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THE PROBLEM OF PRESIDENTIAL INABILITY— WILL CONGRESS EVER SOLVE IT?

JOHN D. FEERICK*

ONE of the most critical and intriguing constitutional questions ever presented for solution is: What happens when the President of the United States becomes incapable of discharging the powers and duties of his office? Does the Vice-President "become President" for the remainder of the term or does he merely "act as President" during the period of the inability? The Constitution is not explicit. It provides:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, *the Same shall devolve on the Vice President*, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.¹

The words "the Same" can be interpreted as referring either to "the Powers and Duties" or to the "Office." If it is the office which devolves, presumably the Vice-President becomes President, while if it is the powers and duties, he merely acts as President. And it would seem clear from the wording of the clause that whatever devolves on the Vice-President does so whether the case be one of removal, death, resignation or inability.

Article II, section 1, clause 6 of the Constitution created no problems for more than fifty years after its passage.² The latent ambiguity in the

* Member, New York Bar. The author wishes to acknowledge the invaluable assistance of his wife.

1. U.S. Const. art. II, § 1, cl. 6. (Emphasis added.)

2. Pursuant to its power to appoint a successor where both President and Vice-President are immobilized, Congress enacted a law of March 1, 1792, placing the President pro tempore of the Senate and the Speaker of the House of Representatives, respectively, next in line. 1 Stat. 240. The act was objectionable because it allowed for a period during which no one would be available to act as President, as during a recess of Congress when there is no President pro tempore of the Senate or Speaker of the House. This possibility existed when Vice-President Arthur succeeded President Garfield. No one would have been available to succeed Arthur if he in turn had died before Congress convened. Another objection to the succession law was that the President pro tempore or Speaker might be from a different political party than the President and would be in a position to change the membership of the Cabinet. Thus, on January 19, 1886, the order of succession was changed so that the Vice-President would be followed, in turn, by the Secretary of State, the Secretary of Treasury, the Secretary of War, the Attorney General, the Postmaster General, the Secretary of Navy, and the Secretary of Interior. 24 Stat. 1 (1886). By an Act of July 26, 1947, ch. 343, § 201, 61 Stat. 499, the Departments of the Army, Navy and Air Force were merged into the National Military Establishment, overseen by the Secretary of Defense. While

clause did not manifest itself until the death of President William Henry Harrison on April 4, 1841, only one month after his inauguration. Despite protests about the constitutionality of his action, Vice-President John Tyler asserted his right to the office and became President for the remainder of Harrison's term. His succession to the title and full authority of the Presidency, and not merely to the powers and duties of the office, was followed, in turn, by Vice-Presidents Millard Fillmore,⁹ Andrew Johnson,⁴ Chester A. Arthur,⁵ Theodore Roosevelt,⁶ Calvin Coolidge⁷ and Harry S. Truman.⁸

The Tyler precedent has not been extended beyond cases of death. Resignation⁹ and removal¹⁰ situations have never arisen. The same is

this new governmental agency did not become an executive department (Department of Defense) until the Act of August 10, 1949, ch. 412, § 4, 63 Stat. 579, its Secretary was added to the line of succession on July 26, 1947, 61 Stat. 509, a new line having been established by an Act of July 18, 1947, ch. 264, 61 Stat. 380. This act reinstated the Speaker of the House and the President pro tempore of the Senate, respectively, before the heads of the executive departments. This was done in order to insure that the immediate successors after the Vice-President are elected officers, even though they may be from a different political party than the President. The new order of succession among department heads is: State, Treasury, Defense, Attorney General, Postmaster General, Interior, Agriculture, Commerce and Labor. 3 U.S.C. § 19 (1958).

3. Succeeded President Zachary Taylor upon his death on July 9, 1850. He took the oath of office on the following day.

4. Succeeded President Abraham Lincoln upon his death on April 15, 1865, and took the oath of office on the same day.

5. Succeeded President James A. Garfield upon his death on September 19, 1881. He took the oath of office on the following day.

6. Succeeded President William McKinley upon his death on September 14, 1901, and took the oath of office on the same day. See Andrews, *The Autobiography of Theodore Roosevelt* 192-93 (1958 ed.).

7. Succeeded President William G. Harding upon his death on August 2, 1923. He took the oath of office on the following day before his father, a state magistrate and notary public. In order to insure the validity of his oath, which was questioned, Coolidge again took the oath—before Judge A. A. Hoehling of the Supreme Court of the District of Columbia. Magruder & Claire, *The Constitution* 156 & n.1 (1933). See generally Daugherty, *The Inside Story of the Harding Tragedy* 278-80 (1932); Fuess, *Calvin Coolidge* 315 (1940).

8. Succeeded President Franklin D. Roosevelt upon his death on April 12, 1945. He took the oath of office on the same day.

9. 3 U.S.C. § 20 (1958) provides: "The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State." Only one Vice-President has resigned from office. John C. Calhoun, who was Vice-President under Presidents John Quincy Adams (1824-1828) and Andrew Jackson (1828-1832), resigned in 1832 to run for the Senate and his resignation was transmitted to the Secretary of State as required by the Act of March 1, 1792.

10. President Andrew Johnson, however, was impeached by the House of Representa-

not true of presidential inability. On two occasions, when a President was unable to discharge the powers and duties of his office,¹¹ the Vice-President did not assume them for fear that by virtue of the Tyler precedent the Constitution would make him President for the remainder of the term without regard to the cessation of the inability. As a result, during these periods in our history the effective functioning of the executive branch was impaired and the Nation suffered. When illness befell President Dwight D. Eisenhower in 1955, 1956, and again in 1957, all the uncertainty of the past surrounding the inability clause was revived. In an effort to avoid an interregnum, President Eisenhower and Vice-President Richard M. Nixon reached an understanding in March of 1958 under which the Vice-President would act as President during periods of presidential inability.¹² Shortly thereafter, the Eisenhower-Nixon precedent was followed by President John F. Kennedy and Vice-President Lyndon B. Johnson.¹³ This type of arrangement, however, has not solved the problem created by the Tyler precedent: Should the Vice-President permanently replace the President in cases of inability?

tives on February 24, 1868, by a vote of 126 to 47. *Cong. Globe*, 40th Cong., 2d Sess. 1400 (1868). He was then tried before Chief Justice Salmon P. Chase in the Senate and acquitted by only one vote (35 voted guilty and 19 not guilty). *Cong. Globe*, 39th Cong., 2d Sess. 411-15 (Supp. 1867). It is interesting to note that at the beginning of the impeachment episode, some members of the House were concerned whether Johnson, who had succeeded Lincoln, had assumed the office or was merely acting as President. *Cong. Globe*, 40th Cong., 2d Sess. 319-21 (1868). The House impeached him as President. See generally Stryker, *Andrew Johnson: A Study in Courage* (1929).

11. See pp. 90-120 *infra*. This does not take into account the period that intervened between the shooting of President McKinley on September 6, 1901, and his death on September 14, 1901. See Leech, *In the Days of McKinley* 595-603 (1959). Nor does it take into account the week before President Harding's death. See S. Adams, *Incredible Era: The Life and Times of Warren Gamaliel Harding* 373-89 (1939); W. Johnson, *The Life of Warren G. Harding* 233-37 (1923). See generally J. Kane, *Facts About the Presidents* (1959); *U.S. News & World Rep.*, March 9, 1956, p. 50 ("Presidents and Their Health").

12. White House Press Release, March 3, 1958. See notes 210-11 *infra* and accompanying text; see also President Eisenhower's remarks at his news conference of February 26, 1958, *Public Papers of the Presidents of the United States, 1958*, at 188-89 (U.S. Gov't Printing Office, 1959). At a news conference on April 3, 1957, President Eisenhower stated: "Now, the Vice President, as we see it under the present wording of the Constitution, . . . himself has to decide . . . [the existence of inability]. But he has always been reluctant to do it because he says, 'How would he turn it back at the end?' or 'Do I become President for the whole time or am I Acting President or am I really the President?' And it is astonishing how full our records are of contrary opinions on this." *Public Papers of the Presidents of the United States, 1957*, at 245 (U.S. Gov't Printing Office, 1958).

13. White House Press Release, August 10, 1961. See notes 213-14 *infra* and accompanying text; see also President Kennedy's remarks at his news conference of August 10, 1961, *Public Papers of the Presidents of the United States, 1961*, at 561-62 (U.S. Gov't Printing Office, 1962).

Further, the arrangement does not have the force of law and has no binding effect if one or both of the parties should decide to break it. And, finally, it does not extend beyond the term of the parties involved.

The problem has other important and intriguing facets: What is "inability"? Who initiates the question of whether "inability" has occurred and who resolves the issue when it has been raised? Who decides when the "inability" has ended once it is found to exist?

Former Presidents and Vice-Presidents, committees of Congress, Congressmen, Attorneys General, bar committees, experts on constitutional law, lawyers, professors, historians, and others have offered a number of suggestions.¹⁴ Activity and interest concerning the problem reached a peak during the period surrounding the Eisenhower illnesses. It was then carefully and thoroughly examined. However, due to a tremendous variance in opinion among those who studied the problem, no solution was ever agreed upon by Congress.

The problem of presidential inability has now been generally forgotten by our national legislators as well as by the public. Since we have a young, able and healthy President,¹⁵ all indications are that the issue will remain dormant until another inability crisis confronts the country. Yet it is imperative that Congress act now. In view of past and present confusion regarding the problem, a presidential inability during a time of crisis could be fatal. The country can no longer afford the uncertainty that exists. The time demands that the effective working of the executive branch be insured. As Representative Emanuel Celler of New York so well stated: "Our position of world leadership demands that we avoid the terrible crisis that would result if a vacuum existed in the office of the President for even a short period of time."¹⁶ "Failure to

14. See generally Comm. on Fed. Legislation of N.Y.C.B.A., *The Problem of Presidential Inability*, 17 Record of N.Y.C.B.A. 185 (1962); Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958) (hereinafter cited as 1958 Senate Hearings); Hearing Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957) (hereinafter cited as 1957 House Hearing); Hearings Before Special Subcommittee to Study Presidential Inability of the House Committee on the Judiciary, 84th Cong., 2d Sess. (1956) (hereinafter cited as 1956 House Hearings); House Comm. on the Judiciary, 85th Cong., 1st Sess., *Presidential Inability: An Analysis of Replies to a Questionnaire and Testimony at a Hearing on Presidential Inability* (Comm. Print 1957) (hereinafter cited as 1957 Analysis); 42 Ops. Att'y Gen. No. 5 (1961). And see the recent Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963) (hereinafter cited as 1963 Senate Hearings).

15. It is reported that President Kennedy has missed only two days from official duties because of illness. U.S. News & World Rep., June 10, 1963, p. 16 ("The President at 46").

16. 19 F.R.D. 153, 157 (1956) (speech at St. Paul, Minnesota).

act," as Representative Peter Frelinghuysen, Jr. of New Jersey put it, "could imperil the future freedom of our Nation and, as a consequence, that of the world."¹⁷

The purpose of this article is to re-examine the problem in detail¹⁸—in particular, to explore the events prior to and during the Constitutional Convention of 1787, to recount the interesting history of presidential inability, to examine the succession provisions of state and foreign constitutions, and finally to discuss the proposed solutions. The article ends with that solution which is, in the opinion of the author, the least objectionable and the most consistent with the principles underlying our form of government.

I. CONSTITUTIONAL CONVENTION OF 1787

^o A. *Pre-Convention Practice*

Article II, section 1, clause 6 of the Constitution had its origin in the early grants,¹⁹ royal charters and colonial practice. The office of deputy or lieutenant governor existed in almost all the colonies²⁰ and

17. 1956 House Hearings 19. See U.S. News & World Rep., June 15, 1956, p. 71 ("A Vice President Must Take the Initiative as Acting President").

18. The outstanding treatise on the subject is Silva, *Presidential Succession* (1951). See also Brownell, *Presidential Disability: The Need for a Constitutional Amendment*, 68 Yale L.J. 189 (1958); Gasperini, *The Presidential Inability Riddle*, 31 N.Y.S. B. Bull. 258 (1959); Hansen, *One Strike and You're Out—The Constitution and Executive Disability*, 5 N.H. Bar. J. 5 (1962); Hansen, *Executive Disability: A Void in State and Federal Law*, 40 Neb. L. Rev. 697 (1961); Heinlein, *The Problem of Presidential Inability*, 25 U. Cinc. L. Rev. 310 (1956); Silva, *Presidential Inability*, 35 U. Det. L.J. 139 (1957); Symposium—*Presidential Inability*, 133 No. Am. Rev. 417 (1881); Wickersham, *Presidential Inability: Procrastination, Apathy and the Constitution*, 7 Vill. L. Rev. 262 (1961-1962). For a good bibliography, see 12 Record of N.Y.C.B.A. 462-63 (1957), and for an excellent analysis of the subject, see Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. (1918). Published at this writing is Hansen, *The Year We Had No President* (1962). For general, but excellent studies on the Vice-Presidency, see Hatch & Shoup, *A History of the Vice Presidency of the United States* (1934); Levin, *Seven by Chance: The Accidental Presidents* (1948); Waugh, *Second Consul* (1956); Williams, *The American Vice Presidency: New Look* (1954); Williams, *The Rise of the Vice Presidency* (1956); Burns, *A New Look at the Vice Presidency*, N.Y. Times, Oct. 9, 1955, § 6 (Magazine), p. 11.

19. Most of the English colonies in America were started by grants to private individuals or trading companies. Private ownership gave way to royal charters and royal provinces. Every colony except Rhode Island, Connecticut, Pennsylvania and Delaware became a royal province, administered under a royal commission by a Governor who was appointed directly by the King. Maryland was ruled by the Crown only from 1689 to 1715. The governments in these five colonies were, in the main, not unlike the others. See Jernegan, *The American Colonies, 1492-1750* (1959 ed.); Labaree, *Royal Government in America* (1930).

20. Provisions for a deputy or lieutenant governor are found in many of the early charters, wherein hereditary succession was common. The author's source for the early

it was not at all uncommon for this official to act as Governor in case of the absence from the colony, sickness, death or other inability of the Governor.²¹ In the English-governed colonies, where the Governor was the local representative of the Crown as well as the chief executive of the colony, the office of lieutenant governor was part of the governmental machinery. The lieutenant governor usually served pursuant to a King's commission²² which authorized him to perform the powers of the Governor in cases of need.

As the colonies moved toward unity, the subject of executive succession was never overlooked. Thus, the Albany Plan of Union of 1754 provided that:

[I]n case of the Death of the President General the Speaker of the Grand Council for the time being shall succeed and be vested with the same powers and authorities & continue till the Kings [sic] pleasure be known.²³

The state constitutions which came into existence shortly after the Declaration of Independence reveal a certain pattern of thinking regarding executive succession.²⁴ The first constitutions of North Caro-

charters is Poore, *The Federal and State Constitutions, Colonial Charter, and Other Organic Laws of the United States* (2d ed. 1878) (hereinafter cited as Poore). For some of these provisions, see *The Fundamental Constitutions of Carolina* (1669) (2 Poore 1403); *Conn. Charter of 1662* (1 Poore 253); *Mass. Bay Charter of 1629* (1 Poore 936-37); *Mass. Bay Charter of 1691* (1 Poore 948); *Grant to William Penn of 1681* (2 Poore 1516); *R.I. and Providence Plantations Charter of 1663* (2 Poore 1597).

21. See generally, Labaree, *op. cit. supra* note 19, at 127-28. The author states that no less than 40 colonial Governors died in office, that some were recalled for disobedience or inefficiency, and that others resigned because of health. *Id.* at 125-26. In one case a Governor's failing health necessitated a commission to a lieutenant governor to act in his place. *Id.* at 19 & n.35. In August, 1716, Governor John Hart of Maryland, who was in ill health, expressed concern about what would happen to the administration of government should he take sick or die. His concern resulted in an act providing for the transfer of power to the first person named in the Crown's commission, which person would act until the Governor returned or another was appointed.

22. The lieutenant governor's commission is explained in Labaree, *op. cit. supra* note 19, at 19-21. Sometimes a lieutenant governor would not be commissioned until an emergency had arisen. See, e.g., 1 *Executive Journals of the Council of Colonial Virginia* 43 (1925) (hereinafter cited as *Executive Journals*). At times, when there was no lieutenant governor in the colony, the senior member of the Governor's council would act as Governor. *Id.* at 494, 500; 3 *id.* at 119 (1928); cf. 5 *id.* at 345-46 (1945); see *Laws of the Government of New Castle, Kent and Sussex* 102-03 (Franklin & Hall 1752 ed.); It was not unusual for the Governor to appoint a successor to act during his absence from the colony. See, e.g., 5 *Executive Journals* 20 (1945).

23. Newbold, *The Albany Congress and Plan of Union of 1754*, at 187, 189, 192 (1955).

24. For background material, see Dodd, *The First State Constitutional Conventions, 1776-1783*, 2 *Am. Pol. Sci. Rev.* 545 (1908); F. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (1930); E. Greene, *The Provincial Governor in the English*

lina,²⁵ Delaware²⁶ and Virginia²⁷ provided for a *temporary* successor to the chief executive upon the occurrence of such contingencies as death, absence and inability. The constitutions of Pennsylvania²⁸ and New Jersey²⁹ provided for a *temporary* successor in cases of absence; Maryland,³⁰ in cases of death, resignation and removal from the state; New York,³¹ in cases of death, resignation, absence from the state,

Colonies of North America (1898); Kelly & Harbison, *The American Constitution, Its Origins and Development* 1-114 (1955); Nevins, *The American States During and After the Revolution, 1775-1789* (1924); Sanders, *Evolution of Executive Departments of the Continental Congress, 1774-1789* (1935); Solberg, *The Federal Convention and the Formation of the Union of the American States* (1958); Thach, *The Creation of the Presidency, 1775-1789* (1922); B. Wright, *The Early History of Written Constitutions in America*, in *Essays in History and Political Theory in Honor of C. H. McIlwain* (1936); E. Wright, *Fabric of Freedom, 1763-1800* (1961).

25. N.C. Const. art. XIX (1776) (2 Poore 1412-13) provided: "And on his [the Governor's] death, inability, or absence from the State, the Speaker of the Senate for the time being—and in case of his death, inability, or absence from the State, the Speaker of the House . . .) shall exercise the powers of government, after such death, or during such absence or inability . . . or until a new nomination is made by the General Assembly."

26. Del. Const. art. 7 (1776) (1 Poore 274) provided: "And on . . . [the President's] death, inability, or absence from the State, the speaker of the legislative council for the time being shall be vice-president, and in case of his death, inability, or absence from the State, the speaker of the house . . . shall have the powers of a president, until a new nomination is made by the general assembly."

27. Va. Const. (1776) (2 Poore 1911) provided: "A Privy Council . . . shall annually choose, out of their own members, a President, who, in case of death, inability, or absence of the Governor from the government, shall act as Lieutenant-Governor."

28. Pa. Const. § 20 (1776) (2 Poore 1545) provided: "The president, and in his absence the vice president, with the council, . . . shall have power . . ."

29. N.J. Const. art. VIII (1776) (2 Poore 1312) provided: "That the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power . . ."

30. Md. Const. art. XXXII (1776) (1 Poore 825) provided: "That upon the death, resignation, or removal out of this State, of the Governor, the first named of the Council, for the time being, shall act as Governor, and qualify in the same manner; and shall immediately call a meeting of the General Assembly, giving not less than fourteen days' notice of the meeting, at which meeting, a Governor shall be appointed, in manner aforesaid, for the residue of the year."

31. N.Y. Const. art. XX (1777) (2 Poore 1336) provided: "And in case of the impeachment of the governor, or his removal from office, death, resignation, or absence from the State, the lieutenant-governor shall exercise all the power and authority appertaining to the office of governor until another be chosen, or the governor absent or impeached shall return or be acquitted. . . ." Several authorities state that the office of Vice-President bore a striking resemblance to the office of lieutenant governor of New York, also an elective office. See, e.g., J. Robinson, *The Original and Derived Features of the Constitution of the United States of America* (1890). See also 1 Bryce, *The American Commonwealth* 686 (1910); Stevens, *Sources of the Constitution of the United States: Considered in Relation to Colonial and English History* 81 (1894); *The Federalist* No. 68, at 350-51 (Beloff ed. 1948) (Hamilton).

impeachment and removal from office; New Hampshire³² and Massachusetts,³³ in cases of death, absence from the state and otherwise; and Georgia,³⁴ in cases of absence or sickness. The Rhode Island³⁵ and Connecticut³⁶ charters, which were still in effect, provided for a deputy governor to act in the absence of the Governor by occasion of sickness, or otherwise by his leave and permission. The South Carolina constitution was unique in its provision that in the event of the "impeachment of the governor . . . or his removal from office, death, resignation, or absence from the State, *the lieutenant-governor shall succeed to his office . . .*"³⁷

At the time of the Convention, therefore, in all the state constitutions, with the possible exception of South Carolina's, succession provisions were worded so that the succeeding officer would not assume the office of the chief executive but merely his powers and duties for a *limited* tenure. Logic dictates the conclusion that this practice influenced the thinking of the delegates when they addressed themselves to the subject of presidential succession. The fifty-five men who attended the Convention during the summer of 1787 were the leaders of the colonies.³⁸ They were

32. N.H. Const. (1784) (2 Poore 1289) provided: "WHENEVER the chair of the president shall be vacant, by reason of his death, absence from the state, or otherwise, the senior senator for the time being, shall, during such vacancy, have and exercise all the powers and authorities which by this constitution the president is vested with when personally present." Compare N.H. Const. (1776) (2 Poore 1280).

