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ERRATA

title page and page iv, line 13: for Lawrence VanderVelde read Louis VanderVelde.

page 1, note 1: for Frances read Francis.

page 9, line 19: for restrain read restrict.

page 23, line 1: for Seven times a President has died in office read Seven Presidents have died in office.

page 45, line 8: for Watton read Walton.

page 74, note 128: for H. R. 3587, 80th Cong. read H. R. 3537, 79th Cong.

page 147, note 31: for no part of his term read only a few days of his term.

page 170, line 5: for No state constitution or law... read Only one state provides a formal method for determining the Governor's inability.100a

page 170, insert note 100a: The Mississippi constitution provides that such determination shall be made by the state supreme court upon request from the Secretary of State. Miss. Const., §131; Miss. Code Ann. (1942), §4003.

page 170, line 6: for The Governor usually asks read In the other states the Governor usually asks...

page 243, line 14: for custom is well established read custom and statute have established.

throughout: for supercede read supersede.

PRESIDENTIAL SUCCESSION

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PREFACE

This is a study of a neglected subject in American Government. The approach is partially legal, partially historical, and partially analytical. The central interest is the constitutional and statutory provisions, but adequacy and policy of succession law are also considered. There have been seven cases of vacancy and two of inability in the presidential office. The present study is not primarily a history of these nine cases, but the political and personal aspects of several cases are considered in some detail, because they are a part of the pattern by which the presidential succession precedent has developed. The precedent by which the Vice President becomes the President and the theories by which it has been attacked and defended have resulted from the interaction of legal concepts, personalities, and the political scene at different times.

The study is based primarily on original sources, the records of the Constitutional Convention, debates in the ratifying conventions, congressional debates, hearings, and reports, decisions of state and federal courts, and newspapers. Because of the nature of the subject, many fruitless sources were searched. It was necessary to check the debates and documents for every session of all eighty Congresses and newspapers published during the fifteen periods of vacancy in the Presidency or Vice Presidency. The unpublished papers of members of the Congress and the Cabinet were searched if the circumstances indicated that these papers might contain relevant material. In some cases the search was rewarding, but in many cases it was

not. The writer wishes to express appreciation to Mr. Robert H. Haines of Widener Memorial Library of Harvard University, the staff members of the Harvard Law School Library, the William Cook Legal Research Library of the University of Michigan, the Massachusetts Historical Society, the Boston Public Library, the Library of Congress, the National Archives, and various state historical societies for making materials available. These acknowledgements are indicated more specifically in the notes.

More immediate indebtedness is owed to the doctoral committee under whose direction this study was prepared, Professors James K. Pollock, Everett S. Brown, Joseph E. Kallenbach, Lawrence VanderVelde, and especially to Professor Harold M. Dorr, who read the entire manuscript and made a number of suggestions for its improvement. The writer is also indebted to Dr. Henrietta C. Jennings of Wheaton College for her constructive criticisms and helpful suggestions. For any errors or short-comings the author assumes full responsibility.

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CHAPTER I

THE SUCCESSION CLAUSE

Heaven guards over this country well, considering how many opportunities for crises are offered by the gaps and uncertainties in the constitutional and statutory provisions for presidential succession, an elder statesman recently observed. "This Nation is the greatest Nation in the world," he continued, "and yet a combination of circumstances may arise under which we would have no head, no President; we are just trusting to luck, and it is an awful gamble with fate."[1] To have regulations for presidential succession which are free from doubt and adequate to meet any contingency has always been important, but it becomes vital with the concentration of power in the hands of the executive and the rise of the United States to a position of world leadership. The ambiguities and omissions in the provisions for executive succession, which several times in the past caused political and administrative embarrassment, on some future occasion when there may be no time for repair could lead to national calamity.

The sine qua non of succession law is that it provide for the exercise of executive power at all times. Because the Constitution as interpreted by usage contains no effective provision for the exercise of presidential power during the President's inability, the executive branch of the United States Government discharged only routine business for eighty days while President Garfield lay at death's door. Such a state of

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[1] Senator Theodore Frances Green before the Senate Committee on Rules and Administration. Hearings on S. Con. Res. 1, S. 139, S. 536, S. 564, 80th Cong., 1st sess., 6.

affairs was certainly not desirable in 1881, but being without a Chief Magistrate for so long a period would probably prove disastrous today. A second necessary characteristic of succession provisions is that they leave no doubt as to who may legally exercise the powers and discharge the duties of the presidential office at any given time. A single, lucid interpretation of the succession clause and the laws made in pursuance thereof, however, has never been agreed upon. There is no unanimous conclusion concerning the status and tenure of a Vice President who acts as President during the inability of the latter. Some say he would supercede the President for the remainder of the term. Others contend he would step down when the President's disability is removed. It is apparent that a serious situation could arise if, in such a case, the President and Vice President represented divergent factions of a sharply divided party. The problem of the tenure of a Vice President acting as President during the latter's inability serves to demonstrate the danger of having the right to exercise executive power surrounded by confusion and disagreement.

Whenever there is a case of the Vice President's exercising the powers of the Presidency because of a vacancy in the latter office, or whenever there is a case of presidential inability, the questions of the meaning, adequacy, and policy of the Constitution and laws regulating presidential succession are debated; and the discussion ends only in showing the confusion and utter lack of agreement surrounding the subject. The debaters become so confused with constitutional questions and often so motivated by the partisan advantages of the moment

that, when the threatened crisis passes, they defer the question of presidential succession until another crisis threatens.

The extent to which existing law is adequate, constitutional, and desirable, and the extent to which the problems involved may be solved by legislation without resort to constitutional amendment has never been thoroughly canvassed. The purpose of the present study is to fill this need and to propose a solution to the presidential succession problem. Limits of space prevent a consideration of succession in relation to the case of a President-elect, because the interrelationship between this problem and those involved in the electoral college system and the time set for the beginning of the presidential term is such that no one of the questions can be given adequate consideration without a thorough examination of the others. Since the electoral college system and the time set for the beginning of the term are beyond the scope of this study, succession as treated in the Twentieth Amendment has been omitted.[2]

The basic constitutional question upon which the solution of most succession problems depends is whether or not one who acts as President under the succession clause ipso facto becomes the incumbent of the presidential office. To state the question in the language of the Constitution, must one actually succeed to the office and become the President in order to "exercise the Office of President of the United States"[3] or to "act as President"[4] or to "discharge the Powers and Duties of

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[2] A President in office is to be distinguished from a President-elect.

[3] Article I, sec. 3, cl. 5.

[4] Article II, sec. 1, cl. 5; Amendment XX.

the said Office?"[5] The Constitution provides for two sets of circumstances, vacancy and inability. According to the document, vacancy can occur by removal, death, or resignation.[6] To date, vacancy has occurred seven times, all by death of the President. No President has resigned and none has been removed. On each of these seven occasions, the Vice President took the oath of office prescribed for the President and was generally recognized as the President of the United States. When cases of inability occurred, no action was taken. A study of the only two cases of presidential inability to date shows that the precedent established in case of the President's death was one of the major causes of inaction on both occasions. Examination of attempts to legislate on the subject of presidential succession indicates the same precedent to have complicated all the problems involved.

During the past hundred years there have been two schools of thought on the question of whether one who acts as President under the succession clause becomes the President. The one maintains that in case of the President's death, resignation, or removal, the office becomes titularly vacant for the time being, and its powers devolve upon the Vice President, or, if there be no Vice President or if he be disabled, upon the officer designated by the Congress. It contends further that the

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[5] Article II, sec. 1, cl. 5.

[6] Loc. cit. The clause 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."

Vice President or designated officer retains his original office, entrusted with the additional duties of the Presidency. Finally, it says the Vice President or designated officer temporarily performs the duties of the President in the event of the latter's inability, but the President continues in the office and is to resume its functions when the disability passes. In summary, this school of thought looks on the President's successor, whether it be the Vice President or an officer designated by the Congress, as an acting President with limited tenure; it does not look upon him as President of the United States.

The second school of thought argues that in case of vacancy in the Presidency, the Vice President becomes the President for the remainder of the term; but, if there is no Vice President available to serve, the officer designated by the Congress merely acts as President for the unexpired portion of the term or, perhaps, until a President is chosen at a special election. In cases of inability, however, some adherents of this school believe the Vice President or designated officer merely acts as President for the duration of the inability, while others contend that the Vice President becomes the President for the remainder of the term for which he and the President were elected. No adherents of this school argue that the designated officer has the exalted status or protected tenure which they accord to the Vice President.

Because the solution of many problems involved in presidential succession depends on whether or not the powers and

duties of the Presidency can be separated from the office in such a way as to allow one to exercise them without becoming the President, the first three chapters will be devoted to a consideration of this question. The remainder of the present chapter will be concerned with an examination of the records of the Federal Convention to determine if the framers of the Constitution intended one upon whom the presidential function devolved to become the President. The purpose of the following two chapters is to trace the establishment of the precedent by which the Vice President becomes President upon the death of the latter, to examine the thesis set forth by each of the two schools of thought on this subject, to analyze the reasoning by which each position has been sustained, and to consider the importance of each in dealing with the practical problems involved in presidential succession. Unanimity among the adherents of either school on all points has often been lacking, and they have not always been willing to accept every logical implication of their respective positions. Material differences in point of view between spokesmen for each school and inconsistencies of each theory will be discussed. With the first three chapters as a basis, subsequent chapters will treat the problems involved in dealing with presidential inability and in legislating to provide a successor in case both the President and Vice President die, are removed, resign, or become disabled.

B. THE FRAMING OF THE SUCCESSION CLAUSE

1. PROCEEDINGS IN THE CONVENTION

Of the various written plans submitted to the Convention,

only the Pinkney Plan made provision for executive succession.[7] The Virginia and New Jersey Plans were silent on the subject. Presidential succession was first mentioned on the floor of the Convention by Hamilton on June 18, 1787, when he presented his plan orally.[8] The Committee of Detail apparently thought there was some merit in the Hamilton-Pinkney suggestion, because succession provisions were incorporated in the second section of the tenth article of the committee's report, submitted August sixth. It was as follows:

> 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.[9]

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[7] Max Farrand, The Records of the Federal Convention of 1787 (1911), III, 600. Article 8 of the Pinkney Plan presented May 29 was as follows: "In case of his 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 s shall do so----"

[8] Ibid., I, 292: "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." It should be noted that Hamilton's executive was to hold office during good behavior. The plan provided only for complete vacancy, failing to mention disability or inability. Hamilton said that under his proposal, "the president of the senate [was] to officiate, with the same powers, until another is elected." Ibid., I, 300.

Section 14 of the plan which Hamilton never presented, provided: "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 untill he shall return within the United States, if his absence was with the Consent of the Senate and Assembly." Ibid., III, 625.

[9] Ibid., II, 186. Among the notes of the Committee of Detail, one finds a marginal note in Rutledge's handwriting: "The Presidt. of ye Senate to succeed to the Executive in Case of ~~death~~ [sic.] Vacancy untill the Meeting of the Legisle." Ibid., II, 146; IV, 47. Also among the notes of the committee

The problem was debated on the twenty-fourth and the twenty-seventh of August and then referred to the Committee of Eleven, which was created to consider especially difficult problems. On September fourth the committee made its report, suggesting that a Vice President, as distinguished from the President of the Senate, be placed in line of succession. The report did not make provision for succession beyond the Vice President.[10] The important thing about this draft is that it provided that the Vice President exercise the powers and discharge the duties of the presidential office only until another President was chosen or until the inability of the President was removed. He was not to continue to act as President for the remainder of the term, but James McHenry of Maryland, a member of the Committee of Eleven, recorded that no provision was made for a new election in case of the death or removal of

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is found the following note in Wilson's handwriting: "He shall be ~~dismissed~~ removed from his Office on Impeachment by the House of Representatives, and Conviction in the Supreme ~~National~~ Court, of Treason ~~or~~ Bribery or Corruption. 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." Ibid., II, 172. The words here crossed out were crossed out in the manuscript, and the italicized words were inserted.

10 "....and in 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." Ibid., II, 495, 499. The extra comma [,] is found in Madison's Notes but not in the Journal. Madison said his copy was exact and variations in the printed journal resulted from the incorporation of later amendments. On this point, see a brief paper prepared by Henry E. Davis, "Inability of the President," S. Doc. 308, 65th Cong., 3rd sess., 10-11.

the President.[11]

On the twenty-seventh of August, Hu Williamson of North Carolina suggested that the legislature ought to have power to provide for "occasional successors,"[12] but it was not until September seventh that a motion was offered to insert the following clause:

> 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.[13]

James Madison, observing that this, as worded, would prevent the filling of a vacancy by special election of the President, moved to substitute "until such disability be removed, or a President shall be elected." Two objections were made to Madison's amendment. Some thought there would be difficulty in calling an election other than at fixed times, because of the process established for the choice of the Executive. Others objected that the amendment would restrain the legislature to making temporary appointments. In spite of these objections, Madison's motion was adopted.[14]

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[11] Ibid., II, 504.

[12] Ibid., II, 427.

[13] Ibid., II, 535. The motion was offered by Edmund Randolph. The two extra commas [,] are found in Jonathan Elliot's Debates in the Several States (2nd ed.; 1881), V, 520 but are omitted in Farrand's Records.

[14] Loc. cit. In the Journal this amendment was put in the original motion. The Journal reads as follows: "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." Ibid., II, 532. The extra comma is found in Elliot's Debates but not in Farrand's Records as explained in n. 13, supra. The other punctuation is identical in both. Madison recorded in his notes that Randolph's motion as amended by Madison carried six to four and one divided. Ibid., II, 535.

When the proposed Constitution went to the Committee of Style, it contained two provisions dealing with presidential succession, one providing for the devolution of presidential power on the Vice President and the other empowering the Congress to designate a successor in certain cases. Each was a separate provision. Each was modified by a temporal clause limiting the tenure of the acting President to the duration of the disability or until another President was elected. The Committee of Style reported on the twelfth of September. Comparison of the draft as sent to the Committee and the draft as reported shows five important changes to have been made in committee: (1) The two paragraphs were consolidated. (2) The temporal clause limiting the tenure of the acting President was used only once instead of being used to modify each part of the provision separately. Thus the so-called "succession clause," as reported by the Committee of Style, was a single sentence consisting of three clauses; an independent clause providing for the devolution of presidential power on the Vice President, an independent clause empowering the Congress to designate a successor in certain circumstances, and a dependent clause limiting the tenure of the acting President. (3) The Committee changed the only semi-colon to a comma. Hence only commas were used and the three clauses were separated from each other by commas. (4) The Committee substituted "the same shall devolve on the vice-president" for "the Vice President shall exercise those powers and duties." (5) The Committee reverted to the earlier language in the dependent clause, "until the disability

be removed, or the period for chusing another president arrive."[15]

There is no record that objection was raised by the Convention to the first four changes; but on September fifteenth a verbal amendment was made changing "or the period for chusing another president arrive" to the clause found in the Constitution today, "or a President shall be elected," in conformity with the vote of September seventh. The amendment was adopted without discussion.[16]

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[15] The changes made by the Committee of Style can be seen clearly by putting the draft as sent to the committee in the left column and the clause as reported in the right:

Article X, sec. 2: "....and in 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."
Ibid., II, 575.

Article X, sec. 1: "The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected" Ibid., II, 573.

Article II, sec. 1: "In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, 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 the period for chusing another president arrive." ["the period for chusing another president arrive" crossed out and "a president be chosen" inserted by Madison.]
Ibid., II, 598-599.

The punctuation above is exactly as found in Farrand's Records.

[16] Ibid., II, 626. See p. 9 and n. 14, supra.

2. INTERPRETATION OF THE PROCEEDINGS

A review of the evolution of the clause and a consideration of the remarks made in the Convention show that the framers of the Constitution intended the Vice President or "officer" designated by Congress to act as President ad interim until a President could be elected or the presidential disability was removed. Three sets of evidence are offered to substantiate this proposition: (1) The language used was such as to make it clear that the Vice President or designated "officer" was not to succeed to the higher office. (2) In each draft of the succession clause there was a dependent clause limiting the tenure of the acting President, whether he be the President of the Senate, the Vice President, or an "officer" designated by law. (3) The debates in the Convention indicate a belief that the acting President would surrender his presidential functions as soon as the President's inability passed or a President was elected.

The first set of evidence demonstrates the intended antecedent of "the Same" as used in the succession clause to be "Powers and Duties of the said Office" rather than "said Office." Each of the original plans, as well as the notes and report of the Committee of Detail, used language synonymous with "Powers and Duties."[17] Even after the Committee of Eleven introduced

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[17] The Pinkney Plan: "the President of the Senate shall exercise the duties of his [the President's] office." Ibid., III, 600. See n. 7, supra. In one of his plans, Hamilton spoke of the exercise of gubernatorial authorities by the President of the Senate, in his other plan of the Vice President's exercise of presidential powers. Ibid., I, 292; III, 625. See n. 8, supra. In the notes of the Committee of Detail, there is a note in Wilson's handwriting: "the President of the

the office of Vice President, it was not suggested that the Vice President should succeed to the higher office. Rather, he was to exercise the presidential powers and duties.[18] The provision empowering the legislature to provide for succession beyond the Vice President stipulated that this occasional successor should act as President.[19] Thus, when the draft Constitution was referred to the Committee of Style, it provided that the Vice President was to exercise those powers and duties and the "officer" designated by Congress was to act as President.[20] The Committee of Style was authorized to put the draft Constitution into clear and concise language, but had no jurisdiction to change substantive provisions. The result of the Committee's efforts was to substitute "the same" for "powers and duties" and "devolve" for "exercise." In providing for succession beyond the Vice President, the Committee adhered to much the same language found in the draft. Hence the Constitution as reported by the Committee of Style provided that "the same shall devolve on the vice-president," and the designated officer "shall then act as president."[21] From this review of the framing of the clause it seems clear that the Convention did not intend the presidential office to devolve upon the President's successor

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Senate shall exercise those [the President's] Powers and Duties..." Ibid., II, 172. Although one also finds among the records of this committee a note in Rutledge's handwriting stating that the President of the Senate was to "succeed to the Executive," the tenure of this acting President was limited "untill the Meeting of the Legisle." Ibid., II, 146; IV, 47. The report of the Committee of Detail used the language, "the President of the Senate shall exercise those powers and duties..." Ibid., II, 186.

[18] Ibid., II, 495, 499. See n. 10, supra.

[19] Ibid., II, 532, 535. See p. 8, supra.

[20] See n. 15, supra.

[21] See n. 15, supra.

who would thereby become the President.

The second evidence offered in substantiation of the proposition relates to the presidential term. The Constitution provides a four-year term for the President,[22] but the framers of the document intended to limit the tenure of an acting President to a shorter period. The Constitution says the latter is to serve as President only "until the Disability be removed, or a President shall be elected."[23] The dependent clause limiting the tenure of the acting President is found in each draft of the provision relating to the succession of the President of the Senate.[24] Even after the Committee of Eleven substituted the Vice President for the President of the Senate, the new officer was to exercise presidential power only "until another President be chosen, or until the inability of the President be removed."[25]

The provision empowering Congress to designate an alternate successor to the President stipulated that the "officer" so designated should act as President "until the time of electing

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[22] Article II, sec. 1, cl. 1. The only method for his removal is impeachment by the House of Representatives and conviction by the Senate. Article II, sec. 4.

[23] Article II, sec. 1, cl. 5.

[24] The Pinkney Plan: "until another President be chosen." Farrand, op. cit., III, 600. Hamilton's orally presented plan used the words, "till a Successor be appointed." Ibid., I, 292. His unpresented plan limited the tenure of the acting President "until another shall be appointed, or untill he [the President] shall return within the United States, if his absence was with the Consent of the Senate and Assembly." Ibid., III, 625. In the notes of Rutledge and Wilson, both members of the Committee of Detail, one finds the limiting clauses, "untill the Meeting of the Legisle" and "until another President of the United States be chosen, or until the President impeached or disabled be acquitted, or his Disability be removed," respectively. Ibid., II, 146 and IV, 47; II, 172. The report of this committee used the language, "until another President of the United States be chosen, or until the disability of the President be removed." Ibid., II, 186.

[25] Journal, Ibid., II, 495; Madison's Notes, Ibid., II, 499. This is also found in Elliot's Debates, op. cit., V, 506. See n. 10, supra.

a President shall arrive."[26] As pointed out previously, when Madison objected that this language would prevent the filling of a vacancy by special election, the clause was changed to read, "until such disability be removed, or a President shall be elected."[27] There are two important things to notice about the amendment: (1) The language of the dependent clause was changed to the same kind of language found in the dependent clause limiting the tenure of a Vice President who might be acting as President.[28] (2) The amendment was made to allow the calling of a special election when both the Presidency and Vice-Presidency were vacant. The conclusion must be that, if the calling of a special election were intended when there was neither a President nor Vice President, the calling of a special election was intended when the Vice President was acting as President in case of a vacancy in the latter office. The dependent clauses used in providing for both cases were substantively the same.

When the two provisions were referred to the Committee of Style, they were in two separate paragraphs. Each was modified by a dependent clause limiting the tenure of the acting President, who was the Vice President in the one case, and the "officer" to be designated by the Congress in the other case. As previously noted, the Committee of Style had no authority to change

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[26] Farrand, op. cit., II, 535.

[27] Loc. cit. See p. 9, supra.

[28] Article X, sec. 2: "...the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed." Ibid., II, 575. Article X, sec. 1: "...such Officer shall act accordingly, until such disability be removed, or a President shall be elected" Ibid., II, 573.

substantive provisions but only to consolidate and clarify them as voted. The efforts of the Committee at consolidation resulted in combining the two succession provisions and separating them from a single limiting clause by commas. It was necessary, of course, to substitute a comma for a semicolon if the limiting clause were to modify both of the preceding clauses. It is clear that the Convention intended the dependent clause, "until the Disability be removed, or a President shall be elected," to apply to the two preceding clauses. The Committee of Style punctuated the succession provision so the limiting clause would be part of a continuous sentence and therefore refer alike to the case of the Vice President and the "officer" designated by the Congress.[29]

The third evidence offered in support of the proposition that the framers of the Constitution did not intend the President's successor, the Vice President or the "officer" designated by the Congress, to become President, but only to act as President ad interim, is found in the debates of the Convention. These debates indicate a conviction that the acting President would surrender his presidential functions as soon as the vacancy could be filled or the inability ceased. This assumption is implicit in James Wilson's objections to the election of the President by Congress. The gentleman from

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[29] The punctuation of the clause is as follows: "...the Same shall devolve on the Vice President, [comma, not semicolon] and the Congress may by Law provide for ...declaring what Officer shall then act as President, [comma, not semicolon] and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." This punctuation agrees with that found in Madison's notes. See Davis, op. cit., 11-12.

Pennsylvania said that in cases of vacancy the Senate might have an interest in throwing dilatory obstacles in the way, so their own presiding officer could continue to exercise the executive function.[30] Gouverneur Morris and James Madison, likewise, objected to this mode of election on the similar ground that the Senate might retard appointment of a President in order to carry points while its own presiding officer possessed the veto power.[31] Such objections are founded on the assumption that the acting President would act temporarily and relinquish his presidential functions as soon as a President were chosen. They are without merit if based on the assumption that the President's successor would become the President for the remainder of the term.

Warren's interpretation of the records of the Federal Convention on the subject of presidential succession is as follows:

> It would seem ... that the delegates probably contemplated that, in such case [death of the President], the Vice President would only perform the duties of President until a new election for President should be held; and that he would not ipso facto become President.[32]

Warren continues, "It is clear that in at least one case, the delegates contemplated the possibility of a special election for the President, i.e., in the event of the death of both the

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[30] Farrand, op. cit., II, 402-403. At this stage in the development of the executive article there was no provision for a Vice President; and the President of the Senate was to be the provisional successor to the President.

[31] Ibid., II, 427.

[32] Charles Warren, The Making of the Constitution (1928), 635. To substantiate this conclusion Warren points to the language used in the reports of August sixth and September fourth. See p. 7 and n. 10, supra. Warren also cites McHenry's note for September fourth to the effect that the Committee of Eleven failed to provide for a new election in case of vacancy [See p. 8, supra.]; but Warren does not appear to think this alters his conclusion. Ibid., 636.

President and Vice President."[33] All available evidence indicates Warren's conclusion to be correct.

C. RATIFICATION OF THE CLAUSE

There is no record that the succession clause, as such, was discussed in the ratifying conventions except briefly in the Virginia Convention. In this case, George Mason, who had been a delegate to the Philadelphia Convention but refused to sign the Constitution, objected that in case of vacancy in both the presidential and vice-presidential offices, there was no provision for the speedy election of another President. To this objection Madison answered:

> When the President and Vice President die, the election of another President will immediately take place; and suppose it would not, all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and continue only to such expiration. This can rarely happen.[34]

Madison was not discussing the status of the Vice President while acting as President, but it is clear that in case of succession beyond the Vice President, the father of the Constitution did not look upon the officer to be designated by the Congress as having the tenure guaranteed by the Constitution to a de jure President.

Since this was the only occasion on which presidential

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[33] Ibid., 637. Warren cites the proceedings of September seventh and fifteenth in support of this proposition. See pp. 9-12, supra. Other students of the origin of the Constitution have been less discerning. For example, Curtis merely says that "when either of these events should occur, it was provided that the office [sic.] should devolve on the Vice President." History of the Origin of the Constitution (1858), II, 397; Constitutional History of the United States (1897), I, 567. The use of the word "office" is probably not significant because Curtis thought it made no difference whether "the Same" had reference to "Office" or "Powers and Duties," for he thought the two were the same. See p.114, infra.

[34] Elliot, op. cit., III, 487.

succession was discussed in the ratifying conventions, further evidence taken from the debates in the several states is mere dictum. It should be pointed out, nevertheless, that the delegates in these conventions were careful to make a distinction between the President and an acting President. In the Massachusetts Convention, James Bowdoin, delegate from Boston, spoke of "the Vice President, when acting as President."[35] He did not say "the Vice President when he becomes President." Nowhere in the debates of the ratifying conventions did any one of the delegates use the latter language.[36] If any of them thought the President's successor would actually succeed to the higher office and become the President, it would have been easier for them to say "become President" than to have engaged in this circumlocution.

The Federalist gives additional support to the proposition

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[35] Ibid., II, 85. It must be remembered, of course, that this is mere dictum since the status of the Vice President while acting as President was not the topic of discussion.

[36] The New York Convention proposed the following amendment: "That all commissions...be tested in the name of the President of the United States, or the person holding his place for the time being..." Ibid., II, 408.

In the Virginia Convention, Madison said that if the President were suspended during the impeachment or if he were removed, "the power will devolve on the Vice President." He went on to say that if both the President and Vice President were removed or suspended, "the legislature may make a temporary appointment." Ibid., III, 498. Also in the Virginia Convention, James Monroe came close to saying that the office would devolve on the Vice President. In describing this officer as unnecessary and superfluous, Monroe said, "He is to succeed to the President in case of removal..." Ibid., III, 489-490.

Luther Martin wrote a letter objecting to the Vice President's being a minority choice under the original mode of election. In this letter, he spoke of the Vice President's supplying the President's place and being vested with his powers. Ibid., I, 378. This is as near as any of the delegates to the ratifying conventions came to saying that the Vice President would become President by force of the succession clause; and in all cases it was mere dicta, because presidential succession was not the issue of discussion.

that the men of 1787 intended the Vice President or officer designated by Congress merely to act as President ad interim. In this collection of papers supporting and interpreting the Constitution presidential succession is mentioned only once, and this one casual mention is in the nature of dictum, but here Hamilton uses the same kind of guarded language found in the debates of the ratifying conventions. He says, "the Vice-President may occasionally become a substitute for the President" and under certain circumstances is authorized "to exercise the authorities and discharge the duties of the President."[37] Hamilton did not say the Vice President will become the President, which would be the natural phraseology if he thought such to be the case.

D. CONCLUSION

The intentions of the men who framed and ratified the succession clause appear to be: (1) In case of the President's death, resignation, or removal, the Vice President would act as President until a President were elected at a special election. (2) In the event of the President's inability to discharge the powers and duties of his office, the Vice President would discharge them until the disability were removed. (3) In case of the death, resignation, or removal of both the President and Vice President, the designated "officer" would act as President until a President were elected at a special election. (4) If both the President and Vice President became disabled

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[37] The Federalist (H. C. Lodge ed.; 1892), #68, pp. 427-428. In this number, Hamilton was answering the objection that the Vice President was a superfluous, if not mischievous, official. His defenses were two: (1) The Vice President was to break a tie vote in the Senate; (2) He was to substitute for the President in certain cases.

or if one of them died, resigned or were removed and the other became disabled, the officer to be designated by the Congress would act as President until the inability of the President or Vice President were removed. This interpretation is not only the one probably intended by the framers of the Constitution, but it is the reasonable and practical one. Precedent, however, has established that the Vice President becomes President for the remainder of the term in case of the President's death.

This precedent has given rise to the division of opinion on the meaning of the succession clause and has created problems and inconsistencies which must be met in solving the presidential succession problem. Therefore, the question might well be asked, how was the precedent established, by what reasoning has it been attacked and defended, and what has it meant in actual cases of vacancy? The following chapter will attempt to answer these questions.

CHAPTER II

VACANCY IN THE PRESIDENTIAL OFFICE

A. THE PRESIDENTIAL SUCCESSION PRECEDENT

Seven times a President has died in office; and seven times the Vice President has taken the presidential oath and been generally recognized as the President of the United States.[1] On the fourth of April, 1841, President Harrison died. This was the first time the presidential office had become vacant; and it was decided on this occasion that the Constitution contemplated the Vice President's becoming President for the remainder of the term. Exactly how the decision was reached is uncertain, but all evidence indicates that the Cabinet, whose ranking member was Daniel Webster, decided John Tyler was to succeed to the presidential office for the remainder of Harrison's term. Contrary to the popular anecdote, the precedent was not established merely because Vice President Tyler claimed presidential status and was able to make good his claim.[2] One thing is certain, Daniel Webster did not make the

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[1] William Henry Harrison died April 4, 1841, and was succeeded by John Tyler; Zachary Taylor died July 9, 1850, and was succeeded by Millard Fillmore; Abraham Lincoln died April 15, 1865, and was succeeded by Andrew Johnson; James A. Garfield died September 19, 1881, and was succeeded by Chester A. Arthur; William McKinley died September 14, 1901, and was succeeded by Theodore Roosevelt; Warren G. Harding died August 2, 1923, and was succeeded by Calvin Coolidge; Franklin D. Roosevelt died April 12, 1945, and was succeeded by Harry Truman.

[2] For example, see A. K. McClure, Our Presidents and How We Make Them (1902), 74; also Ben Perley Poore, Perley's Reminiscences of Sixty Years in the National Metropolis (1886), I, 269. Colonel McClure reported that there was a dispute going on in both parties as to whether John Tyler became the President or merely the "acting President." The author continued, "The question was brought up in Congress, and in the midst of the discussion on the subject a message was received from the Executive Mansion signed 'John Tyler, President.' The dispute was at once ended, and the question was settled for all time." Poore's version of the incident is as follows: "The Cabinet had arrived at the conclusion that Mr. Tyler should be

bold statement in Congress on June first of 1841 that Tyler had violated the Constitution by assuming the Presidency.[3] On the contrary, it seems to have been Daniel Webster who decided that John Tyler was to become the President; and Webster was concerned with the question because he was the Secretary of State, not because he was a member of the Congress.

The matter was first brought to Webster's attention when he was summoned to Washington because of the President's illness. Harrison's condition became critical on March 27, 1841,[4] and Secretary Webster and Attorney General Crittenden, who were out of the Capital City, were called at once. Crittenden returned on the twenty-ninth of March and Webster on the first of April.[5] Upon Webster's arrival in Washington, his first inquiry was as to the condition of the President. He was told

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officially styled, 'Vice President of the United States, acting President,' but he very promptly determined that he would enjoy all the dignities and honors of the office which he had inherited under the Constitution."

[3] New York Times, February 9, 1927. An open letter from Leslie Shaw to Nicholas Murray Butler: "To emphasize his [Tyler's] assumption he sent a message to Congress and signed it 'President.' The records show that no less a constitutional authority than Daniel Webster made the bold statement that while it was appropriate for Tyler to send the message, he had violated the Constitution by assuming to be President, and suggested it would be proper to send the message back for an appropriate signature. Being of the same political faith as Mr. Tyler, he did not make the motion, and no one else care to incur the disfavor of the White House and the matter was allowed to drop." On June 1, 1841, when Tyler sent his message to Congress, Webster was the Secretary of State and continued in that office for some months thereafter. During the eight weeks between the death of Harrison and the meeting of the Twenty-seventh Congress, Tyler signed many official papers, "John Tyler, President of the United States." This message to Congress was certainly not the first official paper so signed.

[4] National Intelligencer, April 1, 1841; Niles National Register, April 3, 1841.

[5] New York Express, April 1, 1841; National Intelligencer, April 3, 1841; Niles National Register, April 3, 1841.

that the physicians thought Harrison was recovering. After visiting the President that evening, however, Webster told his friends, "The President will die," and urged the propriety of sending a message to the Vice President in Virginia informing him of the President's illness, and of its probable result. At this time official Washington was quite optimistic about the President's recovery, and Webster alone seems to have realized the seriousness of his illnes.[6] Even if the President had recovered, the period of recuperation would have been long, and already the public business had been suspended in a great degree during the General's illness.[7] Realizing this, the five members of the Cabinet who were then in Washington discussed the problem of the President's inability.[8] There are no available records as to what happened in these meetings; but it appears that Secretary Webster thought the Vice President could not temporarily exercise the powers of the Presidency. He thought if necessity forced Tyler to act as President, even though Harrison recovered from his illness, Tyler would supercede him as President for the remainder of the term for which

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[6] Boston Daily Advertiser and Patriot, April 10, 1841.

[7] New York Express, April 1, 1841.

[8] They were: Daniel Webster, Secretary of State; Thomas Ewing, Secretary of the Treasury; John Bell, Secretary of War; John J. Crittenden, Attorney General; Francis Granger, Postmaster General. The Secretary of the Navy was not in the city.

both were elected.[9] Before any action was taken on the matter, the problem of inability became one of vacancy.

The same five cabinet members, who had considered the inability question, publicly announced the President's death[10] and dispatched Fletcher Webster with an announcement of the same to "John Tyler, Vice President of the United States."[11] Tyler returned to Washington at once, where he was met by the Cabinet and taken to Brown's Hotel. Judge Cranch, Chief Justice of the Circuit Court for the District of Columbia, was summoned and administered the presidential oath. Thus about

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[9] Thomas Ewing III, the grandson of Harrison's Secretary of the Treasury wrote the following in a letter to the New York Times (December 10, 1921): "Mr. Webster expressed the opinion that even though the President survived the period of inability and became capable of performing the duties of his office during the term for which he was elected, he would not displace the Vice President, who had assumed the duties of that office." Then speaking of President Wilson's inability, Attorney Ewing said: "If that opinion is correct there can be no temporary displacement of the President. This of course adds greatly to the seriousness of the step in the event that the President has not died but is merely incapacitated." At the time Thomas Ewing III wrote this letter, he possessed over seventy boxes, barrels, and suitcases of his grandfather's papers. These papers have been in the possession of the Library of Congress since November, 1946, but have not been sorted, indexed, or made available for research purposes. Whether or not Thomas Ewing III based his letter on these papers is not known; but correspondence with the Ewing family confirms that he was familiar with them.

[10] For the text of this announcement, see James D. Richardson, Messages and Papers of the Presidents (1897), IV, 22.

[11] Ibid., IV, 22-23; National Intelligencer, April 6, 1841; Niles National Register, April 10, 1841. Lyon Tyler says it was mere accident that the Cabinet's message was addressed to John Tyler as "Vice President." He asserts quite dogmatically that "the Same" as used in the succession clause refers to the "Office" and not merely to its powers and duties. Lyon Tyler, Letters and Times of the Tylers (1885), II, 12.

fifty-three hours after Harrison's death, Tyler was sworn in as President of the United States.[12]

It is not known precisely which members of the Cabinet decided that Tyler was to take the oath prescribed for the President.[13] Daniel Webster requested William T. Carroll, the Clerk of the Supreme Court, to write Chief Justice Taney asking him to come to Washington to confer on the matter, but Taney answered Carroll's request in the negative, explaining that it would be in bad taste for him to come without a formal invitation from the Cabinet or the Vice President. Taney also declined to pass on the question of the second oath for the same reason.[14] There is no record as to who summoned Judge

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[12] Thomas H. Benton, Thirty Years View (1856), II, 211; Oliver P. Chitwood, John Tyler, Champion of the Old South (1939), 202-206; Alexandria Gazette, April 7, 1841; National Intelligencer, April 7, 1841; Washington Globe, April 8, 1841; Niles National Register, April 10, 1841.

[13] It seems that the decision was made in a cabinet meeting consisting of John Tyler and the five cabinet members who were in Washington at the time. George Ticknor Curtis, Life of Daniel Webster (1870), II, 67n. None of the published papers of Tyler, Webster, Ewing, Bell, Crittenden, or Granger make mention of the subject. Dr. Elizabeth McPherson, a staff member of the Library of Congress Reference Division, made an examination of the Library's collections of the papers of Francis and Gideon Granger, Daniel Webster, John J. Crittenden, and of Thomas Ewing [As far as the Ewing papers are available, see n. 9, supra], but found no reference to the question of presidential succession. The Ewing papers searched consisted of 6 letter books, 2000 unbound letters, and a sixty-five page journal covering the period of Ewing's service in the Harrison-Tyler Cabinet. The Duke University Library has a collection of Crittenden papers, which were searched, but no mention of presidential succession was found.

[14] Samuel Tyler, Memoir of Roger Brooke Taney (1872), 295-296. On this point Taney wrote: "In intercourse between the Executive Department of the Government and the Judicial, whenever their official characters are involved, the communication from one to the other ought to be direct and from the proper origin." He continued by saying that he wished to be careful lest it appear that he was intruding in the business of a co-ordinate branch of the government.

Cranch; but this much is known: Tyler did not think a second oath was necessary.[15] Lyon Tyler says that his father thought the second oath was unnecessary because he viewed himself as becoming President eo instanti Harrison died.[16] On the other hand, Horwill suggests that Tyler's belief that a second oath was not essential implied that Tyler might have thought he had not actually become the President but merely the acting President.[17]

Whatever may have been Tyler's reason for thinking the presidential oath unnecessary, someone with influence must have thought it was important, because he took the oath. Webster's biographer, George Ticknor Curtis, credits Webster with deciding that the Vice President should take the presidential oath and that the Consitution intended the Vice President to become

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[15] Richardson, op. cit., IV, 31-32. The text of the certificate is as follows: "I, William Cranch, Chief judge of the circuit court for the District of Columbia, certify that the above named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he had taken as Vice President, yet as doubts might arise, and for greater caution, took and subscribed the foregoing oath before me. April 6, 1841. W. Cranch."

[16] Lyon Tyler, op. cit., II, 12.

[17] On this point Horwill says: "This conviction of Tyler's that the oath he had taken as Vice President did not really require to be supplemented is one of the most singular features of the whole affair. For it gives away his entire case. If he had become no more than Acting President, the oath he had previously taken to discharge faithfully the duties of the Vice-Presidency would cover the whole ground, as one of the prescribed duties of that office...is that of acting as President in the event of the President's death. But if, on the other hand, as he contended throughout, his Vice-Presidency had now come to an end and he had become possessed of the Presidency as fully as any person elected to that office, then his assumption of his new dignity must needs require him to take the oath incumbent upon all new Presidents." Herbert W. Horwill, Usages of the American Constitution (1925), 70-71.

the President of the United States in name and designation as well as in power and authority.[18] It is reasonable to conclude that Webster made the decision as to what was the proper procedure, because he was the ranking member of the Cabinet. Whether Webster made the decision or not, at least he and the rest of the Cabinet did not regard Tyler as a usurper, nor did they think the procedure irregular. As evidence of this the following facts are offered: (1) Webster, Ewing, Bell, Crittenden, and Granger all attended the oath-taking ceremony.[19] (2) A study of Webster's papers shows that he left the Cabinet because of Tyler's bank policy, not because he disapproved of Tyler's assumption of the Presidency.[20] (3) It was Daniel Webster who offered the resolution on July 10, 1850, for the two houses to assemble in the hall of the House of Representatives to be present for the administration of the presidential oath to Vice President Fillmore.[21] (4) Both Daniel Webster and John J.

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[18] Curtis, op. cit., II, 67n. Lambert also gave Webster credit for making this decision but cited Curtis as his only authority. Oscar D. Lambert, Presidential Politics in the United States, 1841-1844 (1936), 5.

[19] Richardson, op., cit., IV, 31.

[20] Daniel Webster, The Writings and Speeches of... (1903), III, 121, 137, 185; XVI, 150, 318, 357, 358, 406; XVIII, 110, 117, 149.

[21] Webster's resolution provided that both houses assemble for the administration of the oath "prescribed by the constitution to the late Vice President of the United States, to enable him to discharge the powers and duties of the office of President of the United States, devolved on him by the death of Zachary Taylor..." Senate Journal, 31st Cong., 1st sess., 444. Webster's phraseology, "late Vice President," implies that he thought Fillmore was already the President even though he had not yet taken the oath, but that the oath was necessary before he could exercise presidential power. See pp. 57-59, infra.

Crittenden served in Fillmore's Cabinet.[22] Thus there is no evidence that the Cabinet, and Webster in particular, regarded Tyler as a usurper.

Although not all of the journals of the day viewed John Tyler as becoming President, they did not protest against his taking the presidential oath, and none argued that taking this oath made him President.[23] The Harrisburg Intelligencer, a Whig paper, told its readers that John Tyler as Vice President would act as President ex officio. Virginia's leading Democrat journal, the Richmond Enquirer, said he was only the "acting President." The New York Post, another Democratic paper, thought he had all the powers but did not succeed to the title.[24] The two leading Boston papers, one Whig and the other Democratic, persisted in calling John Tyler the "Vice President" or "acting

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[22] W. L. Barre, Life of Millard Fillmore (1856), 321; unsigned, Biography of Millard Fillmore (1856), 129.

[23] Even before Tyler took the oath, the Pennsylvanian, as quoted in Niles National Register, said he should do so before entering upon his duties. April 10, 1841. Before the news of Tyler's inauguration reached Boston, the Boston Courier, on April 8, explained to its readers that Tyler's oath as Vice President was not sufficient, and that Chief Justice Taney undoubtedly would administer the presidential oath to Tyler. The Boston Daily Advertiser told its readers that on the taking of the oath, Tyler did not become the President in name although he possessed all the powers and duties of the President for the remainder of President Harrison's term. The Advertiser conceded that there was room for difference of opinion concerning the constitutional requirement of taking the presidential oath, but thought one of the duties devolved on the Vice President was the duty of taking the oath. In any case, the Advertiser thought the Vice President took the prudent course for it would resolve all questions in favor of the legality of his acts as Chief Executive. April 10, 1841.

[24] Harrisburg Intelligencer reprinted in the Daily National Intelligencer, April 12, 1841; Richmond Enquirer reprinted in the Washington Globe, April 12, 1841; New York Evening Post reprinted in Niles National Register, April 24, 1841.

President" for many months after his succession.[25]

In any case the major papers did not suggest that a special election should be called. New York's two Whig papers, the American and the Currier and Enquirer, told their readers that Tyler would complete Harrison's term even before these papers knew that Tyler was going to take the presidential oath. The New Brunswick Freedonian likewise said Tyler would serve for three years and eleven months before it knew he was to be sworn in as President.[26] Even the die-hard Boston Daily Advertiser, which persisted in calling Tyler the Vice President, conceded that the duties and responsibilities of the Presidency devolved on him until March 4, 1845.[27] After the oath-taking ceremonies, Francis Blair's Washington Globe, a Democratic organ, affirmed that Tyler would complete Harrison's term, an opinion to which the American Sentinel also subscribed.[28] The United States Gazette and the Pennsylvanian, Philadelphia's leading Whig and Democratic papers respectively, not only stated that Tyler was to complete the term, but explained that the Constitution did not contemplate a special election when the Vice President was called to act as President, but only when an officer designated by Congress was acting.[29]

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[25] For example, see Boston Daily Advertiser (Whig), June 1, 1841; also Boston Morning Post (Democratic), June 4 and 11, 1841.

[26] New York American, April 5, 1841; New York Courier and Enquirer, April 6, 1841; New Brunswick Freedonian, April 7, 1841.

[27] Boston Daily Advertiser and Patriot, April 7, 1841.

[28] Washington Globe, April 8, 1841; American Sentinel reprinted in Niles National Register, April 10, 1841.

[29] United States Gazette, April 5, 1841; Pennsylvanian reprinted in Niles National Register, April 10, 1841.

Some of the journals took a strong stand in favor of the presidential status of John Tyler. Before the news of Harrison's death reached North Carolina, the Raleigh Register, a Whig paper, stated that, if Harrison should die, Tyler would become the President at the moment of the President's death, and would continue until the expiration of the term for which both were elected. After Harrison's demise, the Democratic Pennsylvanian told its readers that Tyler had become the President in conformity with the Constitution; the Washington Globe, also Democratic, spoke of "John Tyler, now President of the United States"; and the Boston Courier, a Whig organ, said the presidential office had devolved on John Tyler, who became the President in name as well as in power, just as much as if he had been elected President by the people.[30]

Gales and Seaton's National Intelligencer, the Whig's chief spokesman, was the most insistent on the subject. Until Tyler took the presidential oath, this paper called him the "Vice President" but as soon as he was sworn in as President, the Intelligencer styled him "President Tyler." On the fifteenth of April the Intelligencer came out with a rather lengthy article rebuking those journals which continued to call Tyler the "Vice President" or "acting President." The editor asserted John Tyler was not the ex officio or ad interim President; he was the President, and the Vice-Presidency became vacant by his succession. The Intelligencer gave three reasons for this

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[30] Raleigh Register, April 5, 1841; Pennsylvanian reprinted in Washington Globe, April 8, 1841; Boston Courier, April 7, 1841; Washington Globe, April 8, 1841.

conclusion: (1) The office of President, not merely its powers and duties, devolved on John Tyler according to the Constitution. (2) The succession clause makes a distinction between a Vice President on whom the office devolves and an officer designated by Congress to act as President. (3) The adverbial clause, "until the Disability be removed, or a President shall be elected," limits only the tenure of the designated officer and does not refer to the Vice President.

The difference in opinion among the newspapers of the day concerning the status of John Tyler was not drawn on partisan lines. The only exceptions to this rule were a few northern Whig papers which reverted to calling him the Vice President after his bank policy proved displeasing to them. Most of the press referred to "President Tyler" and dropped the question of his status within two weeks after he took the presidential oath.

Whatever the journals may have thought about Tyler's status, he at once asserted his right to the presidential office and its title. On the ninth of April, Tyler delivered what he called his "inaugural address" in which he talked about the devolution of the presidential office upon him.[31] Again on June first, in his message to Congress, he spoke of "my accession to the Presidency."[32] Three years after Tyler relinquished his presidential powers, he still asserted that he had been the President

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[31] Richardson, op. cit., IV, 37. On April ninth, writing to William Rives he said: "...The death of our late patriotic president, while it has devolved upon me the high office of President of the United States..." Lyon Tyler, op. cit., II, 20. Italics mine.

[32] Richardson, op. cit., IV, 40.

of the United States.[33] But Tyler's interpretation of the succession clause was not accepted by everyone. Arch Whig John Quincy Adams looked on Tyler only as an acting President.[34] On April 15, 1841, in a letter to Judge Tucker, Henry Clay spoke of "Vice President Tyler" and said his administration would be in the nature of a regency.[35] By June first, however, Clay apparently changed his mind, for he voted in the Senate to give Tyler the presidential title.[36]

The question of Tyler's status after the death of President Harrison was raised in Congress. When the Twenty-seventh Congress met in special session on May 31, 1841, Representative

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[33] Tyler writing to Secretary of State Buchanan protesting a message from the State Department addressed to him as "ex-vice-president" spoke as follows in a letter date October 16, 1848: "...I cannot recognize myself in the address of ex-vice-president; for the third time it is repeated in annual communications from your department, and obviously arises from a studied purpose. I feel convinced that it has been without your sanction...I desire only to say, that if I am addressed, and especially from the State department, by a title, it must be by that which the Constitution confers, which has been recognized by the country and all the departments of its government, and has been used in public correspondence with foreign nations, in the ratification of treaties, and approval of the laws." A few days later Tyler wrote his son that he had received an entirely "apologetic" letter from Buchanan. Lyon Tyler, op. cit., II, 13, n. 1. Italics are Tyler's.

