agency there is danger of conflict. Even more likely, there is danger that no one will act, believing the others have the duty to do so.

#### WHICH PROCEDURES?

The procedures should be simply, swift, flexible, and acceptable. The decision as to disability is not only a technical judgment, but also a political decision involving consideration of many factors and one of highest moment. It should, therefore, be vested in an agency which has continuing public accountability.

The two most obvious agencies to make this decision are Congress and the Supreme Court. The former is more immediately responsible to the electorate, but is also more unwieldy, not always in session, and its decisions, especially if made by a majority of a political party different from the President's, might not be so palatable. The Supreme Court lacks immediate accountability for its actions, but it has the advantage of being able to act swiftly and flexibly. Above all, the respect accorded to the Supreme Court and the general belief that its judges are above partisan politics, makes it especially suited to determine the highly political question of disability. (There is a risk that the Court's own dignity might be jeopardized by the justices' involvement in this ticklish task, but it is a risk worth taking.)

<sup>9</sup> Clyde F. Snider, *Gubernatorial Disability*, *The University of Chicago Law Review*, vol. 8, No. 3, pp. 521-529, April 1941.

<sup>10</sup> See argument of Henry E. Davis, who prepared a monograph for the Senate in the midst of the 1919-20 crisis in which he argued that the Vice President alone is the person to decide when this disability has arisen. *New York Evening Post*, March 1, 1920 cited by Edward S. Corwin, *The President: Office and Powers*. New York: New York University Press, 3d edition, 1948, pp. 398-399.

<sup>11</sup> *Attorney General v. Taggark*, 66 N. H. 363, 366 (1890).

<sup>12</sup> W. W. Willoughby, *The Constitutional Law of the United States*. New York: Baker, Voorhis & Co. 2d edition, 1920, III, pp. 1470-1471, cited by Corwin, op. cit.

The Supreme Court could be authorized to investigate, appointing whatever assistance the justices consider necessary, and to make a determination upon petition of either chamber of Congress or during Congress' adjournment upon petition of any 2 or 3 of the following: Vice President, Speaker, President pro tempore of the Senate, congressional majority and minority party leaders. The Supreme Court could be authorized to stipulate whether the disability is of a permanent or temporary nature and on its own motion to restore the President to office when the disability has disappeared.

There is little State experience to draw upon, but the only three States which have established procedures to determine disability have given the job to their State supreme courts. All have done so by constitutional provision. In Mississippi the secretary of state is authorized to submit the question to the supreme court which investigates and makes a determination in the form of a written opinion filed with the secretary of state. The Mississippi secretary of state, it should be pointed out, unlike that of the National Government, is not chosen by the chief executive.

In Alabama, any two of the following officers request the State supreme court to determine whether the Governor suffers from "unsoundness of mind": the president pro tempore of the senate, speaker of the house, attorney general, State auditor, secretary of state, and State treasurer. A governor may be restored to office upon petition by any of these officers or the governor or lieutenant governor, if the supreme court determines that he has retained his competency.

In New Jersey the constitution stipulates that the office shall be deemed vacant whenever the Governor has been continuously unable for 6 months to discharge his duties because of mental or physical disability. The existence of this vacancy is to be determined by the supreme court upon presentment of a concurrent resolution of the legislature approved by a vote of two-thirds of all members of each house.

As has been noted, other State courts have assumed responsibility for establishing disability through mandamus or quo warranto proceedings, even in the absence of specific constitutional provisions. Nevertheless, a constitutional amendment would be necessary in order to empower the Supreme Court to act.<sup>13</sup>

Without an amendment an adversary proceeding—a case or controversy—would be required to raise the question of Presidential disability and it is doubtful if the issue could be first raised in the Supreme Court.<sup>14</sup> Without an amendment the constitutionality of the procedures might be left unresolved until it became necessary to put them to use. Furthermore, even if the power to decide Presidential inability were vested in others beside the Supreme Court, there would be constitutional problems.

#### STATUTE OR AMENDMENT?

Can Congress by law stipulate who is to determine disability? Does the necessary and proper clause vest this power in Congress? Is the precedent of the act of March 1, 1792, binding? By this act Congress provided that the only evidence of refusal to accept or resignation from the office of President or Vice President is to be an instrument in writing delivered to the Office of Secretary of State.<sup>15</sup>

These questions cannot conclusively be answered until a crisis is upon us, perhaps not until they arise in a legal controversy and are disposed of by the Supreme Court.

The Vice President might refuse to assume the Presidency even if there were a ruling of disability.<sup>16</sup> It is doubtful if Vice President Marshall would have tried to take over against the wishes of President Wilson's official family, even if supported by a determination of disability by some designated agency.<sup>17</sup> On the other hand, a Vice President has respectable authority to support his own right to determine disability even though there had been no action by anyone else.

Hence, an act of Congress would still leave some basic constitutional questions unresolved and would not decisively clarify responsibility. Only a constitutional amendment could do these things.

<sup>13</sup> See the 1920 proposal of Representative Fess of Ohio and comments of Chairman Volstead of the House Judiciary Committee. Representative Fess introduced a joint resolution proposing an amendment to empower the Supreme Court to determine disability on the request of Congress by concurrent resolution. Representative Rogers proposed that the Supreme Court be given this responsibility by law. (He would permit either chamber to initiate proceedings.) See Corwin, *op. cit.*, p. 398.

<sup>14</sup> *Marbury v. Madison* (1 Cranch 137 (1803)).

<sup>15</sup> 3 U. S. C. 23.

<sup>16</sup> See *Attorney General v. Taggart* (66 N. H. 362 (1890)) where the Lieutenant Governor refused to act despite the Governor's announcement of his disability. The lieutenant governor did, however, comply with the mandamus of the State supreme court.

<sup>17</sup> See Williams, *op. cit.*, pp. 60-61.



## REPLY OF J. ROLAND PENNOCK, SWARTHMORE COLLEGE

JANUARY 3, 1956.

HON. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
 House of Representatives, United States,  
 Washington, D. C.*

DEAR CONGRESSMAN CELLER: Herewith is my reply to your questionnaire on Presidential inability. I shall give my answers in accordance with the notation used on the original questionnaire.

Sincerely yours,

J. ROLAND PENNOCK,  
*Chairman, Department of Political Science.*

I. I doubt if the framers of the Constitution had a precisely formulated definition of the word "inability" in mind, although I should have thought that there was little doubt that they meant to include mental as well as physical disability. I doubt very much whether it would be desirable to attempt to enact a definition into law. It seems to me that this is a matter that should be left to the discretion of whatever agency is charged with the determination of "inability."

II. I think that both Congress and the Cabinet should be empowered to initiate the question of the President's inability to discharge the powers and duties of his office by majority vote. Either body should be able to do this without the concurrence of the other.

III. Again, I would suggest that the power to make the determination of inability should be vested in two bodies: the Congress, with the concurrence of the Vice President; or the Cabinet acting by a majority vote.

IV. I find no constitutional prohibitions relative to questions II and III.

VI and VII. I think that any determination of disability should be reviewable at the instance either of the President or the Cabinet; and that when review is called for, the determination of cessation should be made by the Congress and the Cabinet, requiring a majority of each.

VIII and IX. In all cases of disability, I believe that the Vice President should succeed only to the powers and duties of the office.

X. I do not believe, in the event of the finding of permanent disability, the language of the Constitution demands the immediate election of a new President.

## REPLY OF C. HERMAN PRITCHETT, UNIVERSITY OF CHICAGO

## PRESIDENTIAL INABILITY

(A statement by C. Herman Pritchett, professor of political science at the University of Chicago, in reply to a questionnaire from Hon. Emanuel Celler, Committee on the Judiciary, House of Representatives)

The present uncertainty as to the meaning of the term "inability" as applied to the President in article II, section 1 of the Constitution, and the absence of any constitutional or statutory machinery for determining the fact of such inability, are potential dangers which the House Judiciary Committee is fully justified in examining. On the other hand, there are also dangers in attempting to provide too explicitly by new constitutional or statutory provisions for circumstances which are by their nature unpredictable.

The difficulties of the problem are not fully appreciated until concrete proposals for change are considered. Should a definition of "inability" be enacted into law? I would recommend against such an effort, on the ground that it would be impossible to develop anything except a collection of truisms having no real value in arriving at a finding of inability.

Should some arrangements be set up by statute for initiating the question of the President's inability and for making a determination of inability? Serious objections can be entered against any plan which has been proposed to accomplish these purposes. While Congress might initiate the question, it is certainly too large a body and without training for making such a decision; moreover, action of any kind which it might take would be subject to attack as influenced by partisan politics. The Supreme Court could not be given such a responsibility without a constitutional amendment, and in any case the judiciary should not be involved in such a decision. The Vice President has such a direct personal interest in the matter that any decision he would make would be highly suspect. The Cabinet

would have the advantage of close acquaintance and contact with the President on which to base a judgment, but their personal loyalty to him and their stake in continuance in office would probably prejudice them against a finding of disability if it could be at all avoided. Certainly no independent, ad hoc, or expert board, even of the highest medical authorities, should be given final authority to make a decision which could remove a President from office.