33. Mass. Const. ch. II, § 2, art. III (1780) (1 Poore 967) provided: "Whenever the chair of the governor shall be vacant, by reason of his death, or absence from the commonwealth, or otherwise, the lieutenant-governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor, and shall have and exercise all the powers and authorities which, by this constitution, the governor is vested with, when personally present."

34. Ga. Const. art. XXIX (1777) (1 Poore 381) provided: "The president of the executive council, in the absence or sickness of the governor, shall exercise all the powers of the governor."

35. R.I. and Providence Plantations Charter of 1663 (2 Poore 1598).

36. Conn. Charter of 1662 (1 Poore 253).

37. S.C. Const. art. VIII (1778) (2 Poore 1621). (Emphasis added.) Accord, S.C. Const. XIV (1776) (2 Poore 1618-19). However, article 10 of the Constitution of 1778 (2 Poore 1622) provided: "[I]n case of the absence from the seat of government or sickness of the governor and lieutenant-governor, any one of the privy council may be empowered by the governor, under his hand and seal, to act in his room. . . ."

38. Summaries of the lives of these men are to be found in Appleton, *Cyclopaedia of America Biography* (rev. ed. Wilson & Fiske 1900); *Dictionary of American Biography* (1936). For an interesting and novel view as to the kind of men they were, see Beard, *Economic Interpretation of the Constitution of the United States* (1960). See 3 *The Records of the Federal Convention of 1787*, at 87-97 (Farrand ed. 1911 & 1937) (Yale University Press) (hereinafter cited as Farrand); Solberg, *The Federal Convention and the Formation of the Union of the American States* 387-406 (1958).

undoubtedly familiar with their state constitutions, for many had taken part in drafting them. An overwhelming majority had served in their state legislatures, and many had served in the Continental Congress. And thirty-six were lawyers.³⁹

In framing the Constitution, the Founding Fathers did not indulge in the prolixity of a legal code but, to a large extent, in generalities that expressed a certain philosophy of government. Executive succession was part of that philosophy. How it became a part of the Constitution is an interesting chapter in our history.⁴⁰

B. *The Convention*

Although the Convention opened on May 25, 1787, it was not until May 29 that a plan for a federal government was introduced. On that day, Edmund Randolph of Virginia read the fifteen resolutions of his state's plan, one of which called for a national executive to be appointed by Congress.⁴¹ The plan contained no succession provision. The Convention then voted to resolve itself, the day following, into a Committee of the Whole and to refer the plan to the Committee.⁴²

Charles Pinckney of South Carolina then presented his plan to the

39. The author's study, drawn from the sources in note 38 *supra*, shows the following lawyers:

Connecticut: Oliver Ellsworth, William S. Johnson and Roger Sherman.

Delaware: Richard Bassett, Gunning Bedford, Jr., George Read and John Dickinson.

Georgia: Abraham Baldwin, William Few and William Houston.

Maryland: Luther Martin and John F. Mercer.

Massachusetts: Rufus King and Caleb Strong.

New Hampshire: None.

New Jersey: David Brearley, Jonathan Dayton, William C. Houston, William Livingston and William Paterson.

New York: Alexander Hamilton, John Lansing and Robert Yates.

North Carolina: William R. Davie and Alexander Martin.

Pennsylvania: Jared Ingersoll, Gouverneur Morris, James Wilson and George Clymer.

Rhode Island: Not represented at Convention.

South Carolina: Charles C. Pinckney, Charles Pinckney and John Rutledge.

Virginia: John Blair, James Madison, George Mason (not licensed but an expert on matters of public law), Edmund Randolph and George Wythe.

40. The most scholarly work on the proceedings of the Constitutional Convention is a three volume work by Farrand, *op. cit. supra* note 38. See also Bancroft, *History of the Formation of the Constitution of the United States of America (1885)*; Farrand, *The Framing of the Constitution of the United States (1962 ed.)*; Prescott, *Drafting the Federal Constitution (1941)*. For an interesting narrative account, see C. Van Doren, *The Great Rehearsal: The Story of the Making and Ratifying of the Constitution of the United States (1948)*.

41. 1 Farrand 16, 20, 24, 27.

42. *Id.* at 16, 23, 24.

Convention,⁴³ and it was immediately referred to the Committee of the Whole. Although it is generally believed that Pinckney's was the first plan to contain a succession provision,⁴⁴ there is impressive evidence that it had none at all.⁴⁵

On June 15, the Paterson Resolutions (or New Jersey Plan) were submitted to the Convention, calling for a plural executive.⁴⁶ There was no mention of succession. Three days later Alexander Hamilton of New York gave a brief sketch of his plan of government, which included this provision:

On the death resignation or removal of the Governour his authorities to be exercised by the President of the Senate till a Successor be appointed.⁴⁷

During the next five weeks the Constitution began to unfold as the delegates thoroughly examined the Virginia and New Jersey Plans. In the main, attention was directed to the proposals for a federal legislature. On July 23, a Committee of Detail was formed and given the responsibility of considering the matters that had been discussed in the Conven-

43. *Ibid.*

44. See, e.g., 42 *Ops. Att'y Gen. No. 5*, at 3-4 (1961); Davis, *op. cit. supra* note 18; Silva, *op. cit. supra* note 18, at 4.

45. The evidence: In 1818, when John Quincy Adams was preparing the Journal of the Convention, he could not find any copy of Pinckney's Plan among his papers. Consequently, he wrote Pinckney and asked him for a copy of the original. Pinckney replied, sending a draft which included the following succession provision: "In case of his [the President's] removal death resignation or disability The President of the Senate shall exercise the duties of his office until another President be chosen—& in case of the death of the President of the Senate the Speaker of the House of Delegates, shall do so—" 3 Farrand at 588.

Several scholars have studied Pinckney's Plan and have reached the conclusion that the draft of 1818 was not the same as the original plan. Becker, *The Pinckney Plan for the Federal Constitution* (1911); Jameson, *Studies in the History of the Federal Convention of 1787*, at 117-32; 1 *Amer. Historical Ass'n, Ann. Rep.* 87, 117-32 (1902). Both authors have reconstructed the original plan, based on the views expressed by Pinckney during the Convention and immediately thereafter, and, as reconstructed, the plan contains no provision on executive succession. It is suggested by Jameson that the 1818 draft was nothing more than a paraphrase of the draft of the Constitution presented to the Convention on August 6 by the Committee of Detail. Jameson, *supra*, at 124. See note 50 *infra* and accompanying text. The above evidence is summarized in 3 Farrand at 601-04, and the reconstructed plan is set out at 604-09.

46. 1 Farrand at 241-45.

47. *Id.* at 292. Hamilton's Plan was never formally discussed. As included in his written draft, the succession clause read as follows: "The President of the Senate shall be vice President of the United States. On the death, resignation, impeachment, removal from office, or absence from the United States, of the President thereof, the Vice President shall exercise all the powers by this Constitution vested in the President, until another shall be appointed, or until he shall return within the United States, if his absence was with the Consent of the Senate and Assembly." 3 Farrand at 625.

tion up to the time.⁴⁸ On July 24, the Committee of the Whole was discharged and the various plans were referred to the Committee of Detail.⁴⁹

On August 6, the committee presented a draft of the Constitution to the Convention. Article X, section 2 of the draft provided:

In case of his [the President's] removal as aforesaid, death, resignation, or *disability* to discharge the powers and duties of his office, the President of the Senate *shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.*⁵⁰

The committee's draft was the subject of discussion for the rest of the month. The succession section was not discussed until August 27, when Hugh Williamson of North Carolina suggested "that the Legislature ought to have power to provide for occasional successors . . ."⁵¹ He then asked that further discussion of the question be postponed. John Dickinson of Delaware seconded the motion for postponement, remarking that Article X, section 2, was "too vague. What is the extent of the term 'disability' & who is to be the judge of it?"⁵² His questions were never answered.⁵³

On August 31, a number of matters, including succession, were referred to a Committee of Eleven.⁵⁴ On September 4, it presented, through its

48. 2 Farrand at 85, 95. Its members were John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. *Id.* at 97, 106.

49. *Id.* at 98, 106.

50. *Id.* at 186. (Emphasis added.) Professor Farrand has traced the following notes to the Committee of Detail: (1) An emendation in the handwriting of John Rutledge (*id.* at 137 & n.6) that "the Presidt of ye Senate to succeed to the Executive in Case of (death) Vacancy untill the Meeting of the Legisle. . . ." *Id.* at 146. (2) A note of James Wilson (*id.* at 163 & n.17), containing this clause: "In Case of his Impeachment, (Dismission) [Removal], Death, Resignation or Disability to discharge the Powers and Duties of his (Department) [Office]; the President of the Senate shall exercise those Powers and Duties, until another President of the United States be chosen, or until the President impeached or disabled be acquitted, or his Disability be removed." *Id.* at 172. Professor Farrand says the parts in parentheses were stricken out in the original and the bracketed words were added by Wilson.

51. *Id.* at 427.

52. *Ibid.*

53. Professor William W. Crosskey of the University of Chicago Law School says the reason for this was that on the same day the judiciary provisions were extended, meeting "Dickinson's complaint completely." 1958 Senate Hearings 236. Overlooked by the Professor, perhaps, is the fact that Dickinson's state, Delaware, and very likely Dickinson himself, voted against the extension. 2 Farrand 428.

54. *Id.* at 473, 481. The members were Abraham Baldwin of Georgia, David Brearley of New Jersey, Pierce Butler of South Carolina, Daniel M. Carroll of Maryland, John Dickinson of Delaware, Nicholas Gilman of New Hampshire, Rufus King of Massachusetts, James Madison of Virginia, Gouverneur Morris of Pennsylvania, Roger Sherman of Connecticut, and Hugh Williamson of North Carolina. New York was unrepresented.

chairman, David Brearley, a partial report which recommended the choice of the President by an electoral college and suggested, for the first time in the Convention, an office of Vice-President:

[I]n case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office, *the Vice-President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.*⁵⁵

Thus, a Senate-elected President of the Senate was removed from the succession provision. Committeeman Roger Sherman of Connecticut commented that the office of Vice-President was introduced in order to make the Executive independent of Congress.⁵⁶

During the sessions of September 5, 6 and 7, the delegates discussed the report. The questions of succession and the office of the Vice-President were not reached until September 7. That session opened with a motion by Edmund Randolph of Virginia to add the following clause to the report:

"The Legislature may declare by law what officer of the U.S.—shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly *until the time of electing a President shall arrive.*"⁵⁷

James Madison of Virginia objected to the italicized part on the ground that it would prevent the filling of a vacancy by a special election. Accordingly, he moved to substitute the words "until such disability be removed, or a President shall be elected." His motion prevailed by a vote of six to four.⁵⁸ The delegates then addressed themselves to the Vice-President's position as President of the Senate and its relation to the principle of separation of powers.

Elbridge Gerry of Massachusetts declared: "We might as well put the President himself at the head of the Legislature. The close intimacy that

55. *Id.* at 493, 495. (Emphasis added.) Until then, the President of the Senate, who would be chosen from the Senate, was regarded as the immediate successor. The sole exception was Hamilton's Plan, which provided for a Vice-President. See note 47 *supra*. James McHenry of Maryland recorded in his notes for September 4 that there was "no provision . . . for a new election in case of the death or removal of the President." *Id.* at 504. He apparently misunderstood the significance of the words "until another President be chosen," as they would permit a special election. See text accompanying note 57 *infra*.

56. *Id.* at 499.

57. *Id.* at 535. (Emphasis added.)

58. *Ibid.* For: Georgia, Maryland, New Jersey, Pennsylvania, South Carolina, and Virginia. Against: Connecticut, Delaware, Massachusetts and North Carolina. Divided: New Hampshire.

must subsist between the President & vice-president makes it absolutely improper."⁵⁹ Gouverneur Morris of Pennsylvania observed that

the vice-President then will be the first heir apparent that ever loved his father—If there should be no vice president, the President of the Senate would be *temporary successor*, which would amount to the same thing.⁶⁰

In addition, Roger Sherman argued that

if the vice-President were not to be President of the Senate, he would be without employment, and some member by being made President must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom.⁶¹

Edmund Randolph concurred in opposition to the clause providing for Vice-President.⁶² Hugh Williamson said that "such an officer as Vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time."⁶³ The question of succession was not further considered.

On the next day, a committee was formed "to revise the style of and arrange the articles agreed to by the House."⁶⁴ This Committee of Style was given no power to effect substantive changes in the matters submitted to it.⁶⁵

On September 12, the committee returned a draft to the Convention which, except for a few changes, was to become the Constitution of the United States.⁶⁶ When the draft submitted to the committee is compared with the draft returned to the Convention, it becomes evident that some confusing changes were made in the provisions relating to presidential succession. These provisions are compared below.

*As Submitted.*⁶⁷

*As Returned.*⁶⁸

Sec. 2: [I]n case of his removal as aforesaid, death, *absence*, resignation or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties

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

59. Id. at 536-37.

60. Id. at 537. (Emphasis added.)

61. Ibid.

62. Ibid.

63. Ibid.

64. Id. at 547, 553.

65. It is interesting to note that all its members were lawyers—Alexander Hamilton, William S. Johnson, Rufus King, James Madison and Gouverneur Morris. Id. at 547, 554.

66. Id. at 590-603.

67. Id. at 575, 573. (Emphasis added.) The submitted provisions, it is to be noted, were separated from each other.

68. Id. at 598-99. (Emphasis added.)

until another President be chosen, or until the inability of the President be removed.

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

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 the period for chusing another president arrive.*

Thus, in the process of "revising the style" and "arranging" two separately positioned clauses were joined and the following changes were made: (1) the term "inability" was substituted for "disability" and the "absence" contingency was dropped;⁶⁹ (2) the words "the same shall devolve on the vice-president" were substituted for "the Vice-President shall exercise those powers and duties"; (3) the clauses "until such disability be removed, or a President shall be elected," which had appeared, in substance, after both the Vice-President and "other successor" clauses, now appeared only after the latter as "until . . . the period for chusing another president arrive."

The substitution of the words, "until . . . the period for chusing another president arrive" for those which had been agreed upon, namely, "until . . . a President shall be elected," was probably the result of an oversight on the part of the committee. Thus, on September 15,⁷⁰ the words that had been agreed to on September 7, permitting a special election, were reinserted and those that had been wrongly substituted were deleted.

As a result of the committee's changes, the meaning of the succession clause to later generations was rendered uncertain. Did "the Same" refer to the office? And was there any limitation on the tenure of the Vice-President in cases of inability? Grammatically, the changes can be harmonized with what had appeared in the prior drafts. "[T]he Same shall devolve on the vice-president" is a clause the subject of which is the pronoun "same," whose antecedent is the object of the verb "dis-

69. It is the author's opinion that "absence" was dropped because the Committee felt that such was included within "inability" and that "inability" was intended to apply to inability, whether temporary or permanent, and due to any cause. Samuel Johnson defined "inability" as "impuissance; impotence; want of power" and "disability" as "want of power to do anything; weakness; impotence; want of proper qualifications for any purpose; legal impediment." Johnson, *A Dictionary of the English Language* (7th ed. 1783). "Disability" can be considered more restrictive in the number of situations covered by it. The framers of the Constitution, however, appear to have used the terms interchangeably. See note 196 *infra* for constitutions with an "absence" contingency.

70. 2 Farrand 626.

charge," *i.e.*, "powers and duties of the said office," not "office," which is the object of the preposition "of." Further, the words of limitation, "until the disability be removed," can apply not only to an officer appointed by Congress, but to the Vice-President as well, since the limitation is separated from the first part of the sentence, not by a semi-colon, but merely by a comma.⁷¹ Grammatical hair-splitting of this sort is, however, not necessary for an understanding of the succession provision.⁷² Clarity of meaning is provided not so much by a study of the grammar involved as by a study of the intention of the framers.

There is no doubt that the delegates envisioned a temporary Acting President in presidential-inability situations, as in cases of death, resignation or removal. They intended the Vice-President to discharge the powers and duties of the office until the inability was removed or another President was elected, allowing for a special election. All the drafts before the Committees of Detail and Style were explicit in this regard. Moreover, Madison, Hamilton and King were members of the Committee of Style and were particularly notable for their advocacy of a strong, independent President. They would not have accepted a proposal under which the Vice-President would succeed to the Presidency until the end of the term, particularly in "inability" situations. It is clear that when the Constitution left the Convention on September 17, the delegates accepted "the same" as referring to "Powers and Duties" and the words limiting tenure, *i.e.*, "until the disability be removed, or a President shall be elected," as applicable to all successors, including the Vice-President.

C. Other Evidence

Some support for this conclusion is to be found in the deliberations of some of the state ratifying conventions.⁷³ At times, the Vice-President

71. Some versions of the Constitution show vital semicolons. E.g., 1 Annals of Congress xi (1789). However, the Constitution, as on file in the National Archives in Washington, D.C., and all official versions thereof (1 U.S.C. xvii (1958)), do not have semicolons. With semicolons, there obviously would be a good argument that the Constitution places no limitation on the tenure of the Vice-President but only on the tenure of officers appointed by Congress.

72. Other ponderables exist: In 1787, "devolve" was defined as "to fall in succession into new hands" and "office" as "employment." Johnson, *op. cit. supra* note 69. Does one not enter an office? Do not powers and duties fall? Professor Williams, however, says that "it is a cliché of modern political science that 'an office passes, powers and duties devolve. . .'" Williams, *op. cit. supra* note 18, at 53. Another ponderable exists: If the Vice-President permanently replaces the President, what happens in a situation where the Vice-President becomes disabled after the President and the President is the first to recover. Does the officer appointed by Congress continue to act? Such a result was never intended.

73. See Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (1876 ed.) (hereinafter cited as Elliot). See generally, Bates, Rhode

was referred to as "Acting President."⁷⁴ One delegate to the North Carolina ratifying convention, however, remarked that "on the removal of the President from office, it devolves on the Vice-President."⁷⁵ Another delegate, in the Massachusetts Convention, referred to the Vice-President when "acting as President" and then, curiously, stated that he takes the presidential oath before entering the office of President.⁷⁶

In contrast, a proposed amendment at the New York Convention spoke of "the President of the United States, or the person holding his place for the time being . . ."⁷⁷

The Federalist No. 68 contained this interesting language:

[T]he vice-president *may occasionally become a substitute* for the president, in the supreme executive magistracy. . . . We [New York] have a lieutenant-governor, chosen by the people at large, who presides in the senate, and is the constitutional substitute for the governor in casualties similar to those, which would authorize the vice-president to exercise the authorities, and *discharge the duties of the president.*⁷⁸

Island and the Formation of the Union (1898); Grigsby, *The History of the Virginia Federal Convention of 1788* (1890-1891); Harding, *The Contest Over the Ratification of the Federal Constitution in the State of Massachusetts* (1896); Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution, 1787-1788* (1894); McMaster & Stone, *Pennsylvania and the Federal Constitution, 1787-1788* (1888); Miner, *The Ratification of the Federal Constitution by the State of New York* (1921); Trenholme, *The Ratification of the Federal Constitution in North Carolina* (1932); Walker, *A History of the New Hampshire Convention for the Investigation, Discussion and Decision of the Federal Constitution* (1888).

74. 2 Elliot at 85.

75. 4 Elliot at 44.

76. 2 Elliot at 85.

77. 2 Elliot at 408.