[34] On April 16, 1841, Adams wrote: "I paid a visit this morning to Mr. Tyler, who styles himself President of the United States, and not Vice-President acting as President, which would be the correct style. But it is a construction in direct violation both of the grammar and context of the Constitution, which confers on the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office." Memoirs of John Quincy Adams, ed. Charles Francis Adams (1876), X, 463-464. See also X, 465; and XII, 176.

[35] Lyon Tyler, op. cit., II, 30.

[36] Cong. Globe, 27th Cong., 1st sess., 5. In his philippic against Tyler, Clay's biographer devotes several paragraphs to denying that Tyler was ever President of the United States and brands him a usurper. The Works of Henry Clay, ed. Calvin Cotton (1904), II, 355-356.

Henry A. Wise of Virginia offered a resolution providing for the appointment of a congressional committee to wait on the President of the United States and inform him that a quorum of the two Houses had assembled. Representative John McKeon of New York moved to amend the resolution by striking out the word "President" and inserting "Vice President, now exercising the office of President." McKeon read passages from the Constitution to show that the Constitution made a distinction between a President and an acting President. He then referred to the debates in the Federal Convention, and contended from these authorities that Tyler was not actually the President, but merely the Vice President, executing the powers and duties of the higher office. Wise said John Tyler would claim that "he was by the Constitution, by election, and by the act of God, President of the United States"; and the resolution, in which he was referred to as President, passed without amendment and without division.[37]

The next day, June first, the same question arose in the Senate, where William Allen and Benjamin Tappen, the two Senators from Ohio, denied that Tyler had become the President. Allen cited the language of the Constitution and pointed out how the precedent would complicate the situation in cases of the President's temporary inability. Tappen followed a similar line of reasoning and appealed to usage in other jurisdictions. He pointed to the case of the senior Associate Justice who acts as Chief Justice during the absence of the latter and to the

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[37] Cong. Globe, 27th Cong., 1st sess., 3-4.

case of the ranking officer in a regiment who temporarily acts as colonel when the latter is wounded in battle. Senator Robert J. Walker jumped to the defense of John Tyler's presidential status, arguing that the higher office devolved on John Tyler, but if there were no Vice President, the officer designated by Congress would merely act as President. The Senator from Mississippi thought that, in the latter case, the acting President did not complete the unexpired portion of the term, but served only until an actual President was elected. If the Vice President succeeded, however, Walker thought he ceased to be Vice President and became President for the residue of the term.

Again Senator Allen pointed out the danger of establishing the precedent of the Vice President's becoming President when the powers and duties of the presidential office devolved upon him. He asked what would happen in case the President became temporarily unable to discharge the duties of his office. What would happen when the President recovered? Would there be two Presidents? Imagine the struggle for power that would result if the President were of one party and the Vice President of another! Senator Calhoun thought, since the present case was one of complete vacancy, the discussion was needless; and by a vote of thirty-eight to eight the Senate recognized Tyler as the President.[38] Thus, by the first of June Tyler was acknowledged by both houses of Congress and by the country

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[38] Ibid., 4-5.

generally to be the President of the United States.[39]

As Tappen pointed out in the Senate, the same kind of reasoning might lead to the conclusion that the President pro tempore of the Senate became Vice President.[40] In fact, some did urge this. George Poindexter wrote a letter to President pro tempore Samuel Southard in which he maintained that the latter became the successor to Tyler as Vice President of the United States precisely as Tyler had held that office before the death of President Harrison.[41] Several leading newspapers of the day took a similar stand,[42] but it was decided that Samuel Southard would remain President pro tempore of the Senate.[43] The usage has been well established that when

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[39] Apparently William C. Preston of South Carolina was not entirely satisfied with the decision, however, because he offered a resolution instructing the Senate Committee on the Judiciary to inquire whether any further legislation was requisite to define the powers and duties of the Vice President when the Presidency be vacant. The resolution was adopted by unanimous consent, but the report was never made. S. Jour., 27th Cong., 2nd sess., 64.

[40] If such usage had been established, it would have limited the power of Congress to designate an officer to succeed to the powers and duties of the President, for it would have meant that the Vice-Presidency would rarely, if ever, be vacant and would transfer this power to the Senate as part of its right to choose its own President pro tempore.

[41] Baltimore American, May 28, 1841. This interpretation had been suggested fifty years earlier by Roger Sherman, formerly a member of the Federal Convention. In the First Congress he expressed the opinion that the President pro tempore of the Senate succeeded to the office of Vice President when the latter succeeded to the office of President. 2 Annals of Cong. 1863.

[42] Boston Courier, April 7, 1841; Niles National Register, April 17, 1841.

[43] Lambert, op. cit., 5-6; New York American, April 6, 1841; Massachusetts Spy, April 7, 1841; Boston Courier, April 8, 1841; Pennsylvanian reprinted in Niles National Register, April 10, 1841; Daily National Intelligencer, April 15, 1841.

there is no Vice President to preside over the Senate, the President pro tempore does so, while remaining a Senator and voting in the Senate as such.[44] To substantiate his thesis that the Vice President does not become the President by succession, Horwill says that the Senate chooses a President pro tempore rather than a Vice President because there is no vacancy in the Vice-Presidency and, therefore, a Vice President could not be chosen. According to Horwill, the man elected Vice President continues to be Vice President after the President's death, but his office is no longer a sinecure, so someone else must discharge his functions as President of the Senate for the time being. Thus, Horwill concludes that the assumption of the powers and duties of the Presidency creates no vacancy in the Vice-Presidency.[45]

When the second President died in office, no one questioned the status of the Vice President or the President pro tempore of the Senate. President Taylor died on July 9, 1850, and Vice President Fillmore took the presidential oath the next day before a joint meeting of the two houses of Congress. Again it was Judge Cranch rather than Chief Justice Taney who administered the oath,[46] but there is no record as to why Taney did not do so.

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[44] During the last two years of Arthur's administration, George F. Edmunds of Vermont, the President pro tempore of the Senate, occupied the Vice President's room in the Capitol and wrote his correspondence on stationery with the heading "Office of the Vice President." George F. Howe, Chester Arthur (1934), 249-250. However, roll calls of the Forty-eighth Congress amply testify that he did not consider himself Vice President to the point of refraining from voting in the Senate.

[45] Horwill, op. cit., 62-63.

[46] Barre, op. cit., 318; William E. Griffis, Millard Fillmore (1915), 53; unsigned, Biography of Millard Fillmore (1856), 125-127; Richardson, op. cit., V, 51-52.

One will recall that it was Daniel Webster who, as a member of the Senate, introduced the resolution for a joint meeting of the two houses of Congress to be present for the administration of the presidential oath to Fillmore. There is no record that objection to this procedure was raised in either house, and Webster's resolution passed unanimously.[47] Thus no question was raised concerning the status of a succeeding Vice President from the time of Tyler until relations became strained between Andrew Johnson and the radical Republican Congress.

When Lincoln was killed, it seemed to be assumed that Johnson would become the President. The Cabinet informed Johnson of Lincoln's assassination in a note addressed to "the Vice President." Johnson took the presidential oath, which was administered by Chief Justice Chase, in the presence of the Cabinet and a few other notables on April 15, 1865.[48] Soon there was talk of removing Johnson; and his enemies began to deny that he had become the President. When he was actually impeached, however, he was impeached as President of the United States. This is often cited as evidence that the Vice President becomes the President in case of the death of the latter. One of Johnson's most bitter enemies, a member of the House Judiciary Committee which handled the impeachment, says that the impeachment establishes the doctrine that the Vice President becomes the President of the United States when he enters on the duties of

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[47] Cong. Globe, 31st Cong., 1st sess., 1363-1366. See n. 21, supra.

[48] James S. Jones, Life of Andrew Johnson (1901), 139-140; John Savage, Life and Public Services of Andrew Johnson (1866), 327-332; Lloyd P. Stryker, Andrew Johnson (1929), 194-196; Unsigned, Life, Speeches, and Services of Andrew Johnson (1865), 123.

that office.[49]

The original resolutions providing for the impeachment of Andrew Johnson referred to him as Vice President. On January 7, 1867, three separate resolutions were introduced for his impeachment. Loan's and Kelso's resolutions both styled him "the officer now exercising the functions pertaining to the office of President of the United States."[50] Ashley's resolution, the one on which the House acted, spoke of "Andrew Johnson, Vice President of the United States, discharging the powers and duties of the office of President of the United States."[51] The House passed Ashley's resolution in this form,[52] but the House Judiciary Committee reported it as a resolution for the impeachment of the President of the United States.[53]

The standard study of Johnson's impeachment tells us:

> From the time of Johnson's accession, the more spiteful of his adversaries were addicted to the habit of denying he was President, asserting that he was still Vice President and, for the time being only 'Acting President'. And yet by the articles reported he was impeached as 'President of the United States'. Mr. Boutwell affected apprehension that the Senate might decide that Johnson was not President and in that case the whole proceeding would have to be gone over from the beginning. "A different Court," he said, "must be organized for the trial of the Vice-President from that authorized by the Constitution to try the President."[54]

Later, however, in an attempt to prove that Johnson violated the Tenure of Office Act, Boutwell argued that Johnson had not

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[49] George Boutwell, Reminiscences of Sixty Years in Public Affairs (1902), II, 113.

[50] Cong. Globe, 39th Cong., 2nd sess., 319 and 320, respectively. See also D. M. Dewitt, The Impeachment and Trial of Andrew Johnson (1903), 152.

[51] Dewitt, op. cit., 153; Edmund Ross, History of the Impeachment of Andrew Johnson (1896), 46-47.

[52] Boutwell, op. cit., II, 113.

[53] Loc. cit.; Ross, op. cit., 47.

[54] Dewitt, op. cit., 380-381.

become the President with a term of his own but was merely serving out Lincoln's second term.[55]

As is well known Andrew Johnson was tried as President, and was acquitted without a vote to spare. Interestingly enough, it was necessary to recognize Johnson as President in order to carry on his impeachment, and it was Senator Fessenden's conviction that Andrew Johnson was the President which caused him to vote for acquittal.[56] Without Fessenden's vote, Andrew Johnson would have been removed; and Ben Wade, as President pro tempore

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[55] The chief charge against Johnson was that he had violated the Tenure of Office Act by removing Secretary of War Stanton, a Lincoln appointee, without the consent of the Senate. The act provided that removals could not be made without senatorial consent, but an appointee's title to office expired one month after expiration of the term of the President by whom the officer was appointed. If Johnson were still the Vice President, he had removed Stanton during Lincoln's term, in which case, he had violated the law. On the other hand, if Johnson had become the President, he had removed Stanton during his own term, and thus had not violated the act. On this point Boutwell argued that the term of President was four years, and that not the office and its term, but the powers and duties of President had devolved on Johnson. He said Johnson had no term, and it was during Lincoln's second term that Stanton had been removed. Dewitt, op. cit., 367-369, 411, 425.

[56] Senator Fessenden came to the conclusion that Johnson had actually become the President for two reasons: (1) The succession clause makes a sharp distinction between the Vice President and an officer designated by Congress to act as President. (2) Both Tyler and Fillmore took the oath of President, assumed the name and designation, and were recognized as constitutionally President with the universal assent of the nation. Thus he concluded that Stanton had been appointed during Lincoln's administration and his title to office had expired during Johnson's term, so there was no violation of the Tenure of Office Act. For this reason, the Senator from Maine voted against Johnson's removal. Francis Fessenden, William Pitt Fessenden (1907), II, 246-250.

It was asserted during the Johnson impeachment that, if Johnson became the President, instead of merely serving out Lincoln's term, he was entitled to a four year term, that is, his term would expire April 15, 1869, because each presidential term is set at four years by the Constitution. If he were merely the Vice President serving out Lincoln's term, then the term would expire March 4, 1869. Ross, op. cit., 97-99. As a matter of history, Johnson relinquished the presidential powers on March 4th.

of the Senate would have taken over the presidential functions[57] under the Act of 1792.[58]

When President Garfield died, the succession of three Vice Presidents and the impeachment of Andrew Johnson had well established the usage of the Vice President's becoming President upon the death of the latter. This precedent was followed for the fourth time, and Vice President Chester A. Arthur took the presidential oath. The five cabinet members who were with Garfield at the time of his death on September 19, 1881, telegraphed Arthur telling him of the President's death and urging him to take the presidential oath at once. When Arthur received the telegram at his home in New York City, he was in the company of Elihu Root, who summoned Justice Brady of the New York Supreme Court; and Judge Brady administered the presidential oath in the Arthur home in the early morning of September twentieth.[59]

Although the Vice President had taken the oath in New York at the Cabinet's suggestion, when he arrived in Washington, it was decided in consultation with Secretary of State Blaine and Attorney General MacVeagh that, since the oath had been taken before a New York State officer, and since no Federal record of the fact existed, he should take the oath again. In accordance with this decision Chief Justice Waite administered the

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[57] Soon after Johnson's succession there was formed a radical conspiracy to make Ben Wade President by impeaching Johnson. In fact, Wade was chosen President pro tempore of the Senate with this in mind. Stryker, op. cit., 310-316. When it came to a vote in the Senate, Wade voted for Johnson's removal. Dewitt, op. cit., 388-393, 553, 576.

[58] The Act put the President pro tempore of the Senate and the Speaker of the House in the line of succession after the Vice President. I U. S. Stat. 240; Revised Stat. (1878), §146. This law was changed in 1886.

[59] Howe, op. cit., 1-2.

presidential oath to Arthur, in order that official evidence of the Vice President's taking this oath would appear in the records of the Supreme Court.[60] Thus the precedent set by Tyler was reinforced by Arthur who was recognized generally as the twenty-first President of the United States, although an occasional dissenter denied that he had become the President by succession.[61]

William McKinley was the fifth President to die in office, and Theodore Roosevelt was the fifth Vice President on whom the presidential powers and duties devolved. President McKinley was shot in Buffalo, New York, on September 6, 1901. Theodore Roosevelt went to Buffalo at once, but left on the tenth to join his family in a remote part of the Adirondack Mountains, because the surgeons said the President's wounds were neither fatal nor dangerous. On September thirteenth a messenger was sent to the Vice President to tell him that the President had taken a turn for the worse. The story of how the rough rider rode all night on a buckboard over fifty miles of dangerous mountain road to the nearest railway station is well known. Roosevelt reached Buffalo at 1:30 in the afternoon of the fourteenth. Elihu Root, who twenty years before got Judge Brady to administer the presidential oath to Vice President Arthur, was now the Secretary of War. As a member of the Cabinet, Root addressed Roosevelt and asked him to take the oath at once. Roosevelt complied, and the oath was administered by Judge John R. Hazel of the United States District Court that

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[60] Ibid., 155; 25 Harper's Weekly 660 (October 1, 1881)

[61] For example, Senator Lapham of New York denied that Chester Arthur was the President. 14 Cong. Rec. 918

afternoon, the same day the President died.[62]

When President Harding died, Vice President Coolidge followed the precedent set by five Vice Presidents before him. Harding died in San Francisco on August 2, 1923. The story of Coolidge's taking the oath, which was administered by the light of a kerosene lamp in a Vermont farm house, is known by most school boys. When news of the President's death reached Coolidge, he examined the Constitution to see what might be necessary to qualify as President, for he did not consider it clear that an additional oath was required beyond that taken as Vice President. Attorney General Daugherty telegraphed him requesting him to take the oath immediately; and Secretary of State Hughes advised him by telephone of the correct form of the oath. At 2:47 in the morning of August third, his father, a notary public, administered the oath to him. Thus in four hours and seventeen minutes after Harding's death, Coolidge was sworn in as the twenty-ninth President of the United States.[63]

As in the case of Arthur, there was some question concerning the validity of the oath administered by the elder Coolidge, because it was administered by a state officer empowered only to swear in other state officers, so a second oath was taken as a precautionary measure. The second oath was secretly administered

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[62] William Draper Lewis, The Life of Theodore Roosevelt (1919), 169-171; Henry E. Pringle, Theodore Roosevelt (1931), 231-233; Theodore Roosevelt, An Autobiography (1929), 349; William R. Thayer, Theodore Roosevelt (1919), 154-155.

[63] Calvin Coolidge, Autobiography (1929), 173-176; Claude M. Fuess, Calvin Coolidge (1940), 305-310; Horace Green, The Life of Calvin Coolidge (1924), 177-182; New York Times, August 3 & 4, 1923. It is interesting to note that a Bible was not used, as it is not the practice in Vermont and Massachusetts to use the Bible in connection with the administration of an oath.

at the New Willard Hotel in Washington two weeks after the famous oath administered by his father in the Vermont farm house.[64]

After these "inaugurations" Coolidge was recognized generally as President and no question was raised until 1927, when there was talk of his running in the election of 1928. At this time objection was raised that, if he were elected in 1928, it would break the two-term tradition. To this objection Leslie M. Shaw, who had served in Theodore Roosevelt's Cabinet, answered that Coolidge had only been President for one term. He said that Coolidge was only the Vice President acting as President after the death of President Harding; the death of a President does not make a vacancy in the Vice Presidency, but merely increases the duties of the Vice President. Shaw thought it fortunate that Coolidge did not resign as Vice President, for if he had, he would have been only a private citizen, and Secretary of State Hughes would have become the acting President. It was Shaw's opinion that Coolidge's presidential oath was both innocent and unnecessary, for he had already taken an oath faithfully to discharge the duties of Vice President, one of which duties is to act as President under certain conditions. Shaw claimed that no man can become President unless elected to that office in the manner provided by the Constitution.[65]

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[64] New York Times, February 3, 1932. On February 2, 1932, ex-Justice Hoehling confirmed that he swore Coolidge in a second time. The reason the secret was kept for nine years was that Attorney General Daugherty pledged Hoehling to secrecy.

[65] New York Times, February 9, 1927. An open letter to Dr. Nicholas Murray Butler. To buttress his argument Shaw offered some historical misinformation on how Webster had objected to Tyler's assumption of the Presidency. See n. 3, supra.

The New York Times took the position that Calvin Coolidge had become the President in 1923 and, if he ran for election in 1928, he would be running for a third term. As authority for this an Oklahoma case was cited in which the Supreme Court of that state held that M. E. Trapp was not eligible to succeed himself under the Oklahoma Constitution limiting the Governor to a single term, although Trapp was the Lieutenant Governor who succeeded upon the removal of Governor Jack Watton.[66] In any case Coolidge did not run in 1928 and the question remained unanswered.

Franklin Roosevelt died on April 12, 1945, and in exactly two hours and thirty-seven minutes after the President's death, Vice President Truman was sworn in as the thirty-second President by Chief Justice Harlan F. Stone.[67] This was the seventh time a President died while in office, and the seventh time a Vice President took the presidential oath and assumed the office with its title and tenure.

The practice followed on these seven occasions seems to have established the rule that the Vice President succeeds to

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[66] New York Times, February 20, 1927. Fitzpatrick v. McAlister, 121 Okla. 83 (1926). Trapp argued that he could run for Governor, since he had only been the "acting Governor." Justice Harrison held that Trapp had succeeded to the office and become Governor, and hence was ineligible to succeed himself. As authority for this ruling, the Court cited Federal usage and said it was immaterial that no court had ever passed on whether or not the Vice President actually became the President. In the opinion of the Court, acquiescence and practice made it indisputable that the Vice President becomes the President by succession. See n.119, infra.

[67] New York Times, April 13, 1945. It is interesting that the New York Times thought it worth mentioning that Truman was listed in the Congressional Directory as the thirty-second President, April 17, 1945.

the higher office in case of the President's death.[68] If the President resigned or were removed, his incumbency would be completely terminated as in the case of his death. Because there is an actual vacancy in all three cases, the precedent established in the case of the President's death would probably be extended to the other two cases of vacancy as well.[69] That

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[68] The standard work on the usages of the American Constitution says: "I am not denying that on the death of Mr. Harding, for instance, Mr. Coolidge became President of the United States, but I affirm that he became so by virtue not of a provision of the Fundamental Law of the Constitution but of one of its usages." Horwill, op. cit., 58. Again Horwill says: "It is usage, and usage alone, that transforms a Vice President into a President in such a contingency." Ibid., 59.

[69] Although no President ever resigned, three times there has been talk of such resignation, but in all three cases in favor of the Secretary of State, not in favor of the Vice President. On October 5, 1916, Wilson wrote a letter to Secretary of State Lansing saying that, if Hughes won the election, he would appoint Hughes Secretary of State, that he and the Vice President would resign and thus open to Hughes the immediate succession to the Presidency. Wilson's reasoning was that responsible government requires getting rid of leadership at once after it has been rejected at the polls. R. S. Baker, Woodrow Wilson (1927-1939), VI, 292-293.

After the Republican victory in 1920, William Jennings Bryan called on Wilson to resign and let Vice President Marshall take over on the condition that, when Congress convened, he would appoint Harding Secretary of State and resign at once. New York Tribune, November 5, 1920.

After the Republican victory in the congressional elections of 1946, Senator William Fulbright suggested that Truman appoint a Republican Secretary of State and then resign. New York Times, November 7, 8, & 10, 1946. No action was taken on any of these occasions. Such suggestions, of course, are based on admiration for the parliamentary system, under which elections are immediately reflected in the executive.

One Vice President, John C. Calhoun, did resign. On this bit of history, see E. S. Brown, "The Resignation of the President and Vice President," 22 Am. Pol. Sci. Rev. 732 (August, 1928).

No President has ever been removed, but Johnson was impeached and missed removal by a single vote. See pp. 38-41, supra.

is, in case of the President's resignation or removal, the Vice President would probably become the President and not merely succeed to the presidential powers and duties. The precedent is doubtless contrary to the intent of the framers of the Constitution, but it has had some able supporters, who have offered some rather strong arguments to sustain the practice.

B. THE LOGIC AND LAW OF THE PRESIDENTIAL SUCCESSION PRECEDENT

In substantiation of the thesis that the Vice President becomes President when the powers and duties of the superior office devolve upon him, it has been said that the Constitution itself provides that the presidential office, not merely its powers and duties, shall devolve upon the Vice President. When the Twenty-seventh Congress met soon after Tyler assumed the Presidency, some of its members objected to establishing the precedent of the Vice President's becoming President upon the death of the latter. Representative Wise and Senator Walker read the succession clause: "In Case of...[the President's] Death...or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President..." What shall devolve, they asked. What is the antecedent of "the Same?" Both answered that "Office" was the antecedent; it was the office which devolved on John Tyler, and therefore Tyler had become the President.[70] This interpretation of the grammar of the clause was most forcefully set forth by Charles W. Jones of Florida in a Senate debate soon after the death of President

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[70] Cong. Globe, 27th Cong., 1st sess., 4-5.

Garfield. The Senator from Florida argued that "Office" is the immediate antecedent of "the Same," and it is a rule of grammar, he said, that the immediately preceding noun is always connected with the relative which follows.[71]

In answer to this Senator Lapham of New York asserted in the Forty-seventh Congress that "the Same" referred to the object of the verb "discharge" which was not "said Office," for that was the object of the preposition "of," but rather it was "Powers and Duties of the said Office."[72] It has also been argued that the answer is to be found in the word "devolve." Writing in 1922 with reference to the extended illness of President Wilson, Attorney Leavitt asserted that an office passes to another, it does not devolve upon another. Thus, he concluded that only the powers and duties of the office devolved upon the Vice President.[73] In summary, the one school of thought says

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[71] 13 Cong. Rec. 142; 14 Cong. Rec. 918. See also the remarks of John T. Morgan of Alabama, Ibid., 882. In answer to Elbridge G. Lapham of New York, who denied that Chester Arthur had become the President upon the demise of Garfield, George Frisbie Hoar, who wrote the Succession Act of 1886, said he thought it was the office and not merely its powers and duties that devolved. Ibid., 918. See also a House report, which states, "the office shall 'devolve' on the Vice President, who thereby becomes President." H. Rept. 2493, 49th Cong., 1st sess., 2. Italics mine.

[72] 14 Cong. Rec. 918. To support this point of view, Lapham quoted §675 of the Revised Statutes: "In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence..." Lapham thought they as here used was the equivalent of the Same as used in the succession clause of the Constitution. See also the remarks of Maxey of Texas, Ibid., 915-916; John Brooks Leavitt, "A Solution of the Presidential Inability Problem," 8 Am. Bar Assoc. Journ. 189 (March, 1922).

[73] Leavitt, op. cit., 189. See also his letters to the New York Times, December 6, 1921, and August 11, 1923.

"the Same" as used in the succession clause has reference to "office" and, therefore, the office devolves on the Vice President, who thereby becomes President. The other asserts that "the Same" has reference to "Powers and Duties" and therefore the Vice President is only authorized to exercise the powers and duties when the President dies, resigns, is removed, or becomes disabled.

Neither the word "devolve" nor the rules of English usage answers the question whether the antecedent of "the Same" is "Office" or "Powers and Duties."[74] It is a rule of Latin grammar that the immediately preceding noun is the antecedent of the relative which follows, in which case "the Same" would refer to "Office." Accepted English usage, however, does not always conform to this rule, nor did it conform in the period when the Constitution was written. A study of the use of the relative pronoun "the Same" from 1772 to 1819 shows that its antecedent was frequently the last grammatical unit used as a substantive rather than the last preceding noun.[75] The preceding grammatical unit so used is "Powers and Duties of the said Office." Thus, it might well be argued that "the Same" has reference to the object of the verb "discharge" which is

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[74] A study of the historical usage of the verb devolve shows that, during the period when the Constitution was written, the verb was used as a synonym for fall, as a duty or responsibility falls on or upon anyone. The subjects of this verb were usually such nouns as powers, duties, and responsibilities. The study does not establish, however, that office could not have been the subject of the verb devolve. Sir James Murray, A Dictionary on Historical Principles (1888-1928), III, Pt. I, 293.

[75] Ibid., VIII, Pt. II, 75.

"Powers and Duties of the said Office." The object of the verb is not "said Office," for that is the object of the preposition "of" and the prepositional phrase merely modifies the object of the verb.[76]

Since there is no rule governing the word order of relatives and antecedents, at least no rule to which actual usage conforms, it is submitted that the antecedent of "the Same" as used in the succession clause should be determined according to the intention of the framers of the Constitution. Those who have asserted that the language of the Constitution provides for the devolution of the office on the Vice President also argue that the framers of the Constitution intended this to be the case. Professor Dwight, writing at the time of President Garfield's illness, maintained that the specific reference to "powers and duties" had been deliberately rejected by the Federal Convention. He thought that the language used by James Monroe and Luther Martin showed that the Virginia Ratifying Convention was likewise of the opinion that the Vice President would succeed to the Presidency in case of vacancy in that office.[77] A

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[76] The ambiguous clause is as follows: "In Case of...[the President's] Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President..."

[77] Theodore Dwight, "Presidential Inability," 133 No. Am. Rev. 336, 443 (November, 1881). Monroe used the language, "to succeed to the President in case of removal...," and, as Dwight pointed out, Madison failed to object to this. Too much emphasis should not be put on Madison's failure to reply, especially when the provision on presidential succession was not under discussion. Monroe's phrase was mere dictum in connection with the question of whether or not it was wise to have a Vice President who would preside in the Senate and vote in case of tie. Luther Martin's letter said the Vice President was "to supply his [the President's] place, and be vested with his powers." The italics are Dwight's. The professor might have implied that it was the powers and duties which devolved on the Vice President if he had italicized and be vested with his powers instead of emphasizing the preceding phrase. In any case these phrases were mere dicta. See chap. I, n. 36, supra.

few weeks after Professor Dwight's article was published, Charles W. Jones asserted in the Senate that the delegates to the Convention of 1787 had intentionally substituted "devolve" for "exercise" and agreed with Dwight that the dependent clause, "until another President be chosen," had deliberately been stricken out as a limitation on the tenure of the Vice President,[78]

To buttress the position that the Vice President becomes the President, the difference in language used in the two parts of the succession clause has frequently been cited. Senator Walker, in defense of John Tyler's assumption of the Presidency, claimed that the Constitution made a distinction between the status of a Vice President upon whom the presidential functions devolved and an "officer" who might be acting as President by congressional designation. The Senator from Mississippi concluded that in case of single vacancy the office devolved upon the Vice President for the remainder of the term, but in case both of these offices were vacant, the designated officer would merely act as President until an actual President were elected.[79]

This position was rather extensively explained in the Forty-seventh Congress by Charles W. Jones, who emphasized the difference in language used in the two parts of the succession clause and asserted that the dependent clause, "until...a President shall be elected," referred only to the officer designated by Congress. As a necessary consequence, he thought, the Vice President should take office without limitation for the remainder

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[78] 13 Cong. Rec., 142; Dwight, op. cit., 443.

[79] Cong. Globe, 27th Cong., 1st sess., 5.

of the term.[80] As authority for his conclusion, the Senator from Florida cited a report made by the Senate Committee on the Judiciary in 1856 denying that a special election could be held in case of the Vice President's succession but approving of a special election when an officer designated by Congress was acting as President.[81] In making a distinction between the tenure of the Vice President and that of an officer designated by Congress, Judge Dittenhoefer went so far as to say that the limiting adverbial clause was separated by a semicolon from the clause providing for the succession of the Vice President and referred, therefore, only to the "officer" who might act as

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[80] 13 Cong. Rec. 192-193; 14 Cong. Rec. 959, 1007. See also an exposition of this thesis made by John T. Morgan of Alabama, ibid., 884. This point of view has found its way into various congressional reports. See for example a report in which it is unequivocally stated that the office devolves upon the Vice President who thereby becomes President, but the officer designated by Congress only acts as such. H. Rept. 2493, 49th Cong., 1st sess., 2.

[81] 13 Cong. Rec. 192. The Senate report to which Jones referred stated that under the fifth clause of the first section of the second article, the Vice President becomes the President for the residue of the term; but the acting officer would be "a contingent functionary, with presidential authority of a provisional character...confined to a sphere of limited and prescribed duties....The acting officer has not devolved upon him, in terms, the power and duties of an elected President according to the provisions of the Constitution...the officer selected can act only for a limited term with a prescribed purpose." S. Rept. 260, 34th Cong., 1st sess., 3-5. John R. Eden of Illinois, "No provision is made when the office devolves on the Vice President for a special election to fill out the unexpired term. The Vice President fills out the term without question..." 17 Cong. Rec. 669. Morgan of Alabama said, when the Vice President succeeds, he holds for the residue of the term as provided in the Constitution. 14 Cong. Rec. 691.

President.[82]

Those who deny the presidential status of a succeeding Vice President argue the framers of the Constitution did not intend to make a distinction between the status of a succeeding Vice President and that of an "officer" who was acting as President. In either case such person was to exercise presidential power. As pointed out in the first chapter of the present study, the Committee of Style, which had no authority to change substantive provisions, substituted "the same shall devolve on the Vice President" for "the Vice President shall exercise those powers and duties." The Convention never voted to make these changes, and there is no evidence that the Convention thought the phraseology selected by the committee made a material change in the meaning of the clause.[83] As the succession provisions were voted by the Philadelphia Convention, they were two separate clauses, each of which was modified by the adverbial clause. The Committee of Style brought these two clauses together and used the adverbial clause only once, presumably to modify both of the preceding clauses.[84] The Committee punctuated the succession provision so all three

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[82] New York Herald, September 13, 1881. Also reprinted on p. 56 of Hearings on H. R. 12606, 12629, 12647, and H. J. Res. 297, H. R. Comm. on the Judic., 66th Cong., 2nd sess. (1920). Article II, sec. 1, cl. 5 is as follows: (1) the independent clause providing for the devolution of presidential power on the Vice President [comma, not semicolon], (2) the independent clause empowering Congress to designate what officer shall act as President, (3) the adverbial clause. Although Judge Dittenhoefer's punctuation is not found in the engrossed Constitution, the clause has frequently been quoted with a semicolon. For example, see the clause so quoted in H. Rept. 26, 49th Cong., 1st sess., 2.

[83] See pp. 12-14, supra.

[84] See pp. 14-16, supra.

clauses would read as one continuous sentence, in which case the adverbial clause would modify both of the preceding clauses. Although the succession provision of the Constitution has frequently been printed with semicolons, commas are found in the official reprints of the Constitution.[85]

The rule favoring the use of intrinsic aids to interpretation has been used to deny the presidential status of one who acts as President under the succession clause. It has frequently been pointed out that the framers of the Constitution could not have intended for the Vice President to become President for the Constitution does not once say that he shall become President, which would have been the natural language.[86] Throughout the Constitution a distinction is made between a President and an acting President;[87] and it is a well-established rule that

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[85] See for example: 1 U. S. Stat. at L. 18 (1848); Revised Stat. of the U. S. (2nd ed.; 1878), 23; Const. of the U. S. Ann. (1938), 380; U. S. Code (1940 ed.), I, xxxvi. See n. 82, supra.

[86] See for example: Lewis R. Works, "The Succession of the Vice President Under the Constitution," 38 Am. Law Rev. 500, 502-503 (July-August, 1904); H. H. Sawyer, "The Presidential Succession," 16 Am. Mercury 129, 133 (February, 1929); Charles Warren, The Making of the Constitution (1928), 637n.

[87] Article I, sec. 3, cl. 5: "The Senate shall chuse...a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." Article II, sec. 1, cl. 5: "...the Same shall devolve upon 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..." The Twelfth Amendment provides that, if the House of Representatives should fail to choose a President before the fourth of March, "the Vice President shall act as President, as in the case of the death or other Constitutional disability of the President."

intrinsic aids are to be preferred to extrinsic aids, and that the latter cannot be indulged in to enlarge the text.[88] This would point to the conclusion that one does not become President by succession.

It has been asserted that the Twelfth Amendment, which states that if the House of Representatives should fail to choose a President before the time fixed for the beginning of the term, "the Vice President shall act as President, as in case of the death or other constitutional disability of the President," refers only to a Vice President chosen by the Senate, that a Vice President chosen by the electoral colleges actually becomes the President under the succession clause.[89] It must be admitted that there is evidence that the framers of the Twelfth Amendment were not aware of a distinction between a de jure President and an acting President; but there is no indication in the poorly reported debates that they intended to make a distinction between a Vice President chosen by the Senate and one chosen by the electors.[90]

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[88] McPherson v. Blacker, 146 U. S. 1, 27 (1892).

[89] See the remarks of Senator Morgan, 14 Cong. Rec. 884.

[90] The original motion of John Quincy Adams to insert this clause in the Twelfth Amendment spoke of the powers and duties of the Presidency as being discharged by the Vice President or such person as Congress might by law direct. 13 Annals of Cong. 132. Subsequent drafts of the amendment likewise were worded so as to distinguish between a de jure President and an acting President. Ibid., 136, 137, 139, 210, 668.

The debate on this amendment, however, showed that at least some of the members of the Eighth Congress thought that under its provisions as well as under the provision of the succession clause of article II the Vice President would actually become the President for the remainder of the term. Samuel White of Delaware, in interpreting the succession clause, said: "...And he [the Vice President] is Constitutionally the President, not until another can be made only, but of [for?] the residue of the term, which may be nearly four years; and this is not to be supposed a remote or improbable case." There is no record that anyone objected to

Both Senators Maxey and Dawes expressed the opinion in the Forty-seventh Congress that the framers of the Constitution never intended the Vice President to become President by force of the succession clause.[91] Senator Dawes and Judge Trumbull went so far as to say that under the original Constitution before the Twelfth Amendment was adopted, the Vice President was not even required to have the qualifications necessary to become President. This, they thought, was a clear indication that the delegates to the Philadelphia Convention never intended the Vice President to become President by succession.[92] But, as an able Washington lawyer pointed out, the Vice President would

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White's interpretation of the succession clause. Ibid., 143.

If not all of the framers of the Twelfth Amendment were willing to go as far as White in placing the Vice President in the presidential chair, at least many of them thought that once the powers and duties devolved upon him, he was to hold for the remainder of the term. James Hillhouse of Connecticut suggested that provision should be made for the person to act as President only until the electors could be reconvened. To this suggestion, Jonathan Dayton of New Jersey answered that when there is a Vice President, in case of the death or inability of the President, the Vice President alone can exercise the executive powers and "you cannot place any person over his head." Adams agreed with Dayton's thesis. Ibid., 132. In 1841, however, Adams would not admit that Tyler became the President. See n. 34, supra.

There was greater objection to this part of the Amendment than to any other. The protest against putting the Vice President in the President's place at least implied that these people thought that once he was thus invested with executive power, he was to hold for the remainder of the term, which in this case would be a full four years. Persons who attempted to answer the objection did not deny this interpretation, but rather tried to justify such a provision. Ibid., 134-135, 198, 668-682, 692, 695, 702-704, 717, 726, 734-735, 739, 750, 754. During the debates some spoke of the Vice President's becoming President, while others of his "succeeding to the power," and of his "succeeding to the functions."

91 14 Cong. Rec. 915 and 955, respectively.

92 14 Cong. Rec. 956; Lyman Trumbull, "Presidential Inability," 133 No. Am. Rev. 417,419. (November, 1881).

always have the constitutional qualifications to become President, because by the original mode of election, he was chosen Vice President because he received the second highest number of votes for President.[93]

Another approach of those who hold that no one can become President by force of the succession clause is to appeal to what they consider a common sense construction of the clause. Senator Maxey pointed out that the Constitution treats cases of vacancy and inability in the same way; and, since the Vice President cannot become President in case of the President's inability, neither can he in case of the President's death, resignation, or removal.[94] This point of view has been set forth clearly in a law review article published in 1904. Although the author thought "the Same" referred to office grammatically, he concluded that reason dictated "Powers and Duties" to be the antecedent, because the Vice President could not become President while a disabled President occupied the office.[95] Those who hold that the Vice President becomes President for the remainder of the term in case of vacancy in the Presidency answer one of two ways: the Vice President displaces the disabled President, or there is a difference between vacancy and inability. Neither answer is correct or practical.[96]

On each of the seven occasions on which the President has died, the Vice President has taken the oath prescribed by the

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[93] Henry Davis, "Inability of the President," S. Doc. 308, 65th Cong., 3rd sess., p. 6.

[94] 13 Cong. Rec. 129.

[95] Works, op. cit., 501-502.

[96] See chap. III, infra.

Constitution for the President. Although it has never been seriously argued that taking the oath makes the Vice President into a President, such is often implied. For example, in refutation of the statement that a succeeding Vice President does not become the President, it has frequently been asked, "he takes the presidential oath, doesn't he?" Another example, the Congressional Directory dates the beginning of a presidential term from the time the Vice President takes the presidential oath rather than from the time the President dies. Thus April 6, 1841, instead of April fourth is given as the date for the beginning of Tyler's term.[97] Those who hold the view that no one becomes President by succession answer that neither the Vice President nor the "officer" designated by Congress should take the oath. Whether or not it was intended by those who framed and ratified the Constitution for him to take the oath is not known.[98] The Constitution requires the President to take the oath; but in the case of an acting President one may ask whether his taking the oath is a legal obligation or merely

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[97] Cong. Dir., 80th Cong., 1st sess., 254.

[98] This was not even mentioned in the Philadelphia Convention. The only time it was mentioned in the state conventions was in the form of dictum in the Massachusetts Convention, where, in enumerating the many safeguards against abuse of power, James Bowdoin said: "The President, and also the Vice President, when acting as President, before they enter on the execution of the office, shall each 'solemnly swear or affirm, that he will faithfully execute the office of President of the United States, and will to the best of his ability, preserve, protect, and defend, the Constitution of the United States.'" This statement was not challenged in the Convention, but this does not mean much since presidential succession was not being discussed. Jonathan Elliot, The Debates in the Several States (2nd ed.; 1881), II, 85.

custom. The most nearly correct view probably is that taking the oath does not make anyone the President and adds nothing to his powers; and, if it has any effect, it is merely to put his conscience within the bounds of law.[99] As far as state practice is concerned, the acting Governor can be denied the oath in all but six states.[100] But succeeding Vice Presidents must have thought the presidential oath important, for all seven took it, and Arthur and Coolidge took it twice.[101]

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[99] Article II, sec. 1, cl. 7. It is Corwin's thesis that taking the oath by one elected to the Presidency does not make the man the President, but is merely his first duty. He thinks the President is already in office when he takes the oath, and points out that the Constitution says it is the President, not the President-elect, who takes the oath. As Corwin mentions, the Act of March 1, 1792, assumed that Washington became the President on March 4, 1789, although he did not take the oath until April 30; amd in the analagous case of the coronation oath, the succession is not dependent on the heir's taking the oath. In fact the oath-taking ceremony in monarchial states is sometimes deferred for years. If all of this is true, David Atchison's claim that he, as President pro tempore of the Senate, was the President of the United States for one day, March 4, 1849, because of Taylor's refusal to take the oath on Sunday, cannot be allowed. Atchison claimed that the oath was necessary to make Taylor the President, but he did not take the oath himself. Edward S. Corwin, The President: Office and Powers (1940), 59, 148-149, 341. On Atchison's claim to fame, see 13 Cong. Digest 127 (April, 1934). See also H. B. Learned, "The Vice President's Oath of Office," 104 Nation 248 (March 1, 1917); and n. 31, supra.

[100] Warren R. Isolm, "The Office of Lieutenant Governor in the States," 32 Am. Pol. Sci. Rev. 921, 922 (October, 1938). For example of a case in which it was held that an additional oath was necessary, In re an Act Concerning Alcoholic Beverages, 130 N. J. L. 123 (1943); for example of an opposite ruling, Walls v. Hall, 202 Ark. 999, 1004-1005 (1941).

[101] 25 Harper's Weekly 660 (October 1, 1881); New York Times, February 3, 1932.

In summary, there are two schools of thought on the subject of presidential succession. One denies that the Vice President becomes President when the powers and duties of the higher office devolve upon him. It makes no distinction between such a Vice President and the "officer" who might act as President. The adherents of this school hold that either merely acts as President until the President's disability is removed or a President elected, and that no one can be President of the United States unless elected to that office in the manner provided by the Constitution.[102] Horwill says that there can be no "presidential succession" except the following of one elected President by another elected President, because there are only two ways of creating a President, choice by the electors or by the House of Representatives.[103] Thus during the administrations of Tyler, Johnson, and Arthur there were those who asserted that the man discharging the presidential functions at the time was still the Vice President.[104]

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[102] This thesis has frequently been espoused on the floor of Congress. See for example the arguments of Maxey, Lapham, and Dawes, 14 Cong. Rec. 913, 917-920, and 955, respectively. See also the remarks of Representative Jenkins before the House Committee on the Judiciary. Hearings on H. J. Res. 264, 60th Cong., 2nd sess. (1909), 3. The two most frequently quoted articles setting forth this thesis were written by Judge Lyman Trumbull and former Senator Benjamin F. Butler for the North American Review, op. cit., 417 and 428, respectively.

[103] Horwill, op. cit., 65. The term "presidential succession" is used throughout the present study, because language usage has established this as the proper terminology for referring to the devolution of presidential power on the Vice President or designated officer, whether such devolution is equivalent to becoming President or not.

[104] Cong. Globe, 27th Cong., 1st sess., 3-5; Dewitt, op. cit., 380; 14 Cong. Rec. 918.

The other school of thought holds that the Vice President becomes President in case of the latter's death, resignation, or removal, and perhaps in case of his inability as well. This school of thought makes a sharp distinction between a succeeding Vice President and the "officer" who might act as President. The adherents of this school hold that the former becomes the President for the remainder of the term, but the latter merely acts as President for the duration of the inability or until an actual President is elected. They deny that the presidential office can be separated from its powers and duties in such a way as to allow the Vice President to exercise the powers without succeeding to the office and becoming President. None of the standard commentators take an extreme position on this question;[105] but Rawle, Story, Cooley, Burgess, Tucker, Watson, and Burdick all either state or imply that the Vice President becomes President for the remainder of the term when the powers and duties of the latter office devolve upon him because of vacancy.

Rawle, writing sixteen years before the succession of John Tyler, said that the Vice President would succeed to the presidential office and continue therein until the expiration of the term for which the President was elected, but if both of these offices were vacant, a special election would be called under the Act of 1792. Rawle did not question the constitutionality of calling such an election. Thus he implied that there was a

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[105] Four of the standard commentators say nothing about presidential succession in their works. Thomas Sergeant, Constitutional Law (1822); John Norton Pomroy, Introduction to the Constitution of the United States (1868); John I. C. Hare, American Constitutional Law (1889); Roger Foster, Commentaries on the Constitution (1895).

difference in the status of a succeeding Vice President and the status of his successor by giving tenure to the former while allowing the presidential service of the latter to be terminated by special election.[106]

Joseph Story, also writing before the succession of John Tyler, explained that if a Vice President should succeed to the presidential office, he would continue in that office until the expiration of the term for which the President was chosen, because a new President could not be elected, except at the regular quadrennial election if there were still a Vice President able to serve. By questioning the power of Congress to call an election when both offices are vacant, the great jurist implied that a designated officer acting as President might have the same tenure as a Vice President upon whom presidential power devolved.[107]

Cooley, writing after Tyler, Arthur, and Johnson succeeded to the Presidency but before Garfield became disabled, said that when the Vice President became acting President, he held for the remainder of the term. But then Cooley spoke of the presidential office as devolving on the President of the Senate, thus indicating that he did not see the significance of his choice of

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[106] William Rawle, A View of the Constitution (1st ed.; 1825), 49-50. It is possible that Rawle did not think there was a constitutional difference in the tenure of the two officers. He may have thought the Vice President would complete the term, because Congress failed to provide for the calling of a special election in case only the Presidency was vacant, whereas the "officer" would not complete the term, because the Act of 1792 provided for a special election in case both the Presidency and Vice Presidency were vacant.

[107] Commentaries on the Constitution of the United States (1st ed.; 1833), III, 336-337.

language. Writing after the inability of President Garfield, however, Cooley said there could be no question about the Vice President's becoming President in case of complete vacancy in the presidential office; usage has established that he does. Whether the precedent was proper or not, Cooley did not say.[108]

Burgess, also writing after three Presidents died in office and the Vice President assumed the office for the remainder of the term in all three cases, does not question the usage and declares that the Constitution devolves the office on the Vice President in case of the President's death, resignation, removal, or inability. He does not say whether the status and tenure of a Vice President upon whom presidential power devolves are different from the status and tenure of an officer acting as President by statutory designation. It is Tucker's opinion that in case of vacancy the Vice President becomes President, and does not merely act as such. In case the designated officer is called to act as President, however, Tucker is not willing to recognize that he would become the President or have protected tenure. The commentator makes a sharp distinction between a Vice President who becomes the President and an officer who is merely to act as President ex officio. Concerning the tenure of the latter, Tucker holds that he is to serve only until a President is elected to complete the unexpired term.[109]

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[108] Thomas M. Cooley, Principles of Constitutional Law (1880), 51n; "Presidential Inability," 133 No. Am. Rev. 122, 122-124 (November, 1881).

[109] John W. Burgess, Political Science and Comparative Constitutional Law (1891), II, 239-240; John Randolph Tucker, The Constitution of the United States (1899), II, 711-712. Tucker's work was published 13 years after the special election provisions of the Act of 1792 were repealed.

Like the five preceding commentators, Watson and Burdick state that the Vice President becomes President in event of vacancy in the latter office. Burdick is not sure it was intended that the Vice President become President, but usage has established this in case of death, and Burdick thinks the same rule would apply in cases of removal and resignation. Burdick does not discuss whether there is a constitutional difference between the presidential status and tenure of a Vice President and that of an "officer" acting as President; but Watson affirms that the designated "officer" would only act as President.[110]

A survey of the commentaries which state that the Vice President becomes President in case of vacancy in the presidential office suggests that four, Cooley, Burgess, Tucker, and Watson merely report established usage without questioning its constitutional propriety. Burdick questions the constitutional correctness of the usage, but recognizes that it had established the governing rule. In the case of Rawle and Story, who wrote before there was a case of vacancy, there is no evidence that they thought their choice of the word office instead of powers and duties significant or that they saw the implication of their selection of language. Only Tucker makes a sharp distinction between the status of the Vice President and the officer designated by the Congress. Tucker alone attempts to justify the usage.