Clearly the person best fitted to declare the President's inability is the President himself, and for him to perform this function no new machinery is needed. Setting up machinery which would definitely place in someone else's hands the responsibility for determining inability would open up the possibility of declaring a President incapacitated against his will. This is an eventuality of such grave consequences that it should be avoided if at all possible, and the case for transferring this decision out of the President's hands has not, in my opinion, been established.

Admittedly there is one factor in the constitutional situation as it now stands which might motivate a disabled President and his official family to refuse to admit his disability. That is the uncertainty as to the status which the Vice President assumes when the powers and duties of the office of President devolve upon him. A number of capable students of the Constitution have taken the position that once the Vice President replaces the President on the grounds of the latter's inability, the President is foreclosed from ever resuming his post, even though his disability should be removed. It seems to have been this uncertainty which caused President Wilson and his personal staff to resist so vigorously any suggestion that he was incapable of performing his duties during his period of illness in 1919-20.

It is easy to envisage an illness which would completely incapacitate the President for a temporary period, but from which complete recovery would be possible within a short time. In a world situation such as exists today, it might be dangerous to have an incapacitated President for even a week or a month. It should be possible for the President to devolve his powers and duties on the Vice President in the complete, constitutional sense, for such a temporary period, and then to resume them when his disability had passed.

The Constitution can reasonably be interpreted to permit such a temporary devolving of Presidential powers, and Congress would be fully justified in passing an act asserting such an interpretation and making arrangements for facilitating such a temporary transfer. There would seem to be almost no chance that the Supreme Court would question the power of Congress to enact clarifying legislation of this sort, and the act should substantially remove any reluctance which might otherwise be felt by a disabled President to turn over his powers to the Vice President.

Two problems would remain, however, even if such an act were passed. First, what would be the situation if the President were unconscious, or physically unable to sign a document requesting the Vice President to take over his powers and duties temporarily? In such a clear case of inability, where there could be no possible doubt about the necessity for the transfer of powers, the Cabinet could certify to the facts and request the Vice President to assume the President's powers and duties.

Second, there is the problem of determining when, or if, the President's inability has terminated or diminished sufficiently to permit him to resume his office. In accordance with the point of view already expressed, this decision should be made by the President himself. Whenever, on the basis of medical advice and his own judgment and knowledge of his capacities, he determined that he was able to resume the burdens of the Presidency, he should by written statement terminate the Vice President's temporary status and himself resume the powers and duties of the Presidency.

A suggested draft of legislation giving effect to these recommendations is found below. The proposed statute provides for publication of the finding of inability in the form of a notification to Congress. It is submitted that a statute along these lines would have been helpful in handling the three past situations in American history when problems of inability were raised, and that nothing further is required.

After President Garfield was shot, on July 2, 1881, he was clearly incapacitated for the 2½ months until his death. Since he probably could not himself have signed the notification to Congress, the Cabinet would have been called upon to make the finding of inability.

In the case of President Wilson, the knowledge that he was turning over his powers only temporarily might have persuaded him that he should make the

necessary finding as to his inability. Or, if his Cabinet had acted at the time of his initial collapse when his inability was perhaps complete, he could have recaptured his full powers as soon as he himself determined that he was capable of exercising them.

Finally, at the time of President Eisenhower's heart attack, the availability of such a statute might have persuaded him to turn over his powers and duties to the Vice President for the duration of his hospital stay.

The plan is a flexible one which eliminates most of the dangers connected with a situation of Presidential inability, but which does so in a way involving the least possible danger of ousting a President against his own will and judgment.

This proposal does not attempt to deal with the situation where there is no Vice President because he has succeeded to the Presidency on the death of the President. The problem of succession to the Presidency beyond the Vice President is a matter deserving of separate study.

**A BILL To provide for the discharge of the powers and duties of the President in case of the inability of the President**

**SECTION 1. (a)** If the President of the United States shall determine that he is unable to discharge the powers and duties of his office, he shall notify the Congress of that fact in writing, and the powers and duties of the office shall immediately devolve upon the Vice President.

**(b)** If the President is, by reason of his inability, unable to notify the Congress of his inability, the President's Cabinet shall make the finding of inability and notify the Congress in writing of that finding, and the powers and duties of the President shall immediately devolve upon the Vice President.

**(c)** If the Congress is not in session at the time of the finding of inability, the notification shall be made to the President pro tempore of the Senate and to the Speaker of the House of Representatives, or to either of them, and the effect of the notification shall be the same as though the Congress were in session.

**SEC. 2.** When the Vice President is exercising the powers and duties of the President during the inability of the President, his title shall be Acting President, and he shall possess the full constitutional authority of the President.

**SEC. 3.** When the President determines that his inability has been terminated, and that he is capable of exercising the powers and duties of the office, he shall so notify the Congress in writing, and the powers and duties of the office shall immediately revert from the Vice President, serving as Acting President, to the President.

## REPLY OF JOHN H. ROMANI, THE BROOKINGS INSTITUTION

JANUARY 16, 1955.

HON. EMANUEL CELLER,

*Chairman, Committee on the Judiciary, House of Representatives,  
United States Congress, Washington, D. C.*

DEAR MR. CELLER: I enclose my statement concerning Presidential inability which was prepared at your request. I hope that the manner of presentation is in keeping with your desires and with other statements which you and the committee have received. The statement has been reproduced in order to facilitate an internal institutional discussion of the problem, sparked by your questionnaire. It has not been done for public distribution, I assure you.

Also enclosed is a brief biographical statement which you requested in your original letter.

Thank you again for permitting me to participate in this discussion of an important constitutional problem. I shall be most happy to clarify or expand any of the discussion presented in the statement.

Sincerely yours,

JOHN H. ROMANI,  
*Research Fellow.*

## PRESIDENTIAL INABILITY

Statement by John H. Romani, Ph. D., research fellow, the Brookings Institution, January 13, 1956

It is perhaps unnecessary to point out the importance of attempting to clarify the provisions of the United States Constitution regarding the inability of a President to discharge the duties and functions of his office. The increased im-

portance of the American Presidency not only to our political system, but to the world at large, demands serious consideration of this problem. In crisis times such as these, an emergency may arise at any moment; and a Presidential illness which prevents immediate, forceful action by the Chief Executive to meet the contingency may complicate, and make more grave the difficulties. Under some conditions, it is conceivable that the inability of the American President to function might invite foreign action to create an emergency. Moreover, any vacuum in the Presidency, by the very nature of the office, brings forth complications for the President's political party as well as for the opposition group. In its broadest terms, the issue is not restricted to a few phrases in the Constitution and precedents in American constitutional law, but, in part, is bound up with the whole matter of political leadership in our Nation. Although this last consideration is not the focal point here, it must be kept in mind, for any solution to the problem of Presidential inability will have ramifications in this area as well.

The following discussion of the issue is based on a number of presuppositions about the problem which should be made explicit. It is assumed that no single legislative act or constitutional amendment can satisfactorily meet all possible situations in which there may be a case of Presidential inability. Any effort to deal with the question must be framed in rather simple, general rules which will allow considerable flexibility in handling the difficulty. It is also assumed, or recognized, that the major concern is not merely with clear-cut cases of Presidential inability in a time of pressing emergency, but also with cases less defined, and where the emergency and the necessity for action may not be immediate. Perhaps the central objective is to devise a method by which the temporary assumption of Presidential powers by some other governmental officer is legitimized at least in more specific terms than has been done heretofore. This is necessary so that the various political leaders in Government, the public, and the individual official concerned will recognize that under appropriate conditions, such action is neither a usurpation of authority, nor a displacement of the rightfully elected Chief Executive. It is also assumed that any procedure designed to provide for leadership under conditions of temporary or permanent Presidential inability must be consistent with the basic principles of separation of powers. It is in these terms that the examination is undertaken.

The problem set before us may be viewed as having three separate, but related parts, with the solution of each dependent upon the manner in which the others are resolved. The first, and perhaps most crucial, concerns the meaning of the term, "inability," and the status of the Vice President, or any other governmental officer, who might assume the functions of the Presidency in the event of Presidential disability. The second involves the procedure by which the determination of Presidential inability should be initiated and decided. The third is how, assuming the temporary existence of Presidential inability, the President may recover the powers and duties of the office once he is again able to discharge these functions.