78. The Federalist No. 68, at 350-51 (Beloff ed. 1948) (Hamilton). (Emphasis added.) See Warren, *The Making of the Constitution* 635 (1937 ed.), where the author says: "It is singular that there was no discussion as to the chief part which the Vice President has, in fact, played in history, that is, to his succession in case of the death of the President." Professor Warren says that it was probably contemplated that the Vice-President would merely perform until a new election. *Ibid.* Compare Curtis, 1 *Constitutional History of the United States* 568-69 (1889 ed.) (suggests that office devolves), with Story, *Commentaries on the Constitution of the United States* 527-28 (1833 ed.) (speaks of Vice-President as succeeding to office if vacancy). For views of other textbook writers, see Corwin, *The Constitution and What It Means Today* 96-97 (1954) (powers and duties devolve; temporarily, in cases of inability); Corwin & Peltason, *Understanding the Constitution* 45 (1949) (powers and duties devolve); Guitteau, *Government and Politics in the United States* 292 (1911) (office devolves in all cases); Long, *Genesis of the Constitution of the United States of America* 186-87 (1926) (succeeds to office in cases of vacancy); Mathews, *The American Constitutional System* 137 (1940 ed.) (an Acting President was intended); Magruder & Claire, *The Constitution* 154-55 (1933) (duties devolve; authors doubt the idea of permanent succession in cases of inability); Munro, *The Constitution of the United States* 79 (1930) (framers intended powers and duties to devolve); Norton, *The Constitution of the United States; Its Sources and Its Application*

Other parts of the Constitution are also revealing. Article I, section 3, clause 5, provides that the Senate shall choose a President pro tempore "in the Absence of the Vice President, or when he *shall exercise the office of President of the United States.*"⁷⁹ The twelfth amendment, effective in 1804 at a time before any problems had arisen, provides that if the House of Representatives does not elect a President by March 4, "then the Vice-President shall *act as President*, as in the case of the death or other constitutional disability of the President."⁸⁰ These parts indicate early understanding of the effect of the succession clause. The twentieth and twenty-second amendments, however, passed at a time when the Tyler precedent was well established, may be viewed as giving recognition to the precedent. The twentieth amendment provides that if the President-elect dies before the time fixed for his term to begin, the Vice-President-elect shall *become President*, but if the President-elect fails to qualify, the Vice-President *acts* as President until he qualifies. The twenty-second amendment refers to a person "who may be *holding the office of President* when this Article was proposed. . . ."⁸¹

The state constitutions which came into existence shortly after the United States Constitution, furnish additional evidence that succession to

108 (1922 ed.) (Constitution clearly says that Vice-President to discharge duties of office); Ogg & Ray, *Essentials of American Government* 160-61 (1932 ed.), where the authors speak of duties devolving as well as of the Vice-President assuming the Presidency, and imply that the President would not be permanently replaced in cases of inability; Patterson, *American Government* 243-44 (1929) (says that upon succession, the Vice-President becomes "President, exercising powers of the President temporarily"); Sheppard, *The Constitutional Text-Book* 169-70 (1855) (duties devolve; temporarily, in cases of inability); Silva, *Presidential Succession* 13 (1951) (powers and duties devolve; temporarily, in cases of inability); Thach, *The Creation of the Presidency, 1775-1789*, at 133 (1922) (succeeds to Presidency when there is a vacancy); Young, *The New American Government and Its Work* 89 (1925) (succeeds "the President in case of the latter's disability or death").

79. (Emphasis added.) At the time of the Convention, "exercise meant to practice; to perform." Johnson, *op. cit. supra* note 69. It still does. Webster's *New International Dictionary of the English Language* 892 (2d ed. 1957).

80. Notwithstanding the use of the word "act," a few members of the Eighth Congress regarded any succession by the Vice-President as being for the rest of the President's term. Silva, *op. cit. supra* note 78, at 35-37 & n.97. Such a view is not concerned with whether it is the office or powers and duties that devolve because, in either case, the argument goes, succession is for the rest of the term.

81. The twentieth amendment is the only place where the Constitution states that a Vice-President "becomes" President—and that is on the occurrence of one specific contingency. The twenty-second amendment was proposed in 1947, at a time when Truman was President, due to the death of President Roosevelt. As a result, it has been argued that the Constitution, by the use of the words "holding the office," now recognizes succession to the office. Williams, *The American Vice-Presidency: New Look* 55 (1954). But see Kan. Const. art. I, §§ 13-14, and Mont. Const. art. VII, §§ 14-15, where the expression "holding the office" means nothing more than exercising the powers and duties of the office.

the office was not what was intended by the Founding Fathers. Almost all of the state constitutions written between 1788 and 1841 provided that the successor to the Governor was to exercise the office or its powers and duties for a limited tenure.⁸² In cases of death, resignation or removal, he was to act as Governor until another Governor assumed the office; in cases of absence or impeachment, he was to act until the Governor returned or was acquitted. Inability as a contingency was generally absent from these constitutions.⁸³ However, the principle of a temporary successor was well established and undoubtedly would have been applied to cases of inability as well.

II. HISTORY OF PRESIDENTIAL INABILITY

A. Tyler

The death of President William Henry Harrison, just thirty days after his inauguration, gave rise to a precedent that has, in effect, assumed the force of law. Immediately following his death on April 4, 1841, Vice-President John Tyler, a Virginia Democrat who had split with his party and had run with Harrison on the Whig ticket, journeyed to Washington where, on April 6, he took the presidential oath of office before Chief Judge William Cranch of the Circuit Court for the District of Columbia.⁸⁴ He became the tenth President of the United States, the first Vice-

82. See, e.g., Ala. Const. art. IV, § 18 (1819) (1 Poore 39); Ark. Const. art. V, § 18 (1836) (1 Poore 110); Conn. Const. art. IV, § 14 (1818) (1 Poore 262); Fla. Const. art. III, § 18 (1838) (1 Poore 320); Ga. Const. art. II, § 4 (1789) (1 Poore 385); (cf. Ill. Const. art. III, § 18 (1818) (1 Poore 443)); Ind Const. art. IV, § 17 (1816) (1 Poore 504-05); Ky. Const. art. II, § 15 (1792) (1 Poore 650); La. Const. art. III, § 17 (1812) (1 Poore 704); Me. Const. art. V, § 14 (1820) (1 Poore 795); Mich. Const. art. V, § 13 (1835) (1 Poore 987); Miss. Const. art. IV, § 20 (1817) (2 Poore 1061); Mo. Const. art. IV, § 16 (1820) (2 Poore 1110); N.H. Const. § 49 (1792) (2 Poore 1302); N.Y. Const. art. III, § 6 (1821) (2 Poore 1344); Ohio Const. art. II, § 12 (1802) (2 Poore 1458); Pa. Const. art. II, § 14 (1790) (2 Poore 1551); Tenn. Const. art. II, § 12 (1796) (2 Poore 1670); Vt. Const. § 11 (1793) (2 Poore 1878); Va. Const. art. IV, § 5 (1830) (2 Poore 1918). S.C. Const. art. II, § 5 (1790) (2 Poore 1631), however, provided for succession to the office of governor.

83. Interestingly, the Delaware Constitution of 1792, providing for the "exercise [of] the office" in cases of inability, declared that no Governor could be removed from office on account of inability without a two-thirds vote of all members of the legislature. Del. Const. art. III, § 14 (1792) (1 Poore 282); same, Del. Const. art. III, § 14 (1831) (1 Poore 293).

84. Tyler wanted to have Mr. Chief Justice Roger B. Taney administer the oath, but Taney was in Maryland at the time and it is said that he refused to attend without a formal request. See Silva, *op. cit. supra* note 78, at 16-17. It is also said that Tyler took the oath of office because he regarded himself, without it, as merely an Acting President. Corwin, *The President, Office and Powers, 1787-1957*, at 54 (1957); Warren, *op. cit. supra* note 78, at 636 & n.2. Others say that Tyler, certain of his status as President, took the oath in order to remove any doubt that might arise in the future. Fraser, *Democracy in the Making*

President to succeed to the title and authority of the Presidency.⁸⁵

Tyler's ascendancy to the office of President, and not merely to its powers and duties, was not without opposition. Protests were echoed by several newspapers of the day.⁸⁶ Some leaders of the Whig party regarded him as an "Acting President," but Harrison's Cabinet appears to have accepted him as President.⁸⁷ It is interesting to note, however, that when the Cabinet notified him of Harrison's death, he was addressed as Vice-President.⁸⁸ Daniel Webster, then Secretary of State, is said to have been of the view that the powers and duties were inseparable from the office and that any succession by a Vice-President was to the *office* for the remainder of the term.⁸⁹ John Quincy Adams, sixth President of the United States, then a member of the House of Representatives, held a different opinion. His diary of April 16, 1841, contained this notation:

158, 160 (1938) (The Jackson-Tyler Era); Williams, *op. cit. supra* note 81, at 52 & n.36. The oath of office clause (U.S. Const. art. II, § 1, cl. 8) has obvious reference to the elected President. The words "he" and "his" make this clear. The Vice-President, who takes the same oath as other public officials (see 15 Stat. 85 (1858), 5 U.S.C. § 16 (1958)), should not have any greater authority by virtue of taking the presidential oath. Whatever devolves on the Vice-President does so independently of the oath. The oath taken by the Vice-President provides, in part, as follows: "I will well and faithfully discharge the duties of the office on which I am about to enter." Succession is one of those duties. In any event, the precedent of the Vice-President taking the presidential oath in cases of death is now well established. See Horwill, *The Usages of the American Constitution* 70-71 (1925).

It is also to be noted that Tyler gave an inaugural address on April 9. 4 Richardson, *Messages and Papers of the Presidents, 1789-1897*, at 36-39 (1898). See Binkley, *The Man in the White House* 268-71 (1959).

85. In his diary of April 4, 1841, John Quincy Adams reported that the Constitution "makes the Vice-President of the United States, John Tyler, of Virginia, Acting President of the Union for four years less one month." 10 Adams, *Memoirs of John Quincy Adams* 456 (1876).

86. See Silva, *op. cit. supra* note 78, at 18-20.

87. The Cabinet consisted of George E. Badger, Secretary of Navy; John Bell, Secretary of War; Thomas Ewing, Secretary of Treasury; John J. Crittenden, Attorney General; Francis Granger, Postmaster General; and Daniel Webster, Secretary of State. After taking the presidential oath in a Washington, D.C. hotel, Tyler held his first Cabinet meeting. Fraser, *op. cit. supra* note 84, at 159. Daniel Webster is said to have suggested at the meeting that all Cabinet matters be subject to a majority vote, whereupon Tyler said he would have the ultimate say in all matters. *Ibid.* By September 11, 1841, the whole Cabinet, with the exception of Daniel Webster, had resigned due to differences of opinion over Tyler's banking policies. Webster stayed for two years in order to conclude the Webster-Ashburton Treaty defining the disputed boundary between Maine and Canada. See Miller, *Treaties and Other International Acts of the United States of America* 363 (U.S. Gov't Printing Office, 1934).

88. Fraser, *op. cit. supra* note 84, at 151. Tyler's son viewed this as a mere oversight. 2 Tyler, Lyon, *Letters and Times of the Tylers* 72 (1885).

89. See Silva, *op. cit. supra* note 78, at 15-16 & n.8. See 13 Cong. Rec. 122 (1831) (remarks of Senator Charles W. Jones of Florida).

But it [Tyler's assumption of the title and office of the Presidency] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.⁹⁰

When the Special Session of the Twenty-Seventh Congress met on May 31, 1841, some of its members took strong exception to Tyler's assumption of the presidential office. On that day, Henry A. Wise of Virginia introduced a resolution in the House of Representatives calling for the formation of a committee "to wait on the President of the United States. . . ."⁹¹ Representative John McKeon of New York immediately moved to strike the word "President" and insert "Vice-President, now exercising the office of President." He argued that "a grave constitutional question" was presented, which should be set "at rest for all future time."⁹² The House rejected his suggestion and passed the Wise resolution intact, forwarding it to the Senate, which discussed it the next day.

There, Senator William Allen of Ohio strongly urged that Tyler be addressed as "the Vice President, on whom by the death of the late President, the powers and duties of the office of President have devolved."⁹³ Senator David Tappan of the same state agreed, saying that under the Constitution a person could become President only through the elective route and not by succession. Senator Robert J. Walker of Mississippi disagreed. In his opinion, the Constitution provided for two separate contingencies. He stated that the Vice-President succeeds to the office because the Constitution was explicit that an officer appointed by Congress *acts* as President where both President and Vice-President are immobilized but not so where a Vice-President takes over for an immobilized President. "This is the language and the meaning of the Constitution," he said. "Can there be any doubt on the subject?"⁹⁴ Senator Allen thought there was. He hypothesized a case of temporary disability, more easily conceived of by the Founding Fathers than death, he said, where a disabled President recovered to find the Vice-President in his office.

The question would then arise, which of the two officers should continue in the chair. . . . Was it [the office] to *vibrate* [assuming a struggle for power] between the two claimants? In what manner could a President of the United States—unimpeached, sane, and alive—cease to be President? There was none known to the Constitution. None.⁹⁵

90. 10 Adams, *op. cit. supra* note 85, at 463-64.

91. Cong. Globe, 27th Cong., 1st Sess., 3 (1841).

92. *Id.* at 3-4. Representative Wise remarked that Tyler would claim a right to the title and office, so that Congress should address him accordingly.

93. *Id.* at 4.

94. *Id.* at 5.

95. *Ibid.*

Senator John C. Calhoun of South Carolina regarded the discussion as being irrelevant since there was a permanent vacancy in the presidential office. The House resolution passed the Senate, without change, by a vote of thirty-eight to eight, and the Tyler precedent became firmly established in our history.

B. *Garfield*

On July 2, 1881, President James A. Garfield was preparing to leave Washington to attend a class reunion at Williams College when he was shot by Charles T. Guiteau, a disappointed office seeker, who exclaimed, "I am a Stalwart and Arthur is President now!"⁹⁶ President Garfield was rendered unconscious, and hovered between life and death. Vice-President Chester A. Arthur was notified that he should be ready to take the oath of office "at any minute."⁹⁷ He, and the Nation, were kept posted by the doctors as to Garfield's condition. For the next eighty days, Garfield lay near death, although he was conscious for a good part of the time. He was clearly unable to discharge the powers and duties of the Presidency,⁹⁸ and "the Federal Administration simply drifted."⁹⁹ During the disability his only governmental act was that of signing an extradition paper.¹⁰⁰

Several weeks after the shooting the Cabinet met and unanimously agreed that Vice-President Arthur should assume the responsibilities of the Presidency. A majority of the Cabinet, however, including Attorney General Wayne MacVeagh, held the view that Arthur's succession would be to the Presidency and that Garfield would be unable to regain his office should he recover.¹⁰¹ Others held the same view. Abram J. Dittenhoeffer, a noted lawyer of the day, declared:

I start with this conclusion:—That whenever the Vice President gets lawfully into the Presidency the President gets lawfully out of it. There cannot be two lawful

96. Lossing, *A Biography of James A. Garfield* 627-31 (1882), where the author discusses the complexion of the Republican Party at the time. See Clancy, *The Presidential Election of 1880*, at 262-67 (1958).

97. 2 Smith, *The Life and Letters of James Abram Garfield* 1179 (1925).

98. For good accounts of the period, see Binkley, *op. cit. supra* note 84, at 279-80; Bundy, *The Life of James Abram Garfield* 233-47 (1880); Lossing, *op. cit. supra* note 96, at 628-65, 765-89; Ogilvie, *History of the Attempted Assassination of James A. Garfield* 29-99 (1881); Smith, *op. cit. supra* note 97, at 1179-1207; Silva, *op. cit. supra* note 78, at 52-57.

99. Howe, *Chester A. Arthur, A Quarter-Century of Machine Politics* 152 (1957 ed.). The author says there were many public matters that required the President's attention. One such matter was post office swindles. *Id.* at 153.

100. *Id.* at 152. During the eighty days, Secretary of State James G. Blaine displayed some initiative, but he was criticized for it.

101. Brownell, *Presidential Disability: The Need for a Constitutional Amendment*, 68 *Yale L.J.* 189, 193 (1958).

Presidents at the same time. . . . Mark, no limit to the time for which these powers and duties "shall devolve" is fixed. It is just as absolute and limitless as if the language were:—"In case of the removal of the President from office, or of his death, or resignation or inability to discharge the powers and duties of said office, the Vice President shall become President." . . . And when the President gets lawfully out there is no way in which he can get in again.¹⁰²

Vice-President Arthur, who was from a different faction of the Republican Party, refused to act. He feared being labeled a usurper and, quite possibly, killing Garfield.¹⁰³ The former fear was justified because the people, having been kept up-to-date on Garfield's condition throughout the summer months, were, so to speak, in Garfield's corner. As one biographer of Garfield has said, "It may be doubted if at any time in the history of the United States the human sympathies of the people had been worked up to such a pitch of intensity."¹⁰⁴

Garfield's losing fight against death ended on the evening of September 19, 1881. Arthur was informed of the death and took the presidential oath of office before Justice John R. Brady of the New York Supreme Court on September 20 at approximately 2:00 A.M. So that there would be a federal record of it, he repeated the ceremony in Washington on September 22 before Mr. Chief Justice Morrison R. Waite of the United States Supreme Court.¹⁰⁵ Thus, Arthur became the twenty-first President of the United States, the fourth by succession.

Due largely to his own experiences, Arthur expressed deep concern over the question of presidential inability in his messages to Congress in 1881, 1882, and again in 1883.¹⁰⁶ His message of December 6, 1881, contains as clear a statement of the problems involved as can be found anywhere:

Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import? What must be its extent and duration? How must its existence be established? Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability, and how and by what tribunal or authority it should be ascertained? If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office? Does he continue as President for the remainder of the four years'

102. N.Y. Herald, Sept. 13, 1881, p.5, cols. 1-2.

103. See Howe, *op. cit. supra* note 99, at 151-52. The author states that Postmaster General Thomas L. James asked Arthur whether he would assume presidential power, but he declined to do so. *Id.* at 153.

104. Smith, *op. cit. supra* note 97, at 1201.

105. Howe, *op. cit. supra* note 99, at 155.

106. 8 Richardson, *op. cit. supra* note 84, at 65, 147-48, 187.

term? Or would the elected President, if his inability should cease in the interval, be empowered to resume his office? And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?¹⁰⁷

Garfield's death generated a great deal of discussion of the inability problem. The November 1881 issue of the *North American Review* carried a series of articles by four outstanding constitutional authorities. In the symposium, Senator Lyman Trumbull of Illinois,¹⁰⁸ Governor Benjamin F. Butler of Massachusetts¹⁰⁹ and Judge Thomas M. Cooley of the Michigan Supreme Court¹¹⁰ expressed the opinion that a Vice-President merely "acts" as President for the period of inability. Professor Theodore W. Dwight of Columbia College¹¹¹ differed, subscribing to the view that succession by the Vice-President was for the remainder of the presidential term.

Similarly, there was discussion in the Forty-Seventh Congress. Senator Charles W. Jones of Florida forcibly argued, as had Senator Robert J. Walker of Mississippi in the Twenty-Seventh, that succession was to the office.¹¹² He said that the framers of the Constitution had deliberately substituted the word "devolve" for "exercise" and had intended the clause "until another President be elected" as a limitation on the tenure of an officer appointed by Congress but not on the Vice-President, who was elected for a four-year term.¹¹³

General interest and discussion ebbed and the problem was left unsolved. It was to plague the Nation again during the Wilson administration.

C. *Wilson*

On September 3, 1919, President Woodrow Wilson left Washington to begin a speaking tour of the country in order to gain public support for the participation of the United States in the League of Nations. Shortly after a speech in Pueblo, Colorado, on September 25, the fatigued

107. *Id.* at 65.

108. Symposium—Presidential Inability, 133 *No. Am. Rev.* 418-21 (1881). Senator Trumbull believed that the Vice-President should act only when the "urgencies" of the situation required it. The occasion would be characterized by the demand of the people that he act. He said that inability applied to both physical and mental causes.

109. *Id.* at 434. The Vice-President, said General Butler, is the sole judge as to when his duties begin and as to how they are to be exercised. *Id.* at 433.

110. *Id.* at 422-24. Judge Cooley, however, believed that the Vice-President became President where there was a complete vacancy.

111. *Id.* at 442-43. "Inability," according to Professor Dwight, means strict intellectual incapacity, which should be established by forms of law prescribed by Congress.

112. 13 *Cong. Rec.* 124, 142-43, 191-93 (1882).

113. *Ibid.*

President fell ill and had to cancel his tour and return to Washington. On October 2 he suffered a stroke which paralyzed the left side of his body. From then until March 4, 1921, when William G. Harding was sworn in as twenty-ninth President, the Nation was without a real leader.¹¹⁴ This was clearly reflected in the Senate's rejection of American participation in the League. It is generally believed that, had Wilson been able to function as President, our participation would have become a reality.