Among the standard commentators Kent, Black, and Willoughby

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[110] David K. Watson, The Constitution of the United States (1910), I, 891-902; Charles Kellogg Burdick, The Law of the American Constitution (1922), 59-61.

adhere to the second school of thought. That is, they say the Vice President merely acts as President when the powers and duties of the Presidency devolve upon him. Kent and Black do not discuss the question, but use language which indicates their position. Chancellor Kent says the Vice President acts as President.[111] Black refers to the Vice President as the acting President, but apparently does not understand the significance of using the term acting President, because he also speaks of the presidential office as devolving on the designated "officer." In any case, Black thought either successor was to complete the unexpired term. Willoughby questions whether the Vice President becomes President and states that it is merely the presidential powers and duties which devolve upon the Vice President.[112]

There are, of course, no court rulings on the question of whether or not one who acts as President ipso facto becomes the incumbent of the office; but there have been judicial pronouncements which have a direct bearing on the question. In addition to obiter dictum, there are gubernatorial succession cases in which the state courts have justified their decisions by appealing to Federal usage as precedent. The only pronouncement made by a Federal court is obiter dictum which lends authority to

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[111] James Kent, Commentaries on American Law (3rd ed.; 1836 and all editions thereafter), I, 278. This is not found in the first two editions, but Kent revised the first six editions himself. The third and fourth were prepared before the succession of John Tyler, but the fifth and sixth were published after his succession.

[112] Henry C. Black, Handbook of American Constitutional Law (1895), 90. W. W. Willoughby, The Constitutional Law of the United States (1929), III, 1471.

the thesis that the Vice President becomes President when the powers and duties of the latter devolve upon him. In this case, which was decided in the United States District Court for the Southern District of New York in 1867, Justice Blatchford used very definite language. He said in part:

> Three times...the President has died, and, under the provision referred to, the powers and duties of the office of President have devolved upon the Vice President. All branches of the Government have, under such circumstances, recognized the Vice President as holding the office of President, as authorized to assume the title and as entitled to its emoluments. The Vice President holds the office of President until a successor to the deceased President comes to assume the office at the expiration of the term for which the deceased President and Vice President were elected....It has never been supposed that, under the provision of the Constitution, the Vice President, in acting as President, acted as the servant, or agent, or locum tenens of the deceased President, or in any other capacity than as holding the office of President fully, for the time being, by virtue of express authority emanating from the United States.[113]

Although this declaration is mere dictum, it has frequently been cited as authority by state courts in cases involving executive succession. The present study is concerned only with those state cases which have a direct bearing on presidential succession.[114] The two strongest state cases, which can be

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[113] Merriam v. Clinch, 17 Fed. Cas. 68. This was a suit to collect the salary for acting as collector of customs. The court ruled that under the statute of 1799 [1 U. S. Stat. at L. 644] in cases of temporary disability, the collector still acted, but acted through a deputy, and was entitled to all the perquisites and emoluments of the office. In case of permanent disability or death, however, the duties, authorities, and emoluments would devolve upon the deputy. The statute actually made a distinction between vacancy and temporary disability, whereas the succession clause of the Constitution does not.

[114] For a brief, summary discussion of gubernatorial succession, see Isolm, op. cit. In this article Isolm points out that thirty-five states have a Lieutenant Governor, in nine the President of the Senate is the substitute for the Governor, and in four the Secretary of State is the provisional successor. Of the thirty-five which have a Lieutenant Governor, twenty-four provide that the power and authority shall "devolve" on him, in

cited in favor of the presidential status of a succeeding Vice President, were based on an Oregon constitutional provision nearly identical to the succession clause of the Federal Constitution. In each case the Oregon Supreme Court rejected the argument that the gubernatorial duties can be separated from the office in such a way that he who exercises them does not succeed to the office. The court based its ruling, therefore, on the principle that the constitutional successor had become the Governor by force of the functions cast upon him. The court justified its conclusion by reasoning that "the same" referred to "office" and thus the office had devolved upon the Secretary of State. As authority for this, the dictum of Justice Blatchford in the Merriam case was cited.[115] The second Oregon case was decided by a vote of four to three. One of the four, Justice Bennet, wrote a concurring opinion in which he stated that he thought the opinion of the court a bad one, but felt bound to follow the precedent set by the earlier case.[116]

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six he "becomes" the Governor, and in four he is to "exercise" the authorities of the office, and in the thirty-fifth he "has the power and discharges the duties" of the Governor.

[115] Chadwick v. Earhart, 11 Ore. 389, 391 (1884). Article V, sec. 8 of the Oregon Constitution was as follows: "In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve upon the secretary of state; [semicolon, not comma] and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor until the disability be removed or a governor be elected." This was a suit to collect the Governor's salary due to the Secretary of State upon whom the gubernatorial powers and duties had devolved and who continued to act as Governor after he ceased to be Secretary of State. The court held that the Secretary of State had a right to the salary and was to perform the duties for the remainder of the term and not only so long as he continued to be Secretary of State.

[116] State v. Olcott, 94 Ore. 633 (1920). Bennet severely criticized the reasoning in the Chadwick case and unequivocally stated that he thought it was the gubernatorial duties, rather than the office, which devolved upon the Secretary of State, that

These two cases are the only ones in which a court has appealed to Federal usage to interpret a constitutional provision phrased like the succession clause of the Federal Constitution; but there have been other cases in which the courts have thought Federal usage is good authority for deciding executive succession cases. In a confused New York case, the court referred to the devolution of presidential powers on Fillmore and Johnson as precedent for holding that the deputy superintendent of insurance became the superintendent in case of vacancy in the latter office.[117] Similarly, there is a Nevada case in which the highest state court held that, upon the death of the Governor, the Lieutenant Governor became the "acting Governor," entitled to the salary of the Governor, and appealed to Federal usage as authority, saying that whenever the President of the United States died and his powers devolved upon the Vice President, all branches of the Government recognized the Vice President as holding the office of President, as authorized

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he should continue to exercise those duties only so long as he continued to be Secretary of State, and finally that the vacancy should be filled at the next general election. Bennet voted with the majority only because he felt bound by the rule of stare decisis. Ibid., 644-645.

[117] People ex rel. Church v. Hopkins, 55 N. Y. 74, 81 (1873). This case was much like the Merriam Case (op. cit.) in that the court made a sharp distinction between vacancy and temporary absence or inability. In dicta at pp. 80-81, the court recounted the succession of Nathaniel Pitcher and Silas Wright to the Governorship of New York. Although the court said Pitcher and Wright ceased to be Lieutenant Governor and were entitled to the Governor's salary, the court was always careful to refer to them as "acting Governor," never as "the Governor."

to assume its title and having the right to its emoluments.[118]

In 1926, the Oklahoma Supreme Court appealed to Federal usage to justify its ruling that the Lieutenant Governor on whom the gubernatorial office devolved, had actually become the Governor and thus was ineligible to run for election to the Governorship under the state constitution, which precluded the Governor from succeeding himself. The kind of confused reasoning found in the majority opinion in this case is typical of that found in discussions of presidential succession.[119] Chief

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[118] State of Nevada ex rel. Sadler v. LaGrave, 23 Nev. 216, 221 (1896). Article V, sec. 18 of the state constitution provided that upon the death of the Governor, the powers and duties shall devolve upon the Lieutenant Governor for the residue of the term. At pages 221-222 of the report, the court approvingly cited the Merriam and Chadwick cases, but was always careful to speak of the "acting Governor." In a separate concurring opinion, Chief Justice Bigelow said he thought the Lieutenant Governor should have the salary in this case but protested against the implication that the Lieutenant Governor became the Governor. The Chief Justice thought the Governor's office remained vacant while the Lieutenant Governor acted as Govemor. Ibid., 223-225.

[119] Fitzpatrick v. McAlister, 21 Okla. 83, 90-91 (1926). The fifteenth section of Article VI provided for cases of vacancy or inability in the offices of both Governor and Lieutenant Governor, in which case the President of the Senate was to act as Governor until the vacancy be filled or the disability cease. The next section provided in case of vacancy or inability in the governorship, the office and its compensation shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed. Although the language used in sections 15 and 16 was different, the real distinction was that the former provided for cases of double vacancy or inability, whereas the latter provided for vacancy or inability in only the Governorship. The reasoning of the court was badly confused. The majority opinion said that the difference was that section 15 provided for cases of temporary inability, in which case the Governor or Lieutenant Governor resumed the duties when the inability was removed, while section 16 provided for cases of permanent vacancy or inability, in which case the Lieutenant Governor actually became the Governor. Of course, the duration of the inability or vacancy was not the feature that distinguished section 15 from 16. Then the court went on to point to the difference in language used in the two sections, in the one case the presiding legislative officer merely acts as Governor, whereas in the other, the office devolves on the Lieutenant Governor. Ibid., 86.

Justice Branson wrote a dissenting opinion in which he stated that he thought a Governor could be made only by election, not by succession, and in the cases enumerated the Lieutenant Governor exercised the gubernatorial powers as Lieutenant Governor.[120]

Branson's assertion that a Lieutenant Governor does not become Governor by succession is made in a dissenting opinion, but there are state cases in which his view is found in the opinion of the court. The Supreme Court of Arkansas ruled that the office of Governor could never be filled except by direct vote of the people, and, in case of vacancy in the office, the Constitution provided for a temporary devolution of powers on some other functionary while the vacancy existed.[121] The courts of other states have taken a similar position in refusing to recognize that the office of Lieutenant Governor became vacant when the powers and duties of the gubernatorial office devolved upon the Lieutenant Governor, and in pointing out that he remained the Lieutenant Governor entrusted with the powers and

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[120] S. c., 93-99. Branson went on to point out that section 16 made no distinction between temporary and permanent disability or vacancy (see n. 119, supra). He thought nobody would contend that a temporary inability on the part of the Governor would make the Lieutenant Governor the Governor for the remainder of the term.

[121] Futrell v. Oldham, 107 Ark. 386, 390 (1913). Article IV, sec. 12 of the Arkansas Constitution was less ambiguous as to what it was that devolved on the President of the Senate than the Federal Constitution was inproviding "the Same" shall devolve on the Vice President. The former stated, "the powers, duties, and emoluments of the office for the remainder of the term...shall devolve upon, and accrue to the President of the Senate..."

duties of the higher office.[122] Following a similar kind of reasoning, the highest state court in New Jersey declined to recognize that the President of the Senate succeeded to the Governorship and its title when the powers, duties, and emoluments of the higher office devolve upon him.[123]

The Minnesota Supreme Court would not adopt the position that the Lieutenant Governor became the Governor when he was called to act as such, because the Court thought it would require ousting a disabled Governor and placing the Lieutenant Governor in the higher office for the remainder of the term. It was the opinion of the Court that such an interpretation would exclude the possibility of temporary vacancy or inability, and that expelling an ill Governor and denying him the right to the Governorship after his recovery would menace peace and order.[124] The California Supreme Court thought that, if the Lieutenant Governor became the Governor by succession, it would necessitate leaving the executive functions unperformed in cases of inability or temporary vacancy. The Court branded such a construction "excess and folly of reverence for the man, without

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[122] State ex rel. Hardin v. Sadler, 23 Nev. 356 (1897); State of Washington ex rel. Murphy v. McBride, 29 Wash. 335 (1902); Ward v. Curran, 44 N. Y. S. 2d. 240, 266 App. Div. 524 (1943); State ex rel. Lamey v. Mitchell, 97 Mont. 252 (1934). The Montana court expressed the opinion that if the Governor were absent from the state or temporarily unable to perform the duties of his office, the Lieutenant Governor would not become the Governor, but would merely act as Governor until the Governor could resume the duties of his office. Ibid., 372. See also the dictum in a California case in which the court said, "it would hardly be contended that when the powers of the governor devolve upon the lieutenant-governor, he thereby becomes the governor and can appoint a lieutenant-governor." People ex rel. Lynch v. Budd, 114 Cal. 168, 170 (1896).

[123] Clifford v. Heller, 63 N.J.L. 105 (1899).

[124] State ex rel. Marr v. Starnes, 72 Minn. 200, 200-203 (1898).

consideration for the public interest." The Court said that the vested rights of tenure attached to the elected incumbent, but the functions of the office separated from the Governor temporarily and could be exercised by another in certain contingencies.[125]

Although state cases on gubernatorial succession are not necessarily binding precedents for presidential succession, they probably can be cited as supporting authorities. The difficulty is that the cases, like the commentators, do not agree. State cases can be cited in favor of the thesis that a succeeding Vice President becomes President, and other state cases can be cited in support of the contrary thesis. An examination of the state cases does show one thing, however, and this is that the reasoning sustaining the presidential succession precedent had led to some obviously inconsistent conclusions. The same is true of all attempts to buttress the proposition that the Vice President becomes President by succession. An examination of the arguments by which the precedent has been sustained shows that they are vulnerable on historical, logical, or legal grounds. The strength of those who support the presidential status of a succeeding Vice President lies in the fact that they are able to point to actual usage, which is of great importance in the development of a constitutional system.

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[125] People v. Wells, 2 Cal. 199 (1852); dictum at 224-226. The court felt that the confusion which arises in the thinking on the subject is the result of not recognizing that the office and its tenure, which attach to the person of the Governor, can be separated from the functions of the office under certain circumstances. Ibid., 226.

C. CONCLUSION

It is not the purpose of this study to deny that Harry Truman, for example, became the President on the death of Franklin Roosevelt, but it is submitted that he succeeded to the higher office by virtue of a usage rather than by a constitutional provision,[126] and that this usage has confused the thinking on presidential succession. Only a few examples of the problems and inconsistencies arising from this precedent need be mentioned here.

Attempts to buttress the propostion that the Vice President becomes the President by succession have led to some obviously illogical conclusions. For example, it seems to be assumed that taking the presidential oath is a prerequisite to the exercise of presidential power and that such an oath makes the Vice President the President; but it has been contended at the same time that an "officer" designated by the Congress would not become the President although, presumably, the same oath would be a prerequisite to his exercise of presidential power. A second example can be put in the form of a question: If Tyler became President, why did he have a term of three years and eleven months? The Constitution knows only a four year

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[126] It must be recognized that this usage has "amended" the Constitution. At the same time, the courts have said that no number of infractions of the Constitution, however numerous, can furnish a construction not warranted, nor does long acquiescence of the Congress and the Executive make constitutional that which is unconstitutional. Fairbank v. United States, 181 U. S. 283, 307 (1901); Field v. Clark, 143 U. S. 649, 691 (1892); United States v. Bayer, 85 Fed. 425 (1898). The Twentieth Amendment has recognized this usage in some degree, however, by providing that if the President-elect dies, the Vice-President-elect shall become the President.

term for a President.[127]

A third example refers to the power of Congress to designate an "officer" to act as President in certain cases. The unquestioning acceptance of the usage that the Vice President becomes the President by succession has led Congress unconsciously to extend this same rule to the designated officer. In writing legislation, the Seventy-ninth and Eightieth Congresses have assumed that the officer they wished to designate would become the President by providing that he resign his "office" upon taking over the presidential functions. This would be the reasonable thing to do if he becomes the President; but if he is authorized only to exercise presidential power by virtue of holding this "office," he will lose his right to exercise the power when he resigns the office to which it is annexed. The same bills, which are based on the tacit recognition that the designated officer becomes the President, provide for the termination of his tenure as acting President by the special election of a President to displace him or by the qualification of a prior entitled individual, who could displace him.[128] Yet the Constitution gives protected tenure to a de jure President.

Although the framers of the Constitution intended the adverbial clause, "until...a President shall be elected," to limit the tenure of a succeeding Vice President as well as a designated "officer," not even the school of thought which denies that the Vice President becomes the President in cases

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[127] Article II, sec. 1, cl. 1.

[128] For example, H. R. 3587, 80th Cong. and Public Law 199, 80th Cong., 1st sess. See chap. V, infra.

of vacancy in the latter office has seriously questioned the right of the Vice President to serve out the unexpired portion of the term.[129] A few have suggested that the Constitution contemplates the immediate election of a new President to displace the Vice President, but they have been willing to acquiesce in the established usage.[130] Contrary to what seems to have been the intent of the framers of the succession clause, it has always been rather generally agreed that there should be no special election when the Vice President is acting as President. Chancellor Kent, writing in 1832, said: "....the Vice President acts as President during the remainder of the term for which the President was elected."[131] Cooley and Black take the same position.[132] Willoughby denies that the Congress has power to provide for a special election in such case on the ground that the legislative power of Congress with reference to presidential succession is limited to cases in which there is a vacancy in

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[129] See chap. I, supra. The Washington Supreme Court, interpreting a similar provision of the Washington Constitution, held that in case of the death of the Governor the duties of the office devolve on the Lieutenant Governor for the balance of the term and no special gubernatorial election is to be held. The basis of the ruling was that "until...a governor be elected" referred only to the case in which a Secretary of State was acting as Governor. Article III, sec. 10 of the Washington Constitution was as follows: "In case of..., the duties of the office shall devolve upon the lieutenant governor, and, in case of a vacancy in both the offices of governor and lieutenant governor, the duties of the governor shall devolve upon the secretary of state, who shall act as governor until the disability be removed or a governor elected." State of Washington ex rel. Murphy v. McBride, 29 Wash. 335, 339 (1902)

[130] Sawyer, op. cit., 133; Warren, op. cit., 635

[131] Kent, op. cit. (2nd ed.), 278. See n. 111, supra.

[132] Cooley, op. cit., 51n.; Black, op. cit., 90.

the offices of both President and Vice President.[133]

This interpretation of the clause, "until...a President shall be elected," seems to have been almost unanimously held by the Congress. Even those members of the Congress who have vehemently denied the presidential status of a succeeding Vice President have expressly stated that they thought the powers and duties of the President devolve on the Vice President for the remainder of the term in case of the President's death, resignation, or removal.[134]

The practice of the Vice President's completing the term in case of vacancy has given rise to what some believe to be a defect: it has meant that presidential power can be, and has been, wielded for nearly four years by one who was not selected to be the President. On April 4, 1841, exactly one month after William Henry Harrison's inauguration, John Quincy Adams wrote:

> In upwards of half a century, this is the first instance of a Vice President's being called to act as President of the United States, and brings to the test that provision of the Constitution which places in the Executive chair a man never thought of for that office by anybody.[135]

Our system of choosing a Vice President makes for Vice Presidents who, it may be argued, are often mediocre characters and never the real choice of the people. In 1802 Gouverneur Morris wrote that the Federal Convention rejected separate balloting for President and Vice President on the ground that it would produce Vice Presidents who were lacking in excellence,

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[133] Willoughby, op. cit., III, 1467.

[134] See for example, the remarks of Maxey and Coke, 13 Cong. Rec. 129-131 and 140, respectively; of Maxey again, 14 Cong. Rec. 915; of Morgan and Eden, 17 Cong. Rec. 224 and 669, respectively.

[135] Adams, op. cit., X, 457. Italics mine.

and that the Vice-Presidency would be "but as bait to catch state gudgeons."[136] Whether or not the Twelfth Amendment and the Vice-Presidency's being a sinecure have produced second-rate Vice Presidents is beyond the scope of the present study. The Twelfth Amendment and the development of the party system, however, have led to the choice of Vice Presidents who are not the real choice of the people for a possible President. Vice Presidents frequently are nominated to reconcile an opposing faction of the party, in which case they are likely to stand for principles quite different from those the people approved at the polls. The voters pay little attention to the vice-presidential candidate in deciding which ticket to support. Under our system there is no way the voter can reject a vice-presidential candidate without also rejecting the presidential candidate.[137] Even before the Twelfth Amendment, the Vice President was not a majority choice for a possible President; he was the choice of the defeated party. One student of government has recently said that, if the Constitution brings to the Presidency for nearly four years a person not contemplated by the electors for that office, the Constitution is defective and must be amended. Therefore, he advocates abolishing the Vice Presidency and allowing the Congress to designate an officer to discharge the presidential duties "until a President shall be elected" at a special election.[138]

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[136] Max Farrand, Records of the Federal Convention of 1787 (1911), III, 394.

[137] See an editorial on this point written during the fatal illness of President Garfield. New York Herald, August 11, 1881.

[138] Lucius Wilmerding, Jr., "The Presidential Succession," Atlantic Monthly (May, 1947), 91.

The important thing is that the Constitution contains a remedy for this state of affairs which some feel to be a "defect" of our system. The framers of the document intended the adverbial clause, "until...a President shall be elected," to allow the calling of a special election in such cases. To the suggestion that the Constitution contemplates a special election when the Vice President is acting as President, it might be objected that a President cannot be elected unless a Vice President is elected also, because the Constitution provides that both officers be elected "together" and for the same term, and this would oust the incumbent Vice President before the expiration of his term. It is true that a vacancy in the Presidency cannot be filled by a special election unless a Vice President be chosen also, but the Constitution does not set a four year term for the Vice President. He is to have the same term as the President,[139] which is four years or, in case of vacancy in the Presidency, "until a President shall be elected." Thus, it seems the President chosen at the special election would displace him as President and the Vice President so chosen would displace him as Vice President.

To the suggestion of such a presidential election, it might also be objected that a special election would destroy the synchronism of presidential and congressional elections. This objection could be met by providing that a special election would be held only if the vacancy occurred early enough in the term to allow the election to concur with the congressional

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[139] Article II, sec. 1, cl. 1.

by-election. A President and Vice President so chosen must, of course, have a four year term, as that is the only presidential term known in the Constitution.

It may be neither wise nor possible to overturn the presidential succession precedent by calling a special election when the Presidency becomes vacant and the Vice President is acting as President; but the "defect" of having one who is not chosen as President discharge the presidential functions for nearly four years, if it be a "defect," is the result of usage, not of constitutional provision.

The most serious result of the precedent, however, is not in cases of vacancy, but in cases of inability. To hold that the adverbial clause, "until the Disability be removed," restricts the tenure only of the designated officer leads to an obviously unreasonable conclusion. As the New York Tribune asked editorially: What sort of sense does it make to say that if a President becomes ill, the Vice President replaces him for the rest of the term, but, if the Vice President becomes ill, the designated "officer" would only act until the Vice President recovered?[140] Precedent having established that on the death of the President the Vice President becomes the President for the remainder of the term, it is not difficult to extend the same doctrine to case of inability. In such case, it would mean either that the Vice President would supercede the disabled

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[140] August 16, 1881. The editorial said such a doctrine would mean "a week of paralysis disqualifies an elected President forever; but an attack of the same malady does not hurt his constitutional substitute [the Vice President] in the least if he recovers from it within his term." The Tribune branded such reasoning "midsummer madness."

President for the remainder of the term of there would be two Presidents. As a result, in cases of inability there has been no competent Chief Executive at all.

CHAPTER III

THE CASE OF THE PRESIDENT'S INABILITY TO DISCHARGE THE POWERS AND DUTIES OF HIS OFFICE

A. THE PRESIDENTIAL SUCCESSION PRECEDENT

Soon after Tyler assumed the Presidency in 1841, Senator Allen of Ohio objected to establishing the precedent of the Vice President's becoming President on the ground that it would unnecessarily complicate the situation at some future date in case a President became disabled.[1] Custom having established that on the President's death the Vice President becomes President and not merely the acting President ad interim, it is an easy step to claim that any time he exercises presidential power, he supercedes the President. There have been only two serious cases of presidential inability, the Garfield and Wilson cases;[2] and in both the chief impediment to calling the Vice President to act as President was that those in authority feared the Vice President would become the President and thereby dispossess the disabled President. As a result, the affairs of the executive branch were allowed to drift. In effect there was no Chief Executive.

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[1] Cong. Globe, 27th Cong., 1st sess., 5.

[2] Harrison was ill only seven days before his death. Taylor was ill five days. Lincoln lived but a few hours. McKinley lived only eight days after he was shot. Harding survived only four days after his collapse in San Francisco. Roosevelt lived but a few hours after his stroke. There was some talk of Wilson's trip to Europe constituting an inability, but he continued to act as President while abroad. For a discussion of Wilson's absence, see chap. IV, infra.

1. THE GARFIELD CASE

The first case of presidential inability occurred in 1881, when President Garfield lingered for eighty days after he was shot. During this eighty-day period, he performed but one official act, the signing of an extradition paper.[3] Although his mind was clear during the first weeks of his inability, he was physically unable to perform the duties of his office. The daily bulletins of his physicians were sufficient evidence that de facto he was not able to exercise the presidential powers. During these eighty days there was much urgent business calling for the immediate attention of the President: there were mail frauds; there were officers to be commissioned; the country's foreign relations were deteriorating; but only routine business, which could be handled by the department heads without the supervision of the President, was discharged.[4] Nearly every day the papers mentioned some important matter which required the President's personal attention, but which was ignored. At one time there was rumor that the Central Pacific Railway was determined to bring action for a writ of mandamus directing Vice President Arthur to assume the powers and duties of the President during the latter's inability.[5] No action, however, was taken and the

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[3] He was shot about 9:00 A. M. on July 2 and died at 10:30 P. M. of September 20. George F. Howe, Chester A. Arthur (1934), 152; New York Herald, August 11, 1881; Boston Evening Transcript, September 20, 1881.

[4] Howe, op. cit., 153, 181; New York Herald, September 1, 1881. See an editorial calling for action to provide an executive capable of dealing with the country's deteriorating foreign relations. New York Herald, September 5, 1881.

[5] Boston Evening Transcript, August 25, 1881. The railway's ground for action was the need for a President to appoint an auditor of railway accounts.

Cabinet continued to conduct the affairs of government in such manner as possible without a competent Chief Executive.

The New York Times and the New York Herald both objected to governmental affairs being managed by the Cabinet, a body unknown to the Constitution, and to Secretary of State Blaine's activities as a kind of de facto President.[6] The Herald spoke of such government as usurpation and called on the Cabinet to invite Arthur to act as President.[7] The Boston Evening Transcript, however, defended Blaine's conduct of governmental business and noted that he had not committed the Government on any matter of policy and had frequently communicated with the Vice President.[8] In answer to the numerous editorial demands for action to provide an able Chief Executive during Garfield's illness, the New York Tribune said editorially that public affairs were being handled satisfactorily during the President's illness.[9] Although such papers as the Transcript and the Tribune were satisfied with the conduct of governmental business, the fact still remained that questions of policy demanding the decision of the Chief Executive were largely ignored.

Around the first of September it appeared that the President would recover, but the Cabinet thought it would take him sixty to ninety days to convalesce. Already the public interest had suffered as a result of the President's continued inability and in every executive department matters were in statu quo, so the possibility of calling Arthur to act as President was discussed.[10]

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[6] New York Times, August 11, 1881.

[7] New York Herald, September 5, 1881.

[8] Boston Evening Transcript, August 1, 1881.

[9] New York Tribune, September 6, 1881.

[10] New York Herald, September 1, 1881; Boston Evening Transcript, September 1, 1881; New York Tribune, September 2, 1881.

Although there are reports that the Cabinet asked Arthur to act during the President's convalescence,[11] none of these reports can be conclusively documented. In any case, Arthur did not act as President largely for three reasons: (1) Garfield represented the Half Breeds and Arthur was a Stalwart. As a result of the bitter intra-party struggle, Arthur was in a delicate position, and was reluctant to intrude in what might seem like Garfield's domain.[12] (2) There was no agreement on what constituted inability within the meaning of the Constitution, and how such inability should be established. (3) The Cabinet feared that if Arthur exercised presidential authority he might become the President and thereby oust Garfield for the remainder of the term.

During this period the leading journals and periodicals sought outstanding legal opinion on the constitutional questions involved. What constitutes inability within the meaning of the Constitution? How is the existence of this inability to be established? What will happen if and when Garfield recovers? The answers to these questions were conflicting and confusing. On the first question, there was a wide difference of opinion. Many thought mental inability was the only inability referred to in the Constitution. They held that physical inability,

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[11] There were reports that the Cabinet actually did send for Arthur and notified him that it was his duty to take over the presidential functions, because the Cabinet recognized Garfield's inability and the probable long period of convalescence that would be required in case of his recovery. Boston Evening Transcript, August 24, 1881. Arthur's biographer reports that Secretary of State Blaine urged Arthur to take over, and Postmaster General James made a trip to New York to ask Arthur to do so, but the Vice President flatly refused. Howe, op. cit., 153.

[12] Howe, op. cit., 152; New York Herald, July 7, 1881. See the opinion of Governor Bigelow of Connecticut concerning Arthur's friendship with Conkling. New York Herald, September 6, 1881.

however severe, was not sufficient to devolve presidential power on the Vice President. They thought only mental incompetence, such as insanity, was an inability within the meaning of the Constitution.[13] Other equally competent legal authorities thought "inability" as used in the Constitution had a broader meaning. They held that whenever there is a duty to be done and the President is unable to do it for any reason, an inability exists. They believed this inability could be temporary absence, physical illness, mental incompetence, or anything else making the performance of the duty impossible. They believed further that the inability could be either permanent or transient.[14] A third school of opinion held that "inability," as used in the Constitution, is only one of a permanent character extending throughout the entire term.[15]

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[13] The meaning of inability is discussed in chap. IV, infra. For an exposition of this thesis, see the opinions of: Theodore Dwight, "Presidential Inability," 133 No. Am. Rev. 436, 436-440 (November, 1881); Secretary of the Interior Kirkwood and former Senator McDonald of Indiana, who while in the Senate was regarded as an authority on the Constitution, Boston Evening Transcript, July 16 and August 19, respectively, 1881; former Senator Eaton of Connecticut, New York Times, September 2, 1881; Governor Cullom of Illinois and Judge Lyman Trumbull, New York Herald, September 9, 1881. See also editorial on the subject in the Boston Evening Transcript, August 27, 1881; and a survey of opinion reported in the Transcript, September 5, 1881.

[14] For an exposition of this thesis, see the opinions of: Benjamin Butler, who was long a member and chairman of the House Judiciary Committee, "Presidential Inability," 133 No. Am. Rev. 428, 428-430 (November, 1881); Congressman George M. Robeson, who was previously Secretary of the Navy, New York Tribune, September 2, 1881; Judge Elias Griswold, New York Herald, September 9, 1881; also an editorial on this point in the New York Herald, September 15, 1881.

[15] See the opinions of Senator Hoar, who was regarded as an authority on presidential succession, New York Times, September 5, 1881; and of Judge Dittenhoefer, New York Herald, September 13, 1881. See also an editorial espousing this position, New York Tribune, September 6, 1881.

This third group actually overlapped the other two: that is, some thought the inability must be both mental and permanent, while others thought it could be either physical or mental as long as it was of a permanent character.

Whether Garfield's inability would prove to be permanent, nobody could tell at the time, but there could be no doubt about his physical inability. Probably no mental inability existed in the early days of his illness. Secretary Kirkwood, a member of the Cabinet, said that Garfield was rational, his mind was clear, his judgment unimpaired, and that he would be able to make a decision if absolutely necessary, but as a measure of prudence the physicians forbade him to discuss public affairs.[16] Whether the cause was physical or mental, the important thing was that for eighty days public business requiring the President's personal attention was not discharged. The President's mind may have been clear in July and August, but during the last days of his illness his inability was both physical and mental. Even the Boston Evening Transcript, which had argued that inability must be mental before the Vice President could act as President and which fought any suggestion that Arthur might act, was compelled to report in September that the President's mind was very weak and showed evidences

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[16] New York Tribune, July 15, 1881. Because Secretary Kirkwood thought the Constitution had reference only to disabilities that were both mental and permanent, he did not think Garfield's illness was an inability within the meaning of the Constitution. Two weeks later the Boston Evening Transcript declared that at no time had the President really been incapable of making decisions if any important matter had been presented to him, for his mind had never been clouded. August 1, 1881.

of disturbance and that the President had continued hallucinations.[17] Still no action was taken to call on Arthur to act as President during Garfield's illness.

One reason no action was taken to place Arthur in command was that no one knew exactly how the inability should be established or what could be done to cause the Vice President to act. Legal opinion on this question was just as conflicting and confusing as was opinion on the meaning of inability. Some thought the Vice President alone should decide when the President was disabled.[18] It was suggested that the Supreme Court might determine the question.[19] Another suggestion was to have the President ask Arthur in writing to perform the

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[17] Boston Evening Transcript, September 16, 1881.

[18] A discussion of who is to determine presidential inability will be found in chap. IV, infra. The weight of judgment was in favor of the Vice President's determining such inability. See, for example, the opinions of Benjamin Butler, op. cit., 431-433; Representative Robeson of New York, Boston Evening Transcript, September 2, 1881; former Senator Eaton of Connecticut, New York Times, September 2, 1881; Governor Hendricks of Indiana, New York Herald, August 21, 1881; Governor Long and Attorney Shellabarger, an eminent lawyer practicing in Washington at the time, New York Herald, September 5, 1881; former Attorney General Schoonmaker, a sound and careful lawyer and strict constructionist, New York Herald, September 17, 1881; Attorney Montgomery Blair of Falkland, Maryland, New York Herald, September 6, 1881. Others, however, thought it was inadmissible that the Vice President was the one to determine the question of inability. See, for example, the opinion of Senator Hoar, Boston Evening Transcript, September 5, 1881; also editorials in the New York Tribune, September 6, 1881 and the New York Times, July 30, 1881.

[19] In answer to this suggestion, Otto, the reporter for the United States Supreme Court, pointed out that the Supreme Court could not determine cases of inability, inasmuch as it had already decided even an act of Congress could not increase its original jurisdiction. New York Herald, August 21, 1881.

presidential functions.[20] Some thought the Cabinet might decide when an inability on the part of the President existed and notify the Vice President of the same.[21] Still another suggestion was that Congress might decide whether or not the President was disabled.[22] Others said, no, Congress can't decide individual cases, but Congress has power under the elastic clause to enact a general law defining "inability," its extent and possible duration, the rules of evidence for establishing inability, and perhaps even to set up a tribunal for deciding specific cases.[23] The various plans and arguments in their support became so confusing that many, like Judge Dittenhoefer of Chicago, decided it was doubtful if anyone could determine inability and thought the best way to settle the question would be by constitutional amendment.[24]

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[20] For an exposition of this thesis, see the opinions of Governor Bigelow of Connecticut, New York Herald, September 6, 1881; former Vice President Schuyler Colfax, New York Tribune, September 8, 1881. A variation of this plan was to have the President issue a proclamation making known that he was temporarily unable to act as President, and that exigencies of public service required the immediate performance of certain executive acts, and therefore he requested the Vice President to assume and perform the duties of the President until the President recovered. New York Herald, September 1, 1881.

[21] For example, see the opinions of former President Grant, Boston Evening Transcript, September 7, 1881 and of Judge Lyman Trumbull, "Presidential Inability," 133 No. Am. Rev. 417, 421 (November, 1881).

[22] Judge Thomas M. Cooley thought Congress had "inherent power" to do so. "Presidential Inability," 133 No. Am. Rev. 422, 425-427. See also the opinion of W. Jeffers of East Orange, New Jersey, New York Tribune, September 1, 1881. Governor Jackson of West Virginia took the position that inability was a political question, and Congress is the only tribunal in the United States to settle political questions. New York Herald, September 9, 1881.

[23] See chap. IV, infra.

[24] New York Herald, September 13, 1881.

The questions of what constituted an "inability" and who was to determine its existence were difficult, but the question that most complicated the problem was whether or not Vice President Arthur would become the President for the remainder of the term if called to act as President during the period of Garfield's recuperation. Some respected legal thinkers held that the Vice President would become the President in case of inability just as in case of vacancy, and the powers and duties once devolved could not be returned to the President when the disability was removed.[25] Most lawyers, however, thought the President would resume his powers and duties when he recovered,[26] but the Cabinet was impressed by the arguments to the contrary.

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[25] Dwight, op. cit., 443-446; Judge Dittenhoefer, New York Herald, September 13, 1881. At first the New York Sun took the same position arguing that it was the presidential office that devolved on the Vice President, but later modified its position so far as to hold that only the powers and duties of the President, not the office and its title, would devolve on the Vice President in case of established inability. The Sun's position was explained in a news item in the Boston Evening Transcript, August 20, 1881. The New York Tribune took the position editorially that there could be no temporary devolution [August 11, 1881], but modified its position so as to reject the doctrine that Arthur could oust Garfield [August 16, 1881].

[26] Butler, op. cit., 434-436; Cooley, op. cit., 422-424; George Ticknor Curtis, "Presidential Inability," 25 Harper's Weekly 631 (September 17, 1881); former Senator Eaton of Connecticut, New York Times, September 2, 1881; W. Jeffers of East Orange, New Jersey, New York Tribune, September 1, 1881; Governor Hendricks of Indiana, New York Herald, August 21, 1881; Governor Long, ibid., September 5, 1881; former Attorney General Jeremiah Black, Governor Littlefield of Rhode Island, and Governor Bigelow of Connecticut, ibid., September 6, 1881; Judge Elias Griswold and Judge Lyman Trumbull, ibid., September 9, 1881; former Attorney General Schoonmaker, ibid., September 17, 1881. See also editorials espousing this thesis in the New York Times, July 30 and August 11, 1881; New York Herald, September 15, 1881; Washington Post as reported in the Boston Evening Transcript, August 24, 1881.

When it appeared that Garfield would recover, the Cabinet met at the State Department and discussed the inability question, the constitutional form, and procedure. There was unanimous agreement on the desirability of having Arthur act as President during Garfield's recuperation; but there was an abundance of legal authority to the effect that once the Vice President took over he would supercede the President for the remainder of the term. Therefore, the Cabinet finally concluded that, in view of such conflicting opinion, it would be unfair to advise Garfield to invite Arthur to act as President without first presenting all the questions for the President's consideration, because it might mean that they were asking him to abdicate his office for the rest of the term. All agreed that the President was too ill to have these questions presented to him. The Cabinet thought the shock of taking any action on the matter might cause his death, so the question was deferred.[27] Because of the fear that Arthur's acting as President would have the effect of removing Garfield from office, the decision seems to have been made in terms of "loyalty to Garfield" rather than in terms of the dignity of the office

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[27] New York Herald, September 2, 1881; New York Tribune, September 2, 1881. The New York Times reported that three members of the Cabinet, Secretary of State Blaine, Secretary of the Navy Hunt, and Secretary of War Lincoln, thought the Vice President could temporarily act as President during Garfield's inability, but four members, Attorney General MacVeagh, Postmaster General James, Secretary of the Treasury Windom, and Secretary of Interior Kirkwood, were of the opinion that there could be no temporary devolution of presidential power on the Vice President. September 4, 1881.

and the welfare of the country.[28]

The possibility of ousting Garfield by calling Arthur to act as President during the former's illness caused many to look for a way of conducting the business of government without a President who was able to exercise the powers of his office. Three plans were suggested. First, it was argued that the Government could go on functioning for a long period without a President, and pointed out that the duties of the department heads are prescribed by law and, although every act such an official performs is legally done by the personal direction of the President, probably not in one case in a thousand does he actually receive the President's personal direction. Advocates of this plan pointed out that Congress was not in session and would not meet for three months, so there was no immediate problem in allowing the legislative powers of the President to lie dormant.[29]

The second plan for the discharge of executive business during Garfield's recuperation called for a delegation of executive power instead of a devolution of this power. Delegation was viewed as having the advantage of allowing Garfield to recover his powers if and when his inability was removed, while devolution would make Arthur President for the remainder of the

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[28] See the comments of former Attorney General Schoonmaker objecting to the decision's being made on the basis of personal loyalty to Garfield instead of the public welfare and pointing out that the office is the property of the nation, not of the individual. New York Herald, September 17, 1881.

[29] This was the opinion of Secretary Kirkwood, a member of the Cabinet, Boston Evening Transcript, July 16, 1881; also the opinion of Senator Hoar of Massachusetts, New York Herald, September 5, 1881.

term. One specific suggestion along this line was for Garfield to delegate executive power to a member of the Cabinet, authorizing him to sign the name "James A. Garfield." Some reputable students of the Constitution thought the President could delegate all of his powers except those concerning extradition, appointment, and legislation.[30] None of those who advocated a plan for the delegation of executive power elaborated on how such delegation could be accomplished within the framework of the Constitution and judicial pronouncements on the subject. At the time it was denied that the President could delegate the powers and prerogatives of his office, and this view was probably correct.[31] In any case, there was some serious talk of Garfield's delegating his powers to Vice President Arthur or some cabinet member with full authority to sign the name "James A. Garfield" to commissions and other executive documents.[32]

The third plan, suggested by Judge Dittenhoefer, called for Arthur's acting as President without expelling Garfield for the remainder of the term. The Chicago judge thought that the devolution of power on the Vice President made him President for the remainder of the term, but Congress could by law provide for the temporary discharge of presidential duties during the President's inability. Dittenhoefer was of the opinion that the elastic clause gave this power to Congress.[33] This plan,

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[30] See the opinion of former Senator McDonald of Indiana, Boston Evening Transcript, August 19, 1881; and of Senator Hoar of Massachusetts, New York Herald, September 5, 1881.

[31] See the opinion of Governor Plaisted of Maine, New York Herald, September 9, 1881. For a discussion of the judicial limitations on the President's delegation of power to his subordinates, see pp. 119-124, infra.

[32] New York Herald, September 1, 1881.

[33] Ibid., September 13, 1881.

like those for the delegation of executive power, was devised to provide for the exercise of executive power without dispossessing the disabled President. The plans were attempts to solve the dilemma created by the precedent of the Vice President's becoming President by succession. As Judge Trumbull pointed out, it would be much simpler to have a Vice President act temporarily without displacing the real President or having the anamolous situation of two Presidents at once if it were recognized that under the Constitution the Vice President does not become President when the powers and duties of the higher office devolve upon him.[34] Garfield's death made it unnecessary to solve the dilemma in 1881, and the problem was deferred until Wilson fell ill in 1919.

2. THE WILSON CASE

Wilson's inability was probably more detrimental to the public interest than Garfield's because it occurred during the struggle for the League of Nations and because it lasted for a longer period. President Wilson's tour on behalf of the League, started on September 3, 1919, came to a sudden end on the evening of September 25, when he collapsed and was forced to return to Washington on account of illness. There can be no question that Wilson was unable to perform his presidential duties for many months after his collapse and that the public interest suffered as a result.

As evidence of Wilson's inability, many indisputable facts can be offered, but only a few need be mentioned here:
(1) Joseph Tumulty, his secretary, was not permitted to see

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[34] Trumbull, op. cit., 418-420.

him for nearly a month after his return to Washington.[35] (2) During the special session of the Sixty-sixth Congress, twenty-eight acts became law owing to the President's failure to pass on them within the requisite ten days after their receipt at the White House. He did veto the Prohibition Enforcement Act on October twenty-seventh; but from October twenty-eighth to November eighteenth he passed on only one of the fifteen acts presented to him.[36] (3) Wilson did not meet his Cabinet for eight months during his illness.[37] (4) The Senate Committee on Foreign Relations complained because it could get no executive action on the matter of the Shantung settlement, a situation which caused Senator Fall to suggest that, if Wilson were too ill to take care of legislative matters, the Senate ought to recess until Wilson was able to resume the responsibilities of his office.[38] (5) The Constitution says the President is to receive ambassadors and other public ministers, but Viscount Grey, the British Ambassador, spent four months in Washington without seeing the President once.[39]

These five important facts are objective evidence that there was an inability on the part of the President to exercise

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[35] New York Times, October 13, 1919.

[36] Lindsay Rogers, "Presidential Inability," 2 Review 481-483 (May 8, 1920); see also Rogers' note, "The President's Illness," 14 Am. Pol. Sci. Rev. 87-88 (February, 1920).

[37] David Houston, Eight Years with Wilson's Cabinet (1926), II, 69-70; David Lawrence, True Story of Woodrow Wilson (1924), 298. Houston, Secretary of the Treasury in Wilson's Cabinet, tells here of Wilson's first meeting with the Cabinet in eight months and how Mrs. Wilson stopped the meeting at the end of one hour.

[38] New York Times, October 14, 1919.

[39] Herbert W. Horwill, The Usages of the American Constitution (1925), 80-81.

the powers and discharge the duties of his office. That the public interest suffered because there was no active President is almost beyond question. Nearly every student of the period, whether scholar, cabinet member, or jounalist, agrees public business, not least of which was the Versailles Treaty, was affected by the President's inability.[40] At one time Senator Hitchcock, the Democratic leader in the Senate, thought he might be able to get the Republicans to compromise on the treaty, but Wilson's physicians refused to let him see the President and, as Hitchcock said, he had to consult with the President before the Democratic Senators could do anything. Five days later, however, it was reported that Wilson had seen Hitchcock three times.[41] In any case, many students of the period feel that the fate of the treaty was affected by Wilson's isolation from public opinion, from his advisors, and from congressional leaders. Colonel House's biographer believes this to have been one of the major factors in the treaty defeat.[42]

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[40] See for example Edith Gittings Reid, Woodrow Wilson (1934), 224; John K. Winkler, Woodrow Wilson (1933), 286-299.

[41] New York Times, November 30 and December 5, 1919.

[42] The Intimate Papers of Colonel House, ed. Charles Seymour (1928), IV, 506-507; see also IV, 509-511. Colonel House had a plan to get at least part of the treaty through the Senate. His plan was for Wilson to resign on the excuse of ill health leaving the whole matter to Vice President Marshall. House thought the treaty might have a better chance in the Senate with those Republicans who opposed the treaty because of personal antagonism toward Wilson. It has been suggested that the White House circle never permitted the plan to reach the President. At least, the President never acknowledged the receipt of House's letter. William Allen White, Woodrow Wilson (1924), 448-450. For examples of those who place much of the treaty defeat on Wilson's illness, see ibid., 452-460; Lawrence op. cit., 299. David Lawrence goes so far as to say "...the United States would today be in the League officially if the President had been able to get the advice he so much needed in his enfeebled condition."

Exactly how severe Wilson's inability was is uncertain. There were sensational stories at the time to the effect that the President was dead and his death was being kept a secret and that he was insane, but such stories are so absurd as to call for no comment.[43] This much is known: Wilson had a stroke and his left side was paralyzed.[44] Whether this inability was only physical or was both physical and mental during part of his illness is uncertain. There is good evidence that he was unconscious or only semi-conscious for long periods,[45] but there are also rather authoritative denials of this.[46] Whatever his

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[43] William Allen White recounts the rumor of Wilson's insanity and, of course, discredits it. Op. cit., 448. An account of this rumor and the others can be found in any number of sensational newspaper and magazine stories. As might be expected, cranks were making the most of the situation. See for example, an account of a false telephone call reporting the President's death to Vice President Marshall. New York Times, November 24, 1919.

[44] White, op. cit., 446-448; Winkler, op. cit., 284-288.

[45] Ike Hoover, the White House usher at the time, suggests that the President was unconscious or only semi-conscious for a month or more after October 2, 1919, and that he was both physically and mentally incapacitated much of the time after that date. Irwin Hoover, Forty-two Years in the White House (1934), 100-104. A byline article by "Pollio" reports that starting October 4, 1919, Wilson was unconscious for over a week and only semi-conscious for more than a month. New York Times, March 29, 1921.

[46] Senator Hitchcock, who led the fight for the treaty in the Senate, said he knew the President had reached some important decisions while in bed, that some important business had been transacted by the President, and that the President could sign acts presented to him and know what he was doing. New York Times, October 13, 1919. A month and a half later, however, Hitchcock reported that he was unable to see the President about the treaty. See p. 95, supra.

While Democratic Senators denied that Wilson was disabled, they did not want him bothered with treaty business, because they thought his health would not permit. Likewise Admiral Grayson, Wilson's physician, reported that Wilson was mentally clear, that he was able to act, but it was considered best for his health to rest. For this reason, Grayson declared he would keep all business away from Wilson. New York Times, October 14, 1919.

condition, members of the Cabinet and the Vice President were kept wholly ignorant of it.[47] Meanwhile the Cabinet, Wilson's family, and his White House entourage conducted the affairs of state in such manner and by such methods as they could devise.

The rumors that circulated in the winter of 1919-1920 concerning the forging of Wilson's signature were probably nothing more than the creation of the gossip-mongering Capital City; but Mrs. Wilson and Dr. Grayson did decide many public questions by determining whom the President could and could not see and for how long he could converse with those whom he was permitted to see, by determining what papers should be presented to him, and which should not. There seems to be almost unanimous agreement that state papers were given to Mrs. Wilson first. If she had any doubt about the effect they would have on her husband, she submitted them to Grayson. If he thought Wilson was strong enough to pass judgment on them without excitement, they were shown to the President. If not, they were deferred or passed on to Secretary of the Treasury Houston or a few others in whom Mrs. Wilson had confidence.[48] Some days the newspapers reported

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[47] Statement by Attorney General Palmer, ibid., October 14, 1919. See also Houston, op. cit., II, 36-37. One author explains that the reason for not informing the Vice President of Wilson's condition was this: Those nearest the President believed death a certainty after his first stroke. The White House group did not inform Marshall lest he assume the powers at once. Instead, it was decided to warn Marshall unofficially through his friend J. Fred Issary, the Baltimore Sun's Washington correspondent. James Kerney, "Government by Proxy," 111 Century 481, 481-482 (February, 1926).