In the minds of some other commentators, there may be additional difficulties (i. e., how to lighten the burdens of the Presidency; how to strengthen staff operations to provide for better management), but these questions, although extremely important, seem to be subsidiary and distinct from the central issue: How to insure the effective, continuous exercise of Presidential authority even when the Chief Executive, himself, is prevented, for some reason or another, either temporary or permanent, from carrying out his duties. Neither an easing of the President's workload, nor a strengthening of his staff, can relieve him of his constitutional responsibility for Executive leadership and for decisions on certain public matters. To allow leadership to lapse, and decisions to be made in an ad hoc manner by the President's immediate staff (as under James B. Garfield and Woodrow Wilson) not only seems suspect, constitutionally, but inconsistent with the democratic principle that governmental authority should be exercised only by those who have a specific mandate, either by virtue of election to the office, or by a proper delegation of authority by the elected official. If the President is unable to act, there must be some other officer to fill in for the Chief Executive during any period of temporary inability on the part of the Chief Executive. This substitute must be constitutionally and legally authorized to perform this function. For this reason, nothing less than a clarification of the inability clause of the Constitution and the status of any temporary successors can suffice. The problem of the President's heavy workload and that of Presidential inability should not be confused, even though they may appear to be related.

The first part of the problem is essentially an exercise in constitutional interpretation, and once it is met, the remaining parts are easily resolved. It appears

reasonably clear from a reading of the section of the Constitution in point, and the debates in the 1787 Convention, that the term, "inability", comprehends both temporary and permanent inability on the part of the President to discharge the duties and functions of his office. Further, it seems that the framers intended for the Vice President, or other officer provided by law, to assume the powers of the President under such conditions, and not the office, per se. Implicit here is the argument that the individual who might take over from the Chief Executive becomes an Acting President, maintaining this status until the disability is removed, or a new President is elected. Once the disability is removed, the President resumes the powers and duties of the office, and is not, as some have contended, permanently displaced when a Vice President acts for him.

Constitutional precedent, however, has confused and complicated the issue. Following the death of William Henry Harrison in 1841, it was accepted that John Tyler succeeded to the Presidency. He was not—in his own mind, that of Congress, or that of his staff—viewed as an "acting President." The assumption of the office by Tyler established a procedure which has been followed in later instances of Presidential death, and has led to the proposition that the Vice President does not become an "acting President" at any time, or under any conditions. From this has developed the attitude that the Vice President cannot temporarily discharge the President's duties when the latter is unable to do so. The reasoning behind this argument, and its impact may be summarized as follows:

1. The Constitution provides for only one President.
2. The Vice President becomes the President when he carries out Presidential duties.
3. Since there cannot be two Presidents, assumption of the President's prerogatives by the Vice President is tantamount to removing the former from office.
4. The President, therefore, once the responsibilities are taken over by the Vice President, cannot resume these powers.
5. Thus, only in case of death, removal, or resignation can the Vice President act in a Presidential capacity.

The acceptance of this line of thinking by the Garfield and Wilson staffs was largely responsible for their resistance to any moves which would have permitted the Vice President to take over temporarily during the period of disability. It appears to have been the belief that such action would have prevented both Garfield and Wilson from resuming Presidential authority upon recovery. At the same time, both Chester Arthur and Thomas Marshall, the Vice Presidents concerned, apparently felt that their assumption of Presidential powers would have been a usurpation of authority. Despite pressures from many quarters, both men preferred to undertake no action. This precedent, consequently, has tended to erase what seems to have been the intended constitutional provision for succession in cases of temporary inability. It appears that no legislation establishing a procedure for meeting this problem can be effective until either the original intent of the framers is restored and made clear, or there is, at least, a clarification of the Vice President's status when he acts for the Chief Executive during the latter's inability.

It is suggested, then, that a first step in resolving this issue should be action to declare explicitly that any officer temporarily assuming the duties of the Presidency does so only in an acting capacity, and that the President, after recovery, resumes these powers. Such a move would achieve two objectives: First, it would reduce the resistance on the part of the President's staff, family, and political advisers to having the Vice President take over. This group would know, by such clarification, that the President would still retain the Office, and that there would be no danger of his permanent removal by the Vice President's actions, as current constitutional precedent seems to imply. Second, it would remove inhibitions on the part of the Vice President to assume the President's powers. The Vice President would know that his action would not be considered a usurpation of authority, but merely a legitimate exercise of his own functions as the constitutional officer next in line to the Presidency. There would be, as a result, a legitimization of a temporary assumption of the President's duties, a matter which seems to be lacking under present conditions.

It is not clear whether this distinction can be made without formally amending the Constitution. One possibility may be to do this by concurrent resolution of Congress which, although not having the full force and effect of law, would, nevertheless, carry considerable weight in setting the public's mind at ease.

Another may be to have the President undertake such a move by a statement or order to this effect. In this instance, there seems to be no constitutional bar to his action, for he would be interpreting the powers and functions of his office and the executive article as he does under normal circumstances. The gravity of the problem, however, indicates that it is probably most desirable to accomplish this end by a formal constitutional amendment, such an amendment to include not only a clarification of the Vice President's status, but also the procedures by which inability shall be determined.<sup>1</sup> It should be noted that partial moves in this direction have already been made by virtue of the 20th amendment and the Presidential Succession Act of 1947. The 20th amendment provides for an "acting President" when the President-elect has not qualified by the beginning of his term, while the succession statute states that in the case of the disability of a Vice President, when he has taken over the Presidency, the officer next in line shall act until the disability is removed, or a new President is elected.<sup>2</sup>

It has been suggested by others, that Congress might undertake a definition of the term, "inability," and enact such a definition into law. This approach seems unwise, not only because it is somewhat unnecessary, but also because it is impossible to work out a definition that would cover any and all contingencies. The existence of an inability statute would tend to confuse the issue when a case of Presidential inability arose not mentioned in the law, thereby creating delay, rather than promptness, in meeting the situation. Such a law, also, is no guaranty that the procedures designed to deal with the question would be sufficiently flexible for this purpose. Moreover, any effort to define "inability" would, no doubt, lead to a consideration of whether absence from the seat of government constituted inability, thus opening another Pandora's box. For these reasons, it is strongly recommended that Congress not attempt a definition of the term, "inability," as it appears in article 2, section 1, clause 6 of the Constitution.

The second part of our problem concerns the manner in which the fact of Presidential inability is to be decided. The proposal outlined here, and that relating to the third section of the question, both are premised on the assumption that a Vice President, or other officer, serves only in an acting capacity when he assumes Presidential authority in the event of a living President's inability to act.

There are two stages to be considered here:

1. The initiation of action leading to the determination of a President's inability.

2. The actual decision as to whether an inability exists or not.

The central issue is whether the same agency or individual should initiate and determine the question of a President's disability, or whether this right should be shared, with one agency or person initiating the action, and another, separate group making the decision. Involved here is the matter again of legitimizing the temporary assumption of Presidential authority. Even with a clarification of the status of the Vice President, or other officer, there is a need for an authoritative judgment on the question to avoid political and other difficulties. At the same time, the resolution of this problem should not involve us in a detailed and elaborate procedure that might be self-defeating.

At the outset, it is well to note that there are two general types of situations in which the necessity for such action may arise:

1. The President, despite being disabled, is still capable of taking limited action. Two examples are: (1) He is advised to undergo medical treatment of an extended nature and knows beforehand that he will be disabled for a period of time; (2) Although he is stricken without warning, he is still in possession of his faculties and able to do certain things.

2. The President is stricken without warning and is totally disabled.

In the first contingency, the President should announce that he is, or will be, unable to act; following such proclamation, the Presidential duties would devolve upon the Vice President, or if no Vice President, upon the officer next in line as provided by law. There appears to be no constitutional prohibition against such a procedure. The President is not only the best judge of the situation, but also the constitutional officer in whom the powers and functions are vested. In more practical terms, a Presidential statement of this sort would carry sufficient authority to forestall any political recriminations. Also, the procedure is flexible and can be used to meet almost all possible situations which might occur under this first type of Presidential disability. At the same time, it does not seem that any action by Congress is necessary before a President could act in this manner.

<sup>1</sup> See attachment A for suggested amendment.

<sup>2</sup> See Constitution of the United States, amendment XX, sec. 3; and 61 U. S. Stat. 330 (1947), sec. 1.

It may be desirable, however, to have this procedure outlined either in law or in constitutional amendment. Since it has been recommended that an amendment be proposed to clarify the status of successors during a period of Presidential inability, this procedure could be contained in the same amendment.