In the months following his stroke, the President was shielded by Mrs. Wilson and Admiral Cary T. Grayson, his lifelong friend and physician, to the extent that practically no one was permitted to see him.¹¹⁵ The Vice-President, Congress, the Cabinet and the people were left "in the dark" as to his true condition. As a result, rumors constantly circulated that the President was either insane or dead.¹¹⁶ On one occasion Senator Albert B. Fall of New Mexico, who doubted the President's sanity, and Senator Gilbert Hitchcock of Nebraska, both of the Senate Foreign Relations Committee, were permitted to see the President. William Allen White, in his biography of Wilson, describes the meeting as follows: "[T]hey had from Wilson thirty minutes of the gayest, blithest, sanest talk they had heard in months."¹¹⁷ The President, however, was seldom capable of such vitality.

114. For good accounts of Wilson's illness, see Binkley, *op. cit. supra* note 84, at 281-83; Daniels, *The Life of Woodrow Wilson, 1856-1924*, at 338-43 (1924); Hatch, Edith Bolling Wilson, *First Lady Extraordinary* 204-34 (1961); Hoover, *The Ordeal of Woodrow Wilson* 271-78 (1958); 2 Houston, *Eight Years With Wilson's Cabinet, 1913 to 1920*, at 36-59 (1926); S. McKinley, *Woodrow Wilson* 266-78 (1957); Silva, *op. cit. supra* note 98, at 57-57; Tumulty, *Woodrow Wilson As I Know Him* 434-56 (1921); Viereck, *The Strangest Friendship in History; Woodrow Wilson and Colonel House* 293-303 (1932); W. White, *Woodrow Wilson, the Man, His Times and His Task* 447-60 (1929).

115. See Hoover, *op. cit. supra* note 114, at 271-72; Houston, *op. cit. supra* note 114, at 36-59; Lawrence, *The True Story of Woodrow Wilson* 290 (1924); Tumulty, *op. cit. supra* note 114, at 437-38. See generally, Viereck, *op. cit. supra* note 114, at 304-18 ("The Inaccessible President").

116. See generally Viereck, *op. cit. supra* note 114, at 301, 305-06. In his recent book, *Mr. Wilson's War* (1962), John Dos Passos says at 492: "A few days after the President's stroke, Lansing, profoundly disturbed, seeks out Tumulty in the cabinet room. In default of any real information the wildest rumors are current in Washington. The President is dead. He has lost his mind and is confined in a straightjacket." Viereck, *supra* at 301, says: "It was whispered in the Senate cloakroom that the President was insane. Behind the bars the Senators pictured a raving maniac. No member of the Cabinet, not even the Secretary of State, was permitted to approach the sick man's bedside. Even Tumulty was compelled to wait in the anteroom." So it went. There was also talk of Secretary of State Lansing's acting as President. See Koenig, *The Invisible Presidency* 245-47 (1960) (Colonel House was opposed to Lansing's so acting).

117. White, *op. cit. supra* note 114, at 451.

While Wilson lay ill, unable to discharge the powers and duties of his office, many insisted that Vice-President Thomas R. Marshall assume them.¹¹⁸ For fear he would oust the President if he did, Marshall, like Arthur before him, declined to act.¹¹⁹ Some twenty-eight bills became law by default of any action by the President.¹²⁰ Few public matters reached him and the people seldom saw him for the remainder of the term. Mrs. Wilson, Dr. Grayson and other members of the White House Staff were said to be administering executive affairs. History appears to corroborate this opinion.¹²¹ In her *Memoir*, Mrs. Edith Wilson says she made no decision except as to what matters should go to the President.¹²² But was not this administration of presidential affairs?

Wilson did not call a meeting of the Cabinet until April 13, 1920.¹²³ In the interim the Cabinet met unofficially, largely under the direction of Secretary of State Robert Lansing.¹²⁴ Furious that these meetings were taking place, Wilson forced Lansing to resign.¹²⁵ "[T]he President's

118. See Viereck, *op. cit. supra* note 114, at 308-10, for a good account of the opinions that something should be done. See the interesting description of the situation given by Dos Passos, *op. cit. supra* note 116, at 492-93.

119. Vice-President Marshall was not unaware of the constitutional problems involved, for during the fall of 1918 it was suggested that he act as President during Wilson's absence from the United States. He refused to do so, largely because of the constitutional problems. He said that he was not sure as to what he would do in the event of a congressional resolution that he act. He said he would act if a court of proper jurisdiction so decreed. Swisher, *American Constitutional Development* 666-67 (1943). Former President Taft held the view that the Constitution provided for an Acting President where the "public exigency" required it. 57 Cong. Rec. 119-20 (1918).

120. For the details see 1958 Senate Hearings 234-35 (statement of Professor Lindsay Rogers).

121. See 1956, 1957, 1958 Hearings; George & George, *Woodrow Wilson and Colonel House* 290-315 (1956) ("Defeat").

122. E. Wilson, *My Memoir* 289 (1939). Viereck, *op. cit. supra* note 114, at 293, states: "For six and one-half months . . . a woman was virtually President of the United States." See Hatch, *op. cit. supra* note 114, at 219. There is much speculation as to whether Mrs. Wilson wanted her husband to resign. She says that she suggested the possibility to Dr. Francis X. Dercum, Wilson's nerve specialist, and that he rejected it on the ground that it would be bad for the country and the President. Accord, Hatch, *op. cit. supra* note 114, at 222. On the other hand, two authors say that the President and Mrs. Wilson rejected any thought of resignation. S. McKinley, *op. cit. supra* note 114, at 269; Viereck, *op. cit. supra* note 114, at 322.

123. The meeting is poignantly described in Houston, *op. cit. supra* note 114, at 70.

124. The first meeting was held on October 6, 1919. Houston, *op. cit. supra* note 114, at 36-59. Most authorities speak of twenty-one such meetings. See Brownell, *supra* note 101, at 195; Silva, *op. cit. supra* note 94, at 60. One author speaks of more than twenty-five. Viereck, *op. cit. supra* note 114, at 316.

125. Hoover, *op. cit. supra* note 114, at 275-76. Former President Herbert Hoover says that Wilson's distrust of Lansing existed even before the illness. *Id.* at 276.

action was that of a very sick man."¹²⁶ The actual cause of the discharge appears to have been a suspicion that Lansing was plotting to oust Wilson. Patrick Tumulty, Wilson's secretary, reported that Lansing had suggested that Vice-President Marshall act as President, to which Tumulty answered: "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."¹²⁷ Wilson is reported to have said to Tumulty upon the discharge of Lansing: "Tumulty, it is never the wrong time to spike disloyalty. When Lansing sought to oust me, I was upon my back. I am on my feet now and I will not have disloyalty about me."¹²⁸

The aftermath of Wilson's inability saw a renewed discussion of the problem. Then discussion fell into a lull until September of 1955.

D. Eisenhower

On September 24, 1955, while vacationing in Denver, Colorado, President Dwight D. Eisenhower suffered a heart attack and the nation once again was confronted with the problem of presidential inability.¹²⁹

On the advice of General Howard Snyder, his physician, President Eisenhower was removed to Fitzsimons General Hospital near Denver, shortly after noon. Several hours later the country was informed that the President had suffered a "mild coronary thrombosis." "Mild" was later changed to "moderate."¹³⁰ Paul Dudley White, a noted heart specialist

126. *Ibid.*

127. Tumulty, *op. cit.* supra note 114, at 444.

128. *Id.* at 445.

129. The best accounts of the period are to be found in S. Adams, *Firsthand Report: The Story of the Eisenhower Administration 180-201* (1961); Donovan, *Eisenhower: The Inside Story 362-85* (1956); Nixon, *Six Crises 131-81* (1962). See also Childs, *Eisenhower: Captive Hero 217-25* (1958); Rovere, *The Eisenhower Years 319-328* (1956).

130. The sequence of events surrounding the heart attack, drawn largely from the September 25, 26 and 27 issues of the *New York Times*, 1955, provides interesting background. The first announcement of the President's illness came at 8:00 A.M. (Denver time) September 24. Acting White House Press Secretary Murray Snyder reported that the President had suffered "a digestive upset" during the night." *N.Y. Times*, Sept. 25, 1955, p. 41, col. 2. This was repeated at press conferences at 9:30 A.M. and 12:15 P.M. At the latter conference Murray Snyder said: "I just talked with General Snyder and he tells me that the President is resting. He said that this indigestion is not serious and he says that it is the same type of indigestion that many people have had." *U.S. News & World Rep.*, Oct. 7, 1955, p. 68 ("When Ike's Heart Faltered") (contains excellent summary of the facts).

In the meantime, Maj. Gen. Howard Snyder, the President's personal physician, who had been called to his bedside at about 3:00 A.M. and had remained with him ever since, decided to remove the President to the hospital. The President was driven to the hospital in the early part of the afternoon. Upon arrival, he was placed under oxygen. At about 2:40 P.M., Acting Press Secretary Snyder broke the news, at a hurriedly called press conference, that the President was in the hospital. He stated: "The President has just had

from Boston, was summoned and he reported that the President would be ready for conferences within two weeks. Since the heart attack came at a time when Congress was not in session and since the programs for 1956 were in their early stages and no emergencies existed in the foreign or domestic spheres, the question of Vice-President Richard M. Nixon's assuming executive responsibilities was not seriously considered.¹³¹ Management of the executive branch was left to Sherman Adams, assistant to the President, Vice-President Nixon, Secretary of State John Foster Dulles, Attorney General Herbert Brownell, Jr., Secretary of the Treasury George M. Humphrey, and White House Assistant, General Wilton Persons.¹³² The Cabinet met for the first time on September

a mild coronary thrombosis. He has just been driven to Fitzsimons [Army] General Hospital. He was taken to the hospital in his own car and walked from the house to the car." Ibid. This was repeated, in substance, at 3:05 P.M. At 3:45 P.M. Murray Snyder read the following bulletin: "General Snyder informs me that the President had a mild indigestion yesterday evening. He had the first symptoms of an occlusion, or thrombosis, at 2:45 A.M. Upon completion of his diagnosis, the general decided to move the President to the hospital where he could be given better treatment. The general says the President has been comfortable since the initial pain [and] that the prognosis is good." N.Y. Times, Sept. 25, 1955, p. 41, col. 1. Substantially the same report was made at 8:00 P.M. At about 10:15 P.M. the word "mild" was dropped from the official medical description of the heart attack and the "good" prognosis was dropped from the reports pending the arrival of Dr. Mattingly. U.S. News & World Rep., Oct. 7, 1955, p. 74. Dr. Paul Dudley White arrived in the afternoon of the following day and went into consultation with Drs. Snyder, Mattingly, Pollock, Powell and Griffin. A medical bulletin was issued at 4:12 P.M., stating that the President "has had a moderate attack of coronary thrombosis without complications." N.Y. Times, Sept. 27, 1955, p. 21, col. 3. Dr. White gave the President a thorough examination on Monday, September 26, and reported at a news conference later in the day that the President "has had an average attack." He said that the President would have to have complete rest for about a month. Complications, he said, might well set in during the first two weeks. Only time could tell. Id. at cols. 1-3 (transcript of press conference).

131. The question was of some importance, however, during the first few days after the heart attack. James C. Haggerty, White House Press Secretary, reported on Sunday evening, September 25, that the Attorney General's office had been asked for an opinion "on the legality of delegating President Eisenhower's authority while he is in the hospital unable to handle any official duties." Id. at col. 6. On the following day, a Justice Department spokesman said an opinion would be ready later in the week. Id. at 26, col. 1. See Donovan, *op. cit. supra* note 129, at 369, where the author says that acting Attorney General, William P. Rogers, ordered a study of the problem of delegating non-constitutional functions, on Monday, September 26. Attorney General Herbert Brownell, Jr., who had been on vacation in Spain, returned on Tuesday, September 27, and stated that there were "sufficient legal arrangements to carry on 'the day-to-day operations of the government.'" N.Y. Times, Sept. 28, 1955, p. 1, col. 6. He stated further that "I don't know that it will be necessary to deliver a legal opinion" as requested by the summer White House in Denver." Ibid. No opinion appears to have been delivered.

132. It appears that Nixon, Rogers and Persons met in the evening of September 24 and decided that the Cabinet and the White House Staff should continue the administration

30, and it was then decided that the Government would function under general policy directives previously given by the President.¹³³ On the same day President Eisenhower performed his first official act since his heart attack, that of signing lists of foreign officer appointments.¹³⁴

During Eisenhower's illness the Cabinet met regularly and was presided over by Vice-President Nixon.¹³⁵ The President was kept informed of the meetings and was represented at them in the person of Sherman Adams.¹³⁶ Yet, all "were well aware that a national or international

of the Government. Donovan, *op. cit.* supra note 129, at 368. On the following day, Vice-President Nixon, who was informed of the President's attack before the public, announced that "the President's well-defined policies and Government business would be carried out without delay." *N.Y. Times*, Sept. 27, 1955, p. 26, col. 4. Similar statements were to be echoed by other members of the Cabinet. In order to be consistent with this approach, Secretary of State John Foster Dulles, Secretary of Agriculture Ezra Taft Benson, and Secretary of Commerce Sinclair Weeks left the United States on September 25 for talks in Canada regarding economic and trade matters. On Monday, September 26, Vice-President Nixon announced, after a luncheon conference with Rogers, Adams (who had returned from abroad) and Persons, that the Cabinet would meet on Friday, September 30. *Id.* at 1, col. 7.

133. The Cabinet meeting was preceded by a meeting of the National Security Council, held on September 29. That meeting also was presided over by Vice-President Nixon. (It had been scheduled before the heart attack.) The Cabinet meeting is well described by Donovan, *op. cit.* supra note 129, at 371-75. The following statement (in part) was issued by Murray Snyder after the meeting: "After full discussion of pending matters, it was concluded that there are no obstacles to the orderly and uninterrupted conduct of the foreign and domestic affairs of the nation during the period of rest ordered by the President's physicians. Governor Sherman Adams, the Assistant to the President, will leave for Denver today and will be available there, in consultation with the President's physicians, whenever it may later become appropriate to present any matters to the President. The policies and programs of the administration as determined and approved by the President are well established along definite lines and are well known. Co-ordination of the activities of the several departments of the government within the framework of these policies will be continued by full co-operation among the responsible officers of these departments so that the functions of the government will be carried forward in an effective manner during the absence of the President." *Id.* at 373. Thus Sherman Adams was to take charge in Denver, where James Haggerty had been the liaison previously.

134. Adams, *op. cit.* supra note 129, at 188. During the third and fourth weeks after the heart attack, the President began to have visitors and, shortly thereafter, began to perform official acts. *Id.* at 189.

135. For a brief account of these meetings, see Donovan, *op. cit.* supra note 129, at 378-85.

136. *Ibid.* As would be expected, rumors circulated that Sherman Adams was running the country. See, e.g., *U.S. News & World Rep.*, Oct. 14, 1955, p. 56 ("If It's O.K. With Adams, It's O.K. With Eisenhower"); *id.*, Oct. 7, 1955, p. 26 ("Who's Running the Country Now?"). See also *id.*, Dec. 20, 1957, p. 88 ("What Goes On in White House When the President Is Sick"); *id.*, July 6, 1956, p. 28 ("Stand-In for the President"). See generally Koenig, *The Invisible Presidency* 338-404 (1960).

emergency could have arisen during the President's illness to make this unofficial government by 'community of understanding' entirely inadequate."¹³⁷ No such emergency arose.

On November 22, at his Camp David retreat in the Catoctin Mountains of Maryland, President Eisenhower met with his Cabinet for the first time since the illness.¹³⁸ By mid-January 1956, he was back at his desk in the White House.¹³⁹ As Sherman Adams said:

And so this interlude of sickness and uncertainty came to an end. But it left us uncomfortably aware of the Constitution's failure to provide for the direction of the government by an acting President when the President is temporarily disabled and unable to perform his functions.¹⁴⁰

On two other occasions during the Eisenhower administration, the question of presidential inability was forcibly revived. On June 8, 1956, President Eisenhower suffered an attack of ileitis and the next day underwent an emergency operation. He was discharged from Walter Reed Hospital on June 30 and returned to the White House in July.¹⁴¹ On November 25, 1957, a so-called "little stroke" temporarily impaired his speech, but he was back at his job within a few days.¹⁴²

137. Adams, *op. cit. supra* note 129, at 185. Accord, Nixon, *Six Crises* 150 (1962).

138. Adams, *op. cit. supra* note 129, at 191-92. "Some of them [members of the Cabinet] were openly astonished by the President's fast recovery . . ." *Id.* at 191. President Eisenhower was discharged from the hospital on November 11. He returned to Washington for a brief period and then departed for Gettysburg, Pennsylvania. See *N.Y. Times*, Nov. 13, 1955, § 4 (The News of the Week in Review), p. E, cols. 1-3. He was to spend his convalescence there, in Georgia and in Florida.

139. The President returned to Washington during the week of January 16, and held his first press conference on Thursday, January 19, 1956. *Id.*, Jan. 20, 1956, p. 1, col. 8; see also *id.*, Jan. 22, 1956, § 4 (The News of the Week in Review), p. E, col. 1; *Newsweek*, Jan. 16, 1956, p. 17 ("Ike in Fine Fettle: The Word Later"); *U.S. News & World Rep.*, Jan. 27, 1956, p. 94 ("Ike Discusses His Health, His Job, His Secretary of State").

140. Adams, *op. cit. supra* note 129, at 192. The author discusses President Eisenhower's attempts to stir congressional action. Former Speaker Sam Rayburn was against any action. In all, says Adams, the legislative leaders showed little enthusiasm in regard to taking steps to effect a solution of the problem. *Id.* at 200-01.

141. See *N.Y. Times*, June 10, 1956, § 4 (The News of the Week in Review), p. E, cols. 1-7, for an excellent account of the background facts. See also *U.S. News & World Rep.*, June 21, 1957, p. 34 ("When a President Gets Sick"), and Nixon, *op. cit. supra* note 129, at 167-69.

142. The facts are well reported in *N.Y. Times*, Nov. 27, 1957, p. 1, cols. 4-8, and Nixon, *op. cit. supra* note 129, at 170-78. Sherman Adams reports that the President again attempted to have Congress solve the constitutional problem. Again, the leaders showed little enthusiasm for action. Adams, *op. cit. supra* note 129, at 201. "Disregard of the public interest, the President called it." *Ibid.*

Former Attorney General Herbert Brownell, Jr. is reported to have said that "for such a situation to continue" . . . 'would be reckless beyond belief.' *Life*, Dec. 9, 1957, pp. 33, 37

The Eisenhower illnesses, besides accentuating the constitutional problem, jolted Congress into action. Special Subcommittees of the House and Senate Committees on the Judiciary were formed to study the problem. In 1956, 1957, and again in 1958, hearings were held at which a number of authorities gave their views. Every aspect of the problem was scrutinized and many possible solutions were offered. Yet a final solution was never decided upon by Congress.

III. OTHER CONSTITUTIONS

A. State Constitutions

Succession provisions are to be found in the fifty state constitutions.¹⁴³ A lieutenant governor, president of the Senate or secretary of state is usually next in line to the Governor. All state constitutions provide for the contingencies of death, resignation or removal (or vacancy). Some provide for the absence of the Governor from the state.¹⁴⁴

The expression "inability" as a contingency upon which the succession provision becomes operative is used in twenty-two state constitutions.¹⁴⁵

("Time of Trial for the Republic"). See U.S. News & World Rep., Dec. 20, 1957, p. 88 ("What Goes On in White House When the President is Sick"); id., Dec. 6, 1957, p. 33 ("Ike's Illness—What Will It Mean?"); id. at 48 ("Nixon's New Role"); id. at 108 ("The Hour-by-Hour Reports on the President's Illness").

143. Unlike the other state constitutions, the succession provision in the Tennessee Constitution is limited to cases of death, resignation and removal from office. Tenn. Const. art. III, § 12. *The appendix contains a chart which shows the alignment of the fifty states on the matters discussed herein.* A good discussion of state practice can be found in Hansen, *Executive Disability: A Void in State and Federal Law*, 40 Neb. L. Rev. 697 (1961); see Note, *Gubernatorial Disability*, 8 U. Chi. L. Rev. 521 (1941).

