



1961

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Recommended Citation

Cornelius W. Wickersham, *Presidential Inability: Procrastination, Apathy and the Constitution*, 7 Vill. L. Rev. 262 (1961).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol7/iss2/4>

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PRESIDENTIAL INABILITY: PROCRASTINATION,
APATHY AND THE CONSTITUTION.

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THE FEDERAL CONSTITUTION fails to specify what constitutes "Inability" of the President of the United States and fails to provide the method of determining either the beginning or the end of the disability or what the position of the Vice President should be in that event. This important and possibly vital deficiency has been a matter of embarrassment in the past and could be a matter of national disaster in the future.

The difficulty is apparent from a reading of the pertinent clause of Section 1 of Article II of the Constitution which is as follows:

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

Several questions immediately become apparent upon reading this clause:

First: In case of removal, death or resignation of the President, does the Vice President become President or merely an Acting President empowered to exercise and discharge the powers and duties of that office?

If the crucial words "the Same" were intended to refer only to the powers and duties of the office, and not to the office itself, then upon the death of a President, the Vice President would become an Acting President only. He would not succeed to the office of President.

However, this interpretation has not been adopted. In each of the seven cases in the history of the United States where a President has died in office, the Vice President has been sworn in as President, not merely as an Acting President, and has continued to hold office for the remainder of the term for which his predecessor was elected.

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The initial precedent was set by Vice President Tyler when President Harrison died in office in 1841. Contrary to the interpretation held by many at the time, he succeeded in establishing himself as President rather than as an Acting President. Senator Allen of Ohio warned his colleagues that recognition of Tyler as President would lead to serious complications in a case of disability and Secretary of State Daniel Webster stated that even though a President recovered from his disability during the term for which he was elected he could not displace the Vice President who had assumed the duties of his office.

Tyler, however, refused to consider himself as an Acting President and when a bill was presented to him for signature which had the words "Acting President" on it he always struck out the word "Acting". Despite the doubts and opinions expressed by Senator Allen, Secretary Webster and others, the precedent established by Tyler has never been seriously questioned since that time and has been supported by both parties in our political system, therefore it may be taken as a final and binding interpretation of the Constitution, and an established precedent. Presumably, this would also be the result in the case of the removal of the President from office or of his resignation.

For the reasons to be discussed in this article a similar interpretation of the effect of presidential inability appears to be impossible, despite the failure of the Constitution to separate the four contingencies.

Second: The question of what happens in case of removal, death, resignation, or inability of *both* the President and Vice President, is answered by the latter part of the clause of the Constitution authorizing Congress to declare what officer shall then act as President, and the one so declared is to *act* as President until the disability is removed or a President elected. Under this provision Congress has enacted the so-called Succession Acts designating who shall act as President; but clearly the person so designated does not become President; he succeeds to the powers and duties of the office, though not to the office itself. He is declared to be only an Acting President, and will have to step down when the presidential inability ceases or a new President is elected. The language of the clause is at least clear as to this — "such Officer shall act accordingly [*i.e.* as President], until the Disability be removed, or a President shall be elected."

Third: Does the provision relating to an election require a new election, or does it suffice for the Vice President to become President (in case of death, etc.) or for a selected officer acting as President to continue in office, or to act as President until the end of the term and then have an election at the regular time? In the past the Vice Presi-

dent, upon the death of the President, continued in office as the President for the balance of his predecessor's term despite the fact that in several cases it was almost as long as a full four year term. This precedent seems fairly well established.

Fourth: As there is no definition of inability or disability in the Constitution, the question arises as to whether temporary inability or permanent inability is intended and further who is to determine inability, its commencement or its termination. When the Committee on Style to whom the Constitutional Convention of 1787 had referred the draft for final wording made its report, John Dickinson of Delaware expressed the thought that the section under discussion was too vague and asked, "What is the extent of the term 'disability' and who is to be the judge of it?" No one answered his questions then and they remain unanswered today.