[48] Mrs. Wilson herself confirms much of this. Edith Bolling Wilson, My Memoir (1938), 288-290. Houston, the Cabinet member in whom Mrs. Wilson had the most confidence, likewise confirms much of the story. Op. cit., II, 60-66. See also Hoover, op. cit., 105; Kerney, op. cit., 483-486; Lawrence, op. cit., 283-288; Winkler, op. cit., 287-288; Reid, op. cit., 224-230. See especially the story of Wilson's secretary, Joseph Tumulty, Woodrow Wilson As I Knew Him (1921), 437-438.

that Wilson's condition was so much better that Grayson allowed him to transact executive business,[49] and on other days that the President was allowed to sit up but no executive business was placed before him.[50]

Another method devised for the discharge of executive business was to have others act for the President whenever possible. For example, Ike Hoover, who was the White House usher at the time, reports that Tumulty, Swem, and the Cabinet prepared the President's State of the Union Message to Congress.[51] In his memoirs, Wilson's Secretary of the Treasury, David Houston, suggests that Wilson's letter read at the Jackson day dinner was written by Tumulty and revised by Houston himself.[52] One author reports that many of the documents issued in the President's name during the last months of his term were actually prepared by Secretary of State Colby.[53] The important thing is that public questions were decided by people whose policy was not necessarily Wilson's and who sometimes were untrained in governmental matters.

It is obvious that the affairs of the executive branch were not properly handled from the time of Wilson's collapse on September 25, 1919, until March 4, 1921. Ira E. Bennet,

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[49] See for example a report that Grayson allowed the President to transact some executive business in addition to vetoing the Prohibition Enforcement Act. New York Times, October 28, 1919.

[50] See for example a report that Wilson was allowed to sit up again but not to transact any executive business. Ibid., November 13, 1919.

[51] Hoover, op. cit., 106; Lawrence, op. cit., 290.

[52] Ira E. Bennet, "The Vacancy in the White House," Christian Science Monitor Magazine (September 6, 1941), 6.

[53] Kerney, op. cit., 484.

editor of the Washington Post at the time, has since reported that the newspapers knew Wilson was not performing his duties but refrained from publishing articles to that effect.[54] As a matter of fact this knowledge seems to have been rather wide spread. Then why was no action taken to put Vice President Marshall in Wilson's place? Actually the reasons were several. As in the Garfield case there was some doubt as to how the inability should be declared and what effect the Vice President's acting as President would have on the presidential status and tenure of the disabled President.

At various times different plans for declaring the President's inability were discussed. Three possibilities were suggested: The declaration might be made by the Cabinet or the inner circle of the White House, by the Congress, or by the courts. The evidence is that the Cabinet actually did consider asking Vice President Marshall to act as President, but the White House circle fought it; and thereafter the Cabinet joined hands with the White House in an attempt to carry on executive business in such a way as to help cover up the President's inability. Although Tumulty denied at the time that the Cabinet discussed the possibility of asking the Vice President to act as President,[55] he later admitted that such a possibility was

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[54] Loc. cit.

[55] New York Times, October 7, 1919. The same article reports that Lansing presided at the Cabinet meeting, whose only purpose was to discuss interdepartmental matters. Tumulty was quoted as saying that Grayson wanted only the most important business brought to Wilson's attention. Although the evidence is to the contrary, Tumulty said there was very little business demanding the President's personal attention.

In the same issue of the paper Vice President Marshall was reported as saying he would not act unless requested to do so by Wilson or the Cabinet and with the backing of both houses of

discussed.[56] One member of Wilson's Cabinet, David Houston, reports that Secretary of State Lansing mentioned presidential disability and said there was nothing to guide them as to who should decide the question of the President's ability to discharge the powers and duties of his office. Houston implies that Lansing first called the meeting to oust Wilson, but his purpose seemed to change during the meeting. At this meeting Grayson told the Cabinet that Wilson's condition was critical, but his mind was clear. Wilson's Secretary of the Treasury says it was decided that there was no need for haste since there was no pressing matter requiring the President's decision or signature at the moment.[57]

Tumulty reports that Lansing attempted to displace Wilson on one other occasion. According to Tumulty, Lansing sought a conference with him in the Cabinet room. During this meeting, Lansing read the succession clause of the Constitution to Tumulty and suggested that, in view of the President's incapacity, they should ask the Vice President to act in his stead. At this suggestion Tumulty was indignant and reproached the Secretary of State for his lack of devotion to the President. According to his own story, Tumulty's frame of reference was loyalty to

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Congress. The reporter expressed the opinion that, if the President or Cabinet asked Marshall to act, Congress would be asked to recognize this by concurrent resolution. In any case he did not think Marshall would take this step without some word from Wilson. Ibid., October 7, 1919.

[56] Tumulty, op. cit., 443-446. Exactly the same story can be found in Tumulty's article for the New York Times, December 3, 1921.

[57] Houston, op. cit., II, 37-39. Bennet and Kerney both confirm Houston's story. Bennet, op. cit., 6 and Kerney, op. cit., 482-483.

Woodrow Wilson rather than the welfare of the country and the need for executive action. He quotes himself as saying to Lansing on this occasion:

> You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him. He has been too kind, too loyal, and too wonderful to me to receive such treatment at my hands.[58]

Tumulty's objection to the devolution of presidential power on the Vice President seems to have been that he thought such devolution would displace the President. Wilson apparently took the same view. In 1885 Wilson wrote that the Vice President's importance consists in the fact that the Vice President may cease to be Vice President.[59] Not only did Wilson view a succeeding Vice President as becoming President, but he thought such succession in cases of inability had the effect of displacing the disabled President. Tumulty quotes Wilson as saying on the occasion of Lansing's resignation: "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."[60]

Nine months after Wilson left office, Marshall and the former Cabinet members refused to discuss the truth or falsity of Tumulty's story.[61] Former Secretary of Commerce Redfield did say, however, that there was neither an attempt nor a desire to replace Wilson, but the possibility of asking Marshall

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[58] Tumulty, op. cit., 443-444. Italics mine. Although Tumulty's whole story indicates that Wilson was really disabled, he says that he and Grayson told Lansing that they would never certify the President's inability and would fight any attempt made outside the White House to do so.

[59] Woodrow Wilson, Congressional Government (1885), 240-241. See also Reid, op. cit., 223.

[60] Tumulty, op. cit., 445. Italics mine.

[61] New York Times, December 4, 1921.

to act as President was discussed at the beginning of Wilson's illness. Redfield said it seemed to him that it was the Cabinet's duty to consider the situation not only from the point of view of loyalty to the suffering President but also with a sense of public responsibility.[62]

Because of the precedent of the Vice President's becoming President in case of vacancy in the latter office, asking Marshall to act as President during Wilson's inability was viewed as requiring the ejection of the President from office. His closest friends considered this disloyalty. They did not seem to think that the Vice President would remain the Vice President and discharge the presidential duties only until the President recovered. Shortly after Wilson's term expired John Brooks Leavitt said that neither the President nor his friends should view the Vice President with antagonism, but should view the devolution of presidential power on him as lightening the burden of a stricken man. Because Leavitt's view is not widely held, the Vice President is put in a delicate position; but, as Leavitt said, the administration of a great nation should not hang on questions of delicacy.[63]

It is submitted that those nearest President Wilson should not have decided his ability or inability on the basis of loyalty to their friend. In any case, loyalty to Wilson rather than the need for executive action governed the decision; no action for Marshall's succession was taken; and the Cabinet and the White House staff attempted to keep the government operating so the

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[62] Ibid., December 6, 1921.

[63] Letter to the editor, New York Times, December 6, 1921.

constitutional question of disability would not be pressed. One device to keep the government in operation was the calling of Cabinet meetings with Lansing presiding. Twenty-one such meetings were held; and it is generally conceded that Lansing's action helped make it possible to keep Congress from pressing the inability question.[64] Nevertheless, when Wilson heard of these meetings he looked on Lansing's action as a usurpation of his powers and asked for Lansing's resignation.[65] Editorial comment shows that the press supported Lansing almost unanimously as did the Congress;[66] yet Lansing was replaced by Colby.

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[64] Lawrence, op. cit., 283-288. Lawrence takes the view that there was a real danger of the succession question's being pressed, and that Lansing's action forestalled this. Lindsay Rogers shares this view. "Presidential Inability," 2 Review 481, 482-483 (May 8, 1920). When Wilson asked Lansing to resign for calling these Cabinet meetings, the New York Times spoke editorially as follows: "Of all men in the United States, President Wilson should have been the most wary of raising that question. It was known early in October that he could not attend Cabinet meetings. If Congress had accepted the theory which Mr. Wilson now propounds, that the Cabinet could do nothing without his presence, and consequently that the Government business was at a standstill, Congress might have felt it to be its duty to ascertain whether in respect to the President the condition described in Article II, section 5 [sec. 1, cl. 5?] of the Constitution as 'inability to discharge the powers and duties of the said office' actually existed." February 5, 1920.

[65] Wilson wrote: "Under our constitutional law and practice, as developed hitherto, no one but the President has the right to summon the heads of the executive departments into conference, and no one but the President and the Congress has the right to ask their views or the views of any one of them on any public question.

"I take this matter up with you because in the development of every constitutional system, custom and precedent are of the most serious consequence...." The text of this letter, Lansing's reply, and Wilson's letter asking for Lansing's resignation are all to be found in the New York Times, February 14, 1920.

[66] See the New York Times reprints of editorial comment from other papers and the statements made by members of Congress on this subject. February 14, 1920. See also David Houston's version of this incident, op. cit., 64-70.

In view of all of this, one might ask why Congress took no action to have Vice President Marshall act as President. Actually there were several reasons and they were similar to those which kept Arthur from acting as President nearly forty years before. In the first place there were political reasons. The Republicans would not take the first step, probably because the President's inability embarrassed the Democrats and because the Republicans hoped for some disclosure showing that someone else was acting as President and forging Wilson's signature.[67] Some Democrats did not think the President's condition serious enough to warrant any action, and none of the Democrats was anxious to give any more publicity to the President's illness than was absolutely necessary.[68] Meanwhile Republican newspapers all over the country clamored for Congress to do something about determining the President's disability and pointed out that the executive branch of the Government could not remain inoperative during the President's illness.[69] In response to this kind of pressure, Republican Congressmen introduced three

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[67] A friend of Thomas Marshall's has been quoted as giving this as the reason for not taking any action. Bennet, op. cit., 16. On October 14, 1919 the New York Times reported that the Republicans said any movement to have someone fill in for the President would have to be started by the Democrats; and Senator Moses affirmed that the Republicans would never take the first step in declaring the inability. The same paper reported that Republican Senators were busy examining Wilson's signature on four or five communications sent by him to the Senate, believing that the signature might not really be his. It was reported that one Senator expressed the belief that a couple of signatures were not really Wilson's, and if they were his, he had been helped. New York Times reported the Democratic Senators greatly resented the implied accusation of forgery.

[68] New York Times, October 14, 1919.

[69] See a survey of editorial comment, 64 Literary Digest, no. 9, pp. 13-15 (March 6, 1920).

bills and one proposed constitutional amendment for the declaration of such an inability.[70] Hearings on these proposals brought out almost insurmountable constitutional problems. The most difficult question seems to have been whether or not the President could be restored to his powers and duties once the inability was removed. Authorities were cited on both sides of the question,[71] but the committee could reach no conclusion and reported none of the measures.

A few Senators also made a move to determine the extent of the President's inability. The Senate Committee on Foreign Relations sent Senators Fall and Hitchcock as a special sub-committee to interview the President in order to ascertain the truth or falsity of the many rumors that he was in no physical or mental condition to attend to important public business. They were with the President for forty minutes, found him in bed but mentally vigorous, and the visit came to nothing. A

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[70] H. R. 12609, 12629, 12647 and H. J. Res. 297, 66th Cong. A summary of these measures and the committee hearings thereon can be found in the New York Evening Post, March 1, 1920. Senator Curtis said he also planned to introduce a bill to force the President to resign in case of mental or physical inability. New York Times, November 10, 1920. Senator Curtis never introduced his proposed bill. The Curtis plan seems so obviously unconstitutional as to call for no comment.

[71] Hearings on H. R. 12606, 12629, 12647, and H. J. Res. 297, 66th Cong., 2nd sess. (1920). Other constitutional questions were also raised. For instance Volstead of Minnesota did not think Congress could enlarge the original jurisdiction of the Supreme Court in such a way as to empower it to determine when presidential inability exists and when it ceases (p. 29). Reavis of Nebraska did not think Congress had any power to provide a method of determining inability (p. 32). In 1946 the present author attempted to contact all the living members of the House Committee on the Judiciary and the Senate Committee on Foreign Relations of the 66th Congress, but was unable to get any information that was not already a matter of record.

written report of the interview was not even made.[72]

The only attempts made by the Cabinet and the Congress to determine Wilson's inability have been recounted, but a brief word should be said concerning the role of the judiciary in the matter. Although a reputable reporter published an article in an unsensational newspaper saying that the Supreme Court of

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[72] New York Times, December 6, 1919. Senator Hitchcock, the Democratic leader in the Senate who always defended Wilson against charges of inability and who accompanied Senator Fall on their mission to the White House, told the story in a letter to Clarence Berdahl dated November 7, 1927. According to Hitchcock, Fall had several times told the Foreign Relations Committee that he believed Wilson was unable to function as President and that Mrs. Wilson was acting in that capacity, and that an inquiry should be made. Hitchcock wrote that once after Fall made such a statement, Hitchcock suggested that Fall himself make such an investigation. Therefore, the committee appointed the two of them to make a visit to the White House. Concerning this call, Senator Hitchcock said:

"We went up, and were escorted into the President's bedroom, where he lay propped up in bed. To the evident surprise of Senator Fall, the President held out his hand and shook hands with Fall vigorously, and motioned him to a seat by the bedside. Thereupon a lively conversation ensued, chiefly on the subject of Mexican relations.... I...took no part in the conversation. Senator Fall hardly got over his surprise to find the President so active and alert mentally, and in the course of fifteen or twenty minutes I suggested that we bring our visit to an end.

"No written report of that little call was ever made to the Committee, but Senator Fall confessed himself completely satisfied, and made no further claim that the President was incompetent. He made this confession first to the crowd of newspaper men awaiting our exit from the White House, and in the next meeting of the Committee on Foreign Relations the matter was laughed off and dropped.

"Fall, like many others, had previously been completely convinced that the President was so paralyzed that he could not sign his documents, and the President's vigorous handshake was the first shock of disillusion. As a matter of fact, it was not known that it was the left arm which was paralyzed and concealed by the covers; and as a matter of fact also, I realized that the President braced himself for this interview with Fall, aided by his strong will power." John M. Matthews and Clarence A. Berdahl, Documents and Readings in American Government (1928), 111-112. See also Edith Bolling Wilson, op. cit., 298-299.

the United States was ready and willing to issue a writ of mandamus directing Vice President Marshall to act as President,[73] it is difficult to believe that the Court ever contemplated this, because the Supreme Court does not have original jurisdiction in such cases and it is at least questionable whether the subject is justiciable.[74] The question of Wilson's inability was actually raised in court once, but the courts did not take cognizance of it. Strangely enough, it was the Justice Department which questioned the validity of

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[73] Bennet's article for the Christian Science Monitor, op. cit., 6 and 15. According to Bennet, two Supreme Court Justices discussed the matter with him and told him that the Justices were distressed about the inability in the White House and consequently had canvassed the question. He quotes one of them as saying: "Do you realize that there is a vacancy [inability?] in the White House? Someone other than the President is acting as President. It is an extremely critical situation. The validity of everything emanating from the White House may be challenged at any moment. We do not know whether acts of Congress are valid laws or not. We fear that a chaotic situation will develop that will cause public disorder. But there is nothing the Supreme Court can do on its own motion."

Bennet continues by saying that they explained to him that there was nothing in the Constitution or laws providing for the ascertainment of the President's inability, and since Marshall refused to take the initiative, nothing could be done. Then one of the Justices said that the initiative must come from the people and suggested the matter be brought up in the Washington Post. Bennet said he decided it would be impolitic for the Post to raise the question. Bennet reports that he later called on Marshall, who said he did not want to act as President lest he be assassinated.

The most startling part of Bennet's story is his account of the experience of Perry S. Heath, who was a close friend of both Vice President Marshall and Chief Justice White. According to Bennet, near the corner of M and Rhode Island Streets, the Chief Justice said to Heath, "Tell Tom Marshall that he can have his writ whenever he asks for it." Bennet says Heath told Marshall, but the Vice President answered that he would never start such an action in a thousand years.

[74] Marbury v. Madison, 1 Cr. 137 (1803). Whether the question is justiciable or not is discussed in chap. IV, infra.

an executive order issued during Wilson's illness.[75] In all three decisions the validity of the executive order in question was upheld, and none of the three said one word about the President's alleged inability at the time he signed the order.[76] Thus, no governmental body ever passed on Wilson's alleged inability and the questions involved in cases of presidential inability remained unanswered.

A study of the Garfield and Wilson cases shows that there is surely need for some means of supplying an active Executive at times when the President is unable to discharge the duties and exercise the powers of the Presidency. Both Senator Hitchcock and Secretary Houston, men who were certainly in a position to know, have testified that Wilson's illness demonstrated this to be a serious defect.[77] It is true that the Constitution provides that the Vice President act as President in such cases, but the usage of the Vice President's becoming President has

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[75] United States v. Chemical Foundation [in equity no. 502, United States District Court for the District of Delaware, 1923]. In an attempt to upset the sale of German dye patents to the Chemical Foundation, the Government claimed that President Wilson was a very sick man when he signed the executive order ratifying the sale to the Foundation by the Alien Property Custodian, and thus implied that the order of February 13, 1920, should have no legal force. Brief on Behalf of the Complainant, United States of America, 318-319, 350-351, 720. See also the Government brief filed before the Supreme Court, 130.

The Foundation answered by filing a supplementary brief arguing that by February 13, 1920, Wilson had recovered sufficiently to sign many state papers and submit many nominations to the Senate. Supplemental Brief on Behalf of the Defendant, 6-8; see also Closing Argument on Behalf of the Defense, 46, 269-273; and brief of the Foundation filed before the Supreme Court, 153-154; and New York Times, October 30, 1923.

[76] S. c., 294 Fed. 300 (1924); 5 Fed. 2nd, 191 (1925); 272 U. S. 1 (1926).

[77] Hitchcock's letter to Berdahl, Mathews and Berdahl, op. cit., 112-113; Houston, op. cit., II, 39-40.

practically nullified the constitutional provision for the administration of the Government when a President becomes temporarily incapacitated for the performance of his duties.[78] By what reasoning has the precedent established in cases of the President's death been extended to cases of inability? By what reasoning has the extension been resisted? What are the legal principles involved?

B. THE LOGIC AND LAW OF THE PRESIDENTIAL SUCCESSION PRECEDENT

Not all who argue that the Vice President becomes President in case of vacancy agree on whether or not this rule should apply to cases of inability. Some have advanced the thesis that the Vice President becomes the President in case of inability just as in case of the President's death, and the presidential powers once devolved cannot be returned to the President when the inability is removed.

A few weeks after the termination of President Garfield's extended inability, Charles W. Jones of Florida asserted in the Forty-seventh Congress that inability has the same effect as death, resignation, or removal. In all four cases, he argued, the office devolves on the Vice President. The gentleman from Florida thought that if Garfield had lived and necessity had forced Arthur to act, the latter would have displaced the former, and once the Vice President was seated in the presidential chair, he had all the power and authority given to the Executive by the Constitution, and none could displace him except by impeachment. The Senator went so far as to say that a constitutional amendment would be necessary if the Vice President were

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[78] On this point, see Horwill, op. cit., 77-87.

to serve only for the duration of the President's illness. As the Constitution stood, he affirmed, the Vice President would serve for the remainder of the term.

To support this position the Senator from Florida offered four arguments. First, he pointed out that the Constitution makes no distinction between cases of vacancy and inability. Therefore, if the Vice President becomes President for the residue of the term in the former case, as is generally conceded, he must in the latter also. Second, he held that it would be dangerous to have a changing Executive. He thought that, if the Vice President were supposed to step down when the inability ceased, a struggle for power and perhaps even bloodshed would result. The third line of reasoning submitted was that the vesting clause excludes the possibility of two Presidents at once, one acting and the other disabled. Jones' fourth and final argument was that the adverbial clause, "until the Disability be removed," only limits the tenure of an "officer" acting as President, because it was deliberately stricken out as a limitation on the Vice President by the Constitutional Convention.[79]

No one has used stronger language to assert that a Vice President would supercede a disabled President than Judge Dittenhoefer. In a statement made during the illness of President Garfield, the Chicago judge spoke as follows:

> ....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

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[79] 13 Cong. Rec. 142 and 191-193. On these points, see also the comments of Senator Morgan, 14 Cong. Rec. 691, 882, 884; 17 Cong. Rec. 224. Senator Maxey used the vesting clause argument to reach the opposite conclusion. See pp. 118-124, supra.

> two lawful Presidents at the same time....Mark, no limit to 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, 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.[80]

The judge offered two reasons for this conclusion. He cited the difference in language used in the two parts of the succession clause, arguing that in the one case the office devolves on the Vice President and in the other Congress is empowered to declare what officer shall act as President. He maintained that the adverbial clause, "until the Disability be removed," does not refer to the Vice President because it is separated from the first part of the succession provision by a semicolon.[81] He believed, therefore, that an officer designated by Congress would act as President only for the duration of the inability, but the Vice President would supercede the incapacitated President for the remainder of the term, not merely until the President recovered or a President could be elected under the Act of 1792. Since all of this was true, the judge did not think "inability" as used in the Constitution could be held to include every inability, but only one of a permanent character extending throughout the entire term.[82]

No spokesman for this school of thought has had more

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[80] New York Herald, September 13, 1881.

[81] The clause is as follows: "In Case of...Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, [comma, not semicolon] and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President,...until the Disability be removed...."

[82] New York Herald, September 13, 1881. Dittenhoefer did not think Vice President Arthur could discharge the duties of the President unless Garfield's inability were of this permanent character.

influence or been quoted more frequently than Theodore Dwight, who started with the affirmation that "the Same" refers to "Office" rather than to its powers and duties, and the office devolves upon the Vice President in case of disability just as in case of complete vacancy. He held that the office, once devolved, cannot be returned to the President when the inability passes. It was Dwight's conclusion, therefore, that when such disability is properly established in the case of the President, his office devolves upon the Vice President, who thereupon becomes the President retaining the office until the end of the four year term for which they were both elected.[83]

At the time of President Wilson's trip to the Versailles Peace Conference, Hannis Taylor, an authority of some standing in the field of constitutional law, said Wilson's absence was an "inability" and the Vice President should take the presidential oath and become President when Wilson left the country. Taylor continued:

> And here the fact should be emphasized that neither the Constitution nor the presidential succession act makes any provision for a President of the United States pro tempore. After the Vice President has been sworn in as President he becomes such in the full sense of that term. No provision is made by law under which he can hand back the presidential office to his predecessor.[84]

Not all of those who think the Vice President becomes President in cases of vacancy, however, are willing to ensconce the Vice President in the presidential chair for the remainder of the term in cases of inability. Although the Constitution makes no distinction between vacancy and inability, some are willing

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[83] Dwight, op. cit., 442-446.

[84] A letter to Senator Curtis, 57 Cong. Rec. 28.

to accept the established usage in case of vacancy, but suggest that the rule should be different for cases of inability. During the illness of President Garfield a number of competent lawyers and jurists expressed their opinions on this question. Among those who held that the Vice President becomes President in case of vacancy but does not in case of inability, four slightly different positions were taken. Thomas M. Cooley, J. Alexander Fulton, George Ticknor Curtis, and Elias Griswold are representative exponents of these four positions.

In his article for the North American Review, Cooley wrote that there can be no question that the Vice President becomes the President in case of complete vacancy. Usage has established this. Whether this precedent was proper or not the Chief Justice of Michigan did not say, but he thought the Vice President would only be the "acting President" in case of inability. Judge Cooley refused to admit that a Vice President acting as President would continue to act for the remainder of the term, and held that he would exercise the presidential functions only as long as the President's inability continued.[85]

While the debate concerning Garfield's inability was in progress, J. Alexander Fulton, writing in the Albany Law Journal, asserted that, in case of complete vacancy, the Vice President succeeds to the higher office and becomes the President. In case of inability, however, he thought "the Same" as used in the succession clause refers to the powers and duties, which are to be exercised by the Vice President only

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[85] Cooley, op. cit., 122 and 124.

for the duration of the necessity, and, when the inability ceases, the President is to resume them and the Vice President is relieved.[86] During President Wilson's illness, Representatives Walsh and Fess took a position similar to Fulton's, agreeing that in case of death the office devolves on the Vice President, but in case of inability only its powers and duties devolve.[87]

George Ticknor Curtis, Daniel Webster's biographer, contended that it makes no difference whether it is the office or its powers and duties that devolve, for the two are the same.[88] In any case, he did not think that once the Vice President takes over the presidential function, he ipso facto displaces the President for the remainder of the term. He believed that the elastic clause empowers Congress to decide whether inability should have the same effect as complete vacancy or not. Congress also has the power under the elastic clause, Curtis held, to provide for the temporary devolution of powers and duties

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[86] J. Alexander Fulton, "Presidential Inability," 24 Albany Law Jour. 286, 287 (September 12, 1881). Fulton constructed an interesting hypothetical case to illustrate his point. He suggested a situation in which Congress, having passed revenue and appropriation bills, was ready to adjourn, but the President had become disabled before he was able to sign them. "Here then would be a plain case of temporary inability," he wrote, "and the vice-president would be justified in signing the bills. But suppose again the president should be restored the next day or the next week to his normal powers, would the inability of yesterday exclude him from office for the residue of his presidential term? If it is the powers and duties that are devolved, it would not; but if it is the office, it would seem so, for there is no provision made for its restoration. Duties belong to a person capable of performing them; office to a person legally qualified and authorized to hold it."

[87] Hearings, op. cit., 40.

[88] Curtis, op. cit., 583.

on the Vice President and for their resumption by the President. He thought that the length of time during which the Vice President is to exercise the powers and duties also falls within the power of Congress to determine.[89]

During the illness of President Garfield a fourth and somewhat inconsistent position was taken by some, among whom was Elias Griswold. The judge held that the office, not merely its powers and duties, devolves upon the Vice President, who is to take the presidential oath and thereupon become the President, not merely the acting President. Although the judge would have the Vice President sworn in as President, he denied that the Vice President should continue in office once the disability is removed. His basis for limiting the tenure of the Vice President was the belief that the whole succession clause is one sentence and, therefore, the adverbial clause, "until the Disability be removed," is a limitation on the Vice President as well as on the "officer" designated by Congress. Judge Griswold, like the others who held his opinion, failed to explain how the Vice President becomes the President and is to be sworn in as such and yet can be displaced at the termination of the elected incumbent's inability, when the only method of removing a de jure President is impeachment by the House and conviction in the Senate.[90]

Those who hold that the Vice President becomes President

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89 "Presidential Inability," 25 Harper's Weekly 631 (September 17, 1881).

90 New York Herald, September 9, 1881, and the opinion of Governor Long, ibid., September 5, 1881. See also H. J. Res. 353, 65th Cong., providing for the temporary devolution of presidential power on the Vice President, who was to qualify by taking the presidential oath.

in case of vacancy are not all agreed on the presidential status and tenure of the Vice President in case of inability. But those who deny the presidential status of a succeeding Vice President all agree that he would merely be the acting President in case of the President's inability and would act only until the disability is removed.[91] Such a construction of the Constitution makes it possible to treat temporary inability and vacancy in the same manner, in both cases the powers and duties devolving on the Vice President, who exercises them for the time being but who remains the Vice President. This view greatly simplifies the problem of handling cases of inability because it makes it possible for the Vice President to act as President ad interim without becoming the President. As students of the Constitution have occasionally pointed out, the framers of the Constitution provided more adequately for cases of presidential inability than usage has

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[91] This thesis has been ably set forth a number of times on the floor of Congress and in various articles. For example, see the remarks of Senator Maxey, 13 Cong. Rec. 131 and 14 Cong. Rec. 915-916; of Senators Beck and Coke, 13 Cong. Rec. 124 and 140-141, respectively. Beck suggested that if Lincoln had been captured by the Confederacy, Vice President Hamlin would have been compelled to exercise the presidential powers; and, if he had refused to step down when Lincoln was freed, revolution would have resulted. See also the comments of Senator Lapham, 14 Cong. Rec. 919-921. This thesis has also been espoused in the following articles, to mention only the outstanding ones: Trumbull, op. cit., 419-420; Butler, op. cit., 432-436; John Brooks Leavitt, "A Solution of the Presidential Inability Problem," 8 Am. Bar Assoc. Jour. 189 (March, 1922); H. H. Sawyer, "The Presidential Succession," 16 Am. Mercury 129, 132-133 (February, 1929). See also the opinions of Governors Bigelow of Connecticut and Littlefield of Rhode Island and of former Attorney General Jeremiah Black, New York Herald, September 6, 1881; of Judge Trumbull, ibid., September 9, 1881; and of former Attorney General Schoonmaker, ibid., September 17, 1881. On this point, see Horwill, op. cit., 66.

admitted, because they made provision for the Vice President to act during any and all inabilities of the President and to relinquish the power as soon as the President's inability passed.[92]

This construction of the succession clause allows the Vice President to discharge the presidential functions as a part of his duties as Vice President, and to do so under his oath as Vice President.[93] As Senator Lapham said in 1883, the Vice President commits himself solemnly to discharge all the duties of the office of Vice President, and one of these duties is to perform the functions of the President when they devolve upon him because of vacancy or inability in the Presidency.[94]

The thesis that the Vice President does not become President in case of the President's inability has been supported by the same arguments as those offered in support of the thesis that he does not become President in case of vacancy in the Presidency. These arguments are: It is the presidential powers and duties rather than the office which devolve on the Vice President; both the grammar of the clause and the word "devolve" make this clear; the adverbial clause, "until the Disability be removed, or a President shall be elected," limits the tenure of the Vice President as well as that of the officer designated by

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[92] For example, Henry E. Davis, "Inability of the President," S. Doc. 308, 65th Cong., 3rd sess., 7; Leavitt, op. cit., 190; Sawyer, op. cit., 133.

[93] Butler, op. cit., 434. See the arguments of Maxey and Lapham, 14 Cong. Rec. 915 and 919, respectively. Maxey thought the usage first established by John Tyler was bad law and could not understand how such a decision was reached in 1841. 13 Cong. Rec. 129-131.

[94] 14 Cong. Rec. 919.

Congress; the framers of the Constitution intended that the Vice President act as President ad interim, not that he become President for the remainder of the term; it is only reasonable to recognize that a succeeding Vice President does not become the President for the remainder of the term, because the Constitution treats cases of vacancy and inability in the same language.[95] In addition to these arguments, which apply to cases of vacancy and inability alike, another argument which has been applied only to inability has been offered to deny the presidential status of one who acts as President because of the President's disability.

This argument starts with the premise that the vesting clause of article II forbids the existence of two Presidents at the same time. As Senator Maxey pointed out, there is no serious difficulty in case of vacancy, but in case of inability the clause vesting executive power in the President would preclude the Vice President's taking the presidential oath and becoming the President. He thought once the President had taken the oath and entered on the duties of his office, the executive power "vests" in him, and could not be divested during his term, save by removal, death, or resignation. It was the Senator's conclusion, therefore, that the powers could not be vested in the Vice President in cases of inability, but could be temporarily exercised by him and would revert to the President when the inability passed.[96]

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[95] See pp. 47-73, supra.

[96] 13 Cong. Rec. 129-130. It should not be implied that Maxey approved of the Vice President's becoming President even in case of vacancy. On the contrary, he thought the precedent established by Tyler, Fillmore, Johnson, and Arthur was improper and might be overturned by legislative enactment.

Those who argue that the Vice President becomes President when the powers and duties of the higher office devolve upon him answer: It is true that the vesting clause precludes the possibility of having two Presidents at once, and for this very reason, the disabled President must be ousted from office if the Vice President is to act as President. The stronger argument would be that the clause which vests executive power in the President of the United States forbids the exercise of such power by anyone, Vice President or designated officer, who is not actually the President.[97] This argument has never been offered, but if it were it would apply to cases of vacancy and inability alike.

The vesting clause of article II is the real stumbling block in arguing that the Vice President or officer designated by the Congress does not become the President. There are, of course, no court cases on the devolution of presidential power upon anyone other than the President, but the Supreme Court has upheld the delegation of certain powers by the President to the department heads, and their acts are presumed to be his and are binding within the sphere of the President's legal and constitutional authority.[98] On the other hand some very strong

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[97] Article II, sec. 1, cl. 1.

[98] Wilcox v. Jackson, 13 Pet. 498 (1839), see Justice Barber at 513. United States v. Eliason, 16 Pet. 291 (1842), esp. the dictum of Justice Daniel at 302. Williams v. United States, 1 How. 290 (1843), see the language of Justice Daniel at 296. Confiscation Cases, 20 Wall. 92, 109 (1874). Wolsey v. Chapman, 101 U. S. 755 (1880), see the opinion of Chief Justice Waite at 769-770. Runkle v. United States, 122 U. S. 543, 557 (1887). United States v. Fletcher, 148 U. S. 84 (1893). United States ex rel. French v. Weeks, 259 U. S. 326 (1922). 7 Op. Atty. Gen. 453 (1855). In this Attorney General's opinion Caleb Cushing stated that he believed the Constitution did not require the President to personally exercise all executive power but rather

language has been used to deny anyone the right to exercise for the President a power which from the nature of the case requires the President's personal judgment.[99]

The Constitution vests executive power in the President and commands that he shall take care that the laws be faithfully executed. Specific grants of executive power made by the Constitution are made to him. Attorney General Caleb Cushing thought that the President, the man discharging the presidential office, and he alone, could exercise the executive powers specifically granted by the Constitution, such as the prerogative of mercy; that he alone could act as commander-in-chief of the armed forces; and that the act of signing and vetoing bills was a personal act of the President, and such powers could not be exercised by any other.[100] A study of the cases in which the Court has upheld

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allows "for a subdivision of executive powers, vested in the President, among the administrative departments...." The Attorney General continued by saying "Meanwhile the great constitutional fact remains, that the 'executive' power is vested in the President...." Ibid., 460.

[99] Ex parte Field, 9 Fed. Cas. 1 (1862). This case involved the legality of the suspension of the writ of habeas corpus by the War Department. The Court held the suspension illegal on the ground that such action could not be considered to be the act of the President. District Judge Smalley said in part, "even if the president possessed the delicate and dangerous power of suspending the writ of habeas corpus, it will hardly be claimed that he could delegate it to all or any of his subordinates, to be exercised when, in their discretion, the 'public safety' might require it, any more than he could delegate the veto power." Ibid., 5. Runkle v. United States, 122 U. S. 543, 557 (1887). United States v. Page, 137 U. S. 673, 680 (1891). United States v. Fletcher, 148 U. S. 84 (1893).

[100] 7 Op. Atty. Gen. 453, 464-470 (1855). The only acts which Cushing would allow the department heads to perform independent of the President were: (1) ministerial acts compellable by mandamus, (2) functions imposed upon him by Congress, but functions which were not purely executive, but rather quasi-legislative or quasi-judicial in character.

the delegation of executive power will show that, in every case, the power in question was one granted to the President by statute. Not one of these cases upheld the delegation of a power vested in the President by the Constitution. As Professor Corwin says, the Constitution knows a single executive power, that of the President whose duty it is to see that the laws be faithfully executed, a duty which legally is the obligation and power to execute them himself.[101]

In answer to the argument that the vesting clause, as interpreted by the courts, requires one to become the President in order to exercise those powers vested in the President alone, it should be said that the restrictions laid down by the courts apply to the delegation of executive power by the President to his subordinates; they do not involve the devolution of executive power on the Vice President or an officer designated by Congress. Reasoning by analogy is always dangerous; and there seems to be no reason for extending judicial restrictions on the delegation of executive power by analogy to the devolution of such power.

The history of the framing of the clause vesting executive power in the President shows that the members of the Federal Convention seemed to have no idea that the vesting clause would render impossible the existence of an acting President in case of vacancy or inability in the Presidency. Their sole purpose in writing the vesting clause appears to have been the establishment of a single, as contrasted to a plural, executive.[102] Their

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[101] Edward S. Corwin, The President: Office and Powers (1940), 76-82.

[102] Farrand, op. cit., I, 21, 63, 70, 72, 73, 79, 88, 90, 92, 93, 96, 105, 106, 109, 225, 230, 236, 244, 247, 254, 261, 266,

purpose in writing the succession clause, as set forth in the first chapter of the present study, seems to have been to provide a substitute for the President in certain cases, not to provide for the creation of another President. It is a well established rule of interpretation that the different clauses should each be given effect and, if possible, reconciled.[103] The conclusion is, therefore, that the clause vesting executive power in the President should be construed in such a way as to permit having an acting President, who would exercise executive power in case of the President's removal, death, resignation, or inability, and that the succession clause should be interpreted in such a way as to give effect to the purpose of the vesting clause.

If the succession clause is to be interpreted to give effect to the purpose of the vesting clause, there can be no partial devolution of the executive power on the Vice President or the designated officer while some of this power continues to be exercised by the President. It has been suggested that not only the duration but also the extent of the power which devolves is measured by the nature and duration of the President's inability;[104] but, it seems, the vesting clause precludes such an

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272, 292; II, 22,, 29, 101, 116, 132, 134, 135, 145, 158, 171, 185, 401, 572, 597, 657; III, 132, 347; IV, 17, 46.

[103] Schick v. United States, 195 U. S. 65, 68 (1904).

[104] See the remarks of Beck and Coke, 13 Cong. Rec. 123 and 140, respectively. See also Leavitt, op. cit., 190. In his letter to the New York Times Leavitt said that under Article II the presidential powers and duties devolve upon the Vice President whenever the President is unable to perform them, whether the cause be absence, ill health, or pressure of multifarious duties, whether permanent or temporary, complete or partial. He thought all the President needed to do to have the Vice President's help was to ask him to assist, in which case some of the presidential duties would devolve on the Vice President. August 11, 1923.

interpretation of the succession clause. As George Ticknor Curtis pointed out during the illness of President Garfield, executive power is a unit, and is vested entirely in one person. This means, therefore, if the incumbent of the office cannot discharge all of its powers and duties because of an inability, although he may be able to discharge some of them, either all or none of the said powers devolve on the Vice President or designated officer.[105] Since it is the purpose of the vesting clause to create a single executive,[106] and since the provisions of the Constitution are not to be nullified without regard to the aim and objects of the instrument and the principles on which it is based,[107] an interpretation of the succession clause which would split executive power cannot be admitted. The proper view would seem to be that executive power is a unit, a continuing power unbroken by succession, requiring that there be one person legally authorized to exercise it at all times, although he may not always be the incumbent of the presidential office with its four-year tenure.

It has been suggested that under the vesting clause, as interpreted by the courts in cases involving the delegation of executive power, certain executive powers, such as the veto

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105 Op. cit., 583. Curtis thought that, since this was true, the inability of the President to discharge any of his powers was an "inability" within the meaning of the succession clause and all of his powers devolved on the Vice President. See also Henry J. Cole, "To What Extent Can the President of the United States Perform the Duties of His Office While Abroad?" 4 Mass. Law Quar. 180, 193 (February, 1919); David Hunter Miller, "Some Legal Aspects of the Visit of President Wilson to Paris," 36 Harvard Law Rev. 51, 78 (November, 1922).

106 See n. 102, supra; and The Federalist (H. C. Lodge ed.; 1892), nos. 70 and 71, pp. 436-450.

107 Aldrich v. Kinney, 4 Conn. 380, 385 (1822); People v. Dawell, 25 Mich. 247, 261 (1872).

power, are vested in the President alone and cannot be exercised by an acting President. If such is the case, these powers would be dormant during periods when there is only an acting President;[108] but again delegation and devolution of executive power are not necessarily the same nor bound by the same limitations. Furthermore executive power can never be dormant; the public welfare requires that there be someone at all times to exercise the executive power; in the law this power is a continuing one never ending and not broken by succession; such power can never be allowed to lapse; and the acts of an acting Executive have behind them all the forces of the constitutional and statutory provisions in effect at the time.[109] This is a legal principle which must govern the interpretation of the succession and vesting clauses of the second article of the Constitution. The other governing principle is that the two must be interpreted to give effect to both.

Not one of the commentators who takes the position that the Vice President becomes the President for the remainder of the term in case of vacancy extends the same rule to cases of inability. Rawle and Story do not consider whether or not there is a difference in the rules to be applied to vacancy

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[108] In 1881 Senator Maxey of Texas implied that such would be the case by insisting that the veto power was vested in the President alone and could not be exercised by an acting President, and yet insisting also that one who exercises executive power under the succession clause was merely an acting President. 13 Cong. Rec. 128-134.

[109] Barrett v. Duff, 114 Kan. 220 (1923); Ex parte Crump, 135 Pac. 428 (1913); Ex parte Hawkins, 136 Pac. 991 (1913); Ex parte Norris, 8 S. Car. 408 (1877); In re: An Act Concerning Alcholic Beverag es, 130 N. J. L. 123 (1943); McClusky v. Hunter, 33 Ariz. 513 (1928); State ex rel. Matson v. O'Hern, 104 Mont. 126 (1937).

and inability.[110] Although Cooley does not discuss the question in his study of the Constitution, he says in an article that in case of the President's inability the Vice President is merely the "acting President" and is to act as President only for the duration of the inability.[111] Burgess thinks the office devolves on the Vice President in case of inability as well as in case of vacancy but that the President can displace the Vice President when the inability ceases. Similarly, he thinks a Cabinet officer acting as President under the Act of 1886 by reason of the inability of the President or Vice President or both can be displaced when one of them recovers.[112] Thus, while Burgess does not discuss whether there is a difference in the status of a succeeding Vice President and that of an "officer" acting as President, he does not make a distinction between the tenure of the two officials.[113]

Tucker is of the opinion that the presidential office devolves on the Vice President in case of the President's inability just as in case of vacancy, but the commentator does not say whether or not the President can resume his office when the inability passes. Tucker makes a sharp distinction between the Vice President who becomes President and the designated "officer"

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[110] William Rawle, A View of the Constitution (1825), 49-50; Joseph Story, Commentaries on the Constitution of the United States (1833), III, 336.

[111] See p. 113, supra.

[112] John W. Burgess, Political Science and Comparative Constitutional Law (1891), II, 239-240. The Act of 1886 expressly stated that the "officer" was to act only until the inability of the President or Vice President was removed.

[113] To permit the termination of the presidential services of an acting President by removal of the prior-entitled individual's inability is, of course, tacit recognition that the acting President is not a de jure President, because the Constitution gives protected tenure to the latter.

who merely acts as President ex officio. Concerning the latter officer, he holds that, if the disability is temporary, the Constitution contemplates the President's return to office, but if it is permanent a President must be elected to fill out the term.[114]

Watson takes the position that in cases of vacancy in the Presidency the Vice President succeeds to the higher office, but in case of inability only the presidential powers and duties devolve upon him. In the latter case, Watson thinks, the President continues in the office but its powers and duties are separated from it and are to be exercised by the Vice President.[115] Burdick thinks that in case of vacancy the Vice President at once assumes the presidential office, but does not say what is the proper rule for cases of inability. The commentator does not answer either of the questions which he raises: What will happen in case of inability? What will happen when the inability ceases? In discussing succession beyond the Vice President, he merely summarizes the acts of 1792 and 1886 and says it would be unfortunate if Congress should decide to call a special election, but he does not question the power of Congress to do so.[116]

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[114] John Randolph Tucker, The Constitution of the United States (1899), II, 711-714.

[115] David K. Watson, The Constitution of the United States (1910), I, 895-896. He says in part: "If the President was removed from his office, or if he died, or resigned, so that there was a vacancy in the office of President, the Vice President would succeed to the higher office of President, but in case there was only an inability on the President's part to discharge the powers and duties of his office, it is clear that the Vice President could not become President--for there could not be two officers occupying the office at the same time--and in that event, the powers and duties of the Office of President would devolve upon the Vice President while he retained the office."

[116] Charles Kellogg Burdick, The Law of the American Constitution (1922), 59-61. See n. 113, supra.

Those who make a distinction between vacancy and inability do so in an attempt to reconcile the usage of the Vice President's becoming President in case of vacancy with what seems to be the reasonable rule to apply in case of inability. None who take this position offers any justification for making a distinction between vacancy and inability except to say that the distinction seems reasonable. As far as the language of the constitutional provision and the history of its framing are concerned, there is no basis for making a distinction between vacancy and inability. The Constitution says that in case of either vacancy or inability "the Same shall devolve on the Vice President" or that the designated officer "shall then act as President." Not one draft of the succession clause contains any such distinction between vacancy and inability.[117]

In the event of vacancy in the presidential office there is no difficulty in the Vice President's succeeding to the higher office, except that it blocks the calling of a special election. In case of inability, however, it means the constitutional anomaly of having two Presidents or displacing the disabled President. When a President has been disabled, nothing has been done to furnish a substitute, largely because of the dilemma this precedent has created. As a student of constitutional usage has pointed out, the precedent has practically nullified the provision made in the Constitution for the exercise of presidential power when the President is still alive, has not

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[117] Max Farrand, op. cit., III, 600; II, 172, 186, 495, 499, 532, 535, 573, 575, 598-599, 659.

resigned or been removed, but is disabled.[118] Thus the usage has made it possible for the United States to be without a competent Chief Executive, a situation that could be extremely dangerous in time of war or other crisis.

The commentators who take the position that nobody becomes the President by succession are not troubled by this dilemma. Kent says, "and except in cases in which the president is enabled to re-assume the office, the vice-president acts as president during the remainder of the term...."[119] Black takes exactly the same position.[120] Willoughby points out that it is the powers and duties, rather than the office, which devolve, but usage has established that a succeeding Vice President becomes President. In view of the usage, Willoughby wonders what will happen in actual cases of inability. He asks, what will be the status of the disabled President? of the Vice President? what will happen when the inability is removed? The presidential succession precedent is what has created the problem, but Willoughby thinks it can be solved by a statute empowering the Vice President to act as President in cases of inability, not to be the President.[121]

The state courts have taken a position similar to that of the commentators; that is, in no case has a state court denied

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[118] Horwill, op. cit., 77-83. See also Sawyer, op. cit., 132-133; and the comments of Henry M. Dawes of Massachusetts, 14 Cong. Rec. 955.

[119] James Kent, Commentaries on American Law (3rd ed.; 1836, and all editions thereafter), I, 278. This does not appear in the first two editions, but Kent revised the first six editions himself. Italics mine.

[120] Henry C. Black, American Constitutional Law (1895), 90.

[121] W. W. Willoughby, The Constitutional Law of the United States (1929), III, 1471.

a disabled Governor the right to resume his powers when his disability is removed. Even where the state constitution provided that the "office...shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed," the highest court of Oklahoma held that during the absence of the Governor, the functions of his office devolve pro tempore on the Lieutenant Governor.[122] Similarly, the Supreme Court of Arkansas ruled that, in spite of a provision vesting executive power in the Governor, the veto power did not rest in the Governor alone, but could be exercised by the Lieutenant Governor or the President pro tempore of the Senate when rightly performing the gubernatorial duties under the succession clause. The Court held further that it was not necessary to take the oath as Governor when the duties devolved upon the President pro tempore, because the oath taken to perform the duties of the presiding office in the Senate covered the duty of acting as Governor when it became necessary under the Constitution.[123]

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[122] The court elaborated at some length on the necessity of construing the constitutional provision to allow for the exercise of gubernatorial power during temporary inability, and pointed out the difference between the status of an acting Governor and a de jure Governor. Ex parte Crump, 135 Pac. 428 (1913). The doctrine of this case was affirmed in ex parte Hawkins, 136 Pac. 991 (1913). In the latter case, the Court said that, although the powers of the Governor automatically devolved on the Lieutenant Governor when the Governor was out of the state, the latter did not thereby lose his office. For an exposition of the distinction between actually being Governor and merely acting as Governor, see Montgomery v. Cleveland, 134 Miss. 132 (1923).