144. See Ala. Const. art. V, § 127, which provides that if the Governor is absent for more than twenty days, the secretary of state is to notify the lieutenant governor, who then will act as Governor. Compare *McGregor v. Allen*, 33 La. Ann. 870 (1881) (short absence not sufficient), with [1948-1950] 849 Mich. Att'y Gen. Biennial Rep. 49 (Nov. 3, 1948) (short absence sufficient to allow successor to act as Governor); and compare *Ex parte Hawkins*, 10 Okla. Crim. 396, 136 Pac. 991 (1913) (upon return to state the Governor automatically resumes his powers and duties), with *In re An Act Concerning Alcoholic Beverages*, 130 N.J.L. 123, 31 A.2d 837 (Sup. Ct. 1943) (president of senate must be notified of the return). See also *Markham v. Cornell*, 136 Kan. 884, 18 P.2d 158 (1933) (temporary absence does not make Governor incapable).

145. The word "disability" is also found in many of these state constitutions, as it is in the United States Constitution, as part of the clause limiting the tenure of the successor, e.g., "until the disability be removed." The twenty-two states are: Ark. Const. amend. VI, § 4; Conn. Const. art. IV, § 17; Del. Const. art. III, § 20; Fla. Const. art. IV, § 19; Hawaii Const. art. IV, § 4; Idaho Const. art. IV, § 12; Ind. Const. art. 5, § 10; La. Const. art. V, § 6; Mich. Const. art. VI, § 16; Mont. Const. art. VII, § 14; Nev. Const. art. V, § 18; N.J. Const. art. V, § 1, ¶ 7; N.Y. Const. art. IV, § 5; N.C. Const. art. III, § 12; Okla. Const. art. VI, § 16; Ore. Const. art. V, § 8; R.I. Const. art. VII, § 9; Tex. Const. art. IV, § 16; Utah Const. art. VII, § 11; Vt. Const. ch. II, § 24; Va. Const. art. V, § 78; Wis. Const. art. V, § 7.

Eighteen states refer to "disability."¹⁴⁶ A variety of expressions is embodied in the remaining state constitutions, such as "otherwise" (vacant office),¹⁴⁷ "other disqualification,"¹⁴⁸ "vacancy . . . from any cause whatever,"¹⁴⁹ "from any cause, unable,"¹⁵⁰ "for any reason unable,"¹⁵¹ "from mental or physical disease or otherwise . . . incapable,"¹⁵² and "unable, from protracted illness."¹⁵³ One state constitution has no provision at all in point.¹⁵⁴

Of the forty-nine state constitutions having succession provisions in point, forty-one expressly delimit the tenure of the officer next in line to either (1) the length of the period of disability, or (2) the length of the period of disability or the remainder of the term, or (3) the length of the period of disability or until a new governor is elected.¹⁵⁵ One state is less clear, although an "acting" governor is referred to elsewhere in that state constitution.¹⁵⁶ In three states the successor temporarily exercises the powers and duties until a new governor is elected.¹⁵⁷ Two state constitutions provide for devolution of the "office,"¹⁵⁸ with no limitation on tenure, while two others declare that the office shall be

146. In these states, the word "disability" is used in that part of the provision which describes the contingencies as well as in the part limiting the tenure of the successor. The eighteen states are: Ala. Const. art. V, § 127; Alaska Const. art. III, § 12; Ariz. Const. art. V, § 6; Cal. Const. art. V, § 16; Colo. Const. art. IV, § 13; Ga. Const. art. V, § 2-3007; Ill. Const. art. V, § 17; Iowa Const. art. IV, § 17; Kan. Const. art. I, § 11; Mo. Const. art. IV, § 11; Neb. Const. art. IV, § 16; N.D. Const. art. III, § 72; Ohio Const. art. III, § 15; Pa. Const. art. IV, § 13; S.C. Const. art. IV, § 9; S.D. Const. art. IV, § 6; Wash. Const. art. III, § 10; W. Va. Const. art. VII, § 16.

147. Me. Const. art. V, pt. I, § 14; Mass. Const. pt. II, ch. II, § 2, art. III; N.H. Const. pt. II, art. 49.

148. Md. Const. art. II, § 6.

149. Minn. Const. art. V, § 6.

150. Ky. Const. § 84.

151. N.M. Const. art. V, § 7.

152. Wyo. Const. art. IV, § 6.

153. Miss. Const. art. V, § 131.

154. Tenn. Const. art. III, § 12.

155. For the exceptions, see notes 156-59 *infra*.

156. Ind. Const. art. V, § 10 (same as U.S. Const. art. II, § 1, cl. 6); see art. V, § 11, for words of acting.

157. Ga. Const. art. V, § 1, ¶ 2-2608; Me. Const. art. V, pt. I, § 14; Md. Const. art. II, § 7.

158. Va. Const. art. V, § 78. R.I. Const. art. VII, § 9 provides that the lieutenant governor shall fill the office of governor and exercise his powers and authority until a Governor is qualified to act or until the office is filled at the next election. The contingencies are "vacancy in the office of Governor or . . . his inability to serve, impeachment, or absence from the State. . . ."

deemed vacant if the governor has been unable to perform for a period of six months by reason of "mental or physical disability."¹⁵⁹

Some states differentiate, without more, between temporary and permanent disability.¹⁶⁰ Apart from any explicit constitutional authorization, two states have passed laws establishing disability boards.¹⁶¹ Only a few state constitutions set forth disability procedures. The Alabama, Mississippi and Michigan Constitutions are unique in this regard.

The Alabama Constitution contains a procedure by which any two officers in the line of succession, except the one next in line, who believe the governor to be of unsound mind, may petition the state supreme court for a determination. If the court determines that the Governor is of unsound mind, it will enter a decree to that effect, which is filed in the Office of the Secretary of State. Then, the officer next in line performs the duties of the office until the Governor recovers. If there is a dispute as to whether the Governor has recovered, the state supreme court, at the request of any one officer in the line of succession, must "ascertain the truth" and render a decree.¹⁶²

The Mississippi Constitution refers to "protracted illness" as a disability and provides that if there is any doubt as to whether a disability exists or has ended, the Secretary of State shall submit the question to the state supreme court. The court, or a majority thereof, must investigate and render an opinion to the Secretary of State which opinion is "final and conclusive."¹⁶³

The new Michigan Constitution provides that the inability of the Governor shall be determined by a majority of the Supreme Court on the joint request of the President pro tempore of the Senate and the Speaker of the House of Representatives. "Such determination shall be final and conclusive." Once an inability is found to exist, the Lieutenant Governor exercises the powers and duties of the office until the Supreme Court determines upon its own initiative that the inability has ended.¹⁶⁴

The proposed revised Florida Constitution contains an interesting

159. Alaska Const. art. III, § 12; N.J. Const. art. V, § 1, ¶ 8.

160. E.g., Ariz. Const. art. V, § 6; Cal. Const. art. V, § 16; S.C. Const. art. IV, § 9.

161. Neb. Laws 1961, ch. 452, §§ 1-4, at 1379-81; Ore. Rev. Stat. §§ 176.040, 176.050 (1959). Both laws are similar. They provide for a Disability Board of the Chief Justice, the Dean of the state medical school, and a leading medical official. The Board determines the commencement and termination of a disability and decisions must be unanimous. The Nebraska statute is alone in providing that the decisions are reviewable by the state supreme court on the petition of the Governor. In the interim the successor has the authority.

162. Ala. Const. art. V, § 128. In such case, the governor does not return until it is so decreed.

163. Miss. Const. art. 5, § 131.

164. Mich. Const. art. V, § 26.

provision on executive succession. It provides for a lieutenant governor who is to act as Governor during the physical or mental incapacity of the Governor. If the Governor dies, resigns or is removed, the Lieutenant Governor succeeds to the office for the remainder of the term. Incapacity is determined by the supreme court after the docketing of a written suggestion thereof by four members of an executive cabinet of which the Lieutenant Governor is not a member. Restoration of capacity is also determined by the Supreme Court after the docketing of a written suggestion thereof by the Governor, legislature or four members of the cabinet. The proposed constitution also provides that the Governor may declare his own physical incapacity and in such case the cessation thereof by filing a certificate with the secretary of state.¹⁶⁵

A different kind of procedure is to be found in the New Jersey and Alaska Constitutions. New Jersey provides that if the Governor has been unable to discharge his duties for a period of six months "by reason of mental or physical disability," his office shall be deemed vacant. The vacancy is determined by the state supreme court as follows: (1) upon presentment to it of a concurrent resolution declaring the grounds of vacancy, adopted by two thirds of the members of both houses of the legislature; and (2) upon notice, a hearing before the court and proof that the vacancy exists.¹⁶⁶ The Alaska Constitution provides that the "procedure for determining . . . disability shall be prescribed by law,"¹⁶⁷ and that if the Governor has been unable to perform for a period of six months "by reason of mental or physical disability," his office shall be deemed vacant.¹⁶⁸

B. *Foreign Constitutions*

About fifty per cent of the nations of the world give the title "President" to their chief executive.¹⁶⁹ Over one half of these nations provide for the direct election of the President,¹⁷⁰ while others provide for his appointment by the legislative body.¹⁷¹ Other nations have royal person-

165. Art. IV, § 9.

166. N.J. Const. art. V, § 1, ¶ 8.

167. Alaska Const. art. III, § 12. No statute has been passed.

168. Alaska Const. art. III, § 12.

169. In 1956, forty-one countries, or forty-six per cent of all nations, had a President as Chief Executive. 1 Peaslee, *Constitutions of Nations* 11 (2d ed. 1956) (hereinafter cited as Peaslee); see Fitzgibbon, *The Constitutions of the Americas* (1948). Since 1956, the following republics have emerged, having a President as Chief Executive: Algeria, Cameroun, Chad, Dahomey, Gabon, Guinea, Ivory Coast, Malagasy, Mali, Niger, Somalia and Upper Volta. See Information Please Almanac 618-769 (1963) for a more comprehensive listing.

170. E.g., Finland, France (as of October 28, 1962, referendum) and Ireland (Eire).

171. E.g., Germany, Israel and Turkey.

ages as their chief executives.¹⁷² Still others give executive authority to a council.¹⁷³

In some of the countries where there is a president as chief executive, he is little more than a figurehead. In other countries, particularly in Latin America and Africa, he is an active leader. However, the constitution in almost all presidential systems represents what the framers considered to be the ideal, so that the various other approaches to executive succession merit examination in any search for the best solution.

Somewhat detailed inability procedures are found in a few countries. By a Regency Act of 1937,¹⁷⁴ the following solution was adopted for determining disability of a Sovereign in the United Kingdom. A commission, consisting of the spouse 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, may declare in writing that the Sovereign is "by reason of infirmity of mind or body" incapable of performing the royal functions.¹⁷⁵ Any three may so declare. Until it is declared in a like manner that "His Majesty has so far recovered His health as to warrant His resumption of the royal functions . . .," a Regent shall act in his place.¹⁷⁶

The Constitution of Pakistan lays down an interesting procedure for determining the President's physical or mental incapacity.¹⁷⁷ One third of all the members of the National Assembly can notice the Speaker of the Assembly in writing that they intend to make a motion in the Assembly for the removal of the President on grounds of physical or mental incapacity.¹⁷⁸ The Speaker will then transmit the notice to the President,¹⁷⁹ with a request that he submit himself within ten days to an examination by a Medical Board of five medical practitioners.¹⁸⁰ The resolution

172. E.g., Denmark, Sweden and the United Kingdom.

173. E.g., Union of Soviet Socialist Republics.

174. 1 Edw. 8 & 1 Geo. 6, c. 16.

175. 1 Edw. 8 & 1 Geo. 6, c. 16, § 2(1). The finding must include evidence provided by physicians.

176. *Ibid.* In less serious situations (e.g., absence from the country), the Sovereign is permitted to make partial delegations of power to counsellors of state, which include the spouse of the Sovereign, if any, and the four persons next in line of succession to the Crown. 1 Edw. 8 & 1 Geo. 6, c. 16, § 6(2). The delegation, however, may be revoked or varied in like manner. 1 Edw. 8 & 1 Geo. 6, c. 16, § 6(1).

177. Pak. Const. pt. III, ch. 1, art. 14(1)-(9).

178. Pak. Const. pt. III, ch. 1, art. 14(1). The writing must set forth the particulars of the alleged incapacity. Pak. Const. pt. III, ch. 1, art. 14(2).

179. Pak. Const. pt. III, ch. 1, art. 14(3).

180. The medical practitioners are the most senior medical officers in the civil health

cannot be moved earlier than fourteen days or later than thirty days after notice to the Speaker.¹⁸¹ If the President has submitted to an examination, the resolution cannot be voted upon until the Medical Board has had an opportunity to render an opinion.¹⁸² The President has the right to appear and be represented when the resolution is considered.¹⁸³ A vote of three fourths of the entire Assembly is necessary to remove the President from office.¹⁸⁴ The Pakistan Constitution also provides that at any time when the office is vacant or the President is unable to perform his functions because of illness, absence from the country or otherwise, the Speaker of the Assembly shall act as President.¹⁸⁵

The Constitution of the Republic of South Africa contains a provision under which the President may be removed from office on the ground of misconduct or inability to perform efficiently the duties of his office.¹⁸⁶ The first step in the procedure to remove the President is a petition by not less than thirty members of the House of Assembly, requesting the appointment of a joint committee of the House and Senate to consider the matter.¹⁸⁷ After its appointment the joint committee studies the matter and then submits a report of its findings to both Houses.¹⁸⁸ The report is considered and both Houses might then pass a resolution declaring the President removed from office on the ground of misconduct or inability. The Constitution also provides that whenever the office of President is vacant or the President is unable to perform his duties, the President of the Senate shall serve as acting President.¹⁸⁹

A State Tenure Law of 1951 in Israel contains a provision by which Knesseth (Parliament), upon a proposal of three fourths of the House Committee, may declare by three fourths of its members that "for

service, the medical service of the Army, the health service of East Pakistan, the health service of West Pakistan, and the consultant physician to the Army. Pak. Const. pt. III, ch. I, art. 15.

181. Pak. Const. pt. III, ch. I, art. 14(4).

182. Pak. Const. pt. III, ch. I, art. 14(7). If the President has not submitted himself to an examination by the Medical Board before the resolution is moved, it may be voted upon.

183. Pak. Const. pt. III, ch. I, art. 14(5).

184. Pak. Const. pt. III, ch. I, art. 14(8). Interestingly, if the President submits himself to an examination and less than one half of the Assembly vote in favor of the removal, the members who noticed the resolution cease to be members of the Assembly. Pak. Const. pt. III, ch. I, art. 14(9).

185. Pak. Const. pt. III, ch. I, art. 16.

186. S. Afr. Const. § 10(1)(b).

187. S. Afr. Const. § 10(2)(b).

188. S. Afr. Const. § 10(2)(a).

189. S. Afr. Const. § 11.

reasons of health the President is permanently unable to carry out his functions.¹⁹⁰ The Chairman of the Knesseth then acts as President. If three fourths of the House Committee find only a temporary disability, the Chairman acts until the expiration of the period fixed by the Committee in its decision, or sooner if the President says he is able to perform his duties, and the Committee agrees.

The Constitution of Ireland provides for a commission of three, consisting of the Chief Justice of the Supreme Court, the Chairman of the Dail Eireann (House) and the Chairman of the Seanad Eireann (Senate).¹⁹¹ The commission exercises the executive powers in cases of temporary or permanent incapacity. A permanent incapacity must be established to the satisfaction of the Supreme Court, consisting of not less than five judges. Then a new election must be held within sixty days.¹⁹²

Apart from the above, the constitutions of countries having a President are generally silent on the procedures for determining the commencement and termination of inability. A few constitutions give a general power to the legislature,¹⁹³ supreme court¹⁹⁴ or other body¹⁹⁵ to declare the existence of a permanent impediment. Most constitutions refer to temporary and permanent situations,¹⁹⁶ without more. They prescribe

190. 2 Peaslee 475.

191. Ire. Const. art. 14, §§ 1, 2(1).

192. Ire. Const. art. 12, § 3(1), (3).

193. E.g., Ecuador Const. art. 87 provides: "The functions of the President . . . are definitively terminated . . . by permanent physical or mental incapacity, declared by Congress." In Colombia the Senate may declare "permanent physical incapacity." Colom. Const. art. 125. Peru Const. art. 144 provides: "The presidency of the Republic is vacated . . . by permanent physical or moral incapacity of the President, declared by Congress." Article 145 further provides: "The exercise of the presidency of the Republic is suspended . . . by the temporary physical incapacity of the President, declared by Congress. . . ."

194. Gabon Const. art. 10.

195. Malagasy Const. art. 9 (a Superior Council of Institutions). Port. Const. art. 80, § 1 (Council of State, summoned by the President of the Council of Ministers), Fr. Const. art. 7 (Constitutional Council).

196. Argen. Const. art. 75 (illness, absence from Capital, death, resignation or removal); Aus. Const. art. 64(1) (unable to perform duties or a permanent vacancy); Bol. Const. art. 91 (unable to fulfill duties or temporarily absent); Braz. Const. art. 79 (impediment or vacancy in office); Burma Const. § 64(1) (temporary or permanent absence or incapacity; death, resignation or removal); Chile Const. art. 66 (illness, absence from territory, or other weighty reason; death, resignation or absolute impossibility); Colom. Const. arts. 123-25 (may temporarily retire on account of ill health; death, resignation, removal, abandonment of office, or permanent physical incapacity); Costa Rica Const. art. 135 (temporary or permanent absence); Dahomey Const. art. 9 (replaces President when necessary, whether temporarily or permanently); Dom. Rep. Const. art. 51 (temporary absence or permanent

that in the former the constitutional successor¹⁹⁷ serves until the temporary situation has ended. In the latter, the successor serves until a new president is elected, which is usually at an election by the legislature or the people held within a certain period of time.¹⁹⁸ Some constitu-

vacancy); Ecuador Const. art. 87 (death, removal, resignation, abandonment of office, or permanent physical or mental incapacity); El Sal. Const. art. 64 (temporary incapacity, death, resignation, removal or other cause); Fin. Const. art. 25 (temporary or lasting disability); Gabon Const. arts. 9-10 (temporary impediment or permanent vacancy); Ger. Const. art. 57 ("prevented from exercising his powers"; "office falls prematurely vacant"); Guat. Const. art. 163 (definitive or temporary absence); Guinea Const. art. 28 (vacancy); Haiti Const. arts. 80-81 (temporarily impossible to perform duties; vacancy for any reason); Hond. Const. art. 201 (temporary or absolute absence); Iceland Const. art. 8 (temporary residence abroad, illness or other reasons; vacant office); India Const. art. 65(1)-(2) (vacancy due to death, removal, resignation or otherwise; unable due to absence, illness or other cause); Italy Const. art. 86 (unable to fulfill functions or permanent incapacity, death or resignation); Ivory Coast Const. art. 11 (death, resignation, or permanent impediment); Korea Const. art. 70 (inability to exercise power, or vacancy); Lebanon Const. art. 62 (vacancy); Malagasy Const. art. 9 (temporary impediment or vacancy for any reason); Mex. Const. arts. 84-85 (temporary or absolute disability); Nic. Const. art. 188 (temporary or permanent inability to serve); Pan. Const. art. 149 (temporary or permanent absence); Par. Const. art. 58 (resignation, temporary or permanent inability or death); Peru Const. arts. 144-45 (death, permanent physical or moral incapacity, resignation, or temporary physical incapacity); Port. Const. art. 80 (temporary interruption, death, resignation, permanent physical disability, or absence abroad); P.R. Const. tit. III, §§ 7-8 (temporary disability or permanent incapacity; death, resignation, removal, or other absolute disability); Tunisia Const. art. 51 (death, resignation or total inability); Tur. Const. art. 100 (temporarily absent for travels or illness, demise, or resignation; vacancy for any other reason); Ur. Const. art. 158 (absence, vacancy, temporary impediment, or leave of the councillor serving as president); Ven. Const. art. 188 (temporary absence, which may be absolute after ninety days). For succession provisions patterned after U.S. Const. art. II, § 1, cl. 6, see Liberia Const. art. 3, § 2; Phil. Const. art. VIII, § 8.

197. The successor varies from country to country. Compare, Argen. Const. arts. 75-77 (popularly elected Vice-President); Burma Const. § 64(1)-(7) (a commission of members of legislature and judiciary); Chile Const. art. 66 (a minister, in accordance with order of precedence fixed by law, substitutes as Vice-President); Colom. Const. art. 124 (a designate previously elected by Congress); Gabon Const. art. 8 (a Vice-President appointed by the President); Guinea Const. art. 28 (the President's cabinet); Hond. Const. arts. 193-94 (popularly elected presidential designate); Iceland Const. art. 8 (a commission of the Prime Minister, Speaker of Parliament, and Chief Justice of the Supreme Court); Italy Const. art. 86 (Speaker of the Senate); Ivory Coast Const. art. 11 (person chosen by President of the Assembly); Korea Const. art. 70 (Prime Minister); Nic. Const. art. 188 (designate appointed by the President); Port. Const. art. 80, § 2 (President of Council of Ministers); Tur. Const. art. 100 (Chairman of Senate).