Fifth: We now come to a final critical problem, *i.e.* whether, in the case of Presidential inability, the Vice President becomes President or merely Acting President during the period of the President's inability.

The Constitution fails to provide any machinery for determining the vital questions involved. The power given to Congress to implement the provisions relating to inability of *both* President and Vice President is restricted to the double event, and does not apply where the President alone is under a disability.

This difficulty has had historical consequences. President Harrison's illness was so short before he died that no practical determination of the question of inability was required; however, the cases of Presidents Garfield and Wilson emphasized the inherent problems in such situations. Garfield remained alive for eighty days after he was shot. The Cabinet considered the possibility of asking Vice President Arthur to act as President during the interval, but a majority, including Attorney General MacVeagh, thought that Arthur's exercise of presidential power would make him President for the rest of the term and accordingly would oust Garfield from his office. Arthur could not discuss the matter with Garfield, for his doctors were afraid that such discussion might bring on a state of shock which would cause Garfield's death. Arthur did not attempt to act for Garfield during this period.

When President Wilson was stricken in September, 1919 and was incapable of exercising the duties of his office for considerable periods during the remaining seventeen months of his term, we were fortunate that there was no great power with modern weapons threatening the

peace of the country or of the world. During President Wilson's illness twenty-eight bills passed by Congress became law without his signature under the ten days rule. Our enemies had been defeated and a peace conference had resulted in a series of treaties of peace. The atom bomb was unknown, the air service was in its childhood, the radio in its infancy and communications and intercourse with other nations were slow compared to what they are today. Some people are of the belief that if Mr. Wilson had not been stricken his effort to persuade this country to join the League of Nations might have been successful, and in that event it might have been possible to stave off Hitler and the Second World War. No one can be sure of this. Again, the Vice President was in fact unwilling to endeavor to establish himself as President or Acting President and the country was without a leader for many months. Fortunately, no immediate crises arose and thus the question remained dormant.

When, however, President Eisenhower became ill in 1955, members of Congress became alarmed and a series of hearings were held by committees of both Houses of Congress and a great amount of testimony was taken in an endeavor to reach a solution satisfactory to the country and binding on all concerned.

Many suggestions were made, although most of these appeared to be inadequate to meet the issue in a way that would have been both understandable and acceptable to the American people. For example it was suggested at various times that either the President; the Vice President; the Cabinet; both the Vice President and the Cabinet; a commission of either selected officials or outstanding citizens specially appointed, or the Congress should make the determination of inability. Others felt that the matter should be referred to the courts. In addition a substantial difference of opinions arose as to whether the problem could be cured by statute or by constitutional amendment. The discussions were also confused because of an endeavor to combine that question with the very difficult problem of selection of a satisfactory method for determining the existence of an inability, its commencement and termination. It seems fair to say that the majority felt that in any event the Vice President should not succeed to the office of President but should only be an Acting President until the disability ended or until a new President was elected; and further, that no definition of inability should be attempted.

A special difficulty revolves around the words "the Same" in the existing clause. Does this refer to the office of the President or does it refer to the powers and duties of the office? A vital question!

In the case of presidential inability there is no authority, judicial or otherwise, to provide the answer. The result is that a Vice President who attempted to act for a disabled President would be in a most invidious position with respect to his Chief, as well as to Congress, the government and the country. Should he, for instance, take the oath of office as President? If so, what would be the situation upon the termination of the inability of the President to act prior to a national election? Could the President resume the office, which is rightfully his, without a resignation by the Acting President who had taken the constitutional oath of office for the presidency? Would the Vice President now acting as President be willing to resign? Could he be compelled to do so? By what authority?

It is true that some state courts have been willing to act on similar state questions. Thus the Supreme Court of New Hampshire issued a writ of mandamus to the President of the State Senate directing him to assume the powers and duties of the Governor during the period of the Governor's illness. This was done on request of the State Attorney General with the Governor's consent.¹

The policy of the federal courts to avoid political questions was well expressed by Mr. Justice Frankfurter in *Colegrove v. Green*, as follows:

"From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."²

Thus it is safe to assume that neither *quo warranto* nor *mandamus* is available in a federal court. Aside from the basic question of the correct interpretation of the Constitution, solution by court action presumably cannot be relied on.