[123] Walls v. Hall, 202 Ark. 999 (1941). The pertinent sections were one which vested executive power in the Governor and another which provided that the President of the Senate should act as Governor in case both the Governor and Lieutenant Governor be impeached, removed, dead, unable to perform the duties of the office, resigned, or absent.

An examination of state gubernatorial succession cases, the writings of the commentators, and the arguments by which the presidential succession precedent is attacked and defended leads to one conclusion: Law and logic dictate that the succession clause of the Federal Consitution be interpreted to permit the temporary discharge of the executive power by someone other than the President when the President is unable to discharge this power himself.

C. CONCLUSION

Study of actual cases of presidential inability shows that the precedent, by which the President's substitute becomes the President, has resulted in an impractical interpretation of the constitutional provision for the exercise of presidential power when the President becomes disabled. If the Vice President becomes the President when the powers and duties of the latter devolve upon him, there must either be two Presidents at once or the elected incumbent must be displaced. Since it has been agreed that there cannot be another President until the elected President dies, resigns, or is removed, and since those nearest a disabled President have opposed any move to displace him, there has been no physically and mentally competent Chief Executive when the President is not dead, has not resigned or been removed, but is merely disabled.[124]

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[124] It would hardly be argued that this is a practical construction of the succession clause, but the Court says a practical construction must be given to the Constitution and no part is to be interpreted in such a way as to nullify others. Railway Co. v. Penniston, 18 Wall. 5, 31 (1873); Schick v. United States, 195 U. S. 65, 68 (1904).

It has been shown above that the arguments offered in support of the interpretation of the succession clause which transforms an acting President into a President are not unanswerable, valid, or consistent with other constitutional provisions. On the other hand it has been demonstrated that the arguments offered in denial of the presidential status of one who acts as President under the succession clause are both valid and consistent with other constitutional provisions, such as the provision defining the President's tenure. Finally it has been shown that there are no insurmountable legal problems arising out of the interpretation of the succession clause which regards one on whom presidential power devolves as an acting President with limited tenure.

The fact remains, however, that usage has established the contrary rule. Thus the problem is: How can cases of inability be handled in view of the precedent that the Vice President becomes President when the powers and duties of the higher office devolve upon him? This problem is independent of the difficulty of determining the President's inability and would not be lessened by enactment of a statute providing a means by which such disability could be decided. The following chapter will deal with this problem as well as with those involved in defining "inability" and providing a method for the determination of actual cases of inability.

CHAPTER IV

PROBLEMS INVOLVED IN CASES OF INABILITY

The Constitution provides that the powers and duties of the Presidency shall devolve upon the Vice President in case of the President's inability to discharge them, and that an officer designated by the Congress shall act as President in case of inability in one office accompanied by vacancy or inability in the other. The document does not, however, expressly answer the three major questions which arise in connection with inability: What is the status and tenure of one who acts as President because of the inability of the President or Vice President or both? What constitutes inability to discharge the powers and duties of the presidential office? Who is to determine when an inability exists and when it ceases? The Records of the Philadelphia Convention give no answer to these difficult questions. John Dickinson complained in the Convention that the clause was "too vague" and asked what was the extent of the term "disability" and who was to be the judge of it; but none of his colleagues commented on his remarks.[1]

The constitutional provision for the discharge of executive power during a period of presidential inability went practically unnoticed until the serious and prolonged illness of President Garfield. The Act of 1792 did not deal with inability, and the poorly reported debates do not show that the problem was even discussed then. In 1856 the Senate Committee on the Judiciary was commissioned to study the whole problem of

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[1] Max Farrand, The Records of the Federal Convention of 1787 (1911), II, 427.

succession; but the committee's report completely ignored the questions involved in cases of the President's disability. The eighty-day illness of President Garfield caused the Congress to discuss the meaning of inability, its extent and duration, and how it was to be established. Instead of dealing with the question that had so recently alarmed the country, however, Congress passed a law naming a successor to act as President in case of vacancy or inability in the offices of both President and Vice President.

After the excitement of the Garfield case had subsided, presidential inability was again almost forgotten until the illness of President Wilson.[2] During the eighteen months of Wilson's illness, proposals for dealing with the problem were introduced, only to die in committee. When the succession question was raised in the Seventy-ninth and Eightieth Congresses, inability was presented as the real problem and it was suggested that a joint committee study all aspects of presidential succession; but Congress legislated without benefit of an extensive study and ignored inability questions completely.[3]

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[2] A few legislators, however, continued to press for some action to solve the inability problem. See the resolution introduced by Senator Ingalls directing the Committee on the Judiciary to inquire what legislation, if any, is necessary to ascertain when the presidential powers devolve upon the Vice President in case of the President's inability and in what manner the removal of the inability may be ascertained. 14 Cong. Rec. 1042. See also two House reports calling the attention of the House to inadequacies in existing law on this subject and recommending that Congress deal with the problems in the near future. H. Rept. 3633, 58th Cong., 3rd sess., 1 (1905); H. Rept. 7581, 59th Cong., 2nd sess., 1 (1907). Also the comments of Representative Gaines, member of the House Elections Committee, stressing the need for provision to implement the inability clause. "Succession to the Presidency," 79 Outlook 252-253 (February 4, 1905).

[3] S. Con. Res. 50 and H. R. 3206, 79th Cong. The resolution introduced by Senator Green of Rhode Island instructed the Committee to consider a number of problems dealing with election and succession to the Presidency. It dealt not only with the

Of all the problems connected with presidential succession, disability is the most pressing in terms of actual occurrence. Never has there been a case of succession passing beyond the Vice President, but two cases of presidential inability have jeopardized the public interest.[4] Congress has enacted three laws providing for succession beyond the Vice President, but has done nothing to provide for cases of disability. Presidential inability seems to have been the most difficult of all the problems connected with executive succession. The conflicting theories already mentioned concerning the status and tenure of one who acts as President under the inability clause demonstrate the difficulty in finding a satisfactory solution. In addition to the two questions which bothered John Dickinson, what is the meaning of "disability" and who is to be the judge of it, Congress has been troubled by a third and even more vexing question: What happens if and when the inability is removed?

A. THE STATUS AND TENURE OF ONE WHO ACTS AS PRESIDENT UNDER THE INABILITY CLAUSE

Four possible situations can arise under the succession provision of the Constitution: (1) the President's death, resignation, or removal; (2) the death, resignation, or removal of both the President and Vice President; (3) the President's

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meaning of inability and the mode of establishing it, but also directed the committee to consider whether there are or should be any differences between the status, powers, and duties of an elected President and any other individual executing the powers of President. Both measures were killed in House committees.

Two similar resolutions were offered in the Eightieth Congress, but neither was reported out of the Committee on Rules and Administration of their respective houses. S. Con. Res. 1 and H. Con. Res. 18. See also the remarks of Alben W. Barkley and Estes Kefauver on the need for implementation of the inability clause. 93 Cong. Rec. (unbound) 7941 and 8800; and Elmer Davis, "Message to the 80th Congress," Harper's Magazine (January, 1947), 21, 26-28.

[4] See pp. 82-109, supra.

inability; (4) inability in the Presidency or Vice Presidency accompanied by vacancy or inability in the other office. Precedent has answered the question as to the status and tenure of the successor in the first case: the Vice President becomes President for the remainder of the term. The status and tenure of the officer who acts as President in the second case are primarily matters of congressional power to provide for succession beyond the Vice President and, therefore, are treated elsewhere in this study.[5] In both cases the presidential office is vacant; and, consequently, the problem of restoring the President or acting President to his powers does not arise.

In the third case the Presidency is not vacant. In the fourth either the Presidency or the Vice Presidency is not vacant and perhaps neither is vacant. In these two cases, therefore, the problem of restoring the President or acting President to his powers does arise. This in turn raises the following questions relating to status and tenure: Does the successor become President? What is the status of a disabled President or a Vice President who becomes disabled while acting as President? Is the President or Vice President, as the case may be, to resume the discharge of presidential powers and duties when his disability passes?

The Constitution makes no distinction between the status of one who succeeds to presidential power because of vacancy and that of one who succeeds because of inability. In case of either vacancy or inability in the Presidency, the powers devolve on

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[5] See pp. 213-230, infra.

the Vice President. In case of either vacancy or inability in both offices, the officer designated by Congress is to act as President. The Constitution does, however, make a distinction between the tenure of one who succeeds because of vacancy and that of one who succeeds because of inability. In the former case, the successor is to act until a President is elected, but in the latter he is to act only until the disability is removed.[6]

The problem of providing for the exercise of presidential power during a period of inability would be much simpler if the Vice President were not recognized as President upon succeeding to the powers and duties of the latter.[7] Because usage recognizes a Vice President who succeeds because of vacancy as becoming the President, vacancy and inability must be treated separately. Since precedent is of the utmost importance in the development of a stable constitutional system, it might be unwise to disturb a settled constitutional usage by suggesting that a special presidential election be held to displace a Vice President who is acting as President because of a vacancy. The

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[6] None of the various drafts of the Constitution made a distinction between the status of one who succeeds in case of vacancy and the status of one who succeeds because of inability, nor is there anything in the records of the Convention to indicate such a distinction was intended. All the records indicate that the devolution of presidential power in cases of inability was intended only for the duration of the inability. Farrand, op. cit., III, 600; II, 172, 186, 495, 499, 532, 535, 573, 575, 598-599, 659. See also chap. I, supra.

[7] For an exposition of this thesis, see chap. III, supra; also the remarks of Beck, Maxey, Garland, and Coke, 13 Cong. Rec. 124, 129-130, 138, and 140-141, respectively; of Lapham 14 Cong. Rec. 919; and Hearings on 12609..., 66th Cong., 2nd sess. (1920); Lyman Trumbull, "Presidential Inability," 133 No. Am. Rev. 417, 419-420 (November, 1881); Lucius Wilmerding, Jr., "The Presidential Succession," The Atlantic (May, 1947), 91, 97; Elmer Davis, op. cit., 27-28; John Brooks Leavitt, "A Solution of the Presidential Inability Problem," 8 Am. Bar Assoc. Jour. 189, 190 (March, 1922).

convention should not, however, be extended to cases of inability. Some action should be taken to make it clear that in case of disability the Vice President merely exercises the powers and duties, and to insure that the President will resume the exercise of his power when the disability is removed.

Unless the position of the Vice President in cases of the President's inability is clarified, it is useless to consider means for determining the disability. Unless the President's friends are certain of the President's status following the inability, they will probably resist any attempts to establish inability as equivalent to an action to remove him from office. Established precedent cannot be urged as an impediment to declaring that the Vice President is to act as President only for the duration of the inability, because a Vice President has never succeeded by reason of the President's disability.

Whenever the problem of disability has been considered in Congress, some have seen the necessity of recognizing that the devolution of presidential power in cases of inability does not thereby make the successor the President for the remainder of the term. Accordingly they have introduced bills which provided that the successor should act as President only for the duration of the inability.[8] Such bills have always been killed in

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[8] For example: H. R. 3429, sec. 3, 47th Cong.; S. 579, secs. 1 and 2, 48th Cong.; S. 630, secs. 1 and 2, 49th Cong.; H. R. 547, 68th Cong. These four bills provided that the Vice President was to act as President in case of established inability until the inability was declared to have ceased. Other bills have declared that the presidential powers and duties shall devolve upon the Vice President until removal of the inability is established: H. R. 12609, 66th Cong.; H. R. 2274, 67th Cong. Another provided that the Vice President assume and exercise the constitutional powers of the President until removal of the President's disability shall be declared: H. R. 12629, sec. 2, 66th Cong.

committee, probably because reputable legal opinion can be cited to the effect that a Vice President upon whom the presidential powers and duties devolve becomes President for the remainder of the term by constitutional mandate, which cannot be overturned by mere legislation.[9] Whether the President could resume his powers when his inability ceased was the chief question discussed in the congressional hearings of 1920, but no decision was reached. In view of the great divergence of legal opinion on the matter, Representative Fess thought a constitutional amendment would be necessary.

In 1909, John J. Jenkins, chairman of the House Committee on the Judiciary, pointed out that it is a rather delicate matter to question the presidential status and tenure of a succeeding Vice President after years of established practice, but Jenkins declared it was never intended that the Vice President become President. He thought the Constitution should be amended to provide that the Vice President should become President if succeeding by reason of death, resignation, or removal and that the Constitution should expressly provide that the Vice President only acts as President during periods of inability.[10] Jenkins introduced a resolution to this effect in four Congresses. All were killed in the House Committee on the Judiciary.[11] Similar constitutional amendments have been

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[9] See pp. 109-112, supra. All of the bills contained other provisions of doubtful constitutionality. For example, the first four bills mentioned in n. 8 (supra) sought to give the Supreme Court original jurisdiction to determine the existence and removal of such disability, a provision contrary to the ruling in Marbury v. Madison, 1 Cr. 137 (1803).

[10] Hearings on H. J. Res. 264, 60th Cong., 2nd sess. (1909), 3-5.

[11] H. J. Res. 294, 55th Cong.; H. J. Res. 17, 56th Cong.; H. J. Res. 133, 57th Cong.; H. J. Res. 264, 60th Cong.

proposed more recently, but none has met with any more success than Jenkins' resolutions.[12]

In consideration of the intent of the framers of the Constitution, it seems that a concurrent resolution of Congress declaring the true intent of the Constitution would be sufficient to avoid the difficulty presented in cases of inability. In view of our constitutional usage, however, it may be desirable to declare by constitutional amendment: that the Vice President does not become President and thus does not oust the disabled President from office, but remains the Vice President discharging the presidential functions only for the duration of the inability, and that, when an officer designated by Congress acts as President, he shall act only until the inability of the President or Vice President is removed.[13]

B. WHAT CONSTITUTES INABILITY?

If it is recognized that the Vice President does not become the President in case of the President's disability, the

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[12] H. J. Res. 105, 66th Cong.; H. J. Res. 315, 71st Cong. A constitutional amendment was introduced in the 79th Congress providing that succession to the presidential office shall take place only by reason of vacancy and shall be for the residue of the term, but in case of inability the next entitled person shall serve only until a prior entitled individual is able to serve. H. J. Res. 230, secs. 5 and 6.

[13] Although it has never been seriously contended that an "officer" acting as President because of the inability of the President and/or Vice President becomes the incumbent of the higher office, it seems desirable that there be a specific declaration of the Congress to prevent such an extension of the presidential succession precedent. Section 9 of the Act of 1792 provided that the presiding legislative officer act as President "until the disability be removed." U. S. Stat., I, 240. The Act of 1886 provided that the Cabinet officer act as President "until the disability of the President or Vice President is removed." 24 U. S. Stat. 1. The Act of 1947 provides that if the legislative officer's discharge of the presidential powers and duties "is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals." Public Law 199, 80th Cong., 1st sess. § c, 2.

problem of what constitutes inability loses some of its forbidding character, since the disabled President is not thought to have forfeited his office. Nearly all of those who hold that the Constitution provides only for an inability of a permanent character extending throughout the remainder of the term hold also that once such an inability is established, the Vice President becomes President for the remainder of the term. If the Vice President actually displaces the incapacitated President for the duration of the term, only the most extended disabilities should be held to fall within that class of disabilities which cause presidential power to devolve on the Vice President.[14] But if the Vice President merely acts as President for the duration of the inability, restriction of the term inability to disabilities extending throughout the entire term seems to be unnecessary. Even if this limitation on the meaning of inability is ruled out, there still is no unanimous agreement on its meaning. Some hold that it is limited to mental incapacity, while others believe it covers any inability, whatever the cause.

During the crisis of the Garfield administration an impressive body of opinion was developed which held that the only inability recognized by the Constitution was intellectual incapacity. Theodore Dwight, Professor of Constitutional Law at Columbia College, applied the common law which defined the term as mental incapacity. He said it was such an incapacity as a civil court would recognize as unfitting a man to make a grant,

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[14] See for example the remarks of Judge Dittenhoefer, New York Herald, September 13, 1881.

but not including physical disability such as an arm injury making it necessary to have a deputy sign for him.[15] Former Senator Eaton, a recognized authority on the Constitution, stated that the Constitution provided for no disability of which the President could be aware, and was amazed at the suggestion that the President could decide his own inability. The "inability," he held, must be one such as insanity, which is patent to everyone except the President. As long as the President possesses reason, he is not disabled.[16] Secretary of the Interior Kirkwood likewise thought that the Constitution provided only for mental inability, an opinion with which Senator McDonald of Indiana, Governor Cullum of Illinois, and Judge Trumbull agreed.[17]

An equally respectable body of opinion to the effect that inability is not restricted to mental incapacity has also been developed. If the public interest suffers because the President is unable to exercise his powers, whatever the cause, a case of inability exists. Benjamin Butler, writing with reference to Garfield's illness, said that inability is obvious to any right thinking person. If an emergency arises and the President is unable to act, the Vice President is to assume presidential power.[18] Among those who have taken this broad view of the

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[15] Theodore Dwight, "Presidential Inability," 133 No. Am. Rev. 336, 336-339 (November, 1881). Dwight cited the British precedent of the king's being authorized to have a deputy sign documents when illness made it painful for the king to use his arm. 24 Hansard's Debates (new series) 986-989, 1062-1070 (1830).

[16] New York Times and Boston Evening Transcript, September 2, 1881.

[17] Kirkwood, Boston Evening Transcript, July 16, 1881; McDonald, ibid., August 19, 1881; Cullum and Trumbull, New York Herald, September 9, 1881.

[18] Op. cit., 428-430. See also Henry J. Cole, "To What Extent Can the President of the United States Perform the Duties of His Office While Abroad," 4 Mass. Law Quar. 180, 190 (February, 1919).

meaning of inability are Congressman George M. Robeson, Judge Elias Griswold, Senator Elbridge G. Lapham, Attorney John Brooks Leavitt, and George T. Curtis.[19]

There is an abundance of conflicting opinion on the meaning of "inability" but none is conclusive. The records of the Federal Convention throw no light on the question. All the commentators except Watson completely ignore it, and Watson merely summarizes the different theories concerning the meaning of inability.[20] Since there are no authorities to whom one can turn for a definition of the term, it must be defined on the bases of general principles of law and general rules governing constitutional interpretation.

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

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[19] Robeson, New York Tribune, September 2, 1881; Griswold, New York Herald, September 9, 1881; Lapham, 14 Cong. Rec. 919; Leavitt, op. cit., 190 and Leavitt's letter to the New York Times, December 6, 1921; Curtis, "Presidential Inability," 25 Harper's Weekly 583 (August 27, 1881).

[20] David K. Watson, The Constitution of the United States (1910), I, 892-895. Kent, Rawle, Story, Cooley, Black, and Burdick completely ignore the question of what constitutes inability and who is to determine its existence. Tucker, Burgess, and Willoughby consider who is to determine inability, but ignore the question of the meaning of inability.

someone at all times to exercise the power.[21] The terms of the Constitution are not to be nullified by astute verbal criticisms without regard to the purposes of the instrument; where words admit different meaning, the one consonant with the object in view is to be selected; words are to be taken in their natural and obvious sense and not in a sense unreasonably restricted; the Constitution must receive a practical construction.[22] These well established rules of construction point to a definition of "inability" which covers all cases in which the President is de facto unable to exercise his powers.

In deciding cases of gubernatorial succession no state court has limited "inability" to mental incompetence; and some state courts have said that the term covers all cases in which the general welfare requires the exercise of a certain executive power which the Governor cannot in fact exercise. The reason is immaterial.[23] The highest state court in New Hampshire was the first to rule that the person next in line of succession should act as Governor during a temporary inability of the latter. In this particular case the inability was physical illness.[24]

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[21] Barrett v. Duff, 114 Kan. 220 (1923); Ex parte Crump, 135 Pac. 428 (1913); Ex parte Hawkins, 136 Pac. 991 (1913); In re: An Act Concerning Alcoholic Beverages, 130 N. J. L. 123 (1943).

[22] Aldrich v. Kinney, 4 Conn. 380, 385 (1822); People v. Dawell, 25 Mich. 247, 261 (1872); Railroad Co. v. Penniston, 18 Wall. 5, 31 (1873); Pollock v. Farmer's Loan and Trust Co., 158 U. S. 601 (1895).

[23] For example: State of North Dakota ex rel. Olson v. Langer, 65 N. Dak. 68 (1934); Opinion of the Justices, 87 N. H. 489 (1935).

[24] Attorney General v. Taggart, 66 N. H. 362 (1890).

The determining consideration in each case is not only whether the President is de facto unable to exercise his powers but also whether there is any public business requiring the personal attention of the President. There is rather general agreement that mere inability, however severe or extended, does not constitute an inability in the constitutional sense unless the urgency of public affairs calls for executive consideration or action.[25]

The cause or duration of the inability is immaterial. It is a question of fact. In time of war an illness of a few days may be more serious than one of several months at another time. Congress probably could not define inability before its occurrence in such a way as to meet every contingency even if it possessed the power.[26] But Congress could proclaim the general

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[25] See for example: Thomas M. Cooley, "Presidential Inability," 133 No. Am. Rev. 422, 424-425 (November, 1881); Trumbull, op. cit., 420; opinion of George M. Robeson, New York Tribune, September 2, 1881; "Disability of the President," 23 Law Notes 141 (December, 1919); remarks of Congressman Fess, Hearings on H. R. 12609..., op. cit., 39. See also Attorney General v. Taggart, op. cit.

[26] There has never been unanimous agreement on the power of Congress to legislate on the subject of inability. One position is that the only power Congress has in providing for presidential succession is the power to declare what officer shall act as President in case vacancy or inability occurs in the Presidency and Vice Presidency simultaneously; and under the rule of inclusio unius, exclusio alterius, Congress has no other powers in this field. See W. W. Willoughby, The Constitutional Law of the United States (1929), III, 1467; Benjamin Butler, "Presidential Inability," 133 No. Am. Rev. 428, 431-433 (November, 1881); J. Hampden Daugherty, "Presidential Succession Problems," 42 Forum 523, 525 (December, 1909); Henry Davis, "Inability of the President," S. Doc. 308, 65th Cong., 3rd sess., 13-15; Urban Lavery, "Presidential Inability," 8 Am. Bar Assoc. Jour. 13-17 (January, 1922). See also the remarks of Garland, 13 Cong. Rec. 139; of Evarts and Eden, 17 Cong. Rec. 248-249 and 669; of Reavis, Hearing on H. R. 12609...., op. cit., 32.

The other position is that the elastic clause gives Congress power to implement the inability clause. See John Randolph Tucker, a strict constructionalist, The Constitution of the United States (1899), II, 713; Cooley, op. cit., 425-427;

principles governing the meaning of "inability." That is, Congress could and, in the opinion of the present author, should by concurrent resolution declare "inability" to be a situation that restrains the President from the actual exercise of his powers. The resolution should provide that in such cases, his successor shall act as President if the public interest requires such action. Congress probably lacks power to legislate on the subject of presidential inability. A concurrent resolution is merely an expression of congressional opinion and has moral weight as such, but has no legal force in a court of law. Its only effect would be to place congressional approval on well-established principles of law and constitutional interpretation. Such a declaration, however, would serve the purpose of guiding those who must decide if an inability exists in a particular case. It would be a step toward ensuring that the Constitution be given a reasonable and practical construction and that the term "inability" be not unduly extended or restricted.

The general principles set forth above would mean that some absences and illnesses are inabilities while others are not. Since the development of rapid transportation and communication, absence would not usually be considered an inability.

Curtis, op. cit., 583, 631; Judge Shellabarger and Governor Long, New York Herald, September 5, 1881; former Attorney General Schoonmaker, ibid., September 17, 1881; Congressman Robeson and former Vice President Colfax, New York Tribune, September 2 and 8, 1881. See also the remarks of Maxey, 13 Cong. Rec. 131; of Morgan and Maxey, 14 Cong. Rec. 882 and 916; of Madden and Rogers before the House Committee in 1920, Hearings, op. cit., 4 and 32. Representative McArthur thought the elastic clause gave Congress power to define inability just as it gave Congress power to define "interstate commerce" and "intoxicating liquor." Ibid., 35.

In any case, usage has established that mere absence from the United States is not an inability within the meaning of the Constitution. The records of the Constitutional Convention show that the framers of the succession clause intended the Vice President to exercise presidential power during the President's absence. But they distinguished absence from "inability." The succession clause as referred to the Committee of Style provided for five cases: removal, death, absence, resignation, and inability.[27] The provision for the exercise of presidential power during the President's absence was deleted by the Committee of Style, which had no authority to alter substantive provisions; and there is no record that the Convention was aware of the change.[28] Since absence is not mentioned specifically in the Constitution, the question of whether or not absence is an "inability" arises.

The question did not arise until 1918. Washington avoided entering Rhode Island before that little republic joined the Union, but there is no evidence that his decision was connected with presidential succession.[29] In 1876 the House of Representatives adopted a resolution asking President Grant what duties he had performed outside the District of Columbia, but no mention of "inability" or presidential succession was made

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[27] Farrand, op. cit., II, 575.

[28] Ibid., II, 598-599.

[29] Jared Sparks, The Writings of George Washington (1837), I, 456, 464.

at the time; and the matter came to nothing.[30] Although there were precedents for the President's leaving the United States,[31] some suggested that the constitutional precedents required President Wilson not to absent himself from Washington while Congress was in session.[32] Former Attorney General Wickersham went so far as to say that the President's absence during a session of Congress would be an inability within the meaning of the Constitution, because he would not be present to give Congress information on the state of the Union or to act within ten days on legislation passed by Congress. Wickersham

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[30] In answer to the Democratic House, the Republican President sent a message arguing that the President's duties might call him from seat of the Government and even from the United States, and an attempt to limit the President in the way tacitly suggested by the resolution would be unconstitutional. The message was accompanied by a memorandum of the absences from the national capital of all Presidents to date. The memorandum showed that Thomas Jefferson was away from Washington most frequently. James D. Richardson, Messages and Papers of the Presidents (1897), VII, 361-366.

[31] Benjamin Harrison was probably the first President to leave the country while in office. On this occasion he went to Mexico to have dinner with the President of that country. Theodore Roosevelt and William Howard Taft also left the United States while in office.

Vice President William King spent no part of his term within the United States; and Congress even passed a law empowering the United States Consul in Havana to administer the vice presidential oath to him. The report of the debate on the passage of this act does not show that anyone even suggested King's absence to be an inability. Cong. Globe, 32nd Cong., 2nd sess., 787, 1020, 1033, 1035.

During the Civil War United States Attorney General Bates ruled that the temporary absence of the Governor from the state was not an "inability" under a Kansas constitutional provision similar to that of the United States Constitution. The case involved the validity of a commission in the militia issued by the Lieutenant Governor during the temporary absence of the Governor. Bates held the Lieutenant Governor's action void. 10 Op. Atty. Gen. 276-279 (1862).

[32] See for example an article signed by "an eminent jurist" in the New York Times, November 26, 1918. The author did not see how the President could sign or veto acts of Congress within the ten days allowed by the Constitution, but admitted that it was only expediency and moral duty, not law, which commanded the President to remain in Washington.

believed that during the President's absence Vice President Marshall might veto an act on his own motion and allow the courts to pass on the validity of his action. If Marshall refused to take the initiative, Wickersham said, a writ of mandamus would lie to compel him to act as President.[33]

William Howard Taft, Louis Marshall, Frances Lynde Stetson, and Samuel Untermeyer, all outstanding lawyers, answered Wickersham by saying that the Constitution did not forbid the President's trip to Europe and his absence would not constitute an inability. They pointed out that the Constitution contemplated the President's occasional absence from the United States by making him the Commander-in-Chief and treaty-maker, two roles which might take him abroad. Henry Taft, another outstanding attorney, doubted if a court would issue a writ of mandamus to the Vice President because, Henry Taft thought, the question was political rather than legal.[34]

The Republicans in Congress considered the trip ill-advised, but did not think it was an "inability" within the meaning of the succession clause. Neither did they anticipate complications

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[33] New York Times, November 27, 1918. As authority for this he cited Attorney General v. Taggart (op. cit.), in which the New Hampshire Supreme Court ruled that the question of inability in the Governorship could be determined on a petition for mandamus brought by the Attorney General.

[34] For the remarks of former President Taft, see the New York Times, November 27, 1918; Washington Post, December 5, 1918; 57 Cong. Rec. 119-120. Three years earlier Taft denied that there was anything to stop the President from leaving the United States. Taft thought that if the President's absence were such that he could not discharge his constitutional duties, an inability might arise, but telephone, telegraph, and wireless communication were so improved that it would be difficult for the President to go anywhere and not be able to keep his subordiantes informed as to his whereabouts and wishes. William Howard Taft, Our Chief Magistrate and His Powers (1916), 50, 130-131.
Marshall, Stetson, Untermeyer, and Henry Taft, New York Times, November 28, 1918.

which would necessitate Marshall's acting as President. They thought all executive business could be transacted by cable. A few Democratic Senators, however, thought a contingency might arise that would demand the Vice President's assumption of presidential power. The consensus of congressional opinion was that there was no immediate reason for Marshall's acting as President. If a serious emergency should develop, Marshall could be requested to act by congressional resolution although he could not be forced to comply. No member of Congress took Wickersham's suggestion for a writ of mandamus seriously.[35]

Although some argued that Wilson's absence was an inability,[36] the great weight of opinion supported the position that he would nevertheless be able to discharge the duties of his office.[37] A few took the position that the President was debarred from exercising his powers outside the District of Columbia, because the Act of 1790 establishing the seat of the Government provided that all official powers and offices be exercised within the District. Since the President could not

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[35] New York Times, November 28, 1918.

[36] See for example, the opinion of former Senator George F. Edmunds, a well known constitutional lawyer, New York Times, November 30, 1918; of Senator Sherman, 57 Cong. Rec. 24-26; of Senator Curtis, ibid., 25; letter of Hannis Taylor, ibid., 27-28; also a note in 145 Law Times 326 (August 24, 1918). During Garfield's illness it was frequently said in the form of dictum that absence was an inability. See for example the remarks of Senator Lapham, 14 Cong. Rec. 919.

[37] In addition to the opinions already mentioned, see Cole, op. cit., 180-189; the opinion of George Silzer, New York Times, December 1, 1918; David Hunter Miller, "Some Legal Aspects of the Visit of President Wilson to Paris," 36 Harvard Law Rev. 51 (November, 1922); "May the President Leave the Country," 87 Central Law Jour. 399 (December 6, 1918); "Absence of the President from the United States," 22 Law Notes 162 (December, 1918). See also "The Absence of the Sovereign from the Realm," 146 Law Times 113 (December 14, 1918); "Absence from the Country of the Head of State," 31 Law Notes 19 (April, 1927).

exercise his powers elsewhere, they argued, his absence created a de facto inability and his powers devolved on the Vice President during his absence.[38]

No concerted movement to seat Vice President Marshall in Wilson's place actually developed although a few Republicans attempted to embarrass the President. Senator Sherman of Illinois introduced a resolution declaring that the President's absence created a vacancy and the presidential powers and duties devolved on the Vice President until a President shall be elected.[39] Three other and similar measures were introduced, but none of the three sought to exclude the President from the exercise of his powers after his return to the United States.[40] One bill declared it unlawful for the President to leave the United States during his term of office and denied him the right to exercise his powers outside the District of Columbia.[41] When the

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[38] See the argument of Archibald R. Watson, a well known New York attorney. The pertinent section of the Act of 1790 fixed the District of Columbia as the seat of the Government and provided that "all offices attached to said seat of Government shall, accordingly, be removed thereto by their respective holders and shall after the said day, cease to be exercised elsewhere." Watson said that, if Vice President Marshall went on his proposed tour in the West and the Secretary of State went to Europe, Secretary of the Treasury McAdoo having resigned, Secretary of War Baker would become the acting President under the Succession Act of 1886. New York Times, November 28, 1918. See also "The President's Trip," 11 Lawyer and Banker 379-381 (November-December, 1918).

[39] S. Con. Res. 26, 65th Cong. Sherman said that, if his resolution passed, the Vice President would become the actual President until another was inaugurated March 4, 1921. 57 Cong. Rec. 27. See also the New York Times, December 3 and 4, 1918.

[40] H. J. Res. 353, 65th Cong., introduced by Rodenberg of Illinois, text in New York Times, December 3, 1918. H. J. Res. 105, 66th Cong., introduced by Walsh of Massachusetts. H. R. 12647, 66th Cong., introduced by McArthur of Oregon. The Walsh resolution defined inability as including absence of more than twenty-four hours. The McArthur bill had reference to absences exceeding thirty consecutive days.

[41] H. R. 7114, 66th Cong. See also H. R. 8362, 67th Cong., declaring an absence from the District of Columbia for more than forty-eight hours to be a disability.

President proposed to tour the western states in support of the treaty, two resolutions requesting him to stay in Washington were offered, but neither referred to the legality of his absence or contained a word about succession.[42] All of these measures died in committee.

In December of 1918, Representative Mann, the Republican floor leader, unequivocally said that he opposed any move to install Vice President Marshall in the White House during Wilson's absence, and promised that the House Republicans would take no concerted action to embarrass the President or to deprive him of his power to approve acts of Congress and exercise his other constitutional powers.[43] The Republicans took no concerted action but a few did raise the subject on the floor of Congress. Senator Sherman enumerated the powers which he thought the President could not exercise while abroad. Sherman argued that the Act of 1790, which established the District of Columbia as the seat of Government, was a further bar. He read a letter written by Hannis Taylor, a well known constitutional lawyer, to the effect that both the President and Secretary of State would abdicate their offices by leaving the United States. Senator Curtis agreed with Sherman and Taylor citing an Oklahoma precedent in support of their position.[44] The Democrats

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[42] H. J. Res. 185 and H. Res. 275, 66th Cong.; texts of resolutions at 58 Cong. Rec. 4637 and 4531, respectively.

[43] New York Times, December 4, 1918.

[44] 57 Cong. Rec. 24-28. The case cited was ex parte Hawkins [136 Pac. 991 (1913)], in which the court ruled that during the absence of the Governor, the powers and duties of his office devolve on the Lieutenant Governor. See also the remarks of Strong of Kansas, 58 Cong. Rec. 4531.

charged this to be a partisan conspiracy against Wilson and answered by enumerating instances of Republican Presidents' leaving the United States. Shafroth cited a Missouri case in which the court ruled that the Governor's absence from the state for a limited time did not devolve gubernatorial power on the Lieutenant Governor.[45]

President Wilson did not allow this heckling to deter him from either of his proposed trips. Vice President Marshall said that he would not assume the powers and duties of the Presidency unless directed to do so by a court of competent jurisdiction or by congressional resolution, but even then he would act with reluctance.[46] Neither the courts nor the Congress asked Marshall to act as President. Executive business was handled satisfactorily without the Vice President's succession. Attorney General Gregory ruled that the ten days during which the President is to pass on an act of Congress meant ten days after engrossed copies were actually placed in the President's hands.[47] All bills were sent to Paris by State Department messengers and the President notified the White House of the action taken.[48] President Wilson asked the Vice President to perform certain social functions for him and the

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[45] 57 Cong. Rec. 28-30, 72. The case cited was State ex rel. Crittenden v. Walker, 78 Mo. 139 (1883). See also 58 Cong. Rec. 4855-4856.

[46] New York Times, November 27 and 28, 1918.

[47] Ibid., December 24, 1918. For an exposition of this position see Cole, op. cit., 187-188; Miller, op. cit., 68-70. As authority for this ruling Cole cited a Massachusetts advisory opinion, 99 Mass. 636 (1868).

[48] Lindsay Rogers, "The President's Illness," 14 Am. Pol. Sci. Rev. 87-88, n. 7 (February, 1920); Lindsay Rogers, "Power of the President to Sign Bills," 30 Yale Law Jour. 1, 4, n. 6 (November, 1920).

Vice President complied.[49] The Cabinet continued to meet during Wilson's absence, the Vice President presided over the first several meetings, and the President directed the first meeting by wireless.[50] If absence from the United States were a de facto inability before the day of modern communication, it is not necessarily an inability in the twentieth century. Wilson's trip to Europe proved this.

Franklin Roosevelt and Harry Truman have firmly established the precedent that mere absence from the United States is no inability such as to call for the devolution of presidential power.[51] In spite of occasional demands for a constitutional amendment providing for the devolution of executive power on the President's successor in case of the President's absence,[52] it

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[49] For example, Marshall abandoned his western trip and stayed in Washington to receive a Japanese Prince, a task which the President asked Marshall to perform in his stead. New York Times, November 30, 1918. Similarly Marshall represented Wilson at Theodore Roosevelt's funeral. Ibid., January 8, 1919.

[50] At the beginning of the first meeting Marshall explained that he was presiding at Wilson's request, that he was doing so informally and unofficially and was not undertaking to exercise any official function or duty. Marshall astonished his audience by saying that he had been interested in various opinions offered by constitutional lawyers as to whether or not he was rightfully entitled to the Presidency. Not knowing just where he stood, he said, he wrote to one Newt. Plum, a constable in Indiana, to ask his advice. Plum replied: "The President by leaving the country loses his office but retains the salary." Marshall said, "under these conditions I don't want anything to do with the office." [New York] Sun, December 10, 1918.

[51] In 1936 President Roosevelt went to Buenos Aires, 6,000 miles from Washington, the farthest any President heretofor had been from the Capital. Before leaving Roosevelt let it be understood that there was to be no acting President during his absence. At the time Vice President Garner returned to Washington, but the Secretary of State was also out of the country. Time (December 7, 1936), 12. Roosevelt broke another precedent in 1935 by leaving the country when the Vice President was out of the country also. New York Times, October 17, 1935.

[52] See for example, "Disability of the President," 23 Law Notes 141, 142 (December, 1919).

is no longer seriously suggested that "inability" covers absence. Franklin Roosevelt is said to have once told Harley Kilgore that he wished the Vice President could be given authority to act for the President while the latter was out of the country. This, he said, would give the President an opportunity for a vacation. As the Constitution stands, he thought, a President must keep up with daily work even though he is taking a vacation on the high seas.[53]

State precedents on the absence of the Chief Executive from the state are conflicting. No state court has held mere absence to be an inability which devolves executive power on the Governor's successor. In some cases, in which the state constitution specifically mentions the Governor's absence to be a cause for the devolution of executive power, the courts have held that mere absence from the state is sufficient to justify the exercise of such power by the successor.[54] Usually, however, the state courts have held absence to include only effective absence which would injuriously affect public business.[55] This would seem to be the proper rule to apply if the President's absence is to be included within the term "inability." In any case, usage has ruled out the possibility of

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[53] This previously unpublished wish of Franklin Roosevelt was discussed by members of Congress in connection with the presidential succession measures introduced in the Seventy-ninth Congress. Newsweek (July 23, 1945), 17.

[54] State ex rel. Attorney General v. Barrow, 29 La. Ann. 243 (1877); Montgomery v. Cleveland, 134 Miss. 132 (1923); Walls v. Hall, 202 Ark. 999 (1941); see also obiter dictum in People ex rel. Tennant v. Parker, 3 Neb. 409 (1872).

[55] State ex rel. Crittenden v. Walker, 78 Mo. 139 (1883); Louisiana ex rel. Warmoth v. Graham, 26 La. Ann. 568 (1874); State ex rel. Olson v. Lahiff, 146 Wisc. 490 (1911); Watkins v. Mooney, 114 Ky. 646 (1903); Markham v. Cornell, 136 Kan. 884 (1933).

considering mere absence an inability to discharge the powers and duties of the Presidency.

In considering what constitutes an inability, the last question is whether or not impeachment is an inability causing the devolution of presidential power on the Vice President or designated officer.[56] The intent of the framers of the Constitution seems to have been that an impeached President continue to exercise his powers until removed. The papers of the Committee of Detail include a note in James Wilson's handwriting to the effect that in case of the President's impeachment his successor is to exercise presidential power until the President is acquitted.[57] None of the various drafts of the succession clause, however, mentioned impeachment as a cause for the devolution of executive power on the President's successor, and the Convention specifically rejected a motion providing that persons impeached be suspended until tried and acquitted.[58] Although Madison spoke in the Philadelphia Convention against suspension of the President, in the Virginia Convention he said that an impeached President could be suspended until acquitted and the legislature could make an interim appointment.[59] State courts

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[56] H. H. Sawyer, "The Presidential Succession," 16 Am. Mercury 129, 131 (February, 1929). Sawyer suggests that the power to remove may carry with it the lesser power to suspend during the trial to remove.

[57] Farrand, op. cit., II, 172.

[58] Ibid., II, 612-613. The vote was eight to three. The objection was that it would make the President too dependent on the legislature. Madison pointed out that such intermediate suspension would empower the House of Representatives to make way for an acting President who might be more favorable to its views.

[59] Jonathan Elliot, The Debates in the Several States (1881), III, 498.

have ruled that the impeachment of the Governor has the effect of devolving gubernatorial power on his successor; but in every case the state constitution specifically mentioned impeachment as a cause for such devolution.[60] The succession clause of the Federal Constitution does not mention impeachment. The question then is whether impeachment is an "inability."

During the impeachment of Andrew Johnson, it seems not to have been thought that impeachment was an inability. Johnson continued to act as President while under impeachment and Congress made no attempt to suspend him during the trial. Suspension would have placed Congress in a delicate position since such action would have favored Ben Wade, the President pro tempore of the Senate, who was a member of the radical conspiracy to remove the President. The legality of Johnson's exercise of presidential power during this period seems never to have been seriously questioned.[61] Thus the single precedent follows the clear intent of the Constitution that impeachment is not an inability causing devolution of presidential power on the successor.

C. WHO IS TO DETERMINE THE EXISTENCE AND REMOVAL OF AN INABILITY?

Having decided on the principles governing the meaning of "inability," the next problem is to decide who is to determine the existence and removal of an inability. The records of the Federal Convention do not reveal the intent of the framers of

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[60] Opinion of the Judges, 3 Neb. 463 (1872); New York ex rel. Robin v. Hayes, 163 App. Div. 725 (1914); State ex rel. Trapp v. Chambers, 96 Okla. 78 (1923).

[61] For example, Senator Lapham of New York thought that the Constitution was defective because it failed to make provision for the devolution of presidential power on the Vice President while the President was under impeachment, but he did not suggest that the Constitution contained such a provision in the inability clause, 14 Cong. Rec. 916.

the Constitution on this subject. John Dickinson raised the question, but none of his colleagues offered an answer.[62] Before 1881, no attention was given to the matter. Since that date there have been five theories on the means of establishing disability and its removal: (1) The power is vested in the Vice President or officer upon whom the presidential functions devolve. The proponents of this theory are divided among themselves: Some say the power is vested in the Vice President or designated officer alone. Others say the Vice President is to take the initial action which is subject to ratification by the Congress. Before the ratification, they say, he is the de facto President, but after the ratification he is the de jure President. (2) The courts should decide when the President is disabled. (3) The power of determination is vested in the Congress. (4) The Congress should provide the rules of evidence necessary to establish inability and create a tribunal to decide specific cases. (5) The President, acting President, or the Cabinet should make the decision.

In 1881 the great weight of opinion favored the theory that the successor is to determine when the President is disabled. While Garfield was incapacitated, most students of the Constitution said that the Vice President was obligated to exercise the powers and perform the duties of the President. This was his duty, they said, just as it was his duty to preside in the Senate, and no enabling action by the courts, the Congress, the

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[62] Farrand, op. cit., II, 427.

Cabinet or the President was necessary.[63] Both Judge Trumbull and former Senator Butler held that the determination was to be made by the Vice President. Trumbull thought that there was no need for providing a formal means of determining inability. In Trumbull's opinion the disability must be so notorious that no one can reasonably doubt its existence. In such a case the Vice President is authorized to assume executive power if important public business requires executive action. When these conditions exist, the Cabinet should notify the Vice President just as in case of the President's death, but there is no constitutional requirement for this notification. It is only custom in case of the President's death and desirable in case of his inability. It is extra-legal and adds nothing to the Vice President's right to exercise presidential power.[64]

Trumbull is probably correct in saying that the decision belongs to the Vice President in the first instance. Since the duty of acting under certain conditions of fact is imposed upon him, his official discretion extends to the determination of whether the conditions in fact exist. It is a well established rule of law that in case of contingent grants of power, the one to whom the power is granted is to decide when the

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[63] For example: Butler, op. cit., 431-433; Henry Davis, op. cit., 13-15; Governor Hendricks of Indiana, New York Herald, August 21, 1881; Governor Long of New York and Judge Shellabarger, ibid., September 5, 1881; Attorney Blair of Falkland, Maryland, ibid., September 6, 1881; former Attorney General Schoonmaker, ibid., September 17, 1881; Representative George M. Robeson, Boston Evening Transcript, September 2, 1881; former Senator Eaton of Connecticut, New York Times, September 2, 1881; Senator Garland, 13 Cong. Rec. 139; Senator Lapham, 14 Cong. Rec. 917. See also John Brooks Leavitt, New York Times, December 6, 1921.

[64] Trumbull, op. cit., 420-421.

emergency has arisen. Thus the Vice President or the "officer" designated by law to act as President is constituted the judge of the Executive's inability in the first instance and is bound to act according to his interpretation of the facts. The Constitution provides that the power to act as President belongs to the Vice President or designated officer when the President is disabled. Someone must decide whether the President is disabled; and, since the Constitution mentions only the successor, he is the judge of the facts.[65]

Some have objected that allowing the successor to make the decision would be dangerous.[66] But history has shown that the Vice President is reluctant rather than eager to assume presidential power. If past experience can be taken as a reliable indication of the attitude of future successors, there is no danger of his usurping the President's power for light and transient reasons.[67] To say that the successor may abuse the power to determine the President's inability is not to deny the power, because there is no power which is not susceptible of abuse. The courts say that in an elective government, in which popular opinion is a force, the danger of abuse of power is remote. The President's successor must be presumed to have an honest devotion to the public interest. Popular election and

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[65] Martin v. Mott, 12 Wheat. 19, 31-32 (1827); The Aurora v. United States, 7 Cr. 382 (1813); Field v. Clark, 143 U. S. 649, 682-694 (1891); Hampton and Co. v. United States, 276 U. S. 394, 405-410 (1928). See also "Disability of the President," 23 Law Notes 141, 141-142 (December, 1919); George M. Robeson, New York Tribune, September 2, 1881.

[66] For example: Senator Hoar of Massachusetts, Boston Evening Transcript, September 5, 1881; Governor Jackson of West Virginia, New York Herald, September 9, 1881; and Senator Jones of Florida, 13 Cong. Rec. 190.

[67] See pp. 82-109, supra.

the watchfulness of Congress are further guards against usurpation.[68] The danger of the Vice President's abuse of power should not be exaggerated. It may be assumed that Congress would not grant funds to a usurper, approve his appointments, or cooperate with him.

The Constitution seems to vest in the successor the power of deciding when the President is disabled, yet a situation might arise in which the judgment of the successor would be conditioned by his sense of propriety to the detriment of the public interest. Some have suggested that the Vice President might be relieved of the embarrassment of taking the initiative by some kind of judicial action. This suggestion raises the problems of whether the question of the President's inability is justiciable and how the question may be raised in court.

During the illness of President Garfield, Theodore Dwight said that the President's inability was a judicial question and thus was to be determined in the courts.[69] At the time of President Wilson's trip to Europe, Former Attorney General Wickersham suggested that Wilson's inability might be determined on a petition for mandamus directing the Vice President to act as President.[70] Only four commentators, Burgess, Tucker, Watson, and Willoughby, consider the problem of who is to determine the President's disability; and three of them say the Federal courts can perform this function. John Randolph Tucker thinks the Federal courts can be given jurisdiction to make this determina-

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[68] Martin v. Mott, 12 Wheat. 19, 31-32 (1827).

[69] Dwight, op. cit., 440.

[70] See p. 148, supra.

tion because it is a question arising under the Constitution.[71] David K. Watson quotes approvingly the state case, Attorney General v. Taggart. In that case the highest court of New Hampshire ruled that the existence of an inability may be determined on a petition for mandamus brought by the Attorney General against the Governor's successor to compel the latter to act as Governor.[72] John W. Burgess says that the Supreme Court could decide this but the determination would more properly be made by the Congress.[73] The decisions of several state courts actually to take jurisdiction in such cases lends support to the thesis that the question is justiciable.[74]

The theory of justiciability has found some support in Congress. Several bills have been introduced giving the Supreme Court jurisdiction to determine the President's disability.[75]

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[71] Tucker, op. cit., II, 713.

[72] Watson, op. cit., I, 893-895; 66 N. H. 364 (1890).

[73] John W. Burgess, Political Science and Comparative Constitutional Law (1891), II, 240.