198. Sometimes whether or not there is an election depends on when the vacancy occurs. Thus, in Mexico, a permanent vacancy during the first two years of the six-year term requires an election; during the last four, an appointment. Mex. Const. art. 84. See Pan. Const. art. 151; Par. Const. art. 58. In Austria, a permanent vacancy requires an immediate election, while a disability of more than twenty days calls for an interim appointment. Aus. Const. art. 64(1)-(2).

tions provide for a constitutional successor for the remainder of the term, such as a Vice-President or presidential designate.¹⁹⁹ In all, most constitutions appear to leave questions of inability to the executive branch.

IV. PROPOSED SOLUTIONS

During the congressional inability hearings in 1956, 1957 and 1958, it was generally agreed that any solution to the problem must make at least two points clear: (1) that in cases of death, resignation and removal, the Vice-President succeeds to the office of the President for the remainder of the term, and (2) that in cases of inability, the Vice-President merely exercises the powers and duties of the Presidency for the period of inability.²⁰⁰ Many felt that the President should be able to declare his own inability and that no definition of inability should be enacted into law.²⁰¹ Many, too, were of the opinion that a constitutional amendment was necessary for any real solution.²⁰² Some recommended a detailed constitutional amendment, and others an amendment merely giving Congress the power to establish a procedure.²⁰³ Still others suggested a stopgap statute, followed by a constitutional amendment.²⁰⁴ On the

199. E.g., Costa Rica Const. art. 135; Dahomey Const. art. 11; El Sal. Const. art. 64; Ecuador Const. arts. 88, 91; Nic. Const. art. 188. France is expected to create an office of Vice-President. He would succeed to the presidential office. *N.Y. Times*, April 3, 1963, p. 5, cols. 3-4.

200. See House Comm. on the Judiciary, 85th Cong., 1st Sess., *Presidential Inability: An Analysis of Replies to a Questionnaire and Testimony at a Hearing on Presidential Inability 49-51* (Comm. Print 1957) (hereinafter cited as 1957 Analysis), for a listing of those who were of the opinion that only powers and duties devolve under the present wording of the Constitution.

201. *Id.* at 5-8. Some, however, favored a definition of inability. Professor Everett S. Brown of the University of Michigan thought that any law "should provide for both physical and mental disability, permanent and temporary." *Id.* at 9. Joseph E. Killenbach of the same University said that "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." *Id.* at 10. Professor Arnold J. Lien of Washington University stated that "the wording of any provision relating to 'inability' should be general enough to cover the unavailability of the President for the performance of his duties whatever the cause involved might be—mental or physical illness, airplane crash in some inaccessible place, kidnaping, wartime capture, etc." *Ibid.*

202. *Id.* at 59-63; 1958 Senate Hearings 26-27 (remarks of former Senator Joseph C. O'Mahoney).

203. See notes 231-33 *infra* and accompanying text.

204. See 1956 House Hearings 64 (remarks of Arthur Krock of the *New York Times*).

other hand, some thought that a statute²⁰⁵ or resolution²⁰⁶ of Congress would be sufficient. A few relied on quo warranto²⁰⁷ or mandamus proceedings.²⁰⁸

205. See 1958 Senate Hearings 108-09 (remarks of Henry Fowler); 1957 Analysis 63-68; 1956 House Hearings 122 (remarks of Professor Roger P. Peters). A large number of the authorities in favor of action by Congress believe that Congress has the power to legislate in this area under the necessary and proper clause of the Constitution. U.S. Const. art. I, § 8, cl. 18. See, e.g., 1958 Senate Hearings 108-09 (remarks of Henry Fowler) and 238 (letter of Professor James Hart); Corwin, *The President: Offices and Powers, 1787-1957*, at 54-55 (1957). Against a solution under the necessary and proper clause is the fact that Congress has been given no specific power over inability questions other than the power to determine the successor where both President and Vice-President are immobilized. In *Kansas v. Colorado*, 206 U.S. 46, 88 (1907), the Supreme Court said that the necessary and proper clause was to be exercised only in connection with specific delegations of power to Congress or other departments or offices. The specific power in question is that of the Vice-President to act as President. If Congress were to relocate, without a constitutional amendment, the power of determining inability in any entity other than the Vice-Presidency, its action would be unconstitutional, for "it is axiomatic that when the Constitution imposes a duty on an officer, to be done by him, he must be the sole judge when and how to do that duty. . . ." Butler, 133 No. Am. Rev. 435 (1881); see generally Silva, *Presidential Succession* 107 (1951).

James Madison, himself, stated that the clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." 6 Writings of James Madison 383 (Hunt ed. 1906). See *Kinsella v. United States*, 361 U.S. 234, 247 (1960), (The necessary and proper clause is "not itself a grant of power . . ."); *United States v. Oregon*, 366 U.S. 643, 653 (1961) (Douglas, J., dissenting) ("Only recently we warned against an expansive construction of the Necessary and Proper Clause.")

206. See 1956 House Hearings 42 (remarks of Dr. John H. Romani), 53 (remarks of Sidney Hyman), 97 (remarks of Professor James Hart), 121 (Professor Aikins). Instead of a joint resolution, which must be submitted to the President for his signature (U.S. Const. art. 1, § 7, cl. 3.), some suggest that Congress go on record by way of a concurrent resolution that the Vice-President succeed temporarily to the powers and duties of the office in cases of inability. A concurrent resolution is not subject to the President's veto power. However, it does not have the force of law. See Riddick, *The United States Congress Organization and Procedure* 21-22 (1949); Watkins & Riddick, *Senate Procedure: Precedent and Practices* 167-68 (U.S. Gov't Printing Office, 1958).

207. See note 245-46 *infra* and accompanying text.

208. See *Barnard v. Taggart*, 66 N.H. 362, 29 Atl. 1026 (1890), where a writ of mandamus was issued to the Attorney General of the state, compelling the President of the Senate to act as Governor. For a good account of this case, see Wyman, *U.S. News & World Rep.*, March 9, 1956, p. 44 ("When a President is Too Ill to Handle the Job"). On the national level it is well-settled law that the judiciary will not grant writs of mandamus to compel executive officials to act, particularly where their duties are discretionary. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958) (remedy restricted mainly to situations where ministerial duties of a nondiscretionary nature are involved); see *Whitehouse v. Illinois Cent. R.R.*, 349 U.S. 366, 373 (1955) (Frankfurter, J.) ("[M]andamus is . . . governed by equitable considerations and is to be granted only in the exercise of sound discretion."); *Black v. Boyd*, 251 F.2d 843, 844 (6th Cir. 1958) (mandamus not available to direct action

General disagreement manifested itself during the hearings on the procedure for determining the existence and termination of an inability.²⁰⁹ Proposals were advanced giving the decisive role variously to the Vice-President, the Cabinet, Congress, the Supreme Court or an Inability Commission. Each had, and still has, its adherents and critics. These proposals are now briefly considered.

A. *Vice-President*

The understanding reached between President Eisenhower and Vice-President Nixon in 1958 gave a decisive role to the Vice-President.²¹⁰ It allowed him to decide the question of inability "after such consultation as seems to him appropriate under the circumstances." If able to do so, the President could inform the Vice-President of his inability. In either case, only "powers and duties" would devolve and the President would determine when his inability had ended.²¹¹

In an Attorney General's opinion dated August 2, 1961, Robert F. Kennedy expressed the view, as had the Eisenhower Administration, that the Constitution permits the Vice-President to raise and decide the question of inability and that merely the powers and duties of the office devolve on him until the President recovers.²¹² The time of

in a specific way); *Clackamas County, Ore. v. McKay*, 219 F.2d 479, 488-91 & nn.27-35 (D.C. Cir. 1954) (Prettyman, C.J.) (contains a comprehensive listing of authorities), judgment vacated, 349 U.S. 909, rehearing denied, 349 U.S. 934 (1955); *M.P. & St. L. Express, Inc. v. United States*, 165 F. Supp. 677 (W.D. Ky. 1958) (can not compel a ruling in a particular way). "Discretion is always subject to abuse, but the framers of our Constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment." *Goldberg v. Hoffman*, 225 F.2d 463, 466 (7th Cir. 1955). *Mandamus* will be granted to protect vested legal rights and to enforce fixed legal duties. *Ibid.*

209. For views as to who should initiate the question of inability, see 1957 Analysis 11-20, and as to who should resolve the question once raised, see *id.* at 20-33.

210. White House Press Release, March 3, 1958; see *Public Papers of the Presidents of the United States, 1958*, at 188-89 (U.S. Gov't Printing Office, 1959). See generally Nixon, *Six Crises 178-80* (1962).

211. In explaining the approach of his Administration, President Eisenhower stated: "[In] the first case we covered: the President himself knows, let's say, he is going into a hospital for a very dangerous operation of some kind, and he may be out for seven days or eight days, where he can't even communicate with anyone. He says, 'All right, I am temporarily disabled,' and it is provided for that way."

"There could be a case where a man has a stroke that was slight, from which he would recover. We have great statesmen in the world today that recovered from a couple of them and carried on for years. But he wouldn't be able to say 'I am incapable of acting,' because he would be unconscious." *Public Papers of the President of the United States, 1957*, at 245 (U.S. Gov't Printing Office, 1958).

212. 42 Ops. Att'y Gen. No. 5 (1961).

recovery, the Attorney General stated, was a matter for the President to determine.

The occasion for the opinion of the Attorney General was the agreement reached between President Kennedy and Vice-President Johnson, adopting, in substance, the agreement that had existed between President Eisenhower and Vice-President Nixon.²¹³ "Cumulative precedents of this kind may be valuable in the future," the Attorney General said, and they are "clearly constitutional and as close to spelling out a practical solution to the problem as is possible."²¹⁴

Representative Emanuel Celler of New York,²¹⁵ who conducted extensive hearings on the question in 1956, is in favor of a constitutional amendment²¹⁶ or joint resolution²¹⁷ under which the Vice-President, if satisfied of the President's inability, would convene both Houses of Congress and announce that the powers and duties have devolved. The President would resume such powers and duties upon his declaration of recovery.

Others concurring in an approach which would give authority to the Vice-President included Professor C. Herman Pritchett²¹⁸ of the University of Chicago, Professor Roger P. Peters²¹⁹ of the University of Notre Dame, Thomas K. Finletter,²²⁰ Sidney Hyman²²¹ and John H. Romani.²²²

B. Cabinet

The principal supporters of Cabinet authority in the decision are former members of the executive branch. President Herbert Hoover favors a commission of between seven and fifteen heads of executive departments or agencies, for the reason that "a President's inability . . . should be determined by the . . . [political] party having the responsibilities determined by the election."²²³ Former Attorney General Herbert Brownell, Jr. offered this proposal on behalf of the Eisenhower Administration: The President could declare his inability in writing,²²⁴

213. White House Press Release, August 10, 1961; see Public Papers of the Presidents of the United States, 1961, at 561-62 (U.S. Gov't Printing Office, 1962).

214. 42 Ops. Att'y Gen. No. 5, at 26-27 (1961).

215. See U.S. News & World Rep., June 15, 1956, p. 71 (summary of views).

216. H.R.J. Res. 33, 87th Cong., 1st Sess. (1961).

217. H.R.J. Res. 35, 87th Cong., 1st Sess. (1961).

218. 1956 House Hearings 71-72.

219. *Id.* at 122-23 (emphasis on insanity).

220. 1958 Senate Hearings 240-41.

221. 1956 House Hearings 54; Hyman, *The Issue of Presidential Disability*, N.Y. Times, Feb. 26, 1956, § 6 (Magazine), p. 13.

222. 1956 House Hearings 42-43.

223. 1958 Senate Hearings 10-11; see 1956 House Hearings 1-2.

224. The writing, former Attorney General William P. Rogers later said, "would be filed

whereupon the Vice-President would discharge the powers and duties of the office. If the President failed or was unable to declare his own inability, the Vice-President, "if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet,"²²⁵ would act as President. The President would resume his powers and duties upon his declaration of recovery in writing. Under the Brownell approach, the question of inability could be raised by either the Vice-President or a majority of the Cabinet.

Senator Keating of New York (then a member of the House of Representatives) saw this danger in the Brownell approach:

[I]t strikes me that danger is inherent in this proposal which leaves it to the Vice President and Cabinet. If the Vice President and the Cabinet decided to gang up on the President, they might say, "He is unable," and then the next day, under your proposal, he could say, "I am able to act," and unless he fired the members of the Cabinet, they would then the next day say he was unable.²²⁶

In answering Senator Keating's objection, Brownell said that public opinion would decide the matter in the "ultimate analysis." The Vice-President, said Brownell, would not act without the support of the Nation and could not act without majority approval of the Cabinet. Since the President is elected by the people, Brownell felt that the people would want no obstructions to his resuming the powers and duties of the Presidency. But, if he acted irresponsibly, impeachment would be an available remedy.²²⁷

One year later, the Brownell approach was modified by the Eisenhower Administration to cover the case where a President asserts his ability to perform when he is not able to do so.²²⁸ Upon such a contingency, the Vice-President, with the approval of a majority of the Cabinet, could bring the matter before Congress, which would conduct an inability proceeding in accordance with procedures provided for impeachment.²²⁹ If a majority of the House voted that the inability had not terminated and the Senate concurred by a two-thirds vote of

with the Secretary of State, as other state documents are filed." 1958 Senate Hearings 170. See note 9 *supra*.

225. See the excellent testimony of former Attorney General Herbert Brownell, Jr. before the Celler Committee in 1957. 1957 House Hearing 4-32; see also *N.Y. Times*, April 2, 1957, p. 21, cols. 1-8 (excerpts therefrom). See note 271 *infra*.

226. 1957 House Hearing 29.

227. *Id.* at 29-30. The House impeaches (U.S. Const. art. I, § 2, cl. 5), and the Senate tries, presided over by the Chief Justice of the Supreme Court (U.S. Const. art. I, § 3, cl. 6).

228. See the excellent testimony of former Attorney General William P. Rogers before the Kefauver Committee in 1958. 1958 Senate Hearings 147-85.

229. *Id.* at 155-56 (Rogers).

those present, the Vice-President would discharge the powers and duties for the remainder of the term or until a majority of both Houses decided that the inability had ended. This procedure would eliminate the stigma and permanent effect of an impeachment proceeding.²³⁰

C. Congress

Many of the proposals for participation by Congress involve a general grant of power. Typical is the approach of the New York State Bar Association,²³¹ the Association of the Bar of the City of New York,²³² and the American Bar Association.²³³ All suggest a constitutional amendment, containing the following provision:

230. Professor Edgar Waugh of Eastern Michigan College would qualify Rogers' proposal by permitting Congress to make a conclusive determination of inability upon majority vote. Such a determination could only be made if two thirds of each House had found that a crisis had arisen and that a prompt determination could not be made without Congress' intervention. 1958 Senate Hearings 136-40.

Representative John V. Lindsay of New York (H.R.J. Res. 272, 88th Cong., 1st Sess. (1963); same, H.R.J. Res. 529, 87th Cong., 1st Sess. (1961)) and former Senator Estes Kefauver of Tennessee (S.J. Res. 28, 88th Cong., 1st Sess. (1963); same, S.J. Res. 19, 87th Cong., 1st Sess. (1961)) would also have the Vice-President act, upon the written approval of a majority of the heads of the executive departments. The President would not resume his responsibilities until the seventh day after his public announcement of recovery (unless both he and the Vice-President agreed on an earlier date). In the interim the Vice-President, with written approval of a majority of the heads of the executive departments, could question his recovery by having Congress consider the issue. If a concurrent resolution passed each House by a two-thirds vote of the members present declaring that the disability had not ended, the Vice-President would then discharge the powers and duties until (1) he believed the President to be able, or (2) a majority of the members present in each House so declared by concurrent resolution, or (3) the President's term ended.

231. See Proceedings of 82nd Annual Meeting and Committee Reports for 1958, N.Y. State Bar Ass'n 104-08 (1959).

232. See Comm. on Fed. Legislation of N.Y.C.B.A., A Report on the Problem of Presidential Inability, 17 Record of N.Y.C.B.A. 185 (1962). The Committee's report was approved by the Association of the Bar of the City of New York on May 8, 1962. *Id.* at 282.

233. A.B.A. Rep. 129-30 (1960); See 1963 Senate Hearings 13-18. Also in accord are S.J. Res. 35, 88th Cong., 1st Sess. (1963) (Senators Keating and Kefauver); H.R.J. Res. 77, 88th Cong., 1st Sess. (1963) (Representative Charles E. Bennett of Florida); same, H.R.J. Res. 7, 87 Cong., 1st Sess. (1961); H.R.J. Res. 210 88th Cong., 1st Sess. (1963) (Representative Howard W. Robison of New York); same, H.R.J. Res. 223, 87th Cong., 1st Sess. The present Administration also seems to be behind such a proposal. 1963 Senate Hearings 32-41 (remarks of Deputy Attorney General Nicholas deB. Katzenbach). Professor Richard H. Hansen of the University of Nebraska would add to the proposal that any "procedure must be compatible with the maintenance of the three distinct departments of government . . . and the preservation of the checks and balances between the coordinate branches." See Hansen, *The Year We Had No President* 117-18 (1962) and S.J. Res. 84, 88th Cong., 1st Sess. (1963), and the criticism thereof in 1963 Senate Hearings 36.

The commencement and termination of any inability shall be determined by such method as Congress shall by law provide.

Former Senator Joseph C. O'Mahoney of Wyoming favored a constitutional amendment which would give Congress the power to declare by concurrent resolution the existence and termination of an inability.²³⁴ Professor DeW. Howe of Harvard Law School urged Congress to declare by statute or joint resolution its jurisdiction over inability cases.²³⁵ Professor Charles Aikin of the University of California suggested that Congress pass a joint resolution which would permit it to act by concurrent resolution on questions of inability.²³⁶

Representative Abraham J. Multer of New York has introduced a bill in Congress²³⁷ calling for a statute which would operate as follows: The Senate would determine the question of inability after being requested to do so by a majority of the House of Representatives.²³⁸ If two thirds of the Senate reached the conclusion that the President was disabled, the same two thirds would then have to direct the Vice-President to act as President.²³⁹ The question of termination would be handled in the same manner.²⁴⁰

D. *Supreme Court*

Senator J. W. Fulbright²⁴¹ of Arkansas and Representative Peter Frelinghuysen, Jr.²⁴² of New Jersey suggest constitutional amendments along these lines: Congress, by a concurrent resolution approved by a two-thirds vote of each house, may suggest that the President is unable to discharge his powers and duties. Thereupon the Supreme Court shall determine whether or not the President is able to discharge such powers and duties.²⁴³ If he is found disabled, he can not resume his powers and duties until the Court determines that he is able.

234. 1958 Senate Hearings 24; see note 206 supra.

235. "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." 1958 Senate Hearings 219.

236. 1956 House Hearings 121.

237. H.R. 707, 88th Cong., 1st Sess. (1963); same, H.R. 513, 87th Cong., 1st Sess. (1961).

238. H.R. 707, 88th Cong., 1st Sess. §§ 1-2 (1963). The Chief Justice of the Supreme Court would convene the Senate, upon receipt of a resolution from the House.

239. H.R. 707, 88th Cong., 1st Sess. § 3 (1963).

240. H.R. 707, 88th Cong., 1st Sess. § 5 (1963). A majority of the members of either House of Congress might request the Chief Justice to convene a special session of the Senate.

241. 1958 Senate Hearings 39-40; S.J. Res. 100, 25th Cong., 1st Sess. (1957).

242. 1956 House Hearings 37. See Frelinghuysen, *Presidential Disability*, *Annals* 144-55 (1956).