Even if the courts were willing to take jurisdiction it might require months of litigation before a final decision was reached. During that time no officer of the Government would be sure of his right to carry out the order given to him by either of the claimants. The result could easily be a complete paralysis of our Government and of its armed forces in case of war, rebellion or invasion.

1. *Attorney General v. Taggart*, 66 N.H. 362, 29 Atl. 1027 (1890). See also *Walls v. Hall*, 202 Ark. 909, 154 S.W.2d 573 (1941); *Ex parte Crump*, 10 Okla. 133, 135 Pac. 428 (1913).

2. 328 U.S. 549, 553-54 (1946). In addition Chief Justice Warren informed Congressman Keating, by letter, that the members of the Supreme Court felt that it would be inadvisable for any member of the Court to serve on a commission to determine Presidential inability.

Furthermore, if the President and Vice President were or became antagonistic to each other for personal or political reasons a stalemate might result and clearly neither would have constitutional authority recognized by all to exercise the great powers of the President of the United States.

It was largely for these reasons and especially for the fear that if the Vice President took over, the disabled President would be ousted, that during President Garfield's incapacity and President Wilson's long illness the Vice President in each case was unwilling to take any steps to exercise the powers of the President's office. The necessary decisions incumbent on the President were in fact not exercised. All personal and party feelings of the Vice President for his Chief militated against an act which might have the most serious effect on the President's health and perhaps on his own political future. (When President Wilson learned that Secretary of State Lansing had called a number of Cabinet meetings during the President's absence, he promptly compelled Lansing to resign.)

It can readily be seen that any attempt by agreement between the two men or even by act of Congress, in view of the language of the Constitution, to endeavor to satisfy the practical and political requirements of the situation or the sentiments and feelings of the American people as well as of their representatives in Congress without the overriding authority of a constitutional amendment is completely unrealistic.

Although some who have studied the problem feel that Congress has power to deal with the problem under the "necessary and proper" provisions of the Constitution, others are clearly of the opinion that only a constitutional amendment would be satisfactory. The latter rely on the fact that the "necessary and proper" clause applies only to those matters to which basic policies are laid down in the Constitution and does not authorize Congress to fill gaps in the policies so laid down. The latter view seems to be supported by case law³ and furthermore where a constitutional problem of such vital importance, involving not only legal questions but widespread and national political implications, is concerned it would seem to be most unwise and probably of small effect to leave the matter to legislation of doubtful constitutionality.

3. See, *e.g.*, *Kansas v. Colorado*, 206 U.S. 46 (1907); *United States v. Harris*, 106 U.S. 629 (1883). These cases state the general proposition that Congress can legislate only on subjects where the power to legislate has been granted by the Constitution.

We may reasonably conclude therefore that without a constitutional amendment it would be impossible for the Government of the United States to function with full authority in case of an emergency. The amendment required is one that would provide in substance:

(a) that the commencement and termination of any inability should be determined by such method as Congress shall by law provide;

(b) in case of the inability of the President, so determined, that the Vice President should succeed only to the powers and duties of the office and not to the office itself;

(c) that upon termination of the President's disability prior to an election he shall resume his office;

(d) that for these purposes the provisions relating to inability should be separate from those relating to death, resignation or removal, thus eliminating any ambiguity involved in the present language; and

(e) in the event of inability of *both* the President and Vice President the amendment should distinguish between inability and other events, so that it would be plain that different results would follow.⁴

Let us now analyze these five considerations. With respect to (a) above, some proposals for an amendment go further and endeavor to prescribe the methods to be used for determination of the facts relating to inability and to set up machinery for determination of that question both as to the commencement as well as to its termination. But, the difficulty with this course is that the freezing of any one method into the Constitution would make any necessary future correction extremely difficult because it might require an additional constitutional amendment. It is better constitutional practice to prescribe the principles to govern action and to leave to the legislature the selection of methods by which those principles can be best implemented under the "necessary and proper" clause. This gives necessary elasticity without imperiling