[74] In addition to Attorney General v. Taggart, see also State of North Dakota ex rel. Olson v. Langer, 65 N. Dak. 68 (1934).

[75] H. R. 3429, 47th Cong., providing that any citizen of the United States could petition the Supreme Court and ask for a rule on the President to show cause why the presidential powers should not devolve upon his successor. The bill also provided that the Supreme Court was to declare the removal of the disability.

S. 2352, 47th Cong.; S. 579, 48th Cong.; S. 630, 49th Cong.; all of which provided that two members of the Cabinet could petition the Chief Justice of the United States whereupon the Supreme Court was to hold a hearing to determine whether or not the alleged inability existed. The same procedure was to be followed for determining the removal of the inability.

H. R. 12609, 66th Cong.; H. R. 2274, 67th Cong.; H. R. 547, 68th Cong.; which provided that the Supreme Court was to be set in motion by a resolution of either house of Congress. Once the

It is certain that the Supreme Court could not be given original jurisdiction to make this determination, as the Court has already decided that its original jurisdiction cannot be enlarged.[76] When this objection was raised during the congressional hearings in 1921, Representative Rogers of Massachusetts, the author of the plan, had no answer. At the time, Representative Volstead suggested that the lower courts be given jurisdiction. In answer to Volstead, Representative Fess said that a constitutional amendment was absolutely necessary if the courts were to be given this jurisdiction because the question was political and not justiciable.[77] A number of competent lawyers have agreed with Fess on this point.[78]

It seems almost certain that no court has power to issue a writ of mandamus to the Vice President or designated officer

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disability was declared, the Supreme Court was to determine on its own motion or upon the request of either house, whether the President's inability had been removed. Of course, no federal court can on its own motion enquire into the action of another branch of government. Quackenbush v. United States, 177 U. S. 20, 25 (1900).

All of the above mentioned bills were killed in the standing committee to which they were referred in the house of origin.

[76] Marbury v. Madison, 1 Cr. 137 (1803). See also the opinion of Judge Otto, New York Herald, August 21, 1881; and Lindsay Rogers, "Presidential Inability," 2 Review 481, 483 (May 8, 1920).

[77] Hearings on H. R. 12609..., op. cit., 29-35, 48. Fess introduced resolutions to amend the succession clause by adding: "Such disability to be determined by the Supreme Court when authorized by concurrent resolution of Congress. The Vice President is authorized to call Congress into special session for this purpose upon the recommendation of the Cabinet." H. J. Res. 297, 66th Cong. and H. J. Res. 9, 67th Cong. Both resolutions were killed in the House Committee on the Judiciary.

[78] For example: Cooley, op. cit., 426; Butler, op. cit., 431-433; George M. Robeson, New York Tribune, September 2, 1881; Judge Shellabarger, New York Herald, September 5, 1881. See also dictum in a Louisiana case in which the state court said that the federal courts have no power to enquire into the title of any person to the office of President. State v. Long, 174 La. 169 (1932).

directing him to act as President during the latter's inability. The judiciary cannot interfere with executive action when the executive officer is authorized to exercise his judgment and discretion. Only in cases in which the executive officer is to perform a ministerial act can the courts direct the performance of an executive act by proceeding in mandamus. The province of the courts is to decide on the rights of individuals, not to inquire how the executive officers perform the duties in which they have discretion. Questions which the Constitution submits to the executive branch cannot be decided by the courts.[79] Since the successor's exercise of presidential power is not purely ministerial, the question of the President's inability cannot be determined in an action for mandamus.

To say that the courts cannot be given equity jurisdiction to pass on the question of the President's inability is not to say that the courts can never pass on the question. If properly raised in a case in which individual rights depend on the determination of this question, the courts may be able to pass on whether the decision of the successor was proper.[80] For example, one who was convicted under a law signed by the acting President might properly question the validity of the law on the ground that the President was not disabled and thus the Vice President could not sign the law. Similarly an individual

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[79] Gaines v. Thompson, 7 Wall. 347 (1869); Dudley v. James, 83 Fed. 345 (1897); Mississippi v. Johnson, 4 Wall. 475 (1867); Carrick v. LaMar, 116 U. S. 423 (1886); See also Cole, op. cit., 194.

[80] In cases in which individual rights depend on executive action, the individual has the right to resort to the law for a remedy. Marbury v. Madison, 1 Cr. 137, 170 (1803); United States ex rel. Boynton v. Blaine, 139 U. S. 306, 326 (1891); In re: Cooper, 143 U. S. 472, 503 (1892). But the question must arise in a case involving the rights of actual litigants. Clough v. Curtis, 134 U. S. 361, 372 (1890).

might question an action of the President, alleging his inability at the time the action was taken. Perhaps this method could be used to pass on the legality of executive acts and indirectly on the inability of the President.[81] But it would do nothing to relieve the Vice President of the embarrassment of determining the President's inability in the first instance.

Another suggestion has called for congressional determination of the President's inability.[82] John W. Burgess thinks the matter can best be handled by a concurrent resolution declaring when the inability exists and when it ceases.[83] In 1881, Governor Jackson of West Virginia said that inability is a political question and Congress is the only tribunal in the country which can settle political questions.[84] Tucker suggests that the power to remove for inability by impeachment may furnish a method for deciding whether a disability exists or not.[85] Cooley argues that Congress is to determine inability, because the Constitution provides for this under the elastic clause, reason dictates it, the decision of Congress alone can be final,

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[81] On the other hand, the courts might decide that the question was political and submitted to the successor's decision alone. If the courts decide this, they will hold that they are bound to follow the successor's decision. Luther v. Borden, 7 How. 1 (1849).

[82] See for example Dwight, op. cit., 440-441; W. Jeffreys, New York Tribune, September 1, 1881; Charles Jones, 14 Cong. Rec. 1007. The provisional constitution of the Confederate States actually did contain such a provision. Under Article II, sec. 1, cl. 4, the President's inability was to be determined by a two-thirds vote of the Congress; but this provision was omitted in the permanent constitution. Jefferson Davis, The Rise and Fall of the Confederate Government (1881), I, 644 and 664.

[83] Burgess, op. cit., II, 240.

[84] New York Herald, September 9, 1881. Jackson thought the public interest was suffering as a result of Garfield's illness and urged that Congress be convened at once.

[85] Tucker, op. cit., II, 712.

and Congress is in the best position to know when there are public affairs needing executive attention. In Cooley's opinion possession of the power by Congress is not dangerous because Congress will not dare to displace a President contrary to public opinion. Cooley says it can be done by general law, but each case is peculiar and can best be handled by special law. Even if the President is unable to sign the act, Cooley holds that it will have the force of law. He thinks Congress has "inherent power" to provide for the exercise of executive power at all times. He points out that in 1688, Parliament passed succession legislation which was not signed by the King. In 1788 and 1808 Parliament took action to determine the King's inability.[86]

Attorney Lavery points out that Cooley's English precedents are not in harmony with separation of powers, and consequently they are not necessarily good American law. He agrees with Judge Trumbull that Congress has no such power. It would, he declares, be undesirable to place the President's tenure at the mercy of Congress.[87] The theory more frequently advanced in favor of congressional power is that Congress can provide by general law a method for determining the President's inability rather than make the decision itself.

A number of students of the Constitution have argued that Congress has power under the elastic clause to provide a method for declaring the President's inability. They say that Congress

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[86] Cooley, op. cit., 425-427.

[87] Lavery, op. cit., 13-17 [Lavery was the legislative draftsman for the Illinois Constitutional Convention, 1920-1921]; Trumbull, op. cit., 420-422.

has this power just as Congress has power to provide a method for the President's resignation. They do not think that the grant of power to Congress to designate a successor in case of double vacancy or inability necessarily excludes congressional power to legislate on the subject of presidential inability. The proponents of this theory maintain that the power to provide for determination of inability is a power necessary and proper to carry into execution the powers vested in the President. Since providing for the determination of presidential inability is necessary to ensure that the executive power does not fall into abeyance, they say the power falls clearly within the elastic clause.[88] A few have even gone so far as to say that, if the President were unable to summon Congress into special session and sign the act once passed, Congress could assemble on its own motion and the act would have the force of law without the President's signature.[89]

Whether the Congress has power either to determine actual inability or to provide a means for deciding such cases is questionable. Opinion on the matter is divided, but the weight of opinion seems to be that Congress has no such power. The speeches in Congress have nearly all denied its power to provide for cases of inability on the ground that the delegation

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[88] For example: Former Attorney General Schoonmaker, a strict constructionalist, New York Herald, September 17, 1881; former Judge Shellabarger, ibid., September 5, 1881; former Vice President Colfax, New York Tribune, September 8, 1881; George M. Robeson, ibid., September 2, 1881; George Ticknor Curtis, op. cit., 583 and 631; Senator Maxey, 13 Cong. Rec. 131, and 14 Cong. Rec. 915-916; Senator Barkley, 93 Cong. Rec. (unbound) 7941.

[89] Curtis said there could be no special session unless called by the President and the President must pass on this act the same as on all others. Op. cit., 631. Of course the act could become law without the President's signature in ten days exclusive of Sundays after it is presented to him.

of power to Congress to name a successor beyond the Vice President excludes all other congressional power to deal with presidential succession.[90] Since this is the case and since there is no authoritative answer to the question, another and less questionable means of determining inability should be sought.

One suggested means is for the Cabinet to declare the President's inability by notifying the Vice President just as it notifies him when the President dies. Former President Grant suggested that Garfield's physicians certify the President's inability to the Cabinet, which could then consider the certificate and forward it to Vice President Arthur accompanied by a request that he act as President during Garfield's illness.[91] To this suggestion Governor Jackson of West Virginia answered that the Cabinet could not and should not decide the matter since it is the creature of the President and is only advisory.[92] During Wilson's illness two bills were introduced to vest this power in the Cabinet. The principal legal question was whether Congress had power to authorize the Cabinet to determine the President's inability. Whether the Cabinet had power without the act of Congress was of secondary interest.[93]

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[90] It is a well established rule of construction that enumeration in the Constitution of certain powers denies all others unless incident to an express power and necessary to its execution. United States v. Harris, 106 U. S. 629, 635-636 (1883); Joseph Story, Commentaries on the Constitution of the United States (1833), III, § 1243. See n. 25, supra.

[91] Boston Evening Transcript, September 7, 1881.

[92] New York Herald, September 9, 1881. See also Butler, op. cit., 431; George M. Robeson, New York Tribune, September 2, 1881.

[93] H. R. 12629, introduced by Madden and H. R. 12647, introduced by McArthur, 66th Cong. The Madden bill provided that whenever the President became unable to perform his duties for six consecutive weeks, the question of his inability was to be made the subject of official inquiry by the Cabinet. The bill

Hearings on these bills disclosed the belief that the Cabinet was the safest body in which to vest the power. Determination by the Cabinet would cause the least friction because the decision would be made by the President's own appointees. Cabinet members are the President's friends and are not eager to displace him, and the Cabinet is in the best position to know whether the President is really disabled or not.[94] In spite of this, Reavis of Nebraska objected to having so great a power vested in a small group of appointed officials.[95] Husted of New York thought the bills gave too much discretion to the Cabinet. He favored having Congress define inability and vest in someone the power simply to find the facts under rules of law.[96]

The Cabinet notifies the Vice President when the President dies. It should notify him in the analagous situation of the President's disability. But it is only custom that requires the Cabinet to notify the Vice President in case of the President's death. The Cabinet is under no legal obligation to do so; and the notification adds nothing to the Vice President's powers. Under the Constitution the presidential powers devolve on the Vice President without the notification. It has been suggested

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empowered the Secretary of State to convene the Cabinet for this purpose, and provided that determination was to be made by majority vote, as was the determination of the removal of the inability. The McArthur bill contained similar provisions. Madden thought his bill superior to McArthur's because it made the Secretary of State legally responsible for calling the Cabinet together in case of the President's inability. He objected to Wilson's ruling that the President's inability prevented the Cabinet from functioning. Hearings, op. cit., 7. See chap. III, supra.

[94] Hearings on H. R. 12609...., op. cit., 5, 10-11, 35.

[95] Ibid., 5.

[96] Ibid., 8.

that a statute might serve as the legal basis for the Cabinet's determination of vacancy and inability in the Presidency, but it is doubtful if Congress has this power.

If usage had not established a succeeding Vice President as the President, nine times out of ten the President would merely invite his successor to act for him during his disability. If the President were unable to declare his inability or refused to do so, the duty would fall on his successor.[97] Yet a situation might arise in which the successor would be deterred by his sense of propriety from deciding that the President was disabled. Congress should, therefore, empower some officer to inquire into the President's inability and report to the successor.[98] This would not be contrary to the spirit or practice of the Constitution. The successor would be relieved of any personal embarrassment caused by taking the initiative, but he would still be responsible for making the decision. Such legislation would be a guide to the President's successor. It would dispel the confusion now existing in the public mind.[99] Once the successor assumes presidential power, perhaps the validity of his acts which affect private rights can be tested in the courts. The same would be true in case of the removal of the

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[97] On this point see: Butler, op. cit., 431-433; Willoughby, op. cit., III, 1470; former Vice President Colfax, New York Tribune, September 8, 1881; Representative Robeson, ibid., September 2, 1881; Governor Bigelow of Connecticut, New York Herald, September 6, 1881; Senator Garland, 13 Cong. Rec. 139.

[98] John Brooks Leavitt thought this inquiry might properly be made by the Speaker of the House. New York Times, December 6, 1921.

[99] See the opinions of Judge Shellabarger and Governor Long, New York Herald, September 5, 1881; former Attorney General Schoonmaker, ibid., September 17, 1881; and Representative Madden, Hearings on H. R. 12609...., op. cit., 7.

President's inability. If properly raised, the courts might pass on the validity of the acts of either or both claimants to the presidential power.[100]

This solution is in accord with the practice of the several states. No state constitution or law provides a formal method for determining the Governor's inability. The Governor usually asks his successor to act; but, if he does not, the power of decision rests with the one on whom the gubernatorial power devolves. A formal proclamation is not necessary before the Governor's successor can act.[101] In most states the courts will pass on the validity of the successor's decision if the question is properly raised in a case involving private rights.

Even if Congress has power to provide a method independent of the successor, it probably would not be desirable for Congress to provide such a method for determining inability. The power of acting as President is to be exercised in emergencies and in circumstances which require prompt action. Time-consuming litigation to decide whether the successor can act as President or not might mean that the public interest would suffer beyond repair. A prompt and unhesitating decision is absolutely necessary to attain the object of the Constitution.[102] One thing is certain. Congress should not provide a method which would resemble an elaborate "trial." Such a method would likely cause unnecessary excitement and division in the country. It seems much wiser to trust to the judgment of the successor and

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[100] Willoughby, op. cit., III, 1470.

[101] Walls v. Hall, 202 Ark. 999 (1941).

[102] Martin v. Mott, 12 Wheat. 19, 31-32 (1827).

to the political instincts of the people when the case arises.[103]

D. SUMMARY AND CONCLUSION

The usage which recognizes a succeeding Vice President as the President has practically nullified the provision for the exercise of executive power when the President is disabled. Theories which restrict the meaning of inability are based on the assumption that the Vice President would become President and thereby oust the disabled President. Theories favoring a formal method for determining disability are based on the same assumption. If it were recognized that the acting President did not dispossess the disabled and prior-entitled individual, the matter would usually be settled by the disabled person's inviting his successor to act for him. The Constitution vests the power of decision in the successor in case the disabled person cannot or will not recognize his inability. Since the Constitution does vest the power of decision with the successor, it is doubtful if Congress could divest him of this power or limit his exercise of it. Congress could nevertheless relieve him of the embarrassing duty of taking the initiative. Congress could do this by a concurrent resolution requesting the successor to act as President. It could also do this by empowering the Cabinet or some officer to inquire into the facts and advise the successor of the findings. The responsibility for reaching the decision, however, would rest with the successor as provided in the Constitution. It seems that the power to decide the President's disability rests safely with the successor, although one

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[103] This is Lavery's thesis, op. cit., 13-17.

who is to succeed to the presidential powers may be guided by prejudice.[104]

It is submitted that the problem of presidential inability could be solved within the framework of the Constitution by a concurrent resolution declaring the following general principles: (1) One who acts as President because of the inability of the President or Vice President does so only until the inability of the prior-entitled individual is removed. (2) Inability shall be construed to include any de facto inability whatever its cause or duration. (3) The powers and duties of the President shall devolve upon the successor only when the urgency of public business requires executive action and the President is unable to act. (4) The one on whom the presidential power devolves is the judge of the facts.

This congressional declaration would add nothing to the succession clause, but it would remove the doubt and confusion which now surround that clause. It would give to the inability clause the practical interpretation which the framers of the Constitution appear to have intended. For this reason, a concurrent resolution would be sufficient. In light of our constitutional development, however, declaration of these four

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[104] Objection has been raised to every plan for determining the President's inability. Elmer Davis rejects the idea that the Vice President, the Cabinet, the Congress, or the courts can have anything to do with it, but he offers no suggestion as to who can make the determination. Op. cit., 26-27. A few have argued that no one has power to determine the President's inability. See for example, Dittenhoefer, New York Herald, September 13, 1881, and Fess, Hearings on H. R. 12609..., op. cit., 50. Although Cooley, Butler, Dwight, and Trumbull did not agree in their articles for the North American Review on how the President's inability was to be determined, none of them thought a constitutional amendment was necessary to provide a means.

principles by constitutional amendment may be desirable. Once this has been done, Congress should provide for some means of official notification to be sent to the successor to relieve him of the delicate task of taking the initiative. The decision need not, however, await or be bound by such notification. Declaration of these four principles and provision for notification would solve the inability problem more satisfactorily than any of the other solutions suggested to date.

CHAPTER V

THE POWER OF CONGRESS TO PROVIDE FOR SUCCESSION BEYOND THE VICE PRESIDENT

Since vacancy or inability might occur in the office of President and Vice President simultaneously, the Federal Convention incorporated a clause in the Constitution empowering the Congress to declare by law what officer should act as President in such contingency.[1] The Congress has passed three laws under this power, in 1792, 1886, and 1947. When the First Congress considered the problem of designating a successor, Aedanus Burke of South Carolina consulted a gentleman skilled in the laws of chance and was told that the President and Vice President were not likely to die during the same term more than once in eight hundred and forty years.[2] A case of vacancy or inability in the presidential office has never occurred when there was no Vice President able to serve, but during thirty-seven years and two months of the hundred and sixty years from 1789 to 1949, nearly one-fourth of the period, the office of either President or Vice President has been vacant and a statute has named the next person in line to act as President.[3]

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[1] Article II, sec. 1, cl. 5: "...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." See pp. 9-18, supra.

[2] 2 Annals of Cong. 1865.

[3] In addition to the seven Presidents who have died in office leaving unexpired portions of their terms totaling twenty-two years and nine months, seven Vice Presidents have died in office, and one, John C. Calhoun, resigned making a total of fourteen years and five months vacancy in the Vice Presidency. These figures are even more significant if analyzed according

A. PRESIDENTIAL SUCCESSION LEGISLATION, 1790-1947

When the First Congress undertook to name an officer to act as President in case of vacancy or inability in the office of both President and Vice President, Representative Smith of South Carolina pointed out that the acting President was to be an "officer of the United States." The House of Representatives discussed whether the President pro tempore of the Senate was such officer, but there is no record that any conclusion was reached on this point.[4] The poorly reported debates do not show that any other constitutional question was discussed. When Benson moved to designate the Chief Justice, meaning John Jay, Madison, having Thomas Jefferson in mind, immediately suggested the Secretary of State. Vice President Adams, the presiding officer in the Senate, reported that such a partisan spirit appeared between the supporters of the two rivals that the matter was dropped.[5]

The following year the subject was raised in the Second Congress, and after brief discussion the Law of 1792 was enacted.

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to period. During the five years from March 4, 1812, to March 4, 1817, the Vice Presidency was vacant nearly four years and two months. In the sixteen years from March 3, 1841, to March 4, 1857, the Presidency or Vice Presidency was vacant approximately ten years and six months. During the forty years from 1865 to 1905, vacancies in one or the other office totaled nearly sixteen years and eight months. See Appendix A of the present study; also H. Rept. 2493, 49th Cong., 1st sess., 3.

[4] 2 Annals of Cong. 1813, 1853-1866.

[5] Ibid., 1855-1856; John Adams, The Works of..., ed. Charles Francis Adams (1851), VI, 545-546. On this point in a letter to Thomas Dwight dated January 24, 1791, Fisher Ames wrote in part: "On the late debate on the bill to provide what officer shall act as President, when the two first offices shall be vacant, the ambition of Mr. Jefferson's friends was disclosed. They contended for him with zeal. That will have its share in the business of the session. All this is inter nos." Fisher Ames, The Works of..., ed. Seth Ames (1854), I, 93.

Section nine of this law provided that, in case of the removal, death, resignation, or inability of both the President and Vice President, the President pro tempore of the Senate, or, if the presiding officer of the Senate were not available, the Speaker of the House, was to act as President until the disability was removed or a President was elected. Section ten provided that when the offices of President and Vice President became vacant simultaneously, the Secretary of State was to notify the Governors of the states and the machinery for electing a President was to be brought into operation. Such a special election would be held only if the notification were made at least two months before the first Wednesday in December of the first three years of a presidential term.[6]

During the debates on this bill the only constitutional question raised was the question of who was an "officer" and thus eligible for designation.[7] Although there was serious doubt as to whether the presiding officer in either house was an "officer" in the constitutional sense, the President pro tempore of the Senate and the Speaker of the House were designated. This result is attributable to Hamilton's opposition to Jefferson, who was then the Secretary of State. This conclusion is supported by the testimony of Alexander Hamilton himself. In a letter to Colonel Carrington, he wrote:

> 'Tis evident, beyond a question...that Mr. Jefferson aims with ardent desire at the Presidential chair.... You know how much it was a point to establish the Secretary of State, as the officer who was to administer the gover nment in defect of the

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[6] I Stat. 240; Revised Stat. (1878), §146. See Appendix B.

[7] See pp. 202-212, infra.

> President and Vice-President. Here, I acknowledge, though I took far less part than was supposed, I ran counter to Mr. Jefferson's wishes; but if I had had no other reason for it, I had already experienced opposition from him, which rendered it a measure of self-defense.[8]

Arch-Federalist Fisher Ames confirms that the Secretary of State was not made successor to the President because of antipathy toward Jefferson:

> The Secretary of State is struck out of the bill for the future Presidency, in case of the two first offices becoming vacant. His friends seemed to think it important to hold him up as King of the Romans. The firmness of the Senate kept him out.[9]

William Rives, a partisan of Jefferson, also confirms that the desire of Hamilton's followers to keep Jefferson from the presidential chair caused the President pro tempore of the Senate to be named instead of the Secretary of State:

> That this decision proceeded mainly, if not exclusively, from feelings of personal and political emnity to the gentleman who then filled the office of secretary of State, and the jealousy entertained of him by the friends and partisans of the secretary of the treasury, is rendered apparent by the surviving memorials of the time.[10]

Again Rives writes:

> ....The great zeal shown to prevent the secretary of State being declared in the line of succession to so remote and shadowy an inheritance, arose from its connection with another question of present interest and feeling. It was the pretension of the secretary of the treasury and his friends, that, in analogy to the position of the first lord of the treasury in the English

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[8] Alexander Hamilton, Works of..., ed. Henry Cabot Lodge (1886), VIII, 261. Dated May 26, 1792. Italics Hamilton's.

[9] Ames, op. cit., I, 114.

[10] William C. Rives, History of the Life and Times of James Madison (1859-68), III, 223. Rives (1793-1868) was a political leader of the Jeffersonian tradition in Virginia and had studied law and politics under Jefferson for several years after 1809. Rives' volume here cited is based on much detailed study of documents and is done with sound scholarship.

> cabinet, he ought to be considered prime minister and head of the cabinet here. A legislative declaration that the secretary of State should succeed to the Presidency in the event of a double vacancy in the offices of both President and Vice-President, however improbable the actual occurrence of such a contingency, would, it was thought, operate as a negative to this pretension.[11]

After passing the Act of 1792, Congress did not concern itself with the matter of presidential succession until 1820, when Senator Wilson of New Jersey offered a resolution instructing the Senate Committee on the Judiciary to inquire whether the law should be amended. The committee reported on February 1, 1821, that it would be inexpedient to legislate further on the subject at that time.[12] In 1842, soon after the death of President Harrison, the Senate Committee on the Judiciary was again commissioned to inquire whether any further legislation was requisite to define the powers and duties of the Vice President and the President pro tempore of the Senate when the Presidency was vacant and to study the mode of succession when both of the first offices were vacant. The Committee did not report.[13]

The seriousness of the problem was emphasized in the sixteen years from 1841 to 1857. In the course of this period the presidential or vice-presidential office was vacant ten and a half years. In 1856, Senator Crittenden, who had been Attorney General in the Harrison-Tyler Cabinet, proposed a resolution directing the Committee on the Judiciary to examine the Act of 1792 for constitutionality, propriety, and adequacy

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[11] Ibid., III, 224n. Italics Rives'.

[12] S. Rept. 74, 16th Cong., 2nd sess.

[13] S. Jour., 27th Cong., 2nd sess., 64.

and to inquire whether further legislation was necessary and proper.[14] Six weeks later Andrew Butler, speaking for the Committee, reported the Act of 1792 to be constitutional in all of its parts but recommended extending the line of succession by adding the Chief Justice and the other members of the Supreme Court according to seniority of commission. Under the plan the Chief Justice was not to succeed if the vacancy were caused by removal. The bill was read twice and discussed in the committee of the whole; but no further action was taken.[15]

Lincoln's death left a vacancy of nearly four years and again Congress turned its attention to designating a successor in case of the Vice President's removal, death, resignation, or inability. In 1865, M. Russell Thayer introduced a bill to amend the Act of 1792 as suggested by Andrew Butler nine years before.[16] The House Committee on the Judiciary reported the bill with an amendment which provided that, if Congress were not in session when vacancies occurred in the offices of both President and Vice President, the acting President was to convene Congress and Congress could order a special election by concurrent resolution. George Boutwell, reporting for the

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[14] S. Jour., 34th Cong., 1st & 2nd sess., 394-395. For Crittenden's brief comments on his resolution, see Cong. Globe, 34th Cong., 1st sess., 1476.

[15] S. Rept. 260, 34th Cong., 1st sess. The committee really favored succession running through the Supreme Court; but giving due regard to usage, the Committee would name the President pro tempore of the Senate first and the Speaker of the House second. The members of the Committee were: Andrew Butler of South Carolina (chairman), Isaac Toucey of Connecticut, James Bayard of Delaware, Henry Geyer of Missouri, Robert Toombs of Georgia, and George Pugh of Ohio. The committee submitted a bill (S. 428) embodying its recommendation. Text of the bill found on pp. 6-7 of the report.

[16] H. R. 2, 39th Cong.

committee, pointed out that the Act of 1792 made a special election mandatory. If the Act of 1792 were not amended, the coincidence of presidential and congressional elections might be broken. This, he said, was the reason for the amendment proposed by the Committee. Andrew J. Rogers of Pennsylvania objected to this proposal because it would make the acting President a creature of the Congress. Congress could call an election if the successor were considered unsatisfactory, but if satisfied with the acting President no election need be called.[17] In spite of Rogers' objection, the bill passed the House;[18] it was killed in the Senate.[19]

The impeachment of Andrew Johnson emphasized the dangers in designating either the President pro tempore of the Senate or the Chief Justice, both of whom are members of the tribunal by whose decree vacancy may be produced. Johnson, shortly after being acquitted, asked the Fortieth Congress to pass a constitutional amendment putting the Cabinet officers in the

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[17] Cong. Globe, 39th Cong., 2nd sess., 691-692.

[18] Ibid., 1288.

[19] The bill was referred to the Committee on the Judiciary along with a resolution introduced by Henry B. Anthony directing the Committee to study the adequacy of existing statutes on presidential succession. Lyman Trumbull from the Committee reported adversely on both the bill and the resolution. The committee thought the matter should be taken up in the next Congress but killed the measures because the 39th Congress was to expire in a few days and the Committee could reach no agreement on the matter. S. Jour., 39th Cong., 2nd sess., 30, 302, 304, 365.

A similar bill (H. R. 982) was introduced in the Fortieth Congress by John C. Churchill, but was killed in the House Committee on the Judiciary. The bill also provided for amendment of the special election provision of the Act of 1792 by stipulating that a special election be called only if the vacancy occurred more than eighteen months before the end of a presidential term. The President thus elected was to have a four year term. Summary of the Churchill bill, Cong. Globe, 40th Cong., 2nd sess., 2224-2225.

line of succession.[20] The proposal fell on deaf ears, but it was embodied in several bills in later Congresses.[21] Although no concerted movement to legislate on the subject developed until 1881, Johnson's proposal ultimately became the Presidential Act of 1886.

One shortcoming of the Act of 1792 was revealed in the alleged Republican conspiracy to put Ben Wade in the White House by removing Andrew Johnson. Two other defects were revealed in the events from 1881 to 1886. First, if the Presidency and Vice Presidency became vacant between sessions of Congress, there might be neither a President pro tempore of the Senate nor a Speaker of the House to act as President. This was the case when President Garfield died and again when Vice President Hendricks died. Second, the presiding officers in the two houses might belong to a party different from that of the President. When Garfield died, the Senate was equally divided; and when Hendricks died, the Republicans controlled the Senate.

The Constitution authorized the Senate to choose a President pro tempore only when the Vice President is absent or acting as President. Consequently it had been the custom for the Vice President to absent himself from the Senate a day or two before the end of every session to justify the necessity for election of a President pro tempore. When Garfield and Arthur were inaugurated, the Senate consisted of thirty-seven Democrats, thirty-seven Republicans and two non-partisans, Davis of Illinois and Mahone of Virginia. To prevent the possible election

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[20] Cong. Globe, 40th Cong., 1st sess., 4209-4210.

[21] S. 1069, 44th Cong.; S. 62, 45th Cong. Both were killed in committee.

of a Democrat as President pro tempore, Arthur did not vacate the chair, as was customary.[22] After the Senate adjourned the two Senators from New York, Platt and Conkling, resigned, giving the Democrats a clear majority in the Senate. The attempt on Garfield's life alarmed the New York Republicans. The Legislature, dominated by that party, began a struggle to elect two Senators. The newspapers of the day are sufficient testimony that the Legislature's action was motivated by the knowledge that it might be choosing a President as well as two Senators. After a bitter struggle, one anti-Conkling Senator and one Stalwart Senator were elected.[23] When President Garfield died shortly thereafter, Vice President Arthur was in poor health. There was no presiding officer in either house of Congress. The country had been without an active Chief Executive for eighty days.

If calamity had befallen Arthur, not only would there have been no successor, there would have been no one to convene the Congress. These circumstances so concerned Arthur that, before leaving New York for Washington, he signed a proclamation summoning the Senate into immediate special session. In case of

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[22] New York Times, July 8, 1881. A similar situation arose in 1813, when Vice President Gerry refused to vacate the chair a day or two before the Senate adjourned. Throughout the summer of 1813 it appeared that both Madison and Gerry would die. The anti-administration faction in the Senate was anticipating the succession of one of their number, William B. Giles. The supporters of the administration urged Gerry not to vacate the chair and thus prevent the election of Giles to the Presidency pro tempore. They thought it would be preferable to have Speaker Henry Clay, an administration man, become the acting President if both Madison and Gerry died. For this reason, Gerry presided in the Senate until it adjourned on the second of August. Thus, when he died on November twenty-third, there was no President pro tempore. If Madison had died also, Henry Clay would have succeeded to the presidential powers. H. B. Learned, "Gerry and the Presidential Succession in 1813," 22 Am. Hist. Rev. 94 (October, 1916).

[23] New York Herald, July 5,6, 7, 17, 23, and August 11, 1881.

his death a successor could be chosen. He addressed the envelope containing the proclamation to himself in Washington. If he died before convening the Senate, the country would have a constitutional means of choosing his successor. If he lived, the precaution would be unnecessary.[24] One of Arthur's first acts after reaching Washington was to convene the Senate.

The special session of the Senate, which met three weeks after Garfield's death, set about choosing a possible successor to Arthur. The resignation of the New York Senators gave the Democrats a clear majority, and they proceeded to take advantage of their position by choosing a President pro tempore before seating the newly elected Republican members from New York and Rhode Island. By the narrow margin of thirty-four to thirty-two Thomas Bayard, a Democrat, was elected.[25] The real contest at issue is demonstrated by the attempt of the Republicans to unseat Bayard and elect one of their own members to the position. Although the Republicans had a majority of one after the seating of Miller and Lapham of New York and Aldrich of Rhode Island, they compromised with the Democrats and elected the non-partisan, David Davis, to preside.[26]

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[24] New York Times, November 21, 1886. This was revealed at the time of Arthur's death by George C. Bliss in a speech to the Union League Club. See also George F. Howe, Chester Arthur (1934), 154-155.

[25] 12 Cong. Rec. 505-514.

[26] Ibid., 519-521. On February 27, 1883, Davis announced that he would resign on March third, so the Senate could elect another President pro tempore. Davis' senatorial term expired at midnight of March third, and it seemed advisable for the Senate to choose another presiding officer whose term did not expire for two or four years in order to provide a successor to Arthur. George F. Edmunds of Vermont, a Republican, was elected. 14 Cong. Rec. 3656-3657. See also Howe, op. cit., 249-250.

This struggle in the special session of the Senate was indicative of the attention the Forty-seventh Congress was to give to the constitutionality, adequacy, and policy of the Act of 1792. The matter was given immediate attention. Senators Beck of Kentucky and Maxey of Texas offered resolutions instructing the Committee on the Judiciary to study the whole succession problem.[27] Augustus H. Garland of Arkansas and George F. Hoar of Massachusetts introduced bills placing Cabinet officers in the line of succession.[28] The two resolutions and the two bills were referred to the Committee on the Judiciary, which proposed a substitute for the Hoar and Garland bills.[29]

The main provisions of the bills may be briefly summarized. The Cabinet officers were to be placed in the line of succession in order of the date of the establishment of their respective departments. The acting President was to serve until the end of the term. No Cabinet member was to be eligible to exercise presidential power unless he possessed the constitutional qualifications to become President. A Senate amendment clarified the intention that the presidential powers and duties, not the office, were to devolve on the Cabinet member. By another amendment the term of the succeeding officer was limited to the time "until the disability be removed or a President shall be

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[27] 13 Cong. Rec. 22, 193. See also Beck's remarks, ibid., 121-126.

[28] S. 350 and S. 2035, 47th Cong. For texts of these bills, see 13 Cong. Rec. 122 and 4975.

[29] S. 2047, 47th Cong. See 13 Cong. Rec. 5066; 14 Cong. Rec. 689, 886, 1007-1008.

elected." The special election provisions of the earlier law were added to the bill. Finally, an amendment was adopted which provided that, if Congress were not in session or would not meet within twenty days after the Cabinet officer assumed the exercise of presidential power, he should call a special session of the Congress. The bill, as amended, passed the Senate but was not acted on by the House.[30]

By December of 1883, the concern caused by Garfield's illness and death had subsided. Nevertheless, Senator Hoar again introduced his bill transferring succession to the Cabinet.[31] The bill passed the Senate without debate and was reported by the House committee with certain amendments.[32] The committee proposed that the tenure of the acting President be limited in the law and that the calling of a special election be made mandatory.[33] The House did not take the bill up for consideration and it died on the calendar.

Vice President Hendricks' death occurred on November 25, 1885. The Congress was not yet organized and there was neither a President pro tempore nor a Speaker. Cleveland did not go to

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[30] 14 Cong. Rec. 1006-1014.

[31] S. 22. The bill as passed by the Senate provided: (1) Such officer was to act as President until the disability of the President be removed or a President elected. (2) Such officer was to have the constitutional qualifications to become the President. (3) The acting President was to convene Congress, presumably so Congress could decide whether to call a special election or not.

[32] 15 Cong. Rec. 12, 517, 661, 899.

[33] H. Rept. 1323, 48th Cong., 1st sess. It will be recalled that under the Senate version of the Act, the Cabinet officer was to act as President "until the disability of the President or Vice President is removed or a President shall be elected." Thus it was not clear if he was to finish out the term or act only until a President was elected at a special election.

Indianapolis to attend the Vice President's funeral lest calamity befall him on the trip and the country would be left without a Chief Executive.[34] The situation was much as it had been four years earlier except that the political table had turned. The Democrats now controlled the White House and the Republicans the Senate. Nevertheless, the Republican, George F. Hoar, introduced a bill which would, in effect, have transferred succession from the Republican Senate to the Democratic Cabinet. The new bill was written to meet the objections raised to his earlier version. The new draft provided that the acting President serve only "until the disability of the President or Vice President is removed or a President shall be elected"; that the acting President must possess the constitutional qualifications for the presidential office; and that, if Congress was not in session or due to convene within twenty days, the legal successor should call Congress into special session, presumably so Congress could decide whether to call a special election or not.[35]

The bill was reported six days later and was explained by its author.[36] The Senator from Massachusetts pointed out that

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[34] Henry T. Peck, Twenty Years of the Republic (1906), 79-80.

[35] S. 1, 49th Cong. Hoar's original bill (S. 2035, 47th Cong.) did not have these three provisions; but his second bill (S. 22, 48th Cong.) did contain them. For the text of Hoar's original bill and criticisms of it and amendments, see 13 Cong. Rec. 4975, 5066; 14 Cong. Rec. 689, 886, 1006-1014. The first and third changes seemed to be made to meet objections to repeal of the special election provisions; but Hoar said that under the amended bill the acting President would complete the term. A copy of S. 1 with marginal notes in Hoar's handwriting is in the National Archives.

[36] Actually S. 471 was reported as a substitute for S. 1; but the differences between the two bills were verbal rather than substantive.

his bill differed from the Act of 1792 in two respects. The Cabinet members were substituted for the presiding legislative officers; and the acting President was to complete the term. In defending the first change, Hoar pointed out that during much of the term there was neither a President pro tempore nor a Speaker. He argued that it would be undesirable for a person to preside in the Senate while acting as President of the United States, and that the President pro tempore could be changed at the will of the Senate. History demonstrates, he declared, that the presiding legislative officers are not chosen for executive fitness. Listing all of the Secretaries of State, Presidents pro tempore, and Speakers to date, he argued that nearly all of the Secretaries had been greater leaders than the legislative officers. In defending the second change, Hoar pointed out that a special election called under the Law of 1792 might end the concurrence of congressional and presidential elections. He thought that the frequency of elections should not be increased, and that a special election would cause unnecessary turmoil. Finally he argued that, if a would-be assassin knew that the President's chief adviser would succeed and no change in policy would result, there would be less motive for killing the President.[37] The bill passed the Senate without division.[38]

The act was reported favorably by the House Committee on

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[37] 17 Cong. Rec. 180-182. For Senator Hoar's criticisms of the Act of 1792, see also George F. Hoar, Autobiography of Seventy Years (1903), II, 169-170. The papers of Senators George F. Hoar and Henry L. Dawes now in the Massachusetts Historical Society were searched, but no additional information was found.

[38] 17 Cong. Rec. 214-225, 248-252.

the Election of President and Vice President. Representative Caldwell, speaking for the committee, favored the proposed law because it was clearly constitutional. He said the old law was of doubtful constitutionality, violated separation of powers, and was defective in that there often was no President pro tempore or Speaker. Caldwell also pointed out that the Senate could expel its President pro tempore and thereby deprive the Government of an acting President.[39] A few Republicans struggled to keep the line of succession in the Republican Senate rather than transfer it to the Democratic Cabinet. William McKinley, who later became President, offered a substitute plan to continue the presiding officers as successors and provide for a permanent President pro tempore and

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[39] H. Rept. 26, 49th Cong., 1st sess. The minority report submitted by W. C. Cooper stated the real problem to be providing for vacancies caused by the death, resignation, failure to elect, or failure to qualify of a President-elect and a Vice President-elect. Since this was before the adoption of the Twentieth Amendment, Congress probably lacked power to provide for the filling of such vacancies. Cooper thought Congress had "inherent power" to provide for the filling of "all vacancies." The minority also protested repeal of the special election provisions of the earlier law and suggested enactment of a law providing for special elections to fill vacancies caused by the defect of the President-elect and Vice President-elect. Ibid., 1-5. Cooper and Caldwell took this position in the House debate. 17 Cong. Rec. 664-668. Although Cooper's amendment providing that the act apply to cases of the defect of the President-elect and Vice President-elect was defeated in the House [ibid., 693], debate on the bill shows that some members of Congress thought the Secretary of State of an out-going administration would act as President for four years in such contingencies. For example, see the remarks of Rowell, Rockwell, and Ryan, ibid., 679-680, 686, and 688; H. Rept. 2493, 49th Cong., 1st sess., 2; H. Rept. 3633, 58th Cong., 3rd sess.; H. Rept. 7581, 59th Cong., 2nd sess.

Speaker.[40] Although the Hoar bill originated in a Republican Senate, Representative Rowell thought the only motivation for the bill was a desire of the Democrats, who held the Executive and the House, to take succession out of the Senate.[41] Thomas B. Reed, later Speaker of the House, tried to arouse partisan feeling by asking his fellow Republicans whether they would prefer to have the Democratic Secretary of State, Thomas F. Bayard, or the Republican President pro tempore, Senator Sherman, as the President of the United States. The Republican opposition to the bill was not strong and it became the Presidential Succession Law of 1886 on the nineteenth of January.[42]

Although the new law was almost universally accepted as an improvement over the old one, a few wished to return to a variation of the old law or had still other plans to offer.[43] Generally speaking, Congress paid little attention to the subject of presidential succession for sixty years after passage of the Act of 1886, except for attention given to the problems connected with presidential inability and the problems finally treated in the Twentieth Amendment.[44] From time to time bills

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[40] 17 Cong. Rec. 670. The plan provided that Congress meet on March fourth of the odd years to choose presiding officers and made it the duty of the President to convene either house when it lost its presiding officer. The plan also provided for retention of the special election features of the earlier law, but a specially elected President was to have a four-year term. The McKinley plan was rejected in the House by a vote of 159 to 108.

[41] Ibid., 679.

[42] 24 Stat. 1; U. S. C. A. (1940 ed.), Title 3, §§ 21 and 22. See Appendix C. On the general subject of the passage of this law, see Frederick H. Gillett, George Frisbie Hoar (1934), 151-152.

[43] See chap. VI, infra.

[44] For congressional consideration of the inability problem, see chap. IV, supra. The problem treated in the Twentieth Amendment is beyond the scope of this study. Perhaps it would be

were introduced to add the more recently created Cabinet posts to the line of succession; but none became law, not because they were controversial, but because they seemed relatively unimportant.[45]

The problem of providing a successor in case of the death, resignation, removal, or disability of both the President and Vice President was raised again after the death of President Roosevelt in 1945. The movement for amending the Presidential Succession Act of 1886 began with a clamor against Secretary of State Stettinius, who was next in line to act as President. Truman was over sixty years of age and had nearly four years of

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proper to point out, however, that the latter problem was discussed in 1873 when presidential candidate Horace Greeley died before the casting of the electoral vote. Since Greeley had not won a majority of the electors, no crisis arose. From 1886 until the adoption of the Twentieth Amendment the question was raised periodically, chiefly by Senator George F. Hoar and later by Senator George Norris, who was the man most responsible for the adoption of the Twentieth Amendment. In 1924 there was some apprehension lest the three party split, Republican, Democratic, and Progressive, would make the selection of a President before March 4, 1925 impossible and interregnum would result. However, no such development took place. On this general subject, see "The Country Without a President," 2 N. Y. Law Rev. 381 (September, 1924); and three more popular notes: 102 Outlook 469 (November, 1912); Newsweek (December 16, 1940), 6; and Henry Cabot Lodge, "The Senate," 34 Scribner's Magazine 541, 543 (November, 1903).

[45] It will be recalled that in 1886 there were only seven Cabinet posts, and thus only the first seven members of the Cabinet were in the line of succession. H. R. 3927, 52nd Cong., reported favorably, H. Rept. 160, 52nd Cong., 1st sess. The bill actually passed both houses, but was returned by the President because through an oversight the act made no reference to the statute it proposed to amend. 23 Cong. Rec. 350, 972, 2035, 3518, 4099, 4127, 4140, 4221. The bill was several times introduced thereafter but failed to become law. H. R. 2000, 53rd Cong., reported favorably, H. Rept. 32, 53rd Cong., 1st sess.; H. R. 14757, 58th Cong., reported favorably, H. Rept. 3633, 58th Cong., 3rd sess.; H. R. 7120, 59th Cong., reported favorably, H. Rept. 7581, 59th Cong., 2nd sess.; H. R. 9253, 66th Cong.; H. R. 9882, 66th Cong.

heavy responsibility ahead of him. The politicians seemed to fear the succession of Stettinius, who was not schooled in politics.[46] The approach of Truman's trip to Potsdam, which also took Stettinius out of the country, created congressional interest in the Kefauver and Monroney proposals which had already been introduced.[47]

While interest in these two measures was increasing, Mr. Truman sent a special message to Congress asking for a change in the succession law. Under the Truman plan the Speaker of the House and the President pro tempore of the Senate would replace the Cabinet members as the heirs apparent. These officers would be required to resign their congressional posts before exercising presidential power and would be ineligible to serve unless they possessed the constitutional qualifications. If no presiding officer were available, the ranking Cabinet member would serve until a presiding legislative officer was available. The successor would, in any case, act as President only until the next congressional election, at which a President would be chosen to complete the unexpired portion of the term. Truman maintained that his plan was more "democratic" than the law because the Cabinet posts are not elective, the

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[46] On this point, see Arthur Krock, New York Times, June 3, 1945.

[47] New York Times, June 17, 1945. The Kefauver resolution provided that the Cabinet officer on whom presidential power devolved was to serve only until Congress could assemble and the House could elect a President. The Monroney bill put the Speaker of the House, the President pro tempore of the Senate, and the Cabinet, beginning with the Secretary of State, in the line of succession. The Speaker was to resign his congressional post before undertaking the presidential duties. A Cabinet member was to act as President only until a Speaker or a President pro tempore was chosen or became able to serve.

Speaker is nearer the people, and the President of a democracy should not have power to designate his successor or take such steps in fact by changing Secretaries of State.[48]

Truman's proposal gave impetus to congressional interest in the succession problem. Nine more bills and joint resolutions on the subject were introduced in the Seventy-ninth Congress.[49] Immediate congressional and editorial reaction was

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[48] New York Times, June 20, 1945; also 91 Cong. Rec. 6272, 6280.

[49] S. 1169, introduced by Bridges, provided that the Speaker of the House and the President pro tempore of the Senate were to supercede the Cabinet as successors to the President. Such person was to act as President "until the disability of the President or Vice President is removed or a President shall be elected"; but he was to call Congress into special session, presumably so Congress could decide whether to call a special election or not.

S. 1343, introduced by McCarran, provided that the Senate nominate three Senators of the recent President's party and the House choose one of these to be the "officer" who shall then act as President "until the disability be removed or a President shall be elected."

S. 1345, introduced by Thomas of Utah, provided that the Cabinet member acting as President was to act as such only until a President and Vice President could be elected by a majority vote of the entire membership of the two houses of Congress acting jointly.

H. R. 3206, introduced by Monroney, was essentially the same as the Presidential Succession Act of 1947.

H. R. 3515, introduced by Anderson of California, was essentially the same as S. 1169.

H. R. 3587, introduced by Sumners, is discussed pp. 193-196, infra.

H. R. 4263, introduced by Kefauver, was essentially the same as the Presidential Succession Act of 1947.

H. J. Res. 230, introduced by Kunkel, proposed amending the Constitution to provide for three Vice Presidents, who were to be successors to the President in case of vacancy and temporary substitutes for the President in case of inability.