243. The Supreme Court would receive both medical and nonmedical testimony. 1956 House Hearings 32.

Professor William W. Crosskey has been singular in his insistence that the Constitution provides a method for determining presidential inability cases in the judicial article.²⁴⁴ He reasons that such cases involve the meaning and application of the Constitution and, therefore, fall within the clause "all Cases, in Law and Equity, arising under this Constitution. . . ."²⁴⁵ At the time of the Constitution, he says, quo warranto proceedings, *i.e.*, cases involving the right of an individual to a public office, were not unusual. Consequently, the Founding Fathers intended inability questions to be determined in quo warranto proceedings.²⁴⁶ Professor Crosskey suggests that a statute could give the Vice-President the right to initiate such proceedings when inability is in issue and the President the right when recovery is in issue.²⁴⁷

E. Inability Commission

An impressive array of authorities urged the formation of an Inability Commission to decide questions of presidential inability. Former President Harry S. Truman suggested a commission of seven, consisting of the Vice-President, Chief Justice of the Supreme Court, Speaker of the House, and the majority and minority leaders of both the House of Representatives and the Senate.²⁴⁸ The commission would be empowered to

244. See note 53 *supra*.

245. U.S. Const. art. III, § 2, cl. 1. See note 53 *supra*.

246. See *Wallace v. Anderson*, 18 U.S. (5 Wheat.) 291 (1820), where the Court held that quo warranto was not available to an individual. It could not be maintained, said the Court, "except at the instance of the United States." *Id.* at 292. See generally *Johnson v. Manhattan Ry.*, 289 U.S. 479, 502 (1933) (an "extraordinary proceeding"; an individual needs a statutory right for it); *Newman v. United States ex rel. Frizzell*, 238 U.S. 537 (1915) (good listing of authorities); *Territory v. Lockwood*, 70 U.S. (3 Wall.) 236 (1865) (a territory had no right to test the right of a federal judge to his office). Under these authorities only the Government can institute quo warranto proceedings against national officers. For state decisions, see *State ex rel. Jewett v. Satti*, 133 Conn. 687, 54 A.2d 272 (1947) (quo warranto available to state to determine the right of a state official to his office); *State ex rel. Olson v. Langer*, 65 N.D. 68, 256 N.W. 377 (1934) (quo warranto does not invade state legislative power of impeachment).

It is very likely that the Supreme Court would say that questions of presidential inability are political in nature and do not admit of the exercise of the judicial power. See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939) (the validity of a state's ratification of a constitutional amendment is for Congress to determine and not the courts); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (taxpayer not permitted to attack a congressional appropriation measure); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (to coerce a Governor to surrender a fugitive is political); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (the meaning of "republican form of government" is for the President and Congress to determine).

247. 1958 Senate Hearings 237.

248. *Id.* at 12. The "Committee of Seven" would be empowered to call a special session of Congress if it were in recess. "Should the stricken President, thus relieved, experience

select a group of medical authorities from the top medical schools in the country. If they found the President "truly incapacitated," the commission would so inform Congress and if Congress agreed by a two-thirds vote of its membership, the Vice-President would become President for the remainder of the term.

Arthur Krock of the *New York Times* strongly favored a different type of commission.²⁴⁹ The Vice-President and Chief Justice would be excluded. Its membership would consist of members of the Cabinet and legislative leaders of both parties. His so-called "Inability Council" would operate as follows: Any two members who were not of the President's party might request a meeting of the Council by filing a notice with the Secretary of State, who would convene the body. If a majority believed that a question of inability existed, the Surgeon General of the United States²⁵⁰ would appoint five members of the medical profession from the staffs of voluntary hospitals to investigate and report back to the Council. If a majority of the Council believed the President to be disabled, the Vice-President would discharge the powers and duties of the Presidency. The same procedure would be followed in the President's resumption of such powers and duties. In either event, Mr. Krock suggests that the entire process should be required to be completed within a specified period of time, e.g., thirty days.²⁵¹

Professor Arthur E. Sutherland of Harvard Law School suggests a commission consisting of the Chief Justice, who would have a vote in cases of a tie, the Secretaries of State, Treasury and Defense, the Attorney General and the majority leaders of the two major parties in Congress.²⁵² Professor James Hart of the University of Virginia, on the other hand, leaned toward a commission of between three and five members who would be appointed by the Supreme Court of the United States. The members would be well-respected private citizens in active life, and would remain on the commission until retirement, election to a public office, or removal for cause.²⁵³ Similarly, Professor Arnold J. Lien of Washington University favored a commission of five or seven members appointed by the Supreme Court for long or

during his term a complete recovery, he would not be entitled to repossess the office." *Id.* at 13.

249. 1956 House Hearings 62-63.

250. 58 Stat. 684 (1944), 42 U.S.C. § 205 (1958).

251. 1956 House Hearings 63.

252. 1958 Senate Hearings 205. Professor Sutherland would have the Commission assemble on the call of any two members, and the President or any two members could convene the body in order to have a determination as to recovery. *Ibid.*

253. 1956 House Hearings 97; see 1958 Senate Hearings 238-39. The Commission would determine the commencement and termination of an inability. *Ibid.*

staggered terms. It would have authority to employ specialists.²⁵⁴ Decisions of the commission would be reviewable by either Congress or the Supreme Court on the petition of the President. Former Senator Frederick G. Payne of Maine preferred a commission of the Chief Justice, who would have a nonvoting role, legislative leaders of both parties, and several members of the Cabinet. The Vice-President would have the right to ask for a decision if he felt there was a question of presidential inability.²⁵⁵ Justice Michael A. Musmanno of the Pennsylvania Supreme Court inclined toward a commission of the Senate and House Committees on the Judiciary.²⁵⁶

Other suggestions for inability commissions have been made by Senator Kenneth B. Keating of New York,²⁵⁷ Senator J. Sparkman of Alabama,²⁵⁸ Henry Fowler,²⁵⁹ former Vice-President Henry Wal-

254. 1956 House Hearings 123.

255. 1958 Senate Hearings 37-38, modifying views expressed at 1956 House Hearings 16.

256. 1958 Senate Hearings 71-72.

257. He favors a commission of the Vice-President (who would act as chairman and have a nonvoting role), the Speaker and the minority leader of the House of Representatives, the majority and minority leaders of the Senate, the Secretary of State, the Secretary of Treasury, and the Attorney General. S.J. Res. 125, 87th Cong., 1st Sess. § 4 (1961). Five members would constitute a quorum and the concurrence in writing of five would be necessary for any action. The commission would be convened by the chairman on the request of any three members who stated, in writing, that they had sufficient cause to believe that the President was disabled. It would determine the commencement and termination of inability. S.J. Res. 125, 87th Cong., 1st Sess. §§ 5, 7 (1961). Under the proposal of Senator Keating, the President would be able to notify the commission as to his recovery, but the commission would have to meet, seek medical advice and decide whether he had recovered. S.J. Res. 125, 87th Cong., 1st Sess. § 8 (1961). For previous proposals of Senator Keating, see H.R. 6510, 85th Cong., 1st Sess. (1957); H.R.J. Res. 334, 85th Cong., 1st Sess. (1957). In these proposals the Chief Justice and the Senior Associate Justice were members of the commission.

Representative William S. Curtin of Pennsylvania has introduced a proposal calling for a "President Inability Commission" composed of the Chief Justice (who would have a voting role only in case of a tie), the Senior Associate Justice, the Secretary of State, the Secretary of Treasury, the Speaker and minority leader of the House, and the minority and majority leaders of the Senate. H.R.J. Res. 28, 88th Cong., 1st Sess. § 4 (1963); same, H.R.J. Res. 97, 87th Cong., 1st Sess. § 4 (1961). Five members would be necessary for a quorum and the written concurrence of five for any action. The chairman would convene the commission on the written request of any two members. When a determination were reached, Congress would have to be notified, as well as the President and Vice-President. H.R.J. Res. 28, 88th Cong., 1st Sess. §§ 5, 7 (1963). Then, the powers and duties would devolve. Unlike the Keating approach, the process for determining whether the President had recovered could be started only on the written request of two members. H.R.J. Res. 28, 88th Cong., 1st Sess. § 8 (1963).

258. He prefers a group of men, not "so large as to be unwieldy," functioning under an "extraordinary majority ruling" requirement. 1956 House Hearings 11. He would also favor Supreme Court participation on the commission. *Id.* at 11-12.

259. 1958 Senate Hearings 114. His "Inability Advisory Council" would consist of these

lace,²⁶⁰ Professors David Fellman of the University of Wisconsin²⁶¹ and Joseph E. Kallenbach of the University of Michigan,²⁶² and Representative Louis Wyman of New Hampshire.²⁶³

V. CONCLUSION

The manifold problem of presidential inability has now receded from the general congressional and public consciousness and, very likely, will not return until another President should become disabled. The confusion persists. It is indeed sad that no Congress has succeeded in solving the problem in all the years since it first presented itself. In 1787, a group of men drafted, in four short months, a several thousand word Constitution of the United States which has endured for almost two centuries with only a few changes. The framers thought they had handled the question of executive succession adequately by providing for a substitute who would exercise the powers and duties of the Presidency in cases of death, resignation, removal or inability of the President. A Committee of Style and John Tyler changed all that.

A solution to this problem has been long delayed because of the difficulty in ascertaining what the Constitution means and in finding a solution which would be generally acceptable and which would cover all the situations that could possibly arise. Most of the proposed solutions have some very basic defects.

Those proposals which would give Congress a power of determining or of establishing a procedure for determining the commencement and termination of inability are objectionable principally because to place such power in the hands of Congress could, as former Attorney General Herbert Brownell, Jr. stated, amount to "a major shift in the checks and balances among the three divisions of the federal government. . . ."²⁶⁴ They would give Congress a new power over the Presi-

appointed by Congress for succession purposes. See note 2 *supra*. It would function much like the plan of Arthur Krock. See notes 249-51 *supra* and accompanying text. He would permit the President to resume the powers and duties of the office without waiting for a Committee determination. *Id.* at 115.

260. It was reported that he favored a commission of the Cabinet, Supreme Court Justices, and members of Congress. 1956 House Hearings 11.

261. He suggests a small commission of people from the President's party. It would be subject to majority vote and have among its members the Chief Justice and an Associate Justice. For his views see 1958 Senate Hearings 212-18, where he expressed a preference for the British type of commission. See notes 174-76 *supra* and accompanying text.

262. 1958 Senate Hearings 206-08. Compare with 1957 House Hearing 26 (remarks of former Attorney General Herbert Brownell, Jr.); 1956 House Hearings 50-51 (remarks of Sidney Hyman), 98 (remarks of Professor James Hart).

263. For his commission, see H.R. 1164, 88th Cong., 1st. Sess. (1963).

264. Brownell, *Presidential Disability: The Need for a Constitutional Amendment*, 68 *Yale L.J.* 189, 199 (1958).

dent—one which it does not now possess and which it was never intended to possess. Further, as a forum for partisan politics, Congress could conceivably wield such a power for political purposes. As for Congress itself deciding questions of presidential inability, hearings, discussions, debates, filibusters and other familiar tactics could unduly delay a decision and perhaps even make one a practical impossibility.²⁶⁵ Also, if Congress were in recess, who would have the authority to convene a special session if the President should become disabled? Finally, merely to give Congress a broad power to establish a method for determining the beginning and ending of inability is, in itself, no solution, for a method would still have to be agreed upon by Congress—and that could take years. Surely the Founding Fathers would never have sanctioned such a broad power in the hands of Congress. They were careful to provide only one way for a President to be deprived of the prerogatives of his office, *i.e.*, impeachment, and were quite specific about how this would work. Since a determination of inability would also deprive a President of his prerogatives—at least temporarily—the method of determining the same should be no less specific and should be written into the Constitution itself.

Participation by the Supreme Court in inability cases is objectionable, too, as violative of the principle of separation of powers.²⁶⁶ Moreover, the Court's processes are time-consuming while it is conceivable that circumstances might necessitate an immediate decision. And, of course,

265. In the election of 1874, Samuel J. Tilden won a plurality of the popular vote and one short of a majority in the Electoral College. Some votes were in doubt so that an Electoral Commission was created. Its membership consisted of five Senators, five Representatives and five Supreme Court Justices. Three Senators and two Representatives were Republican, while two Senators and three Representatives were Democrats. Two Justices were Republicans and two were Democrats. The four selected a fifth Justice, who was a Republican. Thus the Commission consisted of eight Republicans and seven Democrats. Rutherford B. Hayes, the Republican candidate, became President by a strict party vote of eight to seven. See O'Neil, *The American Electoral System 193-234* (1887). The special commission was dissolved shortly thereafter and an act was passed to handle any future controversies. 3 U.S.C. § 15 (1958). See J. Mathews, *The American Constitutional System* 136 (1940 ed.), where the author stated that the "special electoral commission was entirely extraconstitutional and Congress possibly exceeded its authority in creating it."

Politics were not absent from the presidential elections of 1800 and 1824, when the House of Representatives chose the President. See O'Neil, *supra* at 68-90, for a good discussion of the election of 1800. See generally MacLean, *President and Congress: The Conflict of Powers* (1955); Pepper, *Family Quarrels, The President, The Senate, and the House* (1931).

266. See 1958 Senate Hearings 193-94 (remarks of Charles S. Rhyne); 1957 House Hearing 25 (remarks of Herbert Brownell, Jr.); 1956 House Hearings 51 (remarks of Sidney Hyman), 61 (remarks of Arthur Krock), 72 (remarks of Professor C. Herman Pritchett).

such participation would require changing the judicial article of the Constitution which would, no doubt, involve other problems.

The establishment of an inability commission having authority to make the determination of inability is objectionable.²⁶⁷ To place such momentous and absolute power over the President of the United States in the hands of a commission whose members might not even be elected by the people would be contrary to the principles underlying our form of government. To place such power in the hands of a Medical Commission would be absurd because inability is much more than a medical question. To place such power in the hands of any kind of board or commission would amount to a serious curtailment of the independence of the Presidency, as would a requirement that the President of the United States submit himself to physical examinations periodically or at the whim of a board or commission. As former Attorney General Brownell, Jr. stated:

[I]t seemed unwise to us [the Eisenhower administration] to establish formal legal machinery for giving a President physical and mental examinations because this amounts to placing a President constantly on trial as to his health and this would give a hostile commission the power to harass him at all times.²⁶⁸

And it is doubtful that a commission could act swiftly enough should the occasion require such action.

Participation by Supreme Court Justices on an Inability Commission is also objectionable. The Supreme Court itself is against it. In a letter to Senator Kenneth B. Keating of New York, Chief Justice Earl Warren had this to say:

It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.²⁶⁹

Giving final or near final authority over inability decision to the Cabinet (or the heads of the executive departments) is not without objection.²⁷⁰ In the first place, the Cabinet is not an elected body.²⁷¹

267. See 1958 Senate Hearings 133 (remarks of Professor Edgar Waugh), 166 (remarks of former Attorney General William P. Rogers), 193 (remarks of Charles S. Rhyne); 1957 House Hearing 26-27 (remarks of Herbert Brownell, Jr.); 1956 House Hearings 122 (remarks of Professor Roger P. Peters).

268. 1957 House Hearing 26.

269. 1958 Senate Hearings 14.

270. See 1958 Senate Hearings 19 (remarks of Senator Joseph C. O'Mahoney), 219 (remarks of Professor Mark DeW. Howe); 1957 House Hearing 36 (remarks of Martin Taylor); 1956 House Hearings 50 (remarks of Sidney Hyman), 61-62 (remarks of Arthur Krock), 116 (remarks of Professor William W. Crosskey).

271. A Cabinet was rejected at the Convention as a mechanism of assisting the President.

To place such power in its hands, moreover, could possibly result in a regency of the Cabinet. And the Cabinet members, owing either to personal loyalty to the President or fear of losing their positions,²⁷² might be too hesitant to find the President disabled. Yet, as a matter of historical fact, the Garfield and Wilson Cabinets actually urged the respective Vice-Presidents to act as President.

The crisis which presently exists could be resolved most simply by the enactment of a constitutional amendment which would: (1) give constitutional status to the Tyler precedent, *i.e.*, amend the succession clause to read that in cases of death, resignation and removal, the Vice-President becomes President for the remainder of the term;²⁷³ (2) eliminate the ambiguous wording of the succession clause so as to make it indisputably clear that the Vice-President merely acts as President for the period of any inability.²⁷⁴ A constitutional amendment is essen-

1 Farrand 1, 70, 97, 110; 2 *id.* at 285, 328, 335-37, 367, 537-42. However, U.S. Const. art. II, § 2, cl. 1 provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ." At present, there are ten executive departments. 70 Stat. 732 (1956), 5 U.S.C. § 1 (1958); see note 2 *supra*. Beginning with President Washington, each President has had a Cabinet, composed usually of the heads of the executive departments. The custom of the Vice-President's participating in Cabinet meetings was started by President Washington, then dropped, and later revived during the administration of President Harding. Since the composition of the Cabinet is at the discretion of the President, most proposals refer to the heads of the executive departments in order to remove all doubt on the point.

272. Executive officers may be removed at will by the President, *Myers v. United States*, 272 U.S. 52 (1926), although the heads of the so-called independent regulatory agencies are removable only for cause where the statute so provides, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); cf. *Wiener v. United States*, 357 U.S. 349 (1958). By virtue of this power, a disabled President is in a position to influence a Cabinet decision.

273. The Vice-President, in these situations, should take the presidential oath of office, though his succession should be effective as of the time of death, resignation or removal. Moreover, his salary, instead of \$35,000 (see 3 U.S.C. § 104 (1958)), should be that of a President, *i.e.*, \$100,000, plus a \$50,000 expense allowance (3 U.S.C. § 102 (1958)), plus a maximum of \$40,000 for traveling expenses (3 U.S.C. § 103 (1958)).

274. The expression "inability" should be left intact as it can cover an almost unlimited number of situations. See note 201 *supra*. To distinguish between temporary and permanent inability, as some suggest, would create unnecessary problems—for example, as to what is temporary or permanent. The times would have a lot to do with whether the Vice-President should act.

In order to be consistent with the constitutional result of exercising the powers and duties, the Vice-President should not take the presidential oath or receive the President's salary in cases of inability (though there would be no serious objection to his receiving the President's salary). He would merely be discharging a power of his office. It would be advisable, however, to make an expense allowance available to the Vice-President when he acts as President (see note 273 *supra*). This could be effected by changing the present statute relating to the Vice-President's salary. 3 U.S.C. § 104 (1958). See generally, *Walls v.*

tial, as any lesser means of solving the problem would be open to constitutional attack, which would come most likely during a time of inability—when we least could afford it.

With this clarification of the succession clause no one disagrees. Yet, it is precisely this clarification which is needed. It was the ambiguous wording of the Constitution that restrained Vice-Presidents Arthur and Marshall from acting as President and that made President Wilson suspicious of Lansing and Marshall. If the Constitution were clarified in this regard, without more, it is suggested that the inability problem would be solved for all practical purposes. If the Constitution had been clear in 1881 and 1919, history very probably would have been different. Most certainly, if the Constitution had been clear in 1955 and it had been necessary for the Vice-President to act as President, he would have acted and he would have done so with the President's approval.

An amendment embracing only these changes would not be so inadequate a solution as some may think.²⁷⁵ Many systems operate smoothly and effectively under a simple type of succession provision which leaves the question of inability to the entities and individuals concerned. Such a succession provision is to be found in most of the states,²⁷⁶

Hall, 202 Ark. 999, 154 S.W.2d 573 (1941), where the president pro tempore of the state senate did not have to take the oath when acting for the governor during his absence from the state. Accord, Opinion of Justices, 70 Me. 560, 593-94 (1880). Compare, *In re An Act Concerning Alcoholic Beverages*, 130 N.J.L. 123, 31 A.2d 837 (1943) (oath taken); *State ex rel. Chatterton v. Grant*, 12 Wyo. 1, 73 Pac. 470 (1903) (received pay of both offices). The constitutions of several states provide that whenever the successor acts as governor, he is to receive the same salary as the governor. E.g., Ala. Const. art. V, § 129; Ky. Const. § 86; La. Const. art. V, § 7; Mich. Const. art. V, § 27. A more logical result occurs in one state where the successor does not receive the governor's salary in cases of temporary absence or disability. Utah Const. art. 7, § 11. A number of state constitutions have no specific provision in point. Still others provide for the devolution of the emoluments of the office, along with the powers and duties, for the period of disability or until the end of the term (or until a new governor is elected). E.g., Colo. Const. art. IV, § 13; Idaho Const. art. IV, § 12; Ill. Const. art. V, § 17; Mo. Const. art. IV, § 11; Ncb. Const. art. IV, § 16; N.M. Const. art. V, § 7; N.C. Const. art. III, § 12; Okla. Const. art. VI, § 16; Pa. Const. art. IV, § 13.

275. At present, a time of inability leaves the President with little leverage. Thus the President may not delegate any of his constitutional functions even to the Vice-President. There are numerous matters which require a President's attention. Bills may be approved or disapproved only by the President. The President, however, can delegate some of his statutory duties. 3 U.S.C. § 301 (1958). See generally Nobleman, *The Delegation of Presidential Functions: Constitutional and Legal Aspect*, *Annals* 134 (1956); 1 Truman, *Memoirs* 195-98 (1955).