The situation in which a President is completely disabled without warning presents considerable difficulty, and is, perhaps, the crucial issue. Since the President cannot act, the decision must rest with someone else, or with some other governmental body. In keeping with constitutional principle, it seems that the decision, both as to the initiation and determination of the inability, should be bested in some area of the executive branch, and the most logical place is in the Vice Presidency. The Vice President is the officer most directly concerned, and he cannot escape his responsibility as the No. 2 man in our Government. The office was created with such a situation in mind, and the Vice President must be presumed to have the discretionary authority to act. Moreover, it seems that the Constitution, now, gives this power of decision to the Vice President.<sup>3</sup>

Beyond these considerations, this recommendation is but an extension to the Presidential office of normal administrative practice. When a chief is incapacitated, his immediate subordinate ordinarily assumes the former's duties as an acting chief, at least until there has been opportunity for action by any available higher authority or governing body. The decision to take over under such circumstances is made usually by the subordinate, and is accepted as within the realm of his authority. In the military, this precedent is established with special clarity. A subordinate officer is required to assume command when his superior officer is disabled. Where the case is filled with ambiguity, the power to decide whether or not the superior officer shall be relieved rests, initially, in military law, with the officer next in the chain of command.

Viewed in these terms, the recommendation to allow the Vice President the right to make a decision on the existence of Presidential inability is essentially a recognition of administrative necessity. It allows for flexibility since the Vice President may decide not to assume the President's powers because the situation does not warrant it. It permits prompt action, for it is one man's decision and not a board decision which would tend to cause delay and possible confusion. It also seems that no legislation is necessary to recognize that such a power does already rest with the Vice President. Yet, as noted above, this procedure might, for clarification, be incorporated into the general amendment concerning Presidential inability.

It may be argued, with some merit, that it is dangerous to permit an immediate successor to determine when his predecessor is incapable of discharging the duties and functions of the office, even for a limited period. It may also be suggested that the Vice President will be motivated by partisan or fractional prejudice. The point may also be made that to allow this discretion to the Vice President is politically unwise. In the past, the manner in which the Vice President has sometimes been selected has meant that he may not have the full confidence of his party in Congress and, therefore, action by him might well lead to severe political difficulties. Granting the possibility of these contingencies, it must be recognized that in the three cases of Presidential inability to date, the Vice Presidents concerned have acted with considerable discretion. It would seem that these kinds of difficulties, although existent, are not as pressing as might appear at first blush.

A further objection to this proposal is the relationship of the Vice President to the administrative hierarchy. It is argued that the Presidential staff, the Cabinet, and other administrative officials will have been chosen by the President, and that the Vice President will not necessarily enjoy their full confidence and vice versa. He will be placed, thereby, in an anomalous position and may not be able to carry out the President's functions effectively. Why not, therefore, allow this administrative group, or the institution, to carry on in the best manner possible? This would insure no disruption or sudden change in administrative policy which might result from a temporary ascension of the Vice President.

This approach may be countered, in part, by the argument that to let Presidential decisions be delayed, or made by those who do not have the constitutional authority to act, is subject to many grave deficiencies. It is assumed that the Vice President would not effect serious changes in administrative policy when acting temporarily as President unless compelled to do so by the situation, but will attempt to carry forward in the best manner possible. The important consideration is that provision will be made for the rendering of Presidential decisions, and a continuance of executive leadership by some one who has the authority to

<sup>3</sup> See Ruth C. Silva, "Presidential Succession" (Ann Arbor, 1961), pp. 110-111.

act. The contingency that we will have no one constitutionally capable of making decisions in a time of emergency will be removed. And this, it seems, is the major reason for attempting to deal with the problem of Presidential inability.

It has been proposed by others, however, that these difficulties in having the Vice President take over could be met by providing that Congress initiate the action, and that the Supreme Court, or some other independent agency, make the determination of Presidential inability. This approach seems unwise for several reasons. First, it is doubtful whether Congress, without a constitutional amendment, has the authority to take such action. In earlier debates on this question, the issue was raised, and it was generally agreed that this type of action lay outside the scope of congressional powers. It was noted that the delegation of power to Congress by the Constitution to provide for succession after the Vice President excluded all congressional right to deal with Presidential succession in other circumstances. Second, there is a practical matter of vesting this authority in the Legislature or some other legislative group. Presidential disability may occur at any moment, and if Congress is not in session, how can it be reconvened? Even if this objection is overcome by law or amendment, is there any assurance that the Legislature by itself, or in conjunction with some other body, can take action prompt enough to meet the problem? It seems that it could not, for the convening of Congress would take the better part of a week, and the deliberations of another agency at least an equal length of time, thus leaving the issue unsettled during a period in which there may be the necessity for action. Third, to vest this power in Congress, or in Congress and the Supreme Court, would tend to establish a trial procedure to determine Presidential inability. Unnecessary delay might be the result, but the fact of Presidential disability, it can be assumed, will be readily known, and no trial, or judicial determination, will alter that fact. Fourth, it is doubtful that the Supreme Court, even with a constitutional amendment giving it this authority, should consider this question. It is not a justiciable issue, but a political one. It involves political judgments of the highest order, and the Court should not be asked to mix in this matter directly. It is better left to a political officer, such as the Vice President, who must assume direct responsibility for the consequences of taking the action. Fifth, the suggestion to give this right of determination to some agency, other than the executive branch, is a violation of the separation of powers as well as of administrative principle. This is not to argue that separation of powers is inviolate, but that if we really desire a change in our constitutional structure, it should be accomplished by facing the issues squarely, and not by modifications to deal with a particular problem which can be met otherwise. Also, the recommendation to allow the Vice President this authority is made in terms of an administrative arrangement within the executive branch. It is a matter of internal administrative policy, although it does have ramifications elsewhere.

The third question, how to terminate a period of Presidential inability, can be handled simply by providing that the President shall make this decision. When he is able, after consultation with whomever he desires, he shall announce his resumption of the Presidential prerogatives, and this, in itself, shall end the role of the Vice President acting as President. In the event, however, that the President is permanently disabled, the Vice President shall continue to function in an acting capacity until a new President is elected. This procedure can also be accomplished without legislation, for it appears that the President already has this authority under the Constitution. Again it vests the power of decision in the person best able to make this judgment. It is simple and flexible enough to meet most, if not all, contingencies. It is recommended, however, that this, too, for clarification, be incorporated into the suggested constitutional amendment.

The first, and most obvious, objection to this recommendation is that it provides the opportunity for a dispute between the President and Vice President over the former's capacity to resume his powers. In the case of any dispute, there will inevitably be justiciable issues which can be decided in the courts, with a consequent clarification of the status of the two men. It must also be recognized that Congress can impeach either of these officials, if it feels that one or the other has acted improperly. Beyond this, a Vice President who assumes the President's powers temporarily would realize that he does just that, and that he must surrender his authority when the President is recovered. It seems, further, that neither of the two men could afford to allow a serious dispute of this sort to develop. Such would be damaging not only to the Nation, but to their particular political group as well. In all this, it is assumed that both the President and Vice President will not make their decisions in a vacuum. Both will avail themselves of good counsel. Both will be cognizant of the political realities and other intangibles



involved. The election of a President is largely a matter of faith—faith in his ability to make judgments concerning the welfare of the country. We accept this in other circumstances, and his decision here is merely an extension of the authority conferred upon him by his election.

The question is raised, however, of the extreme case in which the President may have lost command of his faculties. His decisions under such circumstances might not be rational, and procedures should be designed to protect against this. But probably no procedure, however well conceived, can effectively meet this type of problem. Our only protection lies in the congressional power to impeach, and to remove from office by conviction. This same safeguard is available if a Vice President acts improperly in failing to surrender his position as "Acting President," after a President announces his resumption of the powers and duties.

Although there are obvious potential dangers in the recommendations outlined here, this would seem to be true of any suggestions that could be advanced to deal with this problem. One cannot hope to provide for all eventualities and complete security. Such is not only an impossibility, but inconsistent with the idea of free government. Additionally, it seems unwise to clutter either our Constitution or statute books with detailed prescriptions as to the type of procedure and action to be taken. It seems much better to recognize the existence of the problem, and to legislate, if necessary, in general terms.

The suggestions outlined here would require no further congressional action if this line of constitutional interpretation could receive general acceptance, but because of the confusion surrounding the problem it seems advisable to propose the adoption of an amendment simply to clarify and spell out this reading of the Constitution. This would not only restore the original intent of the framers but also set the public's mind at ease.

This brief statement of the problem and proposed solution does not and cannot consider fully all questions relating to executive inability. It seems advisable, therefore, before action is taken on the proposed amendment, to examine the practices and experiences of the several States. Clues as to the validity or invalidity of the proposals offered here, and in other statements, might be found. This, it is recognized, would take considerable effort, but its value cannot be denied.