H. J. Res. 362, introduced by Trimble, proposed amending the Constitution to provide not only for succession to the Presidency but also for the filling of vacancies in Congress if all these offices should become vacant as the result of an atomic attack. The plan called for the ranking military and naval officers' selecting a civilian to act as President until the Governors of the states could choose from among their number a person to act as President and another to act as Vice President for the remainder of the term.

favorable to the Truman plan. As time went on, enthusiasm for the plan waned, and serious constitutional problems were raised.[50] Meanwhile Stettinius resigned, and Secretary of the Treasury Morganthau was temporarily the heir apparent.[51] While the ranking Cabinet post was vacant, the House committee reported favorably on the Sumners bill which embodied all of Truman's proposals. The bill provided that, if the vacancy occurred more than ninety days before the regular congressional election, a special presidential election was to concur with the congressional election. Otherwise, no special election would be called. The President so chosen was to serve only for the unexpired portion of the term.[52] Opponents of the bill alleged that it was unconstitutional because the legislative officers were not "officers" in the constitutional sense, the specially-elected President could not have a term of less than four years, and the Speaker or President pro tempore could not continue to act as President after resigning his congressional post. The report merely explained the provisions of the bill and denied that it was unconstitutional without making a real attempt to answer the constitutional objections raised.[53]

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[50] This statement is made on the basis of a survey of the editorials from all parts of the country reprinted in the Appendix of the Congressional Record and a survey of editorial comment in the major weekly news magazines. See also, New York Times, June 20, 22, 23, 24, and 27, 1945.

[51] New York Times, June 28 and 29, 1945.

[52] For a text of H. R. 3587 without amendments, see 91 Cong. Rec. 7023-7024. If the event by reason of which the successor was required to act as President occurred more than ninety days immediately preceding the regular congressional election, a special election was to be held on the Tuesday after the first Monday in November in the year of the next congressional election.

[53] H. Rept. 829, 79th Cong., 1st sess. All the other bills dealing with this subject were killed in committee.

Important questions of policy and constitutionality were not seriously discussed in the House debate on the bill. Allen of Illinois admitted that some things involving the constitutionality of the measure might need attention, but favored the plan because it might enable a Southern Democrat or a New England Republican to become President. Hoffman of Michigan said that he would like to vote for the bill, but was afraid he would be accused of anti-semitism if he voted to put Speaker Rayburn in Secretary Morganthau's place in the line of succession. Representative Michener, ranking minority member of the Committee on the Judiciary, did not take the constitutional objections seriously and thought the Speaker could get along better with the Congress than a "bureaucrat or an heir apparent to the throne selected by any executive."[54] The consensus of Republican opinion seems to have been that, if the President must be a Democrat, they would prefer Sam Rayburn; and Democratic opinion favored Joe Martin if the President must be a Republican.

The opponents of the bill presented almost unanswerable objections to its constitutionality,[55] and were answered only by assertions that the bill was constitutional, assertions which in most cases were either unsupported or were supported by misinformation.[56] The chief argument offered in favor of the bill was that it was more "democratic" to have the Speaker act as President because he was popularly elected

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[54] 91 Cong. Rec. 7008-7011.

[55] The remarks of Hancock, Gwynne, Springer, Jennings, and Taber, ibid., 7014-7016, 7017-7018, 7018-7019, 7023, and 7025-7026; also Judd, Hancock, and Gwynne, ibid., 7026-7027. See also pp. 202-221, infra.

[56] The remarks of Monroney, Kefauver, and Sumners, ibid., 7012-7013, 7016-7017, 7021-7023.

in his district and again chosen by the House, which approximates the electoral colleges.[57] Opponents of the bill argued that its enactment would be a legislative encroachment on the Executive and would encourage the removal of the President.[58]

Representative John M. Robsion objected to the provision for a special election on the ground that it might cause instability in the executive branch. It conceivably might mean three Presidents, the changing of forty-eight sets of election laws, an election, then a fourth President, all in 895 days. Even if the provision for a special election were constitutional, the gentleman from Kentucky thought it was bad policy.[59] Vorys of Ohio, Eberharter of Pennsylvania, and Rowe of Maryland all said that such a special election could not be called in their states in ninety days. The House, confronted with these objections, struck the special election provision from the bill.[60]

The measure was given only the most perfunctory consideration. It was introduced on June twenty-fifth. On June twenty-seventh the Judiciary Committee had a meeting and, without discussion, hearings, or study, reported the bill favorably.[61] The House spent only two hours discussing the measure. When objections to this summary procedure were raised, Representative

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[57] The remarks of Monroney, Hinshaw, and Kefauver, ibid., 7013-7014, 7013, and 7016.

[58] Remarks of Graham, Jennings, and Hancock, ibid., 7020-7021, 7018, and 7015.

[59] Ibid., 7020, 7024. See also the remarks of Monroney, ibid., 7013.

[60] Ibid., 7024-7025.

[61] The remarks of Hancock, Gwynne, and Graham, ibid., 7014, 7018, and 7020.

Sumners, the author of the bill, said, "as a matter of fact, to be candid with you about it, and you know it yourselves, this bill is going to be worked out in conference."[62] After a brief two-hour discussion, the bill passed the House by a vote of 167 to 32 amid cheers for Sam Rayburn.[63]

The Senate received the act with less enthusiasm. Senator Hatch presented an excellent legal brief holding the act to be unconstitutional,[64] and the measure was referred to the Committee on Privileges and Elections. When Byrnes was appointed Secretary of State, the whole matter was dropped until Truman asked Congress in his State of the Union Message to act on his succession proposal.[65] Instead of acting on the Sumners measure, the Senate passed Senator Green's resolution. This proposed the creation of a joint committee to study not only the succession problem, but the whole system of electing a President and Vice President.[66] The resolution was greeted with as

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[62] Ibid., 7024.

[63] Ibid., 7028; New York Times, June 30, 1945.

[64] 91 Cong. Rec. 8272-8274.

[65] New York Times, January 22, 1946.

[66] S.Con. Res. 50, for text see 92 Cong. Rec. 78. The study was to include, but not to be confined to, the following: (1) Whether or not the President and Vice President should be elected by the Electoral College, as at present, and if so whether or not the members should be legally bound to vote in accordance with their instructions. (2) Whether or not provision should be made for the case where before the election of presidential electors, or after such time but before the election of President and Vice President, a candidate for the Presidency or for the Vice Presidency dies, declines to run, or is found ineligible to take office if elected. (3) Whether or not provision should be made for the case of the death of any of the individuals from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon it, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon it. (4) Whether or not provision should be made for the case where, after election,

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little enthusiasm in the House as the Sumners act had met in the Senate.[67] Apparently the Senate would not act on the Sumners measure because of grave doubts as to its constitutionality. Moreover, the Senate probably was opposed to placing the Speaker ahead of its own presiding officer. Finally, the Senate appeared to be satisfied with Byrnes as a prospective successor to Truman. The House refused to act on the Green resolution because it had hoped in enacting the Sumners bill to honor Sam Rayburn.[68]

House Democrats took a different view of the matter after the 1946 elections. The Republicans returned a majority to both houses of Congress, and the bill now indicated Martin rather than Rayburn as its chief beneficiary. Senate Republicans, who had been cool or indifferent to Truman's plan, became interested in the measure which with some amendment afforded an opportunity to place the President pro tempore of the Senate, Arthur Vandenberg, first

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the President-elect or Vice President-elect, or both, die, decline to serve, or fail to qualify. (5) How it shall be determined whether the President, or individual acting as President, is unable to execute the powers and duties of the office, and how the duration of such inability shall be determined. (6) Whether or not provision should be made for an individual to execute the office of President in case of removal, death, resignation, or inability, both of the President and Vice President, including provision for selecting an individual to execute such office in cases where by reason of removal, death, resignation, or inability there is no individual upon whom the powers and duties of such office would otherwise automatically devolve. (7) Whether there are, or should be, any differences between the status, powers, duties, and privileges of an elected President and any other individual executing the office of President.

[67] S. Rept. 892, 79th Cong., 2nd sess.; 92 Cong. Rec. 318, 2237. The resolution was killed in the House Committee on Rules, ibid., 2348.

[68] This seemed to be the consensus of opinion among Washington reporters. For example, see Arthur Krock, New York Times, April 18, 1946.

in the line of succession. Truman was unmoved by the election returns, insisting that, if the plan were sound when a Democrat was the Speaker, it was equally sound when a Republican sat on the dais of the House.[69]

Georgia's battle over gubernatorial succession emphasized the importance of freeing the succession law of all doubts and stimulated interest in presidential succession.[70] Truman in a letter to Senator Vandenberg again recommended congressional action.[71] All the plans previously suggested were put into the legislative hopper. One would have amended the Act of 1886 by adding a section providing for a special election to choose a President and Vice President to complete the unexpired portion of the term.[72] Another plan called for putting the Speaker of the House, the President pro tempore of the Senate, and the

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[69] Ibid., November 13, 1946.

[70] Ibid., January 17 and 26, 1947.

[71] Ibid., February 6, 1947; 93 Cong. Rec. 786. See Arthur Krock's interesting article on Republican reaction to renewal of this proposal. Krock's thesis was that many Republicans who had personal hopes for 1948 did not welcome the idea of putting Joe Martin next in line to the Presidency, for, if a vacancy should occur before the end of the current term, Martin would become the acting President and that would make him the leading contender for the presidential nomination to succeed himself. Krock thought there were fifty-one Republican Senators plus numerous Republican hopefuls in the House who were active, potential, or wishful candidates for a place on the Republican ticket in 1948. Such a situation, Krock predicted, would probably defeat the plan. New York Times, February 7, 1947.

[72] S. 139, introduced by Fulbright; S. 536, introduced by McMahon. The Fulbright and McMahon bills differed in that the former provided for the selection of electors especially for this purpose, whereas the latter called for a reassembling of the electors chosen at the last quadrennial election.

Cabinet members in the line of succession in that order.[73] A third provided for amending the Constitution to allow the ranking military officers to select a civilian to act as President until the Governors of the states could meet and select one of their number to act as President for the remainder of the term. The fear of an atomic attack on Washington seems to have been the inspiration for this plan.[74] Again it was urged that a joint committee study the whole problem of presidential election and succession.[75]

After holding hearings, the Senate Committee on Rules and

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[73] S. 564, introduced by Wherry. For a summary of its provisions, see pp. 201-202, infra.

H. R. 163, introduced by Anderson of California, was the same as the bill he introduced in the Seventy-ninth Congress. See n. 49, supra.

H. R. 2524, introduced by Kefauver, was substantially the same as the Wherry bill.

H. R. 2749, introduced by Michener, was substantially the same as the Wherry-Kefauver plan except that it provided for the calling of a special election. On this point it was similar to the original Sumners bill proposed in the Seventy-ninth Congress.

[74] H. J. Res. 34, introduced by Trimble. Elmer Davis took this plan seriously and thought Congress should enact it to provide a Government in case the whole executive and legislative branches were wiped out by an atomic bomb. "Message to the Eightieth Congress," Harper's Magazine (January, 1947), 21, 24. Senator Wiley was also alarmed about such a possibility and proposed that the highest ranking military or naval officer be authorized to act as President until a Speaker or President pro tempore was chosen. Wiley said his proposal was designed to meet the case of an atomic attack in which the President, Vice President, and all members of Congress were casualties. Neither the Trimble nor Wiley proposal was taken seriously. 93 Cong. Rec. 5443, 7598.

[75] S. Con. Res. 1, introduced by Senators Smith and Green, was similar to the one introduced by Green in the Seventy-ninth Congress. See n. 66, supra. An identical resolution was introduced in the House by Estes Kefauver, H. Con. Res. 18.

Administration reported the Wherry bill favorably.[76] On June 27, 1947, over strong Democratic opposition, the Senate passed the bill which differed only in minor respects from the Sumners bill passed by the House in 1945.[77] After the most perfunctory debate, the House of Representatives concurred with the Senate by an overwhelming majority.[78] The act was signed by the President on July eighteenth.

When the Senate was considering the measure, Senator Russell proposed an amendment which would have given the President pro tempore precedence over the Speaker in the line of succession, as in the Act of 1792. The Russell amendment was rejected after Senator Vandenberg, the incumbent President pro tempore, spoke against it.[79] The committee reports and speeches in support of the Wherry bill followed the same line taken in the debate on the Sumners proposal in the Seventy-ninth Congress: The provisions of the bill were thoroughly explained; constitutional questions were largely ignored or dismissed; it was argued that having a popularly elected officer succeed would be more "democratic" than having an appointed officer and that allowing the President, in effect, to designate his own successor by appointment of a Secretary of State was "undemocratic."

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[76] S. Rept. 80, 80th Cong., 1st sess. This report did nothing but briefly summarize the provisions of the bill. No mention was made of the constitutional problems. See the minority report signed by Hayden, McMahon, Green, Myers, and Holland urging that a thorough study of the whole subject be made.

[77] 93 Cong. Rec. 7691-7713, 7766-7786. The Senate vote was 47 Republicans and 3 Democrats favoring the bill and 35 Democrats opposing it.

[78] Ibid., (unbound), 8792-8807. The House vote was 365 to 11, with ten Democrats and one Republican voting against the act. See also H. Rept. 817, 80th Cong., 1st sess. Chairman Michener said the Judiciary Committee voted twenty-six to one in favor of the bill.

[79] 93 Cong. Rec. 7781.

The Presidential Succession Act of 1947 embodies all of Truman's suggestions except the one for a special election to choose a President to complete the term.[80] It provides that in case of the death, resignation, removal, inability, or failure to qualify of the President and Vice President, the Speaker of the House, upon resignation as Speaker and Representative in Congress, shall act as President. If there is no Speaker, or if he is disabled or fails to qualify, the President pro tempore of the Senate, upon resignation as President pro tempore and as a Senator, shall act as President. An individual who acts under these circumstances is to serve for the residue of the current presidential term except in two cases. (1) When acting because of the failure of the President-elect or Vice President-elect to qualify, he serves only until one of them qualifies. (2) When a legislative officer acts as President because of the inability of the President or Vice President, he serves only until the removal of the disability. Under the law a President pro tempore upon whom the presidential powers and duties devolve will not be displaced by the subsequent election of a new Speaker who is able to qualify.

If there is no presiding legislative officer or if neither of them can qualify to act as President, the Secretary of State is to act as President. The other Cabinet members are placed after the Secretary of State in the line of succession in the

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[80] Public Law 199, 80th Cong., 1st sess.

order provided in the Act of 1886.[81] The law requires a succeeding Cabinet officer to take the presidential oath, and the taking of this oath shall be held to constitute resignation from his Cabinet office. His right to act as President under the statute continues only until a Speaker or President pro tempore is available to supercede him. In case of succession of another Cabinet officer, the removal of the inability of the higher ranking Cabinet member or his ability to qualify will not terminate the presidential service of the succeeding Cabinet officer. In all cases, the person must possess the constitutional qualifications as to age, residence, and citizenship. Cabinet officers whose appointments have not been consented to by the Senate or who are under impeachment at the time are not eligible to act as President.

B. LIMITATIONS ON THE POWER OF CONGRESS

1. CONGRESS LIMITED TO THE DESIGNATION OF "OFFICERS"

The constitutional objection most frequently raised against the Act of 1947 is that the presiding legislative officers are not officers in the constitutional sense and thus are not eligible for designation. The Constitution empowers Congress to declare "what Officer" shall act as President in certain contingencies. The framers of the Constitution doubtless intended the term "Officer" to mean "Officer of the United States." The original motion used this language, as did the draft sent to the

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[81] The Act of 1947 includes in the line of succession the three cabinet posts, agriculture, commerce, and labor, which were established after 1886, and which consequently were not covered by the provisions of the earlier law. Under the National Security Act of 1947 [Public Law 253, sec. 311, 80th Cong., 1st sess.] the Secretary of Defense replaces the Secretary of War who along with the Secretary of the Navy is dropped from the list of successors.

Committee of Style. In the Convention some objected to this provision on the ground that the legislature would be limited to making temporary appointments of "officers" of the United States. Madison tells us that the objectors wished the Congress to be free to designate persons other than officers. In spite of this objection the motion was carried by a vote of six to four.[82] The Committee of Style, which had no authority to change substantive provisions, deleted "of the United States" and the alteration went unnoticed.[83]

When the First and Second Congresses considered succession legislation, objection was made to placing the presiding legislative officers in the line of succession on the ground that they were not "officers" within the meaning of the Constitution. Representatives White, Williamson, Smith, and Carroll argued that designating the President pro tempore successor to the President was directly repugnant to the Constitution. Only Representatives Livermore and Sherman took the opposite position. Gerry thought the succession was not confined to officers of the United States and said the term "officer" included state officers.[84]

The bill, which became the Act of 1792, originated in the Senate. The Hamiltonian upper chamber had placed its own presiding officer first after the Vice President in the line of succession;[85] but the Jeffersonian House amended the act,

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[82] Max Farrand, The Records of the Federal Convention of 1787 (1911), II, 532, 535, 573.

[83] Ibid., II, 598-599.

[84] 2 Annals of Cong. 1853-1855, 1864.

[85] S. Jour., 1st and 2nd Cong., 347.

substituting the Secretary of State for the President pro tempore of the Senate. We have no record of the Senate debates;[86] but it is clear that some members of the House doubted the constitutionality of designating legislative officers as successors to the President.[87] Abraham Baldwin, Theodore Fitzsimmons, James Madison, and Hugh Williamson, all former members of the Philadelphia Convention, voted for the motion to strike out the President pro tempore as the President's successor.[88] All the

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[86] No record of Senate debates was kept at that time. The Library of Congress, the National Archives, and the Senate Library contain nothing on the Senate debates on the Succession Act of 1792. The published papers of Senators in the Second Congress have also been searched but no information on this subject was found. The unpublished papers of the following have also been searched but also proved unrewarding: Richard Basset and George Read (Historical Society of Delaware); Oliver Ellsworth and Roger Sherman (Connecticut Historical Society); William Few, James Gunn, and Abraham Baldwin (Georgia Historical Society and the Georgia Department of Archives and History); John Henry and Charles Carroll (Maryland Historical Society); Caleb Strong, George Cabot, and Elbridge Gerry (Massachusetts Historical Society); James Langdon, Paine Wingate, and Nicholas Gilman (New Hampshire Historical Society); Philemon Dickinson and John Rutherford (New Jersey Historical Society); Benjamin Hawkins, Samuel Johnston, and Hugh Williamson (Southern Historical Collection, University of North Carolina); Thomas Fitzsimmons (The Historical Society of Pennsylvania); Joseph Stanton and Theodore Foster (Rhode Island Historical Society); Pierce Butler and Ralph Izard (South Carolina Historical Society); Stephen R. Bradley and Moses Robinson (Vermont Historical Society and the Bennington Historical Museum).

[87] See the remarks of Sturges, White, and Giles, 3 Annals of Cong. 281.

[88] Ibid., 303. Elbridge Gerry and Nicholas Gilman were the only former members of the Convention who voted to keep the President pro tempore in the line of succession. Gerry was absent from the Convention on August 6, 1787, when the succession clause was discussed; and Gilman did not attend the Convention until July 23.

Representatives who had been members of the Constitutional Convention voted against placing the Speaker of the House in the line of succession;[89] and all but Elbridge Gerry voted to put the Secretary of State in place of the President pro tempore as successor to the President.[90] The Senate refused to concur in the House amendment, and the House agreed to the Senate version. Three former members of the Federal Convention, Dayton, Fitzsimmons, and Gerry, voted to concur in the Senate version while Baldwin, Gilman, Madison, and Williamson voted against concurrence.[91] After both houses passed the bill, James Madison wrote Edmund Pendleton that the act was unconstitutional for several reasons, among which were:

> 1. It may be questioned whether these are officers in the Constitutional sense. 2. If officers, whether both could be introduced. 3. As they are created by the Constitution, they would probably have been there designated if contemplated for such service, instead of being left to Legislative selection.[92]

The committee reports and the speeches in support of the constitutionality of the plan, which ultimately became the law of 1947, depended heavily on the argument that legislative officers were placed in the line of succession by the Second Congress, whose views on the Constitution have long been regarded

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89 Ibid., 303. They were Baldwin, Fitzsimmons, Gerry, Madison, and Williamson.

90 Ibid., 402. They were Baldwin, Fitzsimmons, Gilman, Madison, and Williamson.

91 Ibid., 417-418.

92 James Madison, Letters and Other Writings of... (1865), I, 549.

as authoritative.[93] In answer to this argument, opponents of the bill pointed out that an act of the First Congress was declared unconstitutional in Marbury v. Madison, that the Act of 1792 resulted from Hamilton's antipathy for Jefferson not from mature deliberation, and that Madison and others who had been members of the Federal Convention considered the Act of 1792 unconstitutional.[94]

During the congressional debates from 1881 to 1886, all of the great speeches questioned whether the presiding legislative officers were "officers" in the constitutional sense,[95] and this doubt was one of the chief reasons for repealing the law of 1792. The Blount case is most frequently cited as authority for the doctrine that members of Congress are not "officers" within the meaning of the Constitution. In this case Senator Blount was impeached. Jared Ingersoll and A. J. Dallas, who represented the defendant, entered plea to jurisdiction on the ground that a Senator is not an officer of the United States and hence is not liable to impeachment. After four days of secret debate on the subject, the Senate by a vote of fourteen to eleven decided to dismiss the case. The Senate ascribed no reason for its decision; but it is generally

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[93] See for example, Monroney and Sumners, 91 Cong. Rec. 7012, 7022; and the opinion of acting Attorney General McGregor, H. Rept. 817, 80th Cong., 1st sess., 2-4. See also Edwards, 14 Cong. Rec. 963-964.

[94] See for example, Hancock, Gwynne, and Hatch, 91 Cong. Rec. 7014-7015, 7017-7018, 7027, 8273; Hatch and Gwynne, 93 Cong. Rec. 7766-7770; (unbound), 8800.

[95] For example, Beck, Jones, Maxey, Anthony, Garland, and Coke, 13 Cong. Rec. 123-126, 130, 137-142; Garland, Maxey, Lapham, and Sherman, 14 Cong. Rec. 877, 913-915, 921, 957; Maxey, Morgan, and Eden, 17 Cong. Rec. 215, 221-223, 668. See also H. Rept. 26, 49th Cong., 1st sess., 1-3.

accepted that the Senate ruled a member of Congress not to be an officer of the United States in the constitutional sense.[96]

The Representatives who acted as prosecutors in the Blount case depended almost entirely on extrinsic aids for a definition of officer. They quoted from dictionaries, statutes and the like to show that these "authorities" use the term "officer" in a less strict sense. Others who have argued since that a member of Congress is an officer of the United States have used this same approach.[97] The definition of officer found in dictionaries and statutes cannot be accepted, because the Constitution establishes a distinction between an officer and a member of of Congress,[98] and it is a well established rule of constitu-

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[96] 8 Annals of Cong., 2244-2415. An able battery of congressmen including Robert Goodhue Harper of Maryland and James A. Bayard of Vermont presented the case for the House. See especially the brief of Dallas, 2270-2278.

[97] See the remarks of Edmunds and Jones, 14 Cong. Rec. 690, 880-881; Call Evarts, Edmunds, and Rowell, 17 Cong. Rec. 224, 250, 251, 679; Michener, Monroney, Kefauver, Walter of Pennsylvania, Sumners, and White, 91 Cong. Rec. 7010, 7013, 7016-7017, 7020. See also H. Rept. 817, 80th Cong., 1st sess., 2-4; and the opinion of acting Attorney General McGregor reprinted in the above cited House report.

[98] Art. I, sec. 3: "The Senate shall chuse their other Officers, and also a President pro tempore..."
Art I, sec. 6: "...no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."
Art. II, sec. 1: "...no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."
Art. II, sec. 2: "[The President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the Departments."
Art. II, sec. 3: "[The President] shall Commission all the Officers of the United States."
Art. II, sec. 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction..."

tional interpretation that intrinsic aids are to be used in preference to extrinsic aids.[99] All three branches of the Government have recognized the distinction between officers and legislators made in the Constitution.[100]

The Courts have been especially careful not to enlarge the meaning of the term officer as used in the Constitution. They have defined an officer of the United States as a person appointed by the President and the Senate, by the President alone, by the courts, or by a department head, and commissioned by the President.[101] The courts have not departed from this rule, yet they have recognized that the word officer may have a less restricted meaning in certain statutes. In such cases the courts have been careful to distinguish the constitutional and statutory use of the term and have in each case restricted their interpretation to the case at bar. The question was raised in United States v. Lamar and the case is frequently cited in support of the conten-

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Amendment XIV, sec. 3: "No person shall be a Senator or Representative in Congress...or hold any office, civil or military, under the United States..." Italics in all cases mine.

[99] McPherson v. Blacker, 146 U. S. 1, 27 (1892).

[100] See the opinion of Attorney General Brewster, holding that members of Congress are "officers of the Government" within the meaning of a statute but are not "officers of the United States" in the constitutional sense. 17 Op. Atty. Gen. 419 (1892). Congress decided that the law forbidding Officers of the United States from soliciting or receiving contributions for political purposes, did not apply to members of Congress. H. Rept. 677, 63rd Cong., 2nd sess.; 51 Cong. Rec. 8831. See also the arguments of Saulsbury and Bayard, Cong. Globe, 38th Cong., 1st sess., 320-331, A31-A37. The question here was whether Senator Bayard was an officer within the meaning of the test oath law, but the question was argued as to whether he was an officer in the constitutional sense.

[101] United States v. Germaine, 99 U. S. 508 (1879); United States v. Mouat, 124 U. S. 303 (1888); United States v. Smith, 124 U. S. 525 (1888); Burton v. United States, 202 U. S. 344 (1906); Totus v. United States, 39 Fed. Supp. 7 (1941).

tion that a member of Congress is an officer of the United States. In the Lamar case, the Court actually held that members of Congress are officers of the United States within the meaning of section thirty-two of the criminal code. Justice Holmes, speaking for the Court in the first Lamar case, and Justice White, speaking for the majority in the second, were careful to distinguish this ruling from the earlier rulings which had held that members of Congress were not officers in the constitutional sense.[102]

Whether or not a member of Congress is an "officer of the United States" within the meaning of the Constitution, however, is not the question involved in succession legislation. A distinction may be made between the rank and file members and the presiding officers. Representative Peters argued in 1886 that the Speaker and President pro tempore may be officers in the constitutional sense even though Senators and Representatives

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[102] United States v. Lamar, 240 U. S. 60 and 241 U. S. 103 (1916). For an explanation of the Lamar cases, see United States v. Gradwell, 234 Fed. 466 (1916). See also United States v. Hendee, 124 U. S. 309 (1888). Examination of the government briefs in the Lamar cases shows that the Government depended almost entirely on extrinsic aids, dictum, state cases, and statutory usage for a broader definition of the word officer. Lamar's briefs, on the other hand, depended on intrinsic aids and Federal court rulings. In spite of the carefully limited ruling of the Court in the Lamar cases, John W. Davis, who was the Solicitor General in 1916, recently said, "While the Lamar case deals with the statute and not with the Constitution itself, I think it stands for the doctrine that 'members of Congress are officers.' I do not accept the contrary view that that term is applicable only to those who hold office by reason of appointment rather than election." New York Times, July 17, 1945.

are not.[103] In the Acts of 1792 and 1947 the successors are named as the presiding officers not as members of Congress. Thus the real question is whether these are "officers of the United States" in the constitutional sense. Employing intrinsic aids, the question would have to be answered in the negative. The Constitution distinguishes between the President pro tempore and an officer by saying, "the Senate shall chuse their other officers, and also a President pro tempore."[104] Confronted with this language, some have argued that the Speaker is an officer even though the President pro tempore is not. They contended that the Constitution itself refers to the Speaker as an officer by declaring, "the House of Representatives shall chuse their Speaker and other Officers." The antecedent of "their" is clearly "House of Representatives" and not "United States."[105] Thus, the Constitution does not even recognize the President pro tempore as an officer of the Senate and recognizes the Speaker only as an officer of the House, not as an officer of the United States.

Other sections of the Constitution support this interpretation. Article II, section 3, declares that the President "shall Commission all the Officers of the United States"; but the only commission the Speaker or President pro tempore has is the commission issued by the Governor of his state. Furthermore, the Constitution forbids an officer of the United States to be a

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[103] 17 Cong. Rec. 671.

[104] Art. I, sec. 3.

[105] Art. I, sec. 2.

member of Congress, but the President pro tempore always is a Senator and the Speaker is a Representative.[106] The conclusion must be that the Constitution does not contemplate the presiding legislative officers as officers of the United States.

This conclusion is supported by all the commentators. Not one of them defines "officer of the United States" in such a way as to include members of Congress or the presiding officer of either house.[107] Since neither members of Congress nor the presiding legislative officers are "officers of the United States" in the constitutional sense, they are ineligible for designation to act as President. But even if they were constitutionally eligible, the Succession Act is an evasion of the intent of the

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[106] Art. I, sec. 6. Of course the Constitution does not require that these legislative officers be members of their respective houses; but in practice, they always are.

[107] Thos. Sergeant, Constitutional Law (1822), 363-364; William Rawle, A View of the Constitution (1825), 203; Joseph Story, Commentaries on the Constitution of the United States (1833), II, 257-260; John Norton Pomroy, Introduction to the Constitutional Law of the United States (1870), 481-2; Roger Foster, Commentaries on the Constitution (1895), 566-73; Henry Black, Handbook of American Constitutional Law (1895), 121; John Randolph Tucker, The Constitution of the United States (1899), I, 412-414, and II, 713; David K. Watson, The Constitution of the United States (1910), II, 972, 1032; Charles Kellogg Burdick, The Law of the American Constitution (1922), 86-87; W. W. Willoughby, The Constitutional Law of the United States (2nd ed., 1929), III, 1448, 1466, 1505. Kent, Cooley, and Hare did not deal with this subject in their works. See also Henry Davis, "Inability of the President," S. Doc. 308, 65th Cong., 3rd sess., 11; Unsigned, "Succession to the Presidency," 24 Albany Law Jour. 119, 120 (August 6, 1881); J. Alexander Fulton, "Presidential Inability," 24 Albany Law Jour. 286, 288 (September 12, 1881); Charles S. Hamlin, "The Presidential Succession Act of 1886," 18 Harvard Law Rev. 182, 183 (January, 1905); Lindsay Rogers, "Presidential Inability," 2 Review 481 (May, 1920).

Constitution. The Federal Convention originally made the President of the Senate, who was elected by the Senate, the President's first successor. After the theory of separation of powers was introduced and provision made for the independent election of the President, objection was made that a legislative officer should not be allowed to succeed to the executive powers. Such an arrangement, it was argued, was repugnant to the independence of the two branches. To meet this objection, an independently elected Vice President was provided and made the President's first successor.[108]

As pointed out previously, the only officers who are "officers of the United States" in the constitutional sense are those appointed by the President and the Senate, by the President alone, by the department heads, or by the courts of law, and commissioned by the President. Such persons are the only ones eligible to be designated to act as President. This strict definition of officer not only eliminates legislative officers but also rules out proposals for choice of the acting President by the House of Representatives or by a joint session of Congress.[109] This definition of the word "officer" includes only certain executive and judicial officers and means that only they can be designated as possible successors to the President.

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[108] Farrand, op. cit., II, 186, 427, 496-502, 511-516, 521-529, 535-538, 573-575, 659; III, 394. The Act of 1947 is clearly constitutional in its application to the case of a President-elect because the Twentieth Amendment empowers Congress to declare what person [not what officer] shall act as President in certain contingencies.

[109] The one plan was embodied in S. 1343, introduced by Pat McCarran of Nevada; and the other plan in S. 1345, introduced by Elbert D. Thomas of Utah.

2. CONGRESS LIMITED TO ANNEXING THE PRESIDENTIAL POWERS AND DUTIES TO ANOTHER "OFFICE"

A second constitutional objection to the Succession Act of 1947 is that the person on whom presidential powers devolve must continue to hold the office to which these powers are annexed while the law requires him to resign this office. Before 1945 there was almost universal agreement that Congress is given power merely to annex presidential power to an office, not to designate what officer shall become the President.[110] Neither the earlier laws nor any proposals which were seriously considered before 1945 provided for the resignation of an acting President from the office which entitled him to act as such. Apropos of the first succession law Madison wrote:

> Either they [the designated legislative officers] will retain their Legislative stations, and then incompatable functions will be blended; or the incompatability will supercede these stations, and then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Congress may declare what officer &c., which seems to make it not an appointment or a translation, but an annexation of one office or trust to another office.[111]

Madison's argument was repeated among the objections raised to this law from 1881 to 1886. Various members of Congress pointed out that under the Act of 1792 the acting President, as a member of the Senate, passed on his own nominations and treaties, that the Senate could oust an acting President by electing a new presiding officer, and that the President pro

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[110] The one exception was Egbert Benson who said he supposed that whenever the designated officer was acting as President, he would resign his other office. 2 Annals of Cong., 1866.

[111] Madison, op. cit., I, 549. Italics Madison's.

tempore of the Senate could not continue to act as President after the expiration of his term as Senator. Such objections are without merit unless based on the assumption that the President pro tempore must retain his legislative office while acting as President of the United States. Many members of the Forty-seventh, Forty-eighth, and Forty-ninth Congresses expressly stated that these objections could not be met by resignation from the post of President pro tempore because his right to act as President depended on his incumbency of the legislative office. This seems to have been one of the compelling reasons for enacting the law of 1886. It was felt that the Under Secretary of State could relieve the Secretary of State of his departmental duties while the latter acted as President, but that a legislative officer could have no such relief from his legislative duties.[112] This interpretation of the Constitution was clearly summarized by Henry L. Dawes of Massachusetts in the following language:

> Everyone agrees that this devolution of power upon this official is not upon the person but upon him ex officio ....He can not, therefore, abandon the office which he held, by virtue of which the statute clothes him temporarily with the exercise of executive authority, because

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[112] For example, see the remarks of Beck, Maxey, and Hoar, 13 Cong. Rec. 126, 130, 4975, respectively. Senator Hoar, author of the Act of 1886 and recognized authority on the subject of presidential succession, spoke as follows: "It is not a person holding an office at the time succeeding to the Presidency, but it is an officer continuing in that office who is to perform as an annex or incident merely to another office the great duties of the Presidency itself. The moment he lays down or becomes incapable to perform the duties of the principle office to which the Presidency is annexed, that moment he must lay down or be incapable of performing the duties of the Presidency itself..." 14 Cong. Rec., 689. See also the remarks of Morgan and Sherman, 14 Cong. Rec. 883-886, 957; of Hoar, Morgan, Seney, and Dibble, 17 Cong. Rec. 180-182, 223, 675, 684. This point was emphasized by the House committee reporting the bill which finally became the Succession Act of 1886. H. Rept. 26, 49th Cong., 1st sess. See also Lindsay Rogers, op. cit., 481.

> thereby he ousts himself from the position in which he can exercise that executive authority.[113]

Tucker is the only commentator who mentions this subject. He says that in case of succession beyond the Vice President, the office of President does not devolve on the officer designated by the Congress, but virtute officii the officer "acts as President," and that the presidential office is vacant, but its functions are performed by the officer designated by law. He holds that the officer can no longer act as President if he ceases to be such "officer," because incumbency of the office is his title to act as President.[114]

In 1945 a new interpretation of the succession clause was advanced. Previously the presidential status of such an officer was denied as part of the argument supporting the contention that the Vice President becomes President when the powers and duties of the President devolve upon him.[115] After the acceptance of seven Vice Presidents as President, however, it was an easy step in 1945 to argue that anyone who acts as President thereby becomes the incumbent of the office. Truman's proposal and the bills introduced to carry out his plan were based on the principle that the designated officer would not merely assume the presidential powers ex officio, but would become the President; and, therefore, his retention of the office by virtue of which the presidential powers devolved upon him was irrelevant.

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[113] 14 Cong. Rec. 955.

[114] Tucker, op. cit., II, 713-714.

[115] See pp. 47-73, supra.

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[113] 14 Cong. Rec. 955.

[114] Tucker, op. cit., II, 713-714.

[115] See pp. 47-73, supra.

Arguments offered in the Seventy-ninth Congress in support of the plan were generally confusing on this question.[116]

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[116] For example, the following exchanges took place in the House of Representatives:
Taber: "The Constitution provides that whoever might be selected for succession must be an officer. This bill provides that the Speaker cannot become President or acting President without first resigning as Speaker."
Sumners: "Yes."
Taber: "Then he would not be an officer."
Sumners: "I believe he would."
Taber: "He would cease to be an officer when he resigns."
Sumners: "The thing will be simultaneous. I think that is in conformance with our general philosophy." 91 Cong. Rec..7023.
The implication of Sumners' position seems to be that the Speaker would become the President, but not five minutes before he admitted that the Speaker would not become the President. Ibid., 7022.

During the same debate another interesting exchange took place.
Taber: "The minute the Speaker resigns as a result of swearing in, under that provision he ceases to be an officer, if he was an officer before, and he has no authority whatever, and this bill would be an entire nullity."
Lewis then moved to strike out the resignation provision in order to meet Taber's criticism.
Judd: "I do not believe it is true that he then is the President. The Constitution states he 'shall then act as President' but he is not the President. It says 'such officer shall act' as President but if he has resigned how can he still be 'such officer'?"
Taber said the whole trouble with the Sumners-Lewis thesis was that it did not recognize that the Constitution says such officer shall act accordingly, that it does not say he shall become the President. Lewis answered that this was all "splitting of hairs."
Hancock: "Suppose a man is designated to act as President during the disability of the President. Are there then two Presidents of the United States?"
Lewis: "We would have an acting President of the United States and a real President who would resume his office when the disability was removed."
Finally Judd argued that the constitutional provision against members of Congress holding offices under the United States does not mean that the Speaker must resign his office, for the Speaker would not hold the presidential office, he would merely act as President. Ibid., 7026-7027. See also the arguments of Hancock and Hatch, Ibid., 7015, 8273-8274.

Professor Edward S. Corwin also took the position that the "officer" would have to keep his original office, a thing that would be especially objectional, he thought, in the case of the Speaker. United States News (July 13, 1945), 36.

The report of the House committee assumed such officer would hold the presidential office and argued, therefore, that he would have to resign his legislative post because the Constitution denied membership in Congress to an officer of the United States.[117] In the Eightieth Congress Senator Wherry unequivocally stated that he thought the "officer" would not have to continue to hold his qualifying office because he would become the President of the United States.[118]

Wherry's interpretation of the constitutional clause is the one on which the Presidential Succession Act of 1947 is based. It provides that the taking of the presidential oath by such officer shall be held to constitute his resignation from the office, by virtue of the holding of which he qualifies to act as President.[119]

The state courts are not all agreed that the acting Governor becomes the Governor. In some of the states the courts have held that the succeeding officer becomes the Governor by force of the functions devolved upon him. In these states there is no need for the successor to continue to hold the office by virtue of which he qualified to become Governor.[120] In fact,

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[117] H. Rept. 829, 79th Cong., 1st sess., 4. This in itself is, of course, a denial that the Speaker is an officer of the United States.

[118] 93 Cong. Rec. 7771. See also Hearings on S. Con. Res. 1 ..., 80th Cong., 1st sess., 41 and 43.

[119] Section d(3).

[120] For example, Chadwick v. Earhart, 11 Ore. 389 (1884), in which it was held that the acting Governor was to perform the gubernatorial duties for the remainder of the term and not only so long as he should continue to be the Secretary of State. State v. Olcott, 94 Ore. 633 (1920), in which it was held that the Secretary of State actually became the Governor for the remainder of the Governor's term even though his term as Secretary of State expired before such date. But see the dissenting opinion of Justices Bennett and Burnett, pp. 645 ff. of the report. See also pp. 67-70, supra.

continuance in his former office would probably be incompatible with holding the gubernatorial office. In other states, where the courts do not recognize the successor as becoming Governor, it has been held that resignation from the office to which the gubernatorial powers are appendant prevents the person from exercising gubernatorial power.[121] Both rulings are logical; they are merely based on a different view of the status of the successor. One views the successor as becoming the Governor, while the other does not. The same logic should bind the law of presidential succession; but the Act of 1947 is based on two irreconcilable premises. It recognizes the designated officer as becoming President by providing for his resignation from his legislative or Cabinet post, while at the same time it denies that he is the President by not giving him the tenure guaranteed to a President.

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[121] Futrell v. Oldham, 107 Ark. 386 (1913), in which it was held that the Constitution devolved gubernatorial duties upon whomever holds the Presidency of the Senate, and a change in the Presidency of the Senate works a change in the performance of the duties of the Governor; when a new President of the Senate is chosen, he takes over the gubernatorial functions. See the brief of the appellant setting forth the position adopted by the court. People ex rel. Parks v. Cornforth, 34 Colo. 107 (1905), in which the court ruled that the powers and duties of the Lieutenant Governor devolve upon whomever is the President pro tempore of the Senate, and the right to exercise these powers passes to a newly-elected President pro tempore. Clifford v. Heller, 63 N. J. L. 105 (1899), in which the court ruled that the President of the Senate upon whom the gubernatorial functions devolved forfeited his right to act as Governor by resigning his senatorial office and thereby ceasing to be President of the Senate. Robertson v. the State ex rel. Smith, 109 Ind. 79 (1887), see dictum at p. 111 in which Justice Mitchell said, "If an office is appendant...to another office, the determination of the first office will determine the second." See also pp. 70-72, supra.

3. PRESIDENTIAL TENURE AS A LIMITATION ON THE POWER OF CONGRESS

The effect of presidential tenure on the power of Congress depends on whether the successor actually becomes the President or merely acts ex officio. If the designated officer actually becomes the President, he has a term of four years under the Constitution and he can be removed only by a two thirds vote of the Senate upon impeachment. His tenure cannot be merely the remainder of the term or, in the case of a Cabinet officer, only until a Speaker or President pro tempore qualifies to displace him as provided in the Act of 1947. If the designated officer does not actually become President, perhaps Congress may by law restrict his presidential service to a period of less than four years.

There are two conceivable ways of limiting the tenure of the succeeding officer as acting President. The first is to restrict his right to act as President to the time when some other official qualifies. Congress has done this in the law of 1947, but this provision of the law is of doubtful constitutionality.[122] During the debates on presidential succession from 1881 to 1886, Senator Edmunds of Vermont suggested a provision allowing the Secretary of State to act if there were no President pro tempore or Speaker but requiring that he surrender the presidential powers to the President pro tempore or Speaker as soon as one of these legislative officers was chosen. Hoar answered by saying that he did not believe Congress had the power to

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[122] Section d(2). See also H. R. 3587 and the House committee report thereon, H. Rept. 829, 79th Cong., 1st sess., 2-3.

designate several successors, each of whom will serve until some other officer qualifies. He continued by pointing out that Congress is given power to designate an officer to act until the disability of the President or Vice President is removed or a President elected, but not until another officer qualifies.[123]

The second conceivable way of limiting the tenure of the acting President is by providing for a special presidential election when the Presidency and Vice Presidency are both vacant. The question of tenure is unavoidably raised in any consideration of the power of Congress to provide for such election. If the designated officer becomes President, he has presidential tenure. If he does not become the President, he cannot claim this prerogative, and perhaps Congress has power to provide for the election of a President to replace him. This presented a problem in 1947. The original Truman plan called for a special election in certain cases, but the proposal was not incorporated in the Presidential Succession Act of 1947 because there was doubt as to the power of Congress to enact such a provision.[124]

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[123] 14 Cong. Rec. 880. In the 49th Congress Hoar explained that if there was no Secretary of State when the presidential vacancy occurred, the Secretary of the Treasury will act as President and, when he appoints a Secretary of State, the new Secretary of State would not displace him. "You never go back up the ladder after you have gone down." 17 Cong. Rec. 220. See also ibid., 677, 693.

[124] The original Sumners bill contained special election provisions and the report of the House committee thereon ruled in favor of congressional power to enact the provisions. H. Rept. 829, 79th Cong., 1st sess., 4. Represenative Sumners argued in favor of the constitutionality of such a special election on the basis of the "general philosophy of the system we are operating under, which contemplates that it would be better to have somebody elected by the people act as President than an appointed person." 91 Cong. Rec. 7023. Eventually the controversial election provision was stricken from the bill on grounds of both

Under the present law the officer upon whom presidential power devolves is to act as President for the remainder of the term during which the vacancy occurs with such exceptions as mentioned above.[125]

C. THE POWER OF CONGRESS

1. TO PROVIDE FOR SPECIAL PRESIDENTIAL ELECTIONS

The Constitution authorizes Congress to designate an officer to act as President in certain contingencies, and states that such officer shall act until a President shall be elected. The Constitution does not say if the President is to be elected at the next quadrennial election or at a special election. Although Congress is not given power to provide for a special election, the framers of the Constitution doubtless intended that special presidential elections would be called. The original clause stated that the designated officer should act as President "until the time of electing a President shall arrive." Madison objected to this phraseology because it would prevent the filling of a vacancy by special election and moved to substitute the adverbial clause found in the Constitution today, "until...a President shall be elected." Madison's amendment was agreed to by a voice vote.[126] In the Virginia Convention, Mason objected that in case of vacancy in the first two executive offices, there was no provision for the speedy election of

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constitutionality and policy. Ibid., 7018-7028. The Wherry bill, which ultimately became the Act of 1947, did not contain these provisions because Senator Wherry thought Congress lacked this power. 93 Cong. Rec. 7784.

[125] Sections c, d (2).

[126] Farrand, op. cit., II, 535.

another President. Madison answered, "When the President and Vice President die, the election of another President will immediately take place."[127]

It seems clear that Madison's amendment was adopted to permit the filling of vacancies by special election, but constitutional authorities have been divided on the question of the power of Congress to provide for such elections. In 1833 Justice Story suggested that Congress might lack this power and thought the question could best be resolved by constitutional amendment.[128] Burgess questioned the constitutionality of a special presidential election on the ground that the fourth of March [now January 20th] of every fourth year is by implication made the beginning of every presidential term.[129] Willoughby did not think mere removal of an obstacle to the holding of such an election by striking out the provision that the acting President shall serve "until the time of electing a President shall arrive" could be held in itself as conferring the power in question upon Congress.[130] On the other hand, Rawle and

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[127] Jonathan Elliott, The Debates in the Several States (2nd ed., 1881), III, 487.

[128] Story, op. cit., II, 335-337. Story also believed a President could not be chosen under the statute unless a Vice President was chosen also, because the Constitution requires that these two things be done together.

[129] John W. Burgess, op. cit., II, 241. In 1934 the highest court of Montana accepted this position, ruling no special election could be held because the term provided for in the state constitution was four years and applies to the office, not to the person. The state constitution, however, provided that the successor was to act as Governor "for the residue of the term, or until the disability shall cease." State ex rel. Lamey v. Mitchell, 97 Mont. 252 (1934).

[130] Willoughby, op. cit., III, 1468. In support of Willoughby's thesis it may be pointed out that the Convention deleted the provision giving Congress the legal tender power [Farrand, op. cit., II, 310], but the Supreme Court upheld the legal tender power. Legal Tender Cases, 12 Wall. 457 (1871). See also the opinion of Charles Warren, 91 Cong. Rec. A3639-A3641.

Burdick discuss statutory provisions for such special election without questioning the power of Congress to enact the necessary provisions.[131]

Construction given to the succession clause by early Congresses, whose views are regarded as authoritative, favors congressional power to provide for a special election in case both the Presidency and Vice Presidency are vacant. The Act of 1792 contained special election provisions, and nobody at the time seriously questioned the power of Congress to enact these provisions.[132] The only constitutional question discussed was whether the presiding officers of the two houses were eligible to act as President, and this question was resolved within the framework of the Hamilton-Jefferson controversy; but partisanship played no part in the decision favoring the congressional power to call a special election. In 1856 the Senate Committee on the Judiciary held the provisions for a special election contained in the statute constitutional. The Committee pointed out that the status and tenure of the "officer" acting as President would not prevent Congress from providing for a special election to select a President.[133] For seventy-eight years the constitutionality of the law went almost unchallenged. But in

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[131] Rawle, op. cit., 49-50; Burdick, op. cit., 60-61. See also Hamlin, op. cit., 182-195; Lindsay Rogers, op. cit., 482. The Supreme Court of Wyoming took the position that in the absence of a constitutional provision for filling a vacancy in the office of Governor, it was within the power of the legislature to do so by law. In re: Moore, 4 Wyo. 98 (1893).

[132] In the First Congress Smith of South Carolina, however, expressed the opinion that the Constitution forbid a special presidential election. 2 Annals of Cong. 1854.

[133] S. Rept. 260, 34th Cong., 1st sess., 5-6.

1867 the House Committee on the Judiciary was unanimously of the opinion that Congress had no power to fill a vacancy by special election.[134]

In the five years from 1881 to 1886, when the whole succession problem was discussed, opinion was widely divided on the power of Congress to provide for special presidential elections. One objection raised was the possible separation of presidential and congressional elections and the resulting political confusion which would accompany a multiplication of elections.[135] The initial Hoar bill provided that the designated officer was to act as President until the end of the original term.[136] The bill was amended to meet the objections of those who wished to retain the provisions for a special election as under the Act of 1792. The amendments proposed that the acting President serve only until the disability was removed "or a President shall be elected,"[137] and that he call a special session of Congress if that body were not in session or due to convene within twenty days.[138]

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[134] Cong. Globe, 39th Cong., 2nd sess., 691.