276. N.Y. Const. art. IV, § 5, is representative: "In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the office, resignation, or absence from the state, the powers and duties of the office

many foreign countries, the federal judicial system²⁷⁷ and the executive department.²⁷⁸

Although such an amendment would not explicitly answer the question of who determines the commencement and termination of inability, that power would rest where it now is and where it belongs—in the executive branch.²⁷⁹ The wisdom of the framers is legendary. They wrote a Constitution embodying a philosophy of government whereby powers were separately distributed among the legislative, executive and judicial branches. This separation of powers was made subject to specified checks and balances. No others were intended, nor should any others now be written into the Constitution. To give authority in a determination of presidential inability to any branch other than the executive branch would be unconstitutional without an amendment. To do so by an amendment would result in a redistribution of power among the three branches and would be a violation, in spirit, of the principle of separation of powers. To give such authority to a nonelected body would be a violation of the democratic process.

shall devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease.”

277. The Chief Justice of the United States Supreme Court is covered by the following provision: “Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the associate justice next in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified.” 28 U.S.C. § 3 (1958). The Chief Judges of the Circuit Courts of Appeals (28 U.S.C. § 45(d) (1958)), District Courts (28 U.S.C. § 136(d) (1958)), and Custom Court (28 U.S.C. § 253 (1958)) are covered by this provision: “If he [a chief judge] is temporarily unable to perform his duties as such, they shall be performed by the judge in active service, . . . present, able and qualified to act, and next in precedence.”

278. Rev. Stat. 177 (1875), 5 U.S.C. § 4 (1958): “In case of the death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof . . . performs the duties of such head until a successor is appointed, or such absence or sickness shall cease.” See Rev. Stat. 178-79, 5 U.S.C. §§ 5-6 (1958).

279. A frequent objection to a constitutional amendment is that it would take too long to be enacted. The record shows that the lengths of time from proposal to ratification of the twenty-three amendments were as follows: (a) 1-10: 26 mos.; (b) 11: 11 mos.; (c) 12: 6 mos.; (d) 13: 10 mos.; (e) 14: 25 mos.; (f) 15: 11 mos.; (g) 16: 43 mos.; (h) 17: 11 mos.; (i) 18: 13 mos.; (j) 19: 14 1/2 mos.; (k) 20: 11 mos.; (l) 21: 9 1/2 mos.; (m) 22: 47 mos.; (n) 23: 9 1/2 mos. (The ratification date is important as to when an amendment becomes effective. *Dillon v. Gloss*, 256 U.S. 368 (1921).) See *The Constitution of the United States of America, Analysis and Interpretation* 39-54 (Corwin ed. 1953), for an excellent history of each amendment. It is elementary that the Constitution sets forth two ways to propose amendments: (1) by two-thirds vote in both Houses of Congress, or (2) by a national constitutional convention called by Congress on the request of two thirds of the state legislatures—and two ways to ratify them: (1) by the legislatures in three fourths of the states, or (2) by conventions in three fourths of the states. U.S. Const. art. V. See generally Orfield, *The Amending of the Federal Constitution* (1942).

As the Constitution is now written, it is the Vice-President's duty to act as President in cases of inability and therefore, by implication, his duty to make the determination of inability.²⁸⁰ There is no major reason why the President should not be able to declare his own inability. The amendment should so provide. If the President were to use this power in order to shirk his duties, he would be subject to impeachment on the basis of neglect. The amendment should also provide that the President is to be the judge in all cases as to when the inability has ended, whereupon he immediately resumes his powers and duties. The nature of the Presidency dictates that the President should not be deprived of them against his will except by impeachment.

A requirement in any amendment that when the President is unable or does not make the determination of inability the Vice-President can act only with majority approval of the Cabinet is not advisable for reasons previously given²⁸¹ and for the additional reason that there might be situations requiring action by the Vice-President independently of Cabinet approval or before such approval would be possible.²⁸² However, a clause to the effect that "in reaching his determination, the Vice-President may secure the opinions of the Heads of the Executive Departments" is advisable, though he would probably do so anyway. It would serve as a constitutional recommendation that the Vice-President consult the Cabinet, while not preventing him from making the determination alone, should it be necessary. With Cabinet support, however, he would be less reluctant to act in a proper case and his decision would meet with greater public acceptance.

An amendment along the lines above might well foster an attitude of cooperation between the President and Vice-President in inability situations. It would not only permit but encourage the President to make a determination of his own inability, without fear of losing his office, in

280. Herbert Brownell, Jr. has persuasively argued this point, saying that contingent grants of power give the grantee the right to determine when to exercise it. 1957 House Hearing 21; see Brownell, *supra* note 264, at 205. The cases frequently cited for this proposition are *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) (President given authority to fix rate of custom duties on imports); *Field v. Clark*, 143 U.S. 649 (1892) (President given authority to suspend provisions of a tariff act); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (President given authority to call militia into service); and *Aurora v. United States*, 11 U.S. (7 Cranch.) 382 (1813) (President given power to renew trade with certain countries). Martin Taylor, however, says that in each of the above cases acts were done "in pursuance of express authority given the President by Congress." 1957 House Hearing 36. He then adds that "this is an entirely different matter from saying that power may be implied where express direction is not given." *Ibid.* Taylor's objections are not convincing. See note 205 *supra*.

281. See notes 270-72 *supra* and accompanying text.

282. See note 271 *supra* and accompanying text.

such cases as where he is actually sick or about to undergo an operation. It would also allow the Vice-President to act without hesitation in cases where the President is clearly unable to make the determination of inability, e.g., where he is in a coma, kidnapped or a prisoner.

The case of insanity is not covered by the suggested amendment since it is unlikely that the President would declare himself unable, and it would be impossible or futile for the Vice-President to make a determination of inability as the President would undoubtedly insist that he was able—and his word would be final.²⁸³ However, the Constitution provides a remedy for a situation where the President acts irresponsibly or neglects or abuses the duties of his office, namely, impeachment.²⁸⁴ This is the remedy for presidential insanity and there is evidence that it would have been so intended by the Founding Fathers.²⁸⁵ It bears repeating that the President is elected by all the people and therefore should not be deprived of the powers and duties of his office against his will except by the people at the polls or, in extraordinary cases, by Congress under the impeachment provisions of the Constitution. Given the case of an *insane* President, with the attendant danger to the Nation's security, it is submitted that Congress could act to meet the crisis as swiftly and effectively as any board or commission, if not more so.²⁸⁶ In order to provide for the occurrence of such a crisis during a recess of Congress, there is little reason why the Vice-President should not be

283. For an interesting dramatization of a similar situation, see Wouk, *The Caine Mutiny* (1951).

284. As President Eisenhower said at his press conference on April 3, 1957: "[B]ehind this whole thing is the ability and the power in the Congress to impeach a President. Presumably, if a President got in such shape that he was just acting wildly and unconstitutionally, that would happen. That is the final protection of the people against a President who is absolutely unable to discharge the functions of his office but doesn't know it." *Public Papers of the Presidents of the United States, 1957*, at 245 (U.S. Gov't Printing Office, 1958).

285. Significantly, at the Constitutional Convention James Madison spoke out in favor of having impeachment in the Constitution because "he thought it indispensable that some provision be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate. . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity was more within the compass of probable events, and either of them might be fatal to the Republic." 2 Farrand 65. And Gouverneur Morris added: "Corrupting his electors, and incapacity, were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office." 2 Farrand 69. See generally Foster, *Commentaries on the Constitution of the United States* 505-630 (1895); *Atl. Monthly*, Jan. 1957, pp. 88-92 ("The Causes For Which A President Can Be Impeached"). Compare, 1 Curtis, *Constitutional History of the United States* 569 (1889 ed.) (inability not impeachable).

286. Witness: the declaration of war after the bombing of Pearl Harbor.

given the power to convene a special session of Congress in such a case.²⁸⁷

The writer's solution is, in most respects, not original.²⁸⁸ It is, however, that which is most consistent with the intention of the Founding Fathers. The President and Vice-President, the only public officials elected by all the people, should have the opportunity to operate under a succession provision free of the doubt that now exists. The provision should be flexible, capable of working without the rigors of a legal proceeding or the spectacle of a public show, and able to operate immediately if the occasion should require it.²⁸⁹ The author believes an amendment embracing the following points would satisfy these tests:

1. In cases of death, resignation or removal the Vice-President becomes President for the remainder of the term.
2. In cases of inability, the Vice-President exercises the powers and duties of the office for the duration of the inability.
3. The President may declare his own inability.
4. Where the President is unable to or does not declare his own inability, the Vice-President may make the determination of inability.
5. In either 3 or 4 above, the President can declare the cessation of the inability.
6. In making any determination, it is recommended that the Vice-President secure the opinions of the Heads of the Executive Departments.
7. If an inability crisis should arise during a recess of Congress, the Vice-President may convene an extraordinary session thereof.

The pressing problems of the day are those of civil rights, medical care, the communist threat, aid to education, tax reform, and so on. Yet, in a sense, does not the problem of presidential inability transcend them all?²⁹⁰ Our strength and survival depend on our having an able leader at the head of the executive branch at all times. The continuity of the Executive should never be in doubt. At present it is. A constitutional crisis exists. It is time that Congress act to resolve it once and for all.

287. This, of course, would entail a change in the Constitution, which gives such power only to the President. U.S. Const. art. II, § 3.

288. Similar thoughts have been expressed by Brownell, *op. cit. supra* note 264, at 201-04; Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. (1918). The Eisenhower-Nixon and Kennedy-Johnson agreements are very much in point, though they have no formal legal status.

289. As the New York Times wisely said: "The absolute necessity of avoiding any gap, even momentarily, in the Executive power, or any doubt as to the possibility of its exercise, grows more imperative with each passing year. There could be times when the safety of the nation depends on a decision being made instantly and accepted without question." *N.Y. Times*, June 26, 1962, p. 32, cols. 3-4.

290. For general accounts of presidential responsibilities, see Coughlan, *How to Ease the Burdens of World's Most Burdensome Job, Life*, Feb. 27, 1956, p. 125; *U.S. News & World Rep.*, March 14, 1958, p. 35 ("A Day in the Life of the President"); *id.*, Nov. 22, 1957, p. 50 ("The Presidency: Can Any One Man Do the Job?"); *id.*, Feb. 3, 1956, p. 28 ("A Work Week with Eisenhower").

APPENDIX—SUCCESSION PROVISIONS OF THE VARIOUS STATES
(See explanation at end of chart)

State	Contingencies			Result	Impeach- ment	Absence	Contingencies	Result
	Death	Resig- nation	Other				(Disability, Inability or Other)	
Ala.	Lt. Gov.	Yes	Yes	Yes	Yes	Yes if more than 20 days	Unsoundness of mind, or other disability	Powers and authority devolve temporarily
Alaska	Sec'y of State	—	—	Vacancy for any reason	—	Yes	Unable . . . by reason of mental or physical disability	Acts if temporary absence after six months of absence or disability
Ariz.	Sec'y of State	Yes	Yes	Permanent disability	Yes	Yes	Other temporary disability	Powers and duties devolve temporarily
Ark.	Lt. Gov.	Yes	Yes	—	Yes	Yes	Inability	Powers and duties devolve temporarily or for rest of term
Cal.	Lt. Gov.	—	—	Vacancy in office	Yes	Yes	Temporary disability	Powers and duties devolve temporarily
Colo.	Lt. Gov.	Yes	Yes	—	Yes	Yes	Other disability	Powers, duties and emoluments devolve temporarily or for rest of term
Conn.	Lt. Gov.	Yes	Yes	—	Yes	Yes	Inability	Exercises powers and duties temporarily or until new governor elected at next periodical election for governor
Del.	Lt. Gov.	Yes	Yes	—	—	—	Inability to discharge powers and duties of office	Same (powers and duties) devolve temporarily or until new governor elected and qualified
Fla.	Pres. of Senate	Yes	Yes	—	Yes	—	Inability	Powers and duties devolve temporarily or for rest of term unless legislative elections occur

APPENDIX (Continued)

State	Contingencies			Impeachment	Contingencies		Result
	Successor	Death	Resig-Removal		Absence	(Disability, Inability or Other)	
Ga.	Lt. Gov.	Yes	Yes	—	—	Disability	Exercises powers and receives compensation until new governor elected for rest of term at next general election for assembly
Hawaii	Lt. Gov.	—	—	Vacancy	Yes	Inability	Becomes governor
Idaho	Lt. Gov.	Yes	Yes	Yes	Yes	Inability	Powers, duties and emoluments devolve for rest of term
Ill.	Lt. Gov.	Yes	Yes	Yes	—	Other disability	Powers, duties and emoluments devolve for rest of term
Ind.	Lt. Gov.	Yes	Yes	Yes	—	Inability to discharge powers and duties of office	Same shall devolve on lieutenant governor
Iowa	Lt. Gov.	Yes	Yes	Yes	Yes	Other disability	Powers and duties devolve for rest of term
Kan.	Lt. Gov.	Yes	Yes	Yes	—	Other disability	Powers and duties devolve for rest of term
Ky.	Lt. Gov.	Yes	Yes	Yes	—	Unable from any cause	Exercises power and authority until new governor elected and qualified
La.	Lt. Gov.	—	—	Vacancy in office	Yes	Inability . . . from . . . other cause	Fills vacancy
Me.	Pres. of Senate	Yes	Yes	Vacant by . . . otherwise	—	—	Exercises office until new governor qualified

Exercises powers and receives compensation until new governor elected for rest of term at next general election for assembly

Powers and duties devolve temporarily

Powers, duties and emoluments devolve temporarily or for rest of term

Powers, duties and emoluments devolve temporarily or for rest of term

Same shall devolve on lieutenant governor

Powers and duties devolve temporarily or for rest of term

Powers and duties devolve temporarily or for rest of term

Lieutenant governor exercises power and authority temporarily or until new governor elected and qualified

Powers and duties devolve temporarily

APPENDIX (Continued)

State	Successor	Contingencies			Result	Impachment	Absence	Contingencies		Result
		Death	Resig- nation	Remov- al				Other	(Disability, Inability or Other)	
Md.	Pres. of Senate	Yes	Yes	—	Other disquali- fication	—	Yes	—	—	Discharges duties until new governor elected for rest of term by assembly
Mass.	Lt. Gov.	Yes	—	—	Vacant by rea- son of . . . other- wise	—	Yes	—	—	Performs duties for time being
Mich.	Lt. Gov.	Yes	Yes	Yes	—	—	Yes	Inability	—	Powers and duties devolve temporarily
Minn.	Lt. Gov.	—	—	—	Vacancy . . . from any cause whatever	—	—	—	—	Same shall devolve on lieutenant governor
Miss.	Lt. Gov.	Yes	—	—	Vacant by . . . otherwise	—	Yes	—	—	Discharges duties until governor able to resume
Mo.	Lt. Gov.	Yes	Yes	Yes	—	—	Yes	—	—	Powers, duties and emolu- ments devolve temporarily or for rest of term
Mont.	Lt. Gov.	Yes	Yes	Yes	—	—	Yes	Inability	—	Powers, duties and emolu- ments devolve temporarily or for rest of term
Neb.	Lt. Gov.	Yes	Yes	—	—	—	Yes	—	—	Powers, duties and emolu- ments devolve temporarily or for rest of term
Nev.	Lt. Gov.	Yes	Yes	Yes	—	—	Yes	Inability	—	Powers and duties devolve temporarily or for rest of term
N.H.	Pres. of Senate	Yes	—	—	Vacant by rea- son of . . . other- wise	—	—	—	—	Shall have and exercise all powers and authorities of governor during vacancy
N.J.	Pres. of Senate	Yes	Yes	Yes	Vacancy from . . . any other cause	—	Yes	—	—	Powers, duties and emolu- ments devolve tempo- rarily—until new governor elected for rest of term at next general election

APPENDIX (Continued)

State	Contingencies			Result	Impeach- ment	Absence	Contingencies (Disability, Inability or Other)	Result	
	Successor	Death	Resig- Remov- nation at						Other
N.M.	Lt. Gov.	—	—	Vacancy	Succeeds to office and emoluments	—	Yes	For any reason un- able	Acts temporarily with all powers, duties and emolu- ments
N.Y.	Lt. Gov.	Yes	Yes	—	Powers and duties devolve for rest of term	Yes	Yes	Inability	Powers and duties devolve temporarily or for rest of term
N.C.	Lt. Gov.	—	—	Office in any way becomes vacant	Powers, duties and emolu- ments devolve until new governor elected and qualified	Yes	Yes	Inability	Powers, duties and emolu- ments devolve temporar- ily or until new governor elected and qualified
N.D.	Lt. Gov.	Yes	Yes	—	Powers and duties devolve for rest of term	Yes	Yes	Disability	Powers and duties devolve temporarily or for rest of term
Ohio	Lt. Gov.	Yes	Yes	—	Powers and duties devolve for rest of term	Yes	—	Other disability	Powers and duties devolve temporarily or for rest of term
Okla.	Lt. Gov.	Yes	Yes	—	Office devolves, with its compensation, for rest of term	Yes	Yes	Inability	Office devolves, with its compensation, temporarily or for rest of term
Ore.	Pres. of Senate	Yes	Yes	—	Becomes governor until new governor elected	—	Yes	Other inability	Becomes governor tempo- rarily or until new gov- ernor elected
Pa.	Lt. Gov.	Yes	Yes	—	Powers, duties and emolu- ments devolve for rest of term	—	—	Other disability	Powers, duties and emolu- ments devolve temporarily or for rest of term
R.I.	Lt. Gov.	—	—	Vacancy	Lieutenant governor fills office and exercises powers and authority until a gov- ernor is qualified or office filled at next annual elec- tion	Yes	Yes	Inability to serve	Lieutenant governor fills office and exercises powers and authority until a gov- ernor is qualified or office filled at next annual elec- tion

APPENDIX (Continued)

State	Contingencies			Result	Contingencies			Result	
	Death	Resig- nation	Other		Impeach- ment	Absence	(Disability, Inability or Other)		
S.C.	Lt. Gov. Yes	Yes	Yes	Disqualification	Becomes governor	—	Yes	Disability	Becomes governor—in case of temporary disability performs duties
S.D.	Lt. Gov. Yes	Yes	Yes	—	Powers and duties devolve for rest of term	Yes	Yes	Other disability	Powers and duties devolve temporarily or for rest of term
Tenn.	Spkr. Yes	Yes	Yes	—	Powers and duties devolve	—	—	—	—
	[who is, by stat., Lt. Gov.]								
Tex.	Lt. Gov. Yes	Yes	Yes	—	Exercises powers and authority until another governor qualifies	Yes	Yes	Inability to serve	Exercises powers and authority temporarily or until another governor qualifies
Utah	Sec'y of State Yes	Yes	Yes	—	Powers and duties devolve until vacancy filled at next general election	Yes	Yes	Inability	Powers and duties devolve temporarily or until vacancy filled at next general election
Vt.	Lt. Gov. Yes	Yes	Yes	—	Exercises powers and duties until new governor elected	—	—	Inability	Exercises powers and duties temporarily or until new governor elected
Va.	Lt. Gov. Yes	Yes	Yes	—	Office, with its compensation, devolves	—	Yes	Inability	Office, with its compensation, devolves
Wash.	Lt. Gov. Yes	Yes	Yes	—	Duties devolve (and succeeds to office) until new governor elected and qualified	—	—	Disability	Duties devolve (and succeeds to office) temporarily or until new governor elected and qualified
W.Va.	Pres. of Senate Yes	Yes	Yes	—	Acts as governor until vacancy filled	—	—	Other disability	Acts as governor temporarily or until vacancy filled

APPENDIX (Continued)

State	Successor	Contingencies			Result	Impeachment	Absence	Contingencies (Disability, Inability or Other)	Result
		Death	Resig- nation	Remou- val					
Wis.	Lt. Gov.	Yes	Yes	Yes	---	Yes	Yes	Inability from men- tal or physical dis- ease	Powers and duties devolve temporarily or for rest of term
Wyo.	Sec'y of State	Yes	Yes	Yes	---	Yes	Yes	Mental or physical disease or other- wise . . . incapable	Acts as governor tempo- rarily or until vacancy filled

EXPLANATION OF CHART: The provisions on executive succession which exist in the fifty states are classified as follows:

1. Two groups of contingencies are set forth in the chart—those which, when they occur, are necessarily permanent in nature (left-hand side) and those which may be either permanent or temporary.
2. Each group is followed by a "result" category which gives the status of the successor upon the happening of the particular contingencies. The expression "devolve temporarily" is used in place of "until the disability is removed," "the governor returns or is acquitted," or similar expressions.
3. The absence contingency refers to absence from the state and impeachment is limited to the accusation stage.
4. Failure to qualify or refusal to serve contingencies are not covered by the chart.