To summarize, the first move should be a clarification of the status of any governmental officer taking over Presidential functions in the event of a possibly temporary Presidential inability. Second, the decision as to whether such a condition exists rests with the President if he is able to act, or with the Vice President, if not. Third, the period of disability is terminated when the President announces his resumption of his powers. Attached to this statement is a proposed constitutional amendment to effect these purposes.

#### ATTACHMENT A

H. J. —

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

*Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:*

#### "ARTICLE —

"SECTION 1. In case of removal of the President from office, or of his death or resignation, the Vice President shall become President.

"SEC. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.

"SEC. 3. If the President is unable to make such an announcement, the Vice President shall announce that the President is unable to discharge the powers and duties of the President, and said powers and duties shall thereupon devolve upon the Vice President.

"SEC. 4. If the powers and duties of the President devolve upon the Vice President pursuant to section 2 or 3 of this article, the exercise of such powers and duties shall be resumed by the President upon his announcement of his ability and intention thereupon to resume them.

"Sec. 5. The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and the 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.

"Sec. 6. Clause 6 of section 1 of article II of the Constitution of the United States is hereby repealed.

"Sec. 7. This article shall not apply to any person holding the office of President when this article was proposed by the Congress.

"Sec. 8. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

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REPLY OF ARTHUR E. SUTHERLAND, LAW SCHOOL OF  
HARVARD UNIVERSITY

DECEMBER 31, 1955.

HON. EMANUEL CELLER,

*Chairman, Committee on the Judiciary,*

*United States House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN CELLER: This letter is written in answer to your inquiry of November 29 concerning Presidential "inability." On December 12 I wrote you that I wanted a few days to consider the questions you put to me and others, and I now write to give my somewhat puzzled answers.

Your first question asks what the draftsmen of the Constitution meant by "inability" in article II, section 1, clause 6, and whether a statutory definition is now desirable. I do not know of any material which shows us just what the draftsmen had in mind, and it may be that the absence from the Constitution of any machinery for superseding the President in case of inability indicates that comparatively little thought was given to the matter. I should consider an attempt at legislative definition inadvisable and not helpful. The varieties and degrees of disability, physical and mental, temporary or permanent, which might render a President unable to discharge his duties, are so numerous that an inventory would be impracticable, and a definition would end up as a repetition in different words of what we already know—that inability in the constitutional sense is inability so serious that it requires that the President's duties be taken over by someone else.

Your second question asks who should raise the question of disability. The substitution of another officer for the President, whether temporarily or permanently, is of such grave importance that the arrangements for it should, as far as humanly possible, achieve at least two ends: A factually correct decision as to the President's inability; and a decision which will be accepted by all concerned as having been impartial and without partisan bias. If the question of inability were to be raised by the House of Representatives, with open discussion (by analogy to impeachment) these ends might be attained, though in case of a House bitterly opposed to a President, suspicion of politics would inevitably attach. Furthermore the House might not be in session at the time of some such misfortune as the wounding of President Garfield. One of the committees might have this duty delegated to it by previous legislation. The Cabinet, the President's friends and advisers, would be free of the suggestion of hostile partisanship, though they would tend to a slow action out of loyalty, unless the disability were obvious and the need critical. Perhaps this is a good thing. Some special body, for example like that set up under the act of 1877 (19 Stat. 227) could be set up to be always in existence. I incline to favor leaving this matter with the Cabinet. If real need developed, its members would not be deterred, by sympathy for their chief, from doing what the country needed.

Your third question asks who should pass on the question of disability, once brought forward. Of course the Supreme Court has detachment, and profound respect is given to it by the people of the country; but by the Constitution it is limited to judicial functions, which would seem to exclude matters such as you ask about. A standing "Commission on Presidential Disability" could be set up by statute to be ready at all times. Either House could make the decision, if authorized by statute, but the Congress might not be in session. On the whole I come back to the idea that the Cabinet would be an appropriate body to perform this task.

Your fourth question, concerning constitutional difficulties, raises the most serious problem. "Inability" is so ill-provided for in the Constitution that the success of any system of supersession of the President, if made only by act of Congress, will depend on its acceptance by the officers of Government and the people. I am thinking of some national misfortune such as the suspected mental illness of a President. There might be two factions in the country, one favoring the President's continuance in his functions, the other opposing. The Constitution gives the President a 4-year term. Might not his supporters assert with much force that a nonconstitutional body was without constitutional power to displace the President?

I have already suggested the answer that on the whole seems to me wisest, for your fifth inquiry, as to the union in one agency of initiation and determination of the question. On the whole I think the Cabinet should perform both functions. This is not like a criminal prosecution, where an accusatory function may well be separate from the task of trial. The Cabinet will be sympathetic, not hostile. As to the sixth question, whether there should be a finding of the probable duration of the disability, I think the answer is in the negative. Could this have been determined in the cases of Presidents Garfield or Wilson?

Question 7, what happens when the disability ends? This raises the unpleasant picture of a Vice President clinging to office, supported by a clique; and if the termination of disability is left to the Cabinet, this hypothetical Vice President might have "packed" his Cabinet with his partisans. But this is not a realistic picture. Government cannot provide in advance for every conceivable set of unfortunate circumstances. And at the next session of the Congress that body would have a number of ways to circumvent any such unlikely activity as I suggest. I think I would leave termination of disability for determination by the Cabinet as well. But here again one has to assume acceptance by all concerned of the decision with reasonable cooperation, in the absence of a constitutional amendment.

As to the 8th and 9th questions, concerning the succession of the Vice President to duties, or to office, it seems to me that the Vice President should only become President in case of death, resignation, or removal. In case of disability the Vice President should merely perform the duties, because the disability may be removed. I know that there are difficulties of construction of the constitutional language here, but the sensible construction seems to me to be what I suggest.

The Constitution does not provide for an election to replace the President, in my opinion. I think the phrase "or a President shall be elected" refers to the next regular election.

Finally, as to your 11th inquiry, I think that legislation will depend for its effectiveness on voluntary acceptance, as any statute purporting to stop the functioning of a President elected for 4 years will run into constitutional obstacles. I am reassured by remembering that we have only twice had serious trouble of the sort you ask about—in the cases of President Garfield and Wilson, and those were handled without new constitutional or statutory provisions. I am particularly happy when I think that for us this matter is now not of immediate importance, thanks to the fortunate recovery of President Eisenhower. This is a good note on which to end the year 1955, with my best wishes.

Yours very sincerely,

ARTHUR E. SUTHERLAND.

## BIOGRAPHICAL DATA OF CONTRIBUTORS

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# SURVEY OF PROVISIONS OF STATE LAWS RELATING TO DISABILITY OF THE CHIEF EXECUTIVE

THE LIBRARY OF CONGRESS,  
LEGISLATIVE REFERENCE SERVICE,  
Washington 25, D. C., December 14, 1955.

To: House Judiciary Committee.

From: American Law Division.

Subject: State by State résumé of constitutional or other provisions relating to (a) the disability of the chief executive, and (b) any procedure concerning an officer acting as the chief executive during the disability.

The following survey of the provisions enacted by the States to provide for succession in cases of "disability" of the chief executive thereof, shows that word "disability," as used, has two different meanings. In the greater number of instances, it is an inclusive term referring to all eventualities which might prevent the governor, or the next in succession from serving. In several instances, the term refers specifically to physical incapacity. Finally, we find also that some States use the word "disability" and "inability" simultaneously, while others employ only the term "inability" or some similar inclusive phrase. One State, Tennessee, has no provision in its constitution covering disability.

For your convenience we list first the States that employ the term "disability"; then those using "inability," "unable to discharge," etc.; then those using some other inclusive phrase, and finally append Tennessee. Succession with respect to governors-elect and lieutenant governors-elect has not been covered.

## STATES WHOSE CONSTITUTIONS EMPLOY THE WORD "DISABILITY"

### 1. Alabama—*Code of Alabama (1940)*

Constitution (1901), article V, section 127, provides that "In case of impeachment, \* \* \* unsoundness of mind, or other disability" the office of governor devolves upon the lieutenant governor, president of the senate, speaker of the house of representatives, attorney general, State auditor, secretary of state, or State treasurer, in that order.

Constitution (1901), article V, section 128, provides an official method for determining unsoundness of mind. The Supreme Court of Alabama, at regular or special term, upon request in writing by any two officers named in section 127, who are not next in succession to the office, may ascertain the mental condition of the governor or other officer administering the office, and adjudge whether or not he is of unsound mind. The supreme court may also make an adjudication that the governor or other person has been restored to his mind, but this is to be done only where the incumbent of the office denies that such a restoration has occurred.

### 2. Arizona—*Arizona Code Annotated (1939), 1951 Supplement*

Constitution, article 5, section 6 (amendment adopted November 2, 1948): The order of succession is given as secretary of state, attorney general, State auditor, State treasurer, or superintendent of public instruction, in that order, provided such officer is holding by election and is otherwise qualified.