4. Compare the proposal of the Committee on the Federal Constitution of the New York Bar Association.

"In case of the Removal of the President from Office, or of his Death or Resignation, the said Office shall devolve on the Vice President. In Case of the Inability of the President to Discharge the Powers and Duties of the said Office, the said Powers and Duties shall devolve on the Vice President, until the Inability be removed. 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 be President, or in case of Inability, act as President, and such Officer shall be or act as President accordingly, until a President shall be elected, or, in the case of Inability, until the Inability shall earlier be removed. The commencement and termination of any Inability shall be determined by such method as Congress shall by law provide."

the basic design. The danger of freezing a particular method is avoided by giving to Congress the power to select the method. Correction or improvement can thus be made at any time by the enactment of new legislation within the framework of the amendment.

Furthermore, since we have never in the history of this country adopted the alternative method of constitutional amendment, *i.e.* constitutional convention, but have always amended the Constitution by resolutions of the Congress referred to the states it is possible that Congress would resent an attempt to call a constitutional convention for the purpose of enacting an amendment which would deprive them of their ordinary legislative powers. A proposal that the facts as to commencement and termination of any inability should be determined by such method as Congress shall provide would enhance the possibility of Congress submitting a constitutional amendment to the states for ratification.

As to (b) above, the proposal eliminates the difficulties resulting from the words "the Same" in the present clause of the Constitution. Thus, when inability is determined by the method to be laid down by Congress, the Vice President would automatically become authorized to exercise the powers and duties of the office of President and legal action could be taken by him, and bills approved or vetoed, foreign affairs conducted, and orders issued which would be recognized as authoritative by all concerned. As he would have no basis for claiming to succeed to the office itself, or to be sworn in as President, all embarrassment to both officers would be removed. The action would be normal, well understood and expected.

The reasons for (c) are obvious. The fear on the part of a disabled President and of his friends and supporters that the Vice President by acting as President had become the incumbent of the office itself would be removed. Possibly this is one of the most important provisions of the amendment. It is difficult to see how any President could object to the Vice President exercising the powers and duties of the office during the President's disability when he knew that it was only temporary and that upon his recovery he would resume his office unless, of course, his term of office had ended by an election.

In the cases of death, resignation or removal, referred to in (d) above, the established tradition already discussed would naturally and inevitably lead to general and public recognition that the Vice President becomes President. He would be sworn in accordingly, and the amended clause would so provide.

Finally we have the question relating to the inability of both officers, referred to in (e). While the Succession Acts, passed pursuant to the present constitutional provisions are in effect, the latter only by inference separates the restoring to power of a disabled President from the consequences of death, removal or resignation. This can be clarified by more explicit separation of inability from the other causes of succession.

There remains the question of method to be adopted by Congress to implement the provisions of the proposed amendment. The writer does not intend to present a case of special pleading either for the precise wording of the proposed amendment or for the particular method to be adopted by Congress to fill in the chinks. The writer is fully satisfied, however, that an amendment substantially as stated in this article is advisable and necessary and indeed, that inaction is intolerable.

While various methods have been suggested, as already pointed out, it is believed by the writer that the questions involved are so intimately connected with the Executive that the determination of the *commencement* and *end* of presidential inability should be left to that department of Government in accordance with the doctrine of separation of powers, and that no method should be adopted authorizing the judiciary, the Chief Justice, a group of distinguished citizens, Congress or others not part of the Executive to make the determination. The proposal of Attorney General Rogers seems preferable, namely that the President himself, if able to do so, should authorize the Vice President to act, or if the President is unable to do so, the Vice President with the consent of a majority of the Cabinet should be authorized to exercise the powers and duties of the *Chief Executive's office* during the unfortunate circumstances of presidential inability.