Provision is made for succession in the case of the permanent and the temporary disability of the governor. In case of permanent disability, the taking of the oath as governor by any eligible successor constitutes his resignation from the office by virtue of the holding of which he qualifies as governor and he becomes governor in fact. In the event of temporary disability, the power and duties devolve on the next qualified person, but only until the disability ceases.

### 3. Arkansas—*Arkansas Statutes Annotated (1947)*

Constitution, amendment No. 6, section 4 (superseding art. 6, sec. 12), provides that in the case of the governor's "inability to discharge the powers and duties of the said office," etc., the office shall devolve upon the lieutenant governor for the remainder of the term, or until the disability shall cease.

Constitution, amendment No. 6, section 5, provides that the next eligible officer to succeed to the governorship shall be the president of the senate, and then the speaker of the assembly.

4. *California—West's Annotated California Codes*

Constitution, article 5, section 16: The California Constitution endeavors to move up two officers at once so that the offices of both governor and lieutenant governor are ordinarily filled. Thus it provides that when the governor's office is vacant, the lieutenant governor assumes that, and the president pro tempore or speaker of the house becomes lieutenant governor for the residue of the term. Whenever the offices of governor and lieutenant governor become vacant at the same time, the office of governor goes to the president pro tempore and that of lieutenant governor to the speaker. If there is no president pro tempore, the office of governor goes to the speaker, or, if none, in the following order: secretary of state, attorney general, treasurer, or comptroller, for the residue of the term.

If the governor has a temporary disability, the office devolves on the next in succession until the disability shall cease.

When there is a vacancy in the office of governor, and it cannot be filled under these provisions, the senior deputy secretary of state shall convene the legislature within 8 days to choose a governor to act until the next general election.

5. *Colorado—Colorado Statutes Annotated (1935)*

Constitution, article IV, section 13, provides that "in case of the death, etc., or other disability of the governor" the lieutenant governor succeeds for the rest of the term.

Constitution, article IV, section 14, continues the line of succession through the president pro tempore of the senate or the speaker of the house, who shall hold the office until the vacancy is filled or the disqualification removed. The term "disability" is not used in this section.

6. *Connecticut—1953 Supplement to the Connecticut General Statutes*

Constitution, article IV, section 17, provides that in case of an "inability to perform" on the part of the governor, the lieutenant governor shall succeed to office until the next election when a new governor is chosen, or until the "disability be removed."

Constitution, article IV, section 18, provides that where the governor and lieutenant governor simultaneously are unable to serve, the president pro tempore shall so serve until he is superseded by a governor or lieutenant governor.

7. *Georgia—Georgia Code Annotated*

Constitution, article 5, section 1, paragraph 7: Georgia Code Annotated 2-3007: "In case of the \* \* \* disability" of the governor, the lieutenant governor succeeds to office until the next general elections for members of the general assembly, at which a successor to the governor shall be elected for the unexpired term. This is qualified as follows: (1) If the death, etc., occurs within 30 days of the next general election, or if the term will expire within 90 days after the next general election, the lieutenant governor shall serve only for the unexpired term; and (2) if the lieutenant governor becomes a candidate for the unexpired term, he shall resign his office as lieutenant governor, effective upon the qualification of the governor elected for the unexpired term, and his successor for the unexpired term shall be elected at such election.

Further, in case neither the governor nor lieutenant governor can serve, then the speaker of the house of representatives exercises the executive powers until the removal of the disability or the election and qualification of a governor at a special election held within 60 days of the date the speaker assumed the powers of governor.

8. *Idaho—Idaho Code*

Constitution, article 4, section 12: The office of governor devolves upon the lieutenant governor in case of the \* \* \* inability of the governor to discharge the power and duties of the office, for the rest of the term, or until the disability ceases.

Constitution, article 4, section 14, provides that where both the governor and lieutenant governor are unable to serve, the office devolves upon the president pro tempore of the senate or the speaker of the house, as necessary, until either the disqualification of the governor is removed or the vacancy filled.



*9. Illinois—Smith-Hurd Illinois Annotated Statutes*

Constitution of 1870, article V, section 17, provides that the office of governor shall devolve upon the lieutenant governor whenever the governor is convicted upon an impeachment, or has any other disability.

Article V, section 19 provides that when there is no lieutenant governor or he cannot serve, the duties shall devolve upon the president of the senate or the speaker of the house of representatives in that sequence.

*10. Iowa—Iowa Code Annotated*

Constitution, article 4, section 17, provides that "in case of the death, impeachment, \* \* \* or other disability of the governor," the office devolves upon the lieutenant governor for the residue of the term, or until the governor shall be acquitted, or the disability removed.

Constitution (1954 supplement), article 4, section 19, continues the line of succession through the president pro tempore of the senate and the speaker of the house of representatives. If none of these can serve, the justices of the Supreme Court of Iowa shall convene the general assembly by proclamation, and the general assembly shall elect a president pro tempore and a speaker, and thereupon immediately proceed to the election of a governor and lieutenant governor in joint convention.

*11. Kansas—General Statutes of Kansas Annotated (1949)*

Constitution, article 1, section 11, provides that where the governor dies \* \* \* or suffers any other disability, the office devolves upon the president of the senate for the residue of the term, or until the disability is removed.

Constitution, article 1, section 12, states that the lieutenant governor is the president of the senate, but where he cannot perform his duties, or has become governor, a president pro tempore shall be elected.

Constitution, article 1, section 13, provides that when the lieutenant governor, while holding the office of governor, becomes incapable of performing his duties, the office shall go first to the president of the senate, and then to the speaker of the house, until the vacancy is filled or the disability removed.

*12. Michigan—Michigan Statutes Annotated (Supplement 1953)*

Constitution 1906, article VI, section 16, provides that the lieutenant governor assumes the office of governor whenever the latter is "unable to serve," and continues therein for the residue of the term or until the disability ceases.

Constitution 1906, article VI, section 17, provides that, after the lieutenant governor, the line of succession shall be the secretary of state, attorney general, State treasurer, and auditor general. The service of any of these shall be for the residue of the term, or until the absence or disability giving rise to the succession ceases.

*13. Mississippi—Mississippi Code Annotated (1942)*

Constitution, article V, section 131, provides for succession to the office of governor under the following circumstances: (1) Where the office becomes vacant through death or otherwise, the lieutenant governor shall possess the powers and discharge the duties of the office; (2) where the governor is absent from the State, or suffering from protracted illness, the lieutenant governor shall assume the office until the governor is able to resume his duties; (3) where the lieutenant governor, in turn, because of disability or otherwise, is incapable of serving, the president of the senate pro tempore shall act; and (4) where there is no president pro tempore, the speaker of the house of representative shall assume the office. In case none of the foregoing officers is able to assume the office, the secretary of state shall convene the senate to elect a president pro tempore.

Wherever a doubt arises as to whether a vacancy has occurred, or as to whether any disabilities exist or shall have ended, the secretary of state shall submit the question to the judges of the supreme court who shall make an investigation and render an opinion in writing to the secretary of state which shall be final and conclusive.

*14. Missouri—Vernon's Annotated Missouri Statutes*

Constitution, article 4, section 11, provides that upon the death, \* \* \* etc., or other disability of the governor, the office devolves upon the lieutenant governor for the remainder of the term or until the disability ceases. As necessary, the president pro tempore or the speaker of the house are next in succession.

*15. Montana—Revised Codes of Montana, 1947*

Constitution, article VII, section 14, provides that the lieutenant governor shall assume the office of governor in case of \* \* \* the inability to discharge his duties on the part of the governor, and such assumption of office shall be for the residue of the term or until the disability ceases.

Constitution, article VII, section 16, provides that those next in line of succession shall be the president pro tempore of the senate or the speaker of the house.

*16. Nebraska—Revised Statutes of Nebraska*

Constitution, article IV, section 16, provides that the lieutenant governor shall become governor "in case of the death, \* \* \* etc., or other disability" of the governor, and he shall serve for the residue of the term or until the disability is removed.

Constitution, article IV, section 18, provides that those next in line, in case both the governor and lieutenant governor are unable to serve, shall be the president of the senate and the speaker of the house, in that order.

Revised Statutes (1951 Cumulative Supplement), section 32-1041, provides that vacancies occurring in any State Office 30 days prior to a general election shall be filled thereat.

*17. Nevada—Nevada Compiled Laws 1929*

Constitution, section 104, provides that the lieutenant governor shall assume the office of governor in case of the "inability to discharge the duties of the said office." among other factors, and shall serve for the residue of the term or until the disability shall cease.

Constitution, section 103, provides that the president pro tempore of the senate shall act as governor in any case where there is a vacancy in the office of governor and the lieutenant governor is unable to serve. This provision is supplemented by Nevada Compiled Laws, section 4808, as amended by Act of Nevada, 1949, chapter 30, page 39, which carries the line of succession through the speaker of the assembly and the secretary of state, as need be.

Nevada Compiled Laws, section 4799, lists eight factors which would result in an official declaration of vacancy in office. Those which would imply physical disability are confirmed insanity of the incumbent, found upon a commission of lunacy to determine fact, and failure to discharge the duties of the office for a period of 3 months, except when prevented by sickness, or absence from the State upon leave. Upon the happening of any of the eight contingencies, if the incumbent refuses to relinquish his office, the attorney general, with respect to officers on the State level, is authorized to bring a proceeding in a court of competent jurisdiction for a judgment declaring such office vacant.

*18. New Jersey—New Jersey Statutes Annotated*

The New Jersey Constitution contains two provisions which deal with succession to the office of governor in case of vacancy. In both instances the line of succession is, first, to the president of the senate, then to the speaker of the general assembly, and then, if necessary, to such officer and in such order as may be provided by law.

Article 5, section 6, covers, among other things, removals from office. Article 5, section 7, provides that where the governor \* \* \* "is unable to discharge his duties," etc., the office shall devolve as above, until the governor \* \* \* "is able to discharge his duties," etc.

Article 5, section 8, defines "vacancy in office" of governor as arising when the governor \* \* \* or the person administering the office \* \* \* shall have been continuously unable to discharge the duties of the office by reason of mental or physical disability. Such vacancy shall be determined by the supreme court upon presentment to it of a concurrent resolution declaring the ground of the vacancy, adopted by a vote of two-thirds of all the members of the legislature, and upon notice, hearing before the court, and proof of the existence of the vacancy.

*19. New Mexico—New Mexico Statutes, 1953*

Constitution, article V, section 7, provides that the lieutenant governor shall act as governor in any case in which the governor is absent from the State, or is for any reason unable to act as governor, until such disability be removed. The order of succession thereafter is to the secretary of state, then to the president pro tempore of the senate, and then to the speaker of the house.

**20. New York—McKinney's Consolidated Laws of New York**

Constitution, article 4, section 5, provides that in case of the "inability of governor to discharge the powers and duties of office," the lieutenant governor shall assume the office for the residue of the term or until the disability shall cease.

Constitution, article 4, section 6, provides that where the office of lieutenant governor is also vacant, the temporary president of the senate or his successor shall assume the office of governor, or, in lieu, the office of governor shall devolve upon the speaker of the assembly.

McKinney's Public Officers Law, section 30, states that every office shall be held vacant upon the happening of eight cited contingencies, which include the entry of a judgment or order of a court of competent jurisdiction declaring the incumbent insane or incompetent; but does not mention any other classification of physical disability.

**21. North Carolina—General Statutes of North Carolina, 1943**

Constitution, article III, section 12, provides that among other things in case of the inability of the governor to discharge the duties of his office, or in case the office of governor shall in any wise become vacant, the lieutenant governor assumes the governorship until the disabilities shall cease, or a new governor is elected. The president of the senate is next in line of succession, and whenever, during a recess of the senate, it becomes necessary for the president of the senate to administer the government, the secretary of state shall convene the senate that they may elect such a president.

**22. North Dakota—North Dakota Revised Code of 1943**

Constitution, section 72, provides that in case of the \* \* \* disability of the governor, the office shall devolve upon the lieutenant governor until the disability is removed.

Constitution, section 77, provides that the secretary of state shall serve when both the governor and lieutenant governor cannot do so because, among other factors, the lieutenant governor suffers "from mental or physical disease or otherwise" becomes incapable of performing the duties of his office.

**23. Ohio—Baldwin's Ohio Code**

Constitution, article III, section 15, provides that the lieutenant governor is to assume the office of governor in case of the \* \* \* disability of the governor, his service to last until the disability is removed.

Constitution, article III, section 17, continues the line of succession through the president of the senate and the speaker of the house of representatives.

**24. Oregon—Oregon Revised Statutes**

Constitution, article V, section 8, provides that the order of succession to the office of governor in case of his \* \* \* inability to discharge the duties of the office shall be, first, the president of the senate; second, the speaker of the house of representatives; third, the secretary of state; and fourth, the State treasurer. Such successor shall serve until the disability is removed or a governor is elected at the next biennial election. The governor so elected shall hold office only for the unexpired term.

**25. Pennsylvania—Purdon's Pennsylvania Statutes Annotated**

Constitution, article 4, section 13, provides that in case of the death \* \* \* or other disability of the governor, the office shall go to the lieutenant governor for the remainder of the term or until the disability is removed.

Constitution, article 4, section 14, provides that where there is a vacancy in the office of lieutenant governor, his office shall devolve upon the president pro tempore of the senate, who in turn shall assume the office of governor if a vacancy or disability occurs in the office of governor.

**26. South Carolina—Code of Laws of South Carolina 1952**

Constitution, article 4, section 9, provides that a vacancy in the office of governor due to \* \* \* disability \* \* \* shall be filled by the lieutenant governor, or the president pro tempore of the senate, in that order.

Code of Laws of South Carolina, section 1-112, provides that the president of the senate, performing the duties of governor in the case of \* \* \* disability of both governor and lieutenant governor, shall act until the disability is removed, or the next general election at which a governor is elected shall occur. Section 1-113 makes the same provisions applicable to the speaker of the house when he performs the duties of governor. Section 1-114 provides that when all of the

previously enumerated officers, for any reason, are unable to assume the office of governor, the general assembly, by joint vote, shall elect a person to assume the office of governor, and such person shall serve for the residue of the term.

**27. South Dakota—South Dakota Code of 1939**

Constitution, article IV, section 6, provides that in case of death \* \* \* or other disability of the governor, the office shall devolve upon the lieutenant governor until the disability is removed.

Constitution, article IV, section 7, provides that where the lieutenant governor, in turn, cannot act, "the secretary of state shall act as governor until the vacancy shall be filled or the disability removed."

**28. Texas—Vernon's Texas Statutes Annotated**

Constitution, article 4, section 16, provides that in case of \* \* \* the inability or refusal of the governor to serve, etc., the lieutenant governor shall be governor until another is elected, or the disability is removed.

Constitution, article 4, section 17, provides that if the lieutenant governor, in turn, is unable to serve, the president of the senate shall assume the office of governor until he is superseded by a governor or lieutenant governor.

**29. Utah—Utah Code Annotated 1953**

Constitution, article VII, section 11, provides that in case of the \* \* \* inability of the governor to discharge the duties of his office, etc., the office shall go to the secretary of state, and if he, in turn, for any of the above reasons, cannot function, it shall go to the president pro tempore of the senate. Such service shall last until the vacancy is filled at the next general election, or the disability removed.

**30. Vermont—Vermont Statute (Revisions of 1947)**

Constitution, section 20, assumes that the lieutenant governor succeeds to the office of governor.

Constitution, section 24, states that the legislature shall provide for an officer to act as governor whenever there is a vacancy in both the offices of governor and lieutenant governor, and the officer so designated shall exercise the duties of governor until the disability is removed or a governor elected.

Section 424 of the Vermont Statutes provides that the speaker of the house of representatives shall act as governor when there is a vacancy in the offices of governor and lieutenant governor.

**31. Washington—Revised Code of Washington**

Constitution, amendment 6, provides that in case of the \* \* \* disability of the governor, the office shall devolve upon the lieutenant governor, and if there is a vacancy in both offices, in the following order: secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public lands. In any case in which the aforementioned vacancies occur more than 30 days before the next general election occurring within 2 years of the commencement of the term, an election shall be held to fill the unexpired term.

**32. West Virginia—West Virginia Code of 1955**

Constitution, article VII, section 16, provides that in case of the death \* \* \* or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled, or disability removed, and next in order shall be the speaker of the house of delegates, or someone chosen by joint vote of the legislature. Whenever a vacancy occurs in the office of governor before the first 3 years of the term have expired, a new election for governor shall take place to fill the vacancy.

Section 210 of the code (1949 edition) states the above and then provides for the election as follows: (a) If the vacancy occurs more than 30 days before a regular election, the vacancy shall be filled at such election; (b) if it occurs less than 30 days before the expiration of the term, a special election shall be held; and (c) if the vacancy occurs more than 30 days before the primary, candidates shall be nominated at the primary, but in all other cases the nominations shall be made by party convention.

**33. Wisconsin—Wisconsin Statutes (1949)**

Constitution, article V, section 7, provides that in case of the \* \* \* inability of the governor to serve due to mental or physical disease, etc., the office shall devolve upon the lieutenant governor until the disability shall cease, etc.

Constitution, article V, section 8, provides that the next in succession shall be the secretary of state.

### 34. Wyoming—*Wyoming Compiled Statutes (1945)*

Constitution, article 4, section 6, provides that if the governor \* \* \* from mental or physical disease or otherwise become incapable of performing the duties of his office, etc., the secretary of state shall act as governor until the vacancy is filled or the disability removed.

Wyoming Compiled Statutes, section 18-110, provides that the order of succession shall be the secretary of state, the president of the senate, the speaker of the house of representatives, the State auditor, or the State treasurer, who shall act until the disability of the governor is removed or a governor elected.

WCS 18-111 requires the person assuming the office to issue a proclamation to the effect that the person theretofore an incumbent has ceased to act as such.

WCS 18-112 provides that whenever one of the above persons assumes the office more than 20 days before an election for county offices, he shall call for an election of governor to fill the unexpired term, and the person so elected shall qualify and assume his duties within 30 days after election.

## STATES WHOSE CONSTITUTIONS EMPLOY THE WORD "INABILITY"

### 1. Delaware—*Delaware Code Annotated*

Constitution of 1897, article 3, section 20, provides for devolution of the office of governor in three instances, among them, when the governor becomes unable to discharge the duties of his office after his term has begun, whereupon the office goes to the lieutenant governor; or when both the governor and lieutenant governor are unable to serve so that the office devolves as follows: upon the secretary of state, the attorney general, the president pro tempore of the senate, or the speaker of the house, who are eligible at the time the office devolves upon them, and who may serve only until the disability of the governor or lieutenant governor is removed, or a governor duly elected.

There is no direct statement that when the lieutenant governor takes the office he retains it only so long as the governor is unable to discharge the duties thereof; but it is directly stated of the other succeeding officers.

### 2. Florida—*Florida Statutes Annotated*

Constitution of 1885, article 4, section 19, provides that in case of the " \* \* \* inability to discharge his official duties" on the part of the governor, his office devolves upon the president of the senate or the speaker of the house. If, however, there is a general election for members of the legislature during the vacancy, an election for governor to fill the office shall also be conducted.

### 3. Indiana—*Burns Indiana Statutes Annotated*

Constitution (1915 Replacement Volume), article V, section 10, provides that "in case of the \* \* \* inability of the governor to discharge the duties of office," the office devolves upon the lieutenant governor. Where the lieutenant governor, in turn, is unable to serve, the legislature is to provide for someone to act as governor until the disability is removed or a governor elected.

Burns, section 49-401, provides where a vacancy occurs in the office of governor because neither the governor nor the lieutenant governor is able to serve, the president of the senate shall act as governor until the vacancy is filled; and if there is no president of the senate, the secretary of state shall convene the senate for the purpose of electing one.

The lieutenant governor is ordinarily the president of the senate, but when he becomes governor, or is unable to attend as president of the senate, the senate elects a president pro tempore (Constitution, art. 5, sec. 11).

### 4. Kentucky—*Kentucky Revised Statutes 1953*

Constitution, section 84, provides that the lieutenant governor succeeds to the office of governor whenever the latter \* \* \* for any cause is unable to discharge the duties of his office, and serves until the governor \* \* \* is able to discharge the duties of his office.

Constitution, section 85, provides that where the lieutenant governor is unable to serve, the office shall go to the president pro tempore of the senate. In this instance, whenever a vacancy occurs in the office of governor before the first 2 years of his term have expired, a new election for governor shall take place. Kentucky Revised Statutes 121.010 states that the chief justice of the court of appeals or, in his absence, one of the associate justices shall issue a proclamation for a special election to fill the office of governor where a vacancy occurs and there are more than 2 years of his term yet remaining. Kentucky Revised Statutes 122.210 (4) provides that a special election shall likewise be ordered whenever a

successful candidate in the regular election contest is found not qualified and the first 2 years of his term have not yet passed.

5. *Louisiana—Constitution of the State of Louisiana, amended through November 1954*

Article V, section 6, provides that in case of a vacancy in the office of governor, the order of succession is, first, lieutenant governor; second, president pro tempore of the senate; and third, until the election of a president pro tempore of the senate, the secretary of state. Such vacancy may arise through the inability of the governor to act by reason of his absence from the State or for other cause, and such officer assuming the powers and duties of the office of governor shall serve ad interim until the inability be removed.

6. *Oklahoma—Oklahoma Statutes Annotated*

Constitution, article 6, section 16, provides that in case of the governor's \* \* \* inability to discharge the powers and duties of the office, the office shall devolve upon the lieutenant governor.

Constitution, article 6, section 15, provides that the further order of succession shall be the president of the senate or the speaker of the house of representatives in that order, who shall serve until the vacancy is filled or the disability ceases.

Annotation: In *Fitzpatrick v. McAlister* ((1926) 121 Okla. 83, 248 P. 569), it was held that this section has reference to temporary vacancies only.

7. *Rhode Island—General Laws of Rhode Island 1938*

Constitution, article VII, section 9, provides that in case of the inability of the governor to serve, etc., the lieutenant governor shall fill the office, until a governor is qualified or the office filled at the next election.

Constitution, article VII, section 10, provides that where both governor and lieutenant governor are unable to serve, the person entitled to preside over the senate for the time being shall fill the office of governor during such absence or vacancy.

Constitution, article of amendment XI, section 4, provides that if the offices of governor and lieutenant governor are both vacant by reason of death or otherwise, they shall be filled by the general assembly in grand committee, and the acting governor shall call a special session for that purpose within 20 days after both offices become vacant, if a State session is not sooner to occur.

8. *Virginia—Code of Virginia 1960*

Constitution, section 78, provides that in case the governor \* \* \* is unable to discharge the powers and duties of the office, the office shall devolve upon the lieutenant governor, and the legislature shall provide for further devolution.

Code, section 24-150, provides that where there is a vacancy in both the office of governor and of lieutenant governor, the president pro tempore shall act or, if the senate is not in session, the person who was president pro tempore at the close of the last session and, where there is no such person, by the speaker of the house of delegates or the secretary of the Commonwealth, in that order.

Code 24-151 provides that such acting governor shall, within 5 days after a vacancy in the offices of both governor and lieutenant governor, issue writs of election for the unexpired terms, such election to be held within 60 days, and he shall also convene the general assembly, if necessary, to count the vote.

STATES WHOSE CONSTITUTIONS USE PHRASES SUCH AS "OR OTHERWISE"

1. *Maine—Revised Statutes of Maine*

Constitution of Maine, article V, part I, section 14: "Disability" here would have to be included under the phrase "or otherwise" relating to vacancies in the office of governor. The succession is to the president of the senate and then the speaker of the house of representatives. When, during a recess of the senate, none of the above officers is available, the person acting as secretary of state shall by proclamation convene the senate, that a president may be chosen.

2. *Maryland—Flack's Annotated Code of Maryland*

Constitution, article II, section 6: "Disability" here would have to be included under the phrase "or other disqualifications," whereupon the general assembly, if in session, shall elect some other qualified person governor.

Constitution, article II, section 7, provides that where the vacancy occurs during the recess of the legislature, the president of the senate or the speaker of the house of delegates shall discharge the duties of the office of governor until the legislature convenes and elects a new governor for any residue of the term.

This section also states that the legislature may provide by law for succession to the office of governor upon conviction under an impeachment or any vacancy not herein provided for; and, further, if such vacancy occurs without such provisions having been made, the legislature shall be convened by the secretary of state for the purpose of filling such vacancy.

There has been no law passed governing the right of succession apart from the constitutional provisions.

*3. Massachusetts—Annotated Laws of Massachusetts*

Constitution, section 72, does not mention disability but it could be included under the phrase "or otherwise" which permits the lieutenant governor to assume the chair of governor whenever that is vacant.

Constitution, section 185, provides that the subsequent succession shall be secretary, attorney general, treasurer and receiver general, and auditor.

*4. Minnesota—Minnesota Statutes Annotated*

Constitution, article V, section 6, provides that the lieutenant governor shall be governor during any vacancy arising from "any cause whatever." The senate shall elect a president pro tempore at the close of each session, who shall be lieutenant governor in case a vacancy should occur in office.

*5. New Hampshire—Revised Laws of New Hampshire, 1942*

Article 49 of the constitution provides that when the chair of governor is vacant for specified reasons "or otherwise," the president of the senate or the speaker of the house succeeds to the office, as the case may be.

TENNESSEE

Constitution, article 3, section 12, has no phrase under which a vacancy due to disability could be provided for. Upon a vacancy from one of the specified causes, however, the office devolves upon the speaker of the senate or the speaker of the house.

Code (1952 Supplement), section 187.2, creates the office of lieutenant governor with right of succession to the office of governor.

Code (1952 Supplement), section 187.3, states that the speaker of the senate shall in all cases be the lieutenant governor of Tennessee.

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