[135] For example, see the remarks of Beck and Hoar, 13 Cong. Rec. 122, 4975; of Hoar, Garland, and Maxey, 14 Cong. Rec. 689, 878-879, 915-916, 954, 1008-1009; of Maxey, Morgan, Evarts, and Eden, 17 Cong. Rec. 216, 224, 248-249, 669. See also H. Rept. 26, 49th Cong., 1st sess., 4. For an exposition of the opposite thesis, see the remarks of Morgan, Blair, Sherman, Jones, and Ingalls, 14 Cong. Rec. 691, 884, 886-887, 957, 959, 960. See also the general discussion, ibid., 1011-1014; and the remarks of Edmunds, Peters, and Adams, 17 Cong. Rec. 250-251, 670, 678.

[136] S. 2035, 47th Cong., for text, see 13 Cong. Rec. 4975.

[137] 14 Cong. Rec. 1006-1014.

[138] When Ingalls offered the amendment, Senators Garland and Lapham protested that it was unconstitutional to try to direct the acting President when to call Congress, for this is a power left to presidential discretion under the Constitution. Ibid., 1009. Edmunds of Vermont suggested that some legislative officer, such as the clerk of the Senate, should be given power

The effect of these amendments is by no means clear. When the amendments were adopted, Senator Hoar said that Congress, when convened, was free to decide whether to call an election or not. Sherman thought Congress would not have this power under the amended bill. The debates do not indicate that agreement was reached.[139] Later, Senator Hoar said that under his bill the provisions for a special election were abrogated and that the acting President was to complete the term.[140] The House which passed the Act of 1886 seems to have understood that the designated officer was to complete the unexpired portion of the term unless he were only acting ad interim because of a temporary inability on the part of the President or Vice President.[141] An amendment to restore the special election provision of the old law was defeated in the House.[142]

In spite of this evidence that a special election was not contemplated under the Act of 1886, it must be remembered that the bill was amended to meet the objections of those who wished to retain the provisions for a special election. The commentators have not agreed on whether a special election could be called under the law or not. Tucker said, if the disability

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to convene Congress in case of vacancy when there was no President pro tempore of the Senate or Speaker of the House. The purpose was to allow each house to choose a presiding officer. Hoar answered that only the President [or one on whom presidential power had devolved] could convene Congress. Ibid., 880. Senators Blair and Jones thought Congress could convene under its own power without a call from the acting President. Ibid., 958, 1006.

[139] Ibid., 1011.

[140] 17 Cong. Rec. 180.

[141] Ibid., 665; H. Rept. 26, 49th Cong., 1st sess., 4.

[142] 17 Cong. Rec. 678-679, 693.

were temporary, the President was to be restored to his powers, but, if it were a case of vacancy or permanent inability, an election was to be called.[143] Cooley, Black, and Watson, on the other hand, said the acting President was to serve until the disability of the President or Vice President was removed or a President was elected at the next quadrennial election.[144]

The Act of 1886 did nothing to resolve the question of congressional power to call a special election. Instead of providing that the acting President should serve until a President was elected at the next quadrennial election or until a President was chosen by special election, the law adopted the vague language of the Constitution, "until a President shall be elected." The result of this uncertainty was probably to place the tenure of the acting President in the hands of Congress. If Congress were satisfied with the acting President, probably no special election would be ordered; but, if he faced a hostile Congress, such an election might be called.[145] Whatever criticisms may be made of the Presidential Succession Act of 1947, it has the merit of removing the uncertainty as to the tenure of the acting President which existed under the previous statute.

Constitutional authorities are by no means agreed on congressional power to provide for a special presidential election when the Presidency and Vice-Presidency are both vacant, but the

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[143] Tucker, op. cit., II, 714.

[144] Thomas M. Cooley, Principles of Constitutional Law (3rd ed., edited by Andrew McLaughlin, 1898), 52 n. 4; Black, op. cit., 93-94; Watson, op. cit., 900-902.

[145] For a criticism of this aspect of the Act of 1886, see Hamlin, op. cit., 182-195; and Willoughby, op. cit., III, 1469.

preponderance of evidence supports the power. The proceedings in the Philadelphia Convention and the Virginia Ratifying Convention, early interpretation of the clause, and the opinion of a number of careful students of the Constitution seem to confirm this conclusion. If one accepts this position, logic compels him to go a step further and hold that the officer designated to act as President does not become President. The power to call the election precludes his claim to the tenure guaranteed by the Constitution to a de jure President. Since there has never been a case of succession passing to the designated officer, no conflicting usage has been established. To say that Congress has the power to provide for a special election is not to say that Congress must exercise the power. Whether special election provisions shall be incorporated in the succession laws falls within the discretion of the legislature. When the Act of 1792 was passed, Congress saw fit to enact special election provisions. When the Acts of 1886 and 1947 were passed, Congress saw fit not to enact these provisions.

Having accepted the power of Congress to provide for a special presidential election in cases of vacancy in both the Presidency and Vice Presidency, there is the further question of the tenure of the specially-elected President. This question was presented in the Truman plan in the Sumners bill, both of which conceded the constitutional power to call the election and provided that the person so elected should serve for the unexpired portion of the term during which the vacancy occurred. Since the special election was to concur with the congressional

by-election, such a President would have a term of two years. This part of the proposal is contrary to earlier interpretations of the Constitution.

Prior to 1945, opinion was almost unanimously in favor of the constitutional necessity of a four-year term for a specially-elected President. In 1856, Senator Butler, reporting for the Senate Committee on the Judiciary, said that a President elected at a special election must hold office for a term of four years, since this is the only term known in the Constitution for a President elected by the electoral colleges to that high office. The committee denied that Congress had power to provide for an election of a President who would hold for the residue of any existing term. The election held under this authority, said the committee, is like an election to provide for an approaching regular vacancy.[146] The opinion rendered in 1856 was almost unanimously accepted by Congress during the debates on succession from 1881-1886.[147]

Truman's plan provided for a special election to fill vacancies occurring early in the term, but the President so elected was only to complete the unexpired portion of the term. This part of the plan was written into the Sumners bill but was stricken from it in the House.[148] When the matter was again

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[146] S. Rept. 260, 34th Cong., 1st sess., 5.

[147] Remarks of George Boutwell, Cong. Globe, 39th Cong., 2nd sess., 691; Beck, 13 Cong. Rec. 126; Eden and Dibble, 17 Cong. Rec. 669, 685. See also H. Rept. 26, 49th Cong., 1st sess., 6; H. Rept. 3633, 58th Cong., 3rd sess., 1; H. Rept. 7581, 59th Cong., 2nd sess., 1.

[148] See the remarks of Hancock, Kefauver, Gwynne, and Springer on the constitutionality of electing a President for a two-year term, 91 Cong. Rec. 7015-7019.

discussed, in the Eightieth Congress, no serious attempt was made to provide for the filling of vacancies by electing a President to serve for only two years. Senator Wherry, sponsor of the bill which ultimately was enacted, reverted to the earlier position. He said that, if Congress has power to provide for a special election, the President so elected must have a term of four years.[149]

Senator Wherry's conclusion on this point seems to be sound and in accord with the letter of the Constitution and with previous congressional opinion on the subject. It is adequately supported by the opinion of students of the Constitution. It is true that most writers on presidential succession have ignored the question of the tenure of a specially-elected President, but those few who have considered it have generally concluded that such a President has a term of four years.[150]

The argument that a specially elected President need not have the four-year tenure guaranteed by the Constitution, because he would not be the President but only the officer designated by Congress, is untenable. He would be the President, because the only election to the office recognized by the Constitution provides for the selection of the President and Vice President. "Officers of the United States" are appointed by

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[149] 93 Cong. Rec. 7784.

[150] Burgess, op. cit., II, 241; Lewis R. Works, "The Succession of the Vice President Under the Constitution," 38 Am. Law Rev. 500, 503; Lindsay Rogers, op. cit., 482. See also dicta in two Oregon cases in support of this position: State of Oregon ex rel. Whitney v. Johns, 3 Ore. 535, 583 (1870); State v. Olcott, 94 Ore. 633, 642 (1920). Tucker is alone among the commentators in taking the contrary position. Op. cit., II, 714.

the President and the Senate, by the President alone, by the department heads, or by the courts of law. Officers in this sense are not elected by the electoral colleges. Thus a person elected by the electoral colleges would not be an officer designated to act as President, but would be the President and would have the four-year tenure provided in the Constitution.

2. TO DESIGNATE AN OFFICER WHO LACKS THE CONSTITUTIONAL QUALIFICATIONS TO BECOME PRESIDENT

The final constitutional question involved in the power of Congress to provide for succession beyond the Vice President is whether Congress is free to designate an officer who does not possess the constitutional qualifications of citizenship, age, and residence. The Act of 1792 did not require the acting President to have these qualifications. Watson said the law was defective in this respect. He wrote that, if the designated officer lacked any of the constitutional qualifications, he could not act as President, notwithstanding the provisions of the statute.[151] Cooley raised the same question, but did not attempt an answer.[152]

One might reasonably argue that the constitutional qualifications as to citizenship, age, and residence apply only to one who becomes President; and, since the officer designated by Congress does not become the President but only acts as such, he need not have these qualifications. Logic may allow, but does not dictate, this conclusion. There has been almost unanimous

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[151] Watson, op. cit., I, 897.

[152] Cooley, Principles of Constitutional Law (1880), 51.

agreement that one not so qualified could not exercise the powers or discharge the duties of the Presidency.[153] In any case, the laws of 1886 and 1947 make the possession of these qualifications a statutory requirement if such were not already a constitutional requirement.

D. CONCLUSION

The extent of congressional power to provide for succession beyond the Vice President depends largely on whether or not the succeeding officer becomes the President. The preponderance of evidence and informed opinion favor the interpretation that the officer does not become President but merely acts in that capacity. From this it follows that: (1) The acting President does not acquire the four-year presidential tenure, and Congress can, therefore, provide for a special election to fill the vacancy. (2) Congress may be able to designate as acting President an officer who lacks the presidential qualifications with respect to citizenship, age, and residence. Congressional power to provide for presidential succession, however, is not without limitation. Congress cannot declare what person shall become President but can only annex the presidential powers and duties to another office. Therefore Congress cannot authorize the officer to act as President after he ceases to be such officer by relinquishing the office to which these powers and duties are annexed.

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[153] For example, see: S. Rept. 260, 34th Cong., 1st sess., 4-5; the remarks of Senators Beck, Garland, and Coke, 13 Cong. Rec. 122, 138, 140; of Senators Morgan and Edmunds, 14 Cong. Rec. 886, 963; of Representative Graham, 91 Cong. Rec. 7021.

There are further limitations on congressional power to provide for succession. Congress may designate only "officers of the United States," as those officers are defined both by the Constitution and by the courts. Any provision Congress makes for a special election must conform to the constitutional requirement of presidential tenure, which means that a specially elected President must have a term of four years. Finally, if a special election is provided for, it must be a presidential election in the constitutional sense, according to which a President and Vice President must be elected at the same time. While several plans for succession beyond the Vice President are unacceptable under this definition of congressional power, others are entirely within congressional competence. The following chapter will attempt to evaluate these proposals for providing a successor if vacancies or inabilities occur in the Presidency and Vice Presidency simultaneously.

CHAPTER VI

THE POLICY OF VARIOUS PROPOSALS TO PROVIDE FOR SUCCESSION BEYOND THE VICE PRESIDENT

Two important policy considerations are involved in providing for succession beyond the Vice President. The first relates to the officer who should be designated to act as President. The second concerns itself with the term for which the officer should act as President: whether he should be allowed to exercise presidential power for the remainder of the unexpired term or only until a President is chosen by special election. Four different theories have been advanced concerning what officer should be designated. One is that a legislative officer should be made the successor to insure that the acting President is chosen by an elective process. The second is that a subordinate executive officer should be designated to insure continuity of executive policy and maintenance of separation of powers. The third is that the succession should be placed in the Supreme Court. The fourth is that the Constitution should be amended empowering the electoral colleges to choose several Vice Presidents.

A. THE OFFICER TO BE DESIGNATED

Even if a legislative officer could constitutionally be designated to act as President, there are objections to making such a designation. One objection to the provisions of the Succession Act of 1792 was that often there was neither a President pro tempore nor a Speaker. Such was the case when President Garfield died in 1881 and when Vice President Hendricks died in 1885. Before the adoption of the Twentieth Amendment,

the old Congress expired on March third of the odd-numbered years and the new Congress did not convene until the following December unless called into special session. This meant that for nine months out of every twenty-four, there likely would be no one to act as President if the necessity should arise.[1] The problem was intensified by the usage that the President pro tempore of the Senate ceased to be President pro tempore when the Vice President resumed the chair or when the Senate adjourned.[2] Moreover, if the President pro tempore were called to act during the first two years of a presidential term and his senatorial term expired after two years of the President's term, the country might find itself without an acting President.

John J. Jenkins, who favored designating the President pro tempore of the Senate, worked out a plan which provided for a more or less permanent President pro tempore. Jenkins introduced a proposed constitutional amendment in four Congresses to give effect to this plan. The Jenkins proposal called for assembling the Senate in extraordinary session at twelve o'clock noon of the day on which one presidential term expires and another begins for the purpose of choosing a President pro tempore. If the Senate failed to choose a President pro tempore, the Senator of greatest seniority was to become President pro tempore.[3] In

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[1] See the comments of Beck, 13 Cong. Rec. 122, 125; Hoar, Garland, Maxey, Beck, and Sherman, 14 Cong. Rec. 689, 877, 914, 953, 956-957; and Hoar again, ibid., 960.

[2] S. Rept. 3, 44th Cong., 1st sess.; 4 Cong. Rec. 311-316, 360-373. See also the remarks of Senator Jones of Florida, 14 Cong. Rec. 881, 1006-1007.

[3] H. J. Res. 294, 55th Cong.; H. J. Res. 17, 56th Cong.; H. J. Res. 133, 57th Cong.; H. J. Res. 264, 60th Cong.

his argument before the House Committee on the Judiciary, Jenkins pointed out that, under the Constitution, the Senate could not choose a President pro tempore except in case of the Vice President's absence or when he was acting as President. In his opinion, there could be no President pro tempore when the Vice President was present in the Senate. Jenkins thought that his plan would remedy this defect of the Constitution and provide a successor to the President.[4] Although Jenkins was chairman of the Committee, his arguments did not induce the Committee to report the resolution; and no action was ever taken to advance his plan.

The objections to designating legislative officers which Jenkins' proposal sought to remedy no longer exist. As Senator Wherry pointed out, this inadequacy of the Act of 1792 does not apply to the Act of 1947. Since the Twentieth Amendment, the new Congress organizes as soon as the old one expires.[5] Under the Senate rule of 1890 the President pro tempore is a more or less permanent official.[6] Whether the Senate rule of 1890 is constitutional is open to question.[7] But, assuming that it is,

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[4] Hearings on H. J. Res. 264, 60th Cong., 2nd sess., 3-5.

[5] Under the Twentieth Amendment the old Congress expires every other January third and the new Congress meets on the same day. This gives the Congress seventeen days in which to organize and choose presiding officers before the inauguration of the President. For the remarks of Senator Wherry, see 93 Cong. Rec. 7700.

[6] Senate Manual, 80th Cong., 1st sess., 5n. The rule states that the Senate is competent to elect a President pro tempore, "who shall hold the office during the pleasure of the Senate and until another is elected...." See also 21 Cong. Rec. 2144-2153.

[7] Article I, section 3 of the Constitution empowers the Senate to choose a President pro tempore when the Vice President is absent or exercising the office of President of the United States. It does not authorize the Senate to elect an alternate President of the Senate to preside when the Vice President is

the rule and the Twentieth Amendment lessen the force of one of the objections to designating the presiding legislative officers to act as President.

The Senate rule and the Twentieth Amendment, however, do not provide an acting President in case the legislative officer's term as a Senator or Representative expires before the next presidential term begins.[8] Constitutionally the officer must continue in the office to which the presidential power is annexed. If the vacancy occurs during the first two years of the presidential term, the Speaker's term as a Representative will expire two years and seventeen days before the next presidential term begins; and the President pro tempore's senatorial term might expire at the same time. For example, the terms of Messrs. Rayburn and McKeller expired on January 3, 1947, while the Roosevelt-Truman term will not expire until January 20, 1949. In any case, the terms of legislative officers expire seventeen days before the President's. This could deprive the Government of an acting President. Since the Constitution does not require that either presiding officer be a member of the house over which he presides, either house could provide that its presiding officer continue as such after his term as Senator or Representa-

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absent or exercising the office of President of the United States. Section IX of Jefferson's Manual says that the Vice President's office "is understood to be determined on the Vice President's appearing and taking the chair, or at the meeting of the Senate after the first recess." Senate Manual, op. cit., 312.

[8] John J. Coburn introduced a bill to provide for such cases. H. R. 572, 40th Cong. There is no copy of the bill in the Library of Congress or in the National Archives. The Congressional Globe (40th Cong., 2nd sess., 780) describes it as "a bill to provide for the office of President...in case of the expiration, before the next presidential election, of the term of service of the United States Senator acting as President." The bill died in committee.

tive expires. Such action in conjunction with the Twentieth Amendment and the Senate rule of 1890 would eliminate the first objection to designating legislative officers as possible successors to the President.

The second objection to the Act of 1792 was that one or both houses of Congress may be controlled by a party different from that of the President. In case of succession this could mean a change of party in control of the executive branch. This objection, which also applies to the Act of 1947, is frequently raised by party regulars.[9] During the past seventy-five years, the President and the Speaker of the House of Representatives have been of different parties approximately one quarter of the time,[10] and the Senate has been controlled by the party opposing the administration sixteen percent of the time.[11] Those who prefer parliamentary government to our system of separation of powers may argue that this is not a valid reason for not designating legislative officers as possible successors to the President. After the congressional election in 1946, Senator Fulbright argued that the party rejected at the by-election should not continue to control the executive and advocated the succession of a Republican Secretary of State. The succession of a legislative officer in case of partisan cleavage between the executive and legislature might

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[9] To meet this objection to the Truman plan, James Farley suggested that the Speaker succeed if he were of the President's party, but the minority leader succeed if the Speaker were not of the President's party. 23 Cong. Digest, 89, 91 (March, 1946).

[10] Grant, 1875-1877; Hayes, 1877-1881; Arthur, 1883-1885; Harrison, 1891-1893; Cleveland, 1895-1897; Taft, 1911-1913; Wilson, 1919-1921; Hoover, 1931-1933; Truman, 1947-1949.

[11] Hayes, 1879-1881; Cleveland, 1885-1889; 1895-1897; Wilson, 1919-1921; Truman, 1947-1949.

promote harmony between the acting President and the Congress, but it is alien to our Constitution. The Federal Convention deliberately rejected the idea of legislative supremacy and gave the President a quasi-independent status in executive affairs. The original plan was for the President of the Senate to be the President's first successor. After a system of separation of powers with an independently elected Executive was decided upon, however, they determined that an independently elected Vice President should be the President's successor.

Placing succession in the legislative branch may on some future occasion eliminate a deadlock if vacancy or inability occurs when the Executive and the Legislature are of different parties. But under certain conditions several such successions could shift the balance of power so as to alter our entire constitutional system. The doctrine of separation of powers has been criticized on both theoretical and practical grounds. Consideration of the advantages and disadvantages of the system is beyond the scope of this study. It may be pointed out, nevertheless, that the system is embodied in our Constitution and has become a part of our political tradition. It should not, therefore, be altered by succession legislation which fits momentary partisan advantages. If parliamentary government is to be adopted, it should be done only after careful consideration of the advantages and disadvantages of the system.[12] Constitutional amendment rather than succession legislation would be the proper

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[12] On this point, see Elmer Davis, "Message to the Eightieth Congress," Harper's Magazine (January, 1947), 21-29. See also p. 46, n. 69, supra.

means of effecting such a change.

A third objection to the succession law of 1792 was that it gave a hostile Congress incentive to remove a President in order that one of its own presiding officers might administer the executive branch of the Government. Many of the proponents of the Act of 1886 recalled the situation existing at the time of Johnson's impeachment. Had Johnson been removed from office, he would have been succeeded by Ben Wade, the President pro tempore; yet Wade was himself concerned in the conspiracy to impeach Johnson and voted for removal. The unsavory character of the whole Johnson episode should be sufficient to deter Congress from enacting a law that might encourage repetition of the incident.[13]

If, on grounds of constitutionality and policy, the presiding legislative officers are considered ineligible for designation to act as President, the question arises as to whether Cabinet members would be desirable successors. In the First Congress Representatives Benson and Sedgwick objected to designating Cabinet officers because it would allow the President to designate his successor by making Cabinet appointments.[14] The same point was made at the time the Act of 1886 was passed.[15] Truman's chief reason for asking for repeal of the Act of 1886 was that he thought the practice of allowing the President to designate his own successor was "undemocratic." To this

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[13] See pp. 38-41, supra. Also the remarks of Hancock, 91 Cong. Rec. 7015.

[14] 2 Annals of Cong. 1855, 1866.

[15] See for example the comments of Senator Edmunds, 17 Cong. Rec. 219.

objection it may be answered that many of our Presidents have named their potential successors by influencing the selection of the vice-presidential candidate. Roosevelt named Henry Wallace in 1940, and it was Roosevelt who at Chicago in 1944 put Truman in the line of succession.[16] The succession provided by the law of 1886 is not bad because the Senate automatically consents to Cabinet appointments. This should be the practice, because the President is entitled to have advisors of his own choosing and such method of appointment is likely to give the President a successor who supports the policy approved at the polls in the last presidential election. A Senate, whose majority is not of the President's party, should not refuse confirmation of appointments to Cabinet posts for partisan reasons. But the Senate can and should keep really unfit candidates from the line of succession.[17] If past appointments to the post of Secretary of State are an indication of future appointments to that post, the Senate will rarely need to exercise this power.

The presiding legislative officers have also been preferred to Cabinet members as successors to the President on the ground that it is more "democratic" to have the Speaker or President pro tempore succeed because they are popularly elected in their own district or state, and then are chosen to preside in their respective houses by representatives of all the people.[18]

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[16] See an editorial on this point, Muncie [Indiana] Star, May 16, 1945, reprinted in 91 Cong. Rec. A2935.

[17] See the exchange between Senators Edmunds and Hoar, 14 Cong. Rec. 690.

[18] See the remarks of Edmunds and Jones, 14 Cong. Rec. 962-963 and 1006-1007, respectively; and the general debate, ibid., 1011-1014; and the remarks of Peters and Osborne, 17 Cong. Rec. 671 and 686, respectively.

Under the most favorable conditions, such persons are the choice of their constituents as regards national policy, but still they are only the choice of one district or one state.[19] This is more likely to be true of the President pro tempore because he is elected in the state as a whole and is less likely to be tied to local issues. Representatives often and Senators frequently are elected on local issues. The representative character of the Speaker or the President pro tempore may be further reduced if he were chosen in a district or a state where suffrage qualifications are restrictive and/or political apathy prevails.[20]

Moreover, election to the Speakership or to the Presidency pro tempore of the Senate is largely dependent on seniority, factional combinations, and personal popularity among the legislators. Seniority in turn depends on coming from a "safe" constituency. This means that the presiding officers tend to be men who pay a great deal of attention to local affairs and who come from single-party constituencies.[21] For example, when the

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[19] See the comments of Garland and Hoar, 14 Cong. Rec. 878 and 964; of Maxey and Seney, 17 Cong. Rec. 216 and 672-676.

[20] For example: Sam Rayburn, the Speaker in the 79th Congress, was elected in a district having 259,237 population but in which only 40,047 votes were cast in the congressional election although it coincided with the presidential election of 1944. Out of this 40,047 ballots, only four were cast for other candidates, Rayburn receiving 40,043 votes. Cong. Dir., 79th Cong., 1st sess. See the New Republic (July 2, 1945), 4-5.

[21] For example, see the statistics on the popular election of several Speakers who might have succeeded if the present law had been in effect and if the man exercising presidential power at the time had died. Samuel Cox was elected to the 44th Congress (1875-7) from the sixth district of New York by 13,762 votes to 3,428. John Carlisle was elected to the 48th Congress (1883-5) from the sixth district of Kentucky unopposed. As noted above, Sam Rayburn was elected to the 79th Congress (1945-7) by a vote of 40,043 to 4.

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Democrats control the Congress, the presiding legislative officers are often from the South; and it is submitted that the South is not a political cross-section of the nation. Cabinet members, however, are likely to represent principles and policies for which the people voted in a national election. A change in control of the Congress at the by-election is no proof that the people have rejected these policies, because the change may be effected by an accumulation of local issues. The department heads presumably are appointed because they stand near the President on matters of national policy and, like the President, reflect national points of view. Members of Congress, on the other hand, are likely to be local figures, who are often not elected on national issues or selected because of their knowledge of national affairs. For this reason, a Cabinet member can better be depended on to continue the policy of his chief and to represent a broader national view. In this sense the succession of a Cabinet member is likely to be more in harmony with popular government than the succession of a legislative officer.[22]

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[22] For example: The Whigs won the election of 1848, but if Fillmore had died, President pro tempore William R. King, a Democrat, would have succeeded. In 1880 the Republicans won the Presidency; but, if the Act of 1947 had been in effect and Arthur had died after 1883, John Carlisle, a Democrat, would have become the acting President. Under the law then in effect, the non-partisan David Davis would have succeeded if the vacancy occurred before 1883. One may question what popular mandate Davis had from the people of the United States. The Republicans won the election of 1908; but, if Taft had died after Vice President Sherman's death and if the present law had been in effect, the Democratic Speaker, Champ Clark, would have succeeded. If Truman died after 1947, the Republican Speaker, Joseph Martin, would have succeeded to his power.

See the remarks of Hoar, 13 Cong. Rec. 4975; of Hoar and Blair, 14 Cong. Rec. 688-689 and 958; of Maxey and Seney, 17 Cong. Rec. 216 and 675; also Elmer Davis, op. cit., 24; Lucius Wilmerding, Jr., "Presidential Succession," Atlantic Monthly (May, 1947), 91, 97.

Two other objections have been raised to the succession of Cabinet officers to the presidential powers and duties. First, in case of the President's removal the Cabinet might be implicated as participas criminis in the acts for which the President was impeached and removed.[23] If such were the case, presumably the accused Cabinet members would be impeached; and the laws of 1886 and 1947 properly exclude from the line of succession any Cabinet member under impeachment. Finally, the question has been raised as to whether or not Cabinet members continue to be "officers" after the official functions of the President who appointed them have terminated.[24] If they do not continue to be officers, their right to act as President would be vitiated by vacancy in the presidential office. But the custom is well established that a Cabinet member continues in his post until his successor is appointed and qualifies. This is a practical usage; it enables a Cabinet member to act as President after the death, resignation, removal, or inability of his chief; and there is no valid reason for overturning this usage.

In the enactment of succession legislation attention should be given, as a matter of public policy, to the establishment of a system which will ensure that men of presidential calibre will succeed to the executive power. If history is an indication of the stature of the men who will be Presidents pro tempore, Speakers, and Secretaries of State in the future, the Secretary of State is favored. Polk is the only Speaker who later became the

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[23] S. Rept. 260, 34th Cong., 1st sess., 4. See also the objections of Beck and Garland, 13 Cong. Rec. 122 and 138.

[24] S. Rept. 260, 34th Cong., 1st sess., 4.

President. Only two other Speakers, Clay and Blaine, were nominated by a major political party for the Presidency, and both served as Secretary of State after serving as Speaker. On the other hand, six Secretaries of State have later been elected to the Presidency while an equal number of other Secretaries of State have been nominees for that high office. One need only read over a list of the Presidents pro tempore, Speakers, and Secretaries of State to conclude that the latter office is most likely to have an incumbent of presidential stature.[25]

If a choice must be made between legislative and Cabinet officers, both constitutional and policy considerations seem to resolve the choice in favor of Cabinet officers. But there are other possibilities. Several times the suggestion has been made to place presidential succession in the Supreme Court. In the First Congress Representative Livermore objected to such an arrangement because the Chief Justice presides at the impeachment trial of a President.[26] In 1856 the Senate Committee on the Judiciary met this objection by suggesting that the Chief Justice be excluded from succession if the vacancy were caused by removal. In such case, the Committee thought, succession should pass to the Associate Justices according to seniority of commission.[27] This would meet one objection to the succession of judicial officers, but there is another objection. Presumably,

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[25] See the argument of Hoar, 14 Cong. Rec. 964-965; "The Succession Question Historically," 41 Nation 524 (December 24, 1885); and a brief, popular note in Time (July 2, 1945), 13-14.

[26] 2 Annals of Cong. 1863.

[27] S. Rept. 260, 34th Cong., 1st sess., 6.

the Chief Justice and his associates are politically inactive. Although the Supreme Court does in some measure "follow the election returns," as Finley Peter Dunne has said, the Court does not hold a popular mandate in the sense in which the Chief Executive should. Students of government generally agree that the judiciary should be apart from the partisan politics of the day while the President should identify himself with party policy. For this reason, it does not seem desirable to place executive succession in the Supreme Court.

A final suggestion is to empower the electoral colleges to elect several Vice Presidents, and thus insure that the successor would always be chosen in the manner provided for the choice of a President. Adoption of this plan admittedly would require a constitutional amendment. The plan was first suggested soon after the passage of the Presidential Succession Act of 1886. The original proposal, made by Representative Dibble of South Carolina, called for a First and a Second Vice President. The Second Vice President was to be elected at the same time, in the same manner, and for the same term as the President and First Vice President. All three officials were to be voted for in distinct ballots in conformity with the Twelfth Amendment.[28]

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[28] H. J. Res. 61, 49th Cong., died on the House calendar. H. J. Res. 30, 50th Cong., died in committee. W. H. Crain of Texas introduced a somewhat different plan, which called for three Vice Presidents. Whenever a vacancy occurred in a higher office, all incumbents of lower offices were to move up. For example, if the President died, the First Vice President was to succeed to the Presidency, the Second Vice President was to become First Vice President, and the Third Vice President was to fill the vacancy in the office of Second Vice President. H. J. Res. 90, 49th Cong., died in committee. A similar resolution was offered in the Seventy-ninth Congress by Representative Kunkel. H. J. Res. 230, which was never reported by the House Committee on the Judiciary.

The Dibble resolution was reported favorably by the House Select Committee on the Election of President and Vice President. The Committee thought the Act of 1886 was better than the earlier law, but objected to the new law because it allowed the President to appoint his own successor. In the opinion of the Committee, this was repugnant to popular government. The Committee also objected to the succession of the Secretary of State because the duties of the White House and the State Department were too great for one man to discharge. The Committee said the Dibble resolution provided the best solution to the succession problem, and pointed out that adoption of the proposal would not disturb existing state or federal law except to empower the electors to vote for three officers instead of two.[29]

One practical objection to the plan was not discussed. As pointed out previously, our system of election does not encourage the selection of Vice Presidents possessed of qualifications desirable for a President. Too frequently the vice presidential nomination is awarded for party harmony. The practice of nominating a vice-presidential candidate who represents a wing of the party different from that of the presidential candidate means that the Vice President may stand for principles very different from those for which the people vote at the polls. Under our system there is no way the voter can vote for a presidential candidate without also voting for his running mate. Because the Vice President often is not qualified and cannot be depended on to exercise presidential power in terms of the popular will,

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[29] H. Rept. 2493, 49th Cong., 1st sess., 1-3.

Wilmerding has suggested in a recent article that the office of Vice President be abolished and the officer designated by law be made the President's first successor.[30] Wilmerding's suggestion doubtless has merit. This change, however, would require a constitutional amendment which would probably meet with such opposition as to have little chance for adoption. Opposition would arise from resistance to disturbing settled constitutional practice. There would also be opposition from those who are responsible for keeping party harmony, because they would wish to keep this effective tool for reconciling opposing factions within the party.

In any case, the multiplication of the office of Vice President would probably lessen rather than enhance popular control. It would enable a divided party to attempt to reconcile as many factions as there were places on the ticket by giving one to each. The candidates in such case would likely represent very different policies. It would be a mistake to conclude that the President and both Vice Presidents so elected each had a popular mandate for his policy. If popular control be the measure, succession plans which call for several Vice Presidents must be rejected.

Weighing the constitutional considerations discussed in chapter five and the policy considerations set forth in the present chapter, the most satisfactory succession plan seems to be one which designates an officer appointed by the President. If this judgment is correct, the plan embodied in the Act of 1886

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[30] Lucius Wilmerding, Jr., "The Presidential Succession," The Atlantic Monthly (May, 1947), 91-97.

is the most satisfactory one suggested to date. The Act of 1886 had the defect, however, of failing to define the tenure of the acting President. In addition to deciding what officer should be designated to act as President, the Congress must also decide whether the designated officer should continue to act for the unexpired portion of the term or only until a President is chosen by special election.

B. SPECIAL PRESIDENTIAL ELECTIONS

The Act of 1792 contained provisions for a special election in case the Presidency and Vice Presidency were both vacant. Under the law such an election might occur at a time when there was no congressional election. Since the Constitution requires that a President so chosen have a four-year term, the synchronization of presidential and congressional elections might be broken. In 1886, it was suggested that concurrence of presidential and congressional elections could be maintained by providing for the appointment of electors at the next congressional election. Senator Hoar objected to any special election provisions, because he thought the frequency of elections should not be increased. In his opinion, national elections divided the country, caused unnecessary confusion, and harmed business and commerce. No special election provisions were incorporated in the Act of 1886; but the law left the way open for Congress to call a special election when the occasion arose. The Act of 1947 expressly states that the designated officer shall act as President for the remainder of the term.

Proposals for filling vacancies by special election of a President are of two kinds. One plan calls for the reconvening

of the electors chosen at the last quadrennial election. The other calls for the selection of a new set of presidential electors. Two features are essential to the constitutional adequacy of either plan. A special election would have to conform to the constitutional mandates that the President and Vice President be elected together and that the President have a four-year term. In the absence of a constitutional amendment, Congress could not by law provide for the election of only a President or declare that a specially-elected President should serve only for the unexpired portion of the term.[31]

The proposal for reconvening the electors was first suggested in 1790 by Representative Livermore, who favored amending the Constitution to empower the reconvened electoral colleges to choose a President for the unexpired portion of the term.[32] A variation of this plan was again suggested in 1884.[33] The most recent version was proposed in 1947 by Senator McMahon.

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[31] See pp. 221-230 supra.

[32] 2 Annals of Cong. 1863.

[33] H. R. 2885, 47th Cong., and H. R. 462, 48th Cong., both introduced by McCoid of Iowa. The plan provided for the Secretary of State's discharge of the ministerial functions of the Presidency until the vacancies could be filled by election of a President and Vice President whose term was to be the unexpired portion of the presidential term.

H. R. 2078, 49th Cong., introduced by Randall of Pennsylvania, provided that the presidential electors be given four-year tenure. When the Vice Presidency became vacant or the Vice President succeeded to the Presidency, the electors were to reconvene and choose another Vice President, thus making succession beyond the Vice President unlikely. If both the Presidency and Vice-Presidency became vacant simultaneously, a Cabinet member was to act as President until the electors reconvened and chose a President and Vice President. See the remarks of Call, 17 Cong. Rec. 224. See also a minority report signed by Andrew Caldwell, W. C. Cooper, and James Laird favoring Randall's plan. H. Rept. 2493, 49th Cong., 1st sess.

The plan would have made it the duty of the Governor of each state to reconvene the electors for the purpose of electing a President and Vice President, who would serve for the unexpired portion of the term.[34] There are serious objections to this plan, especially since it would have to be amended to provide a four-year term for the specially-elected President.

Under the electoral system as modified by usage, the electors are given a popular mandate to vote for one man for President and another for Vice President. Although this mandate is not based on a constitutional provision, it should not be overturned because it is the key to the democratization of presidential elections.[35] The electors are not chosen because the voters have faith in their individual judgment but because the

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[34] S. 536, 80th Cong. For a discussion of the plan, see Hearings on S. Con. Res. 1, S. 139, S. 536, S. 564, pp. 19-32.

[35] The mandate has legal basis in the law of a few states. California law directs the electors to vote in the electoral college for the presidential and vice-presidential candidates of the political party which the electors represent. Codes of Cal. (Deering, 1939), Election Code, § 10555. Oregon law requires the candidates for presidential elector to file with the Secretary of State a pledge that, if elected, they will vote in the electoral college for their party's nominees for President and Vice President. Comp. Laws Ann. (1940), § 81-503a. The obligation of the elector to vote for the presidential candidate of his party is recognized incidently in the laws of Massachusetts [Laws (1937), c. 23], New Jersey [Rev. Stat. (1937), § 19:13-15], New York [Election Laws (McKinney, 1943), §§ 83(1), 84], and Virginia [Dode Ann. (Michie, 1942), §§ 155, 157]. Repeal of these provisions of the Virginia law will become operative June 29, 1948. Under the broad ruling in McPherson v. Blacker [146 U. S. 1 (1892)], state law could probably make the filing of such pledge a qualification to be a candidate for the office of presidential elector; but it is doubtful if such a pledge could be enforced in the courts.

voters know what that judgment will be.[36] In twenty-two states their names do not even appear on the general election ballot.[37] The whole system is based on the assumption that the voters select a President and the presidential electors act as a device for translating the popular vote into electoral vote. To reconvene a group of electors who have no mandate, as would be the case under McMahon's proposal, would be to return to the electoral college system which was planned but which never existed in practice.

Under McMahon's proposal the electoral college system would be even less subject to popular control than originally anticipated if, for example, the electors chosen in 1948 reconvened in 1950 to choose a President who would serve from 1951 to 1955. The only special election provisions that would increase popular control are those which provide for choice of a new set of electors. Only such a system would ensure that the President be chosen by a set of electors with a mandate for that special purpose. It is beyond the scope of this study to discuss the advantages and disadvantages of multiplying popular elections. The important thing in relation to presidential succession is

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[36] The last elector who failed to follow his instructions was William Plumer of New Hampshire. On this, see Charles O. Paullin, "The Electoral Vote for John Quincy Adams in 1820," 21 Am. Hist. Rev. 318 (January, 1916). In 1876 James Russell Lowell was urged to spare the country the Hayes-Tilden dispute by casting his electoral vote for Tilden; but he declined on the ground that this would be violating his tacit pledge to the people. Horace Elisha Scudder, James Russell Lowell (1901), II, 216-217.

[37] California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin.

that, if Congress decides in favor of filling vacancies in the Presidency and Vice Presidency by special election, the election should be made by electors especially chosen for this purpose.[38]

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[38] Actual provision for the appointment of electors, of course, would rest with the state legislatures as in the case of the regular quadrennial elections. Article II, sec. 1 of the United States Constitution; McPherson v. Blacker, 146 U. S. 1 (1892).

CHAPTER VII

SUMMARY AND CONCLUSIONS

Succession law should provide for the exercise of executive power at all times and should leave no doubt as to who may legally exercise the power at any given time. The Federal Convention attempted to meet these requirements by providing that in case of the President's death, resignation, removal, or inability, the presidential power should devolve on the Vice President. In case of the unavailability of both of these officers, it was provided that an officer designated by law should act as President. In all cases the acting President was intended to serve only until the disability was removed or a President was elected.

Study of the records of the Federal Convention shows that the Vice President or designated officer was never intended to become President by succession. If his exercise of presidential power was founded on vacancy, he was to act as President until a President was supplied by special election. If his discharge of presidential power was founded in whole or in part on inability, he was to act only until the removal of the inability. The clause, "the Same shall devolve on the Vice President" was intended to be equivalent to "[he] shall then act as President." The adverbial clause, "until the Disability be removed, or a President shall be elected," was intended to limit the tenure as acting President of either the Vice President or the designated officer. Other provisions of the Constitution lend support to this interpretation of the succession clause. The Constitution does not once say that the Vice President shall become President,

but instead says he shall act as President, that the presidential powers and duties shall devolve upon him, and that he shall exercise the office of President of the United States.

Such was the intent of the framers of the Constitution; but all seven succeeding Vice Presidents have taken the presidential oath and have been generally recognized as President of the United States for the remainder of the term. William Henry Harrison was the first President to die in office; and it was then decided that the Constitution provided that Vice President John Tyler become the President and serve until the end of the term for which he and Harrison had been elected. Exactly how and by whom the decision was made is uncertain, but all evidence indicates that the Cabinet, whose ranking member was the great constitutional lawyer Daniel Webster, decided this. Although Tyler thought himself qualified to exercise presidential power without any oath other than the one he had taken as Vice President, he took the presidential oath so doubt could not arise concerning the legality of his acts as Chief Executive. Not all of Tyler's contemporaries approved of the decision that he had become President. Many newspapers dissented as did John Quincy Adams, Henry Clay, John McKeon, William Allen, Benjamin Tappen, and others. Both houses of Congress, nevertheless, recognized Tyler as the President; and no one suggested that a special election be called. Within a few weeks the issue was practically forgotten.

The precedent set by Tyler has since been confirmed six times. The status and tenure of Fillmore, Arthur, Roosevelt, Coolidge, and Truman have never been seriously questioned. At

the time of Johnson's impeachment, however, his presidential status was disputed; but nobody questioned his right to act as President for the remainder of Lincoln's term. Actually the precedent was confirmed by impeaching Johnson as President of the United States. All cases of succession to date have been founded on the President's death. No case of resignation or removal has occurred, but the same precedent would probably apply because the presidential office would be vacant as in case of the President's death.

Serious inconsistencies are inherent in the position that a succeeding Vice President becomes President. It is assumed that the presidential oath is a prerequisite to the exercise of presidential power and that taking this oath transforms a Vice President into a President. At the same time it is argued that the officer designated by Congress does not become the President but only acts in this capacity although presumably he also would have to take the presidential oath before he could exercise presidential power. The Constitution says that the President shall have a term of four years unless he dies, resigns, or is removed before the expiration of the term; but seven "Presidents" who have not died, resigned, or been removed have had terms of less than four years.

Precedent has thus made it possible for a Vice President, who has in fact been comitted to no popular mandate, to exercise presidential power for nearly four years. Vice Presidents are frequently nominated to reconcile a faction within the party. This means that the Vice President may stand for principles quite different from those approved by the voters at the polls.

Under the electoral college system, as modified by usage and by state law, there is no way one can vote for a presidential candidate without also voting for his running mate. The theory of popular government may dictate abolition of the Vice President's succession; but this would require constitutional amendment and the Constitution already contains a partial remedy. The document provides that the Vice President shall act as President only until a President and another Vice President are supplied by special election. Since precedent is of great importance in the development of a stable constitutional system, it is not here suggested that in case of vacancy in the Presidency a succeeding Vice President does not actually become President, that the Vice-Presidency should be abolished, or that a succeeding Vice President should be displaced by a President and Vice President chosen by special election. Succession beyond the Vice President, however, should not be supplied by authorizing the electors to choose several Vice Presidents.

The more serious problems created by the precedent relate to inability rather than to vacancy. Application of the usage to cases of inability means either that the Vice President dispossesses the disabled President or that there are two Presidents at the same time. In the only two cases of inability to date, those of Garfield and Wilson, the Vice President was not called to act as President because of the fear that he would supercede the disabled President for the remainder of the term. Because of this fear, the decision as to whether an inability existed or not was made on the basis of personal loyalty to the disabled President rather than on the basis of need for executive

action. On both occasions the Cabinet and the White House circle decided that a disability did not exist and the decision was contrary to the facts. In both cases the presidential powers and duties either were not discharged or were discharged in such manner as the Cabinet and White House circle could devise. In both cases the public interest was jeopardized by having no active President.

It is absurd to hold that the adverbial clause, "until the Disability be removed," limits the tenure of a designated officer who acts as President but does not apply to the Vice President who becomes President. This would mean that, if the President became ill, the Vice President would replace him for the rest of the term; but, if the Vice President also became ill, he could resume the exercise of presidential power when he recovered. Some have tried to escape this conclusion by arguing that the Vice President becomes President in case of vacancy in the Presidency, but in case of inability he only acts as President for the duration of the inability. The difficulty is that the Constitution makes no distinction between vacancy and inability. In both cases, the powers and duties devolve on the Vice President. Others have tried to escape this difficulty by saying that the Vice President becomes President in case of inability just as in case of vacancy, but he ceases to be President when the inability is removed. The difficulty is that this creates the anomaly of two Presidents or the removal of the disabled President. It also requires the removal of the second President at the termination of the first President's inability, yet the only method for removal of the

President from office is impeachment by the House and conviction in the Senate.

If one holds that a succeeding Vice President does not become President, he is not troubled with these inconsistencies. There is no need for distinguishing between a Vice President on whom presidential power devolves and an officer who acts as President. There is no need for distinguishing between vacancy and inability. In all cases the successor merely acts as President ad interim. This view greatly simplifies the problem of handling cases of disability because it allows the Vice President to act as President for the duration of the inability without displacing the President or without causing the anomaly of two Presidents simultaneously. It allows the Vice President to discharge the presidential functions as part of his vice-presidential duties and to do so under his oath as Vice President.

The objection to this interpretation of the succession clause is that the Constitution vests executive power in the President and thus by implication forbids its exercise by anyone who is not actually the President. The Constitution commands that the President take care that the laws be faithfully executed. It grants specific powers to him and makes him the commander-in-chief of the armed forces. This objection, however, is not unanswerable. The records of the Federal Convention show that the only purpose of the vesting clause was to establish a single executive. There seems to have been no idea that this clause would affect the succession clause. Under the rule of interpretation which requires that the different clauses each be given effect and reconciled if possible, the vesting

clause should be interpreted so as to permit the Vice President or designated officer to act as President under the succession clause in case of the President's disability without actually becoming the President.

Unless the status of the successor is clarified and unless the President's friends are certain of the President's status after the removal of the disability, there will probably always be resistance to establishing inability as equivalent to removal of the President from office. For this reason there must be official recognition that the Vice President does not become President but only acts as President for the duration of the President's inability, and that in case the designated officer's discharge of presidential power is founded in whole or in part on inability he shall act only until the disability of the President or Vice President is removed.

Once this is recognized the problem of what constitutes inability becomes less formidable because the disabled President is not thought to have forfeited his office. Since the term "inability" is nowhere authoritatively defined, it must be defined on the basis of general principles of law and constitutional interpretation. A definition of inability which fails to provide for the exercise of executive power at all times is contrary to the legal principle that executive power is a continuing power which can never be dormant or allowed to lapse and that there must be someone at all times to exercise the power. The pertinent rule of constitutional interpretation is that the terms of a Constitution are not to be nullified without regard to the purposes of the instrument, that words are to be taken

in their obvious sense and are not to be unreasonably restricted. These principles dictate a definition of inability which covers all cases in which the President is in fact unable to discharge a power or duty which the public interest requires to be discharged. The cause or duration of the inability is immaterial. It may be permanent or transient. Its cause may be physical or mental.

The Congress probably could not define inability before its occurrence in such way as to meet every contingency. Congress could and should, however, proclaim these general principles governing the meaning of inability. These general principles would mean that some illnesses and absences are inabilities while others are not. Since the development of rapid transportation and communication, absence would not usually be an inability in fact. Although the records of the Federal Convention show that the Vice President was intended to exercise presidential power during the President's absence, usage has established that mere absence from the United States is not an inability within the meaning of the Constitution. This is not to say, however, that some absences might not be inabilities in the constitutional sense. Finally, the single precedent of the Johnson case follows the clear intent of the Constitution that impeachment is not an inability causing the devolution of presidential power on the successor.

The last problem relating to presidential inability is who is to decide when an inability exists. The decision probably belongs to the successor in the first instance. The power of acting as President in certain contingencies is given to the

successor and, therefore, his official discretion extends to the determination of whether or not the contingency exists. Not only does the Constitution vest the power of decision with the successor, but history indicates that the power is safely vested here and that the danger of usurpation on the pretext of inability is slight. The Constitution vests this power in the successor; but the successor should be relieved of the embarrassing duty of taking the initiative.

A court could not take this initial action by issuing a writ of mandamus directing the successor to act as President, because a court can only order the performance of a ministerial function. Both Congress and the Cabinet probably lack the power to make a decision as to the President's inability which would be binding on the successor. The Congress could, however, relieve the successor of the embarrassment of taking the initiative by passing a concurrent resolution requesting the successor to act as President or by authorizing some officer to enquire into the President's inability and report the facts to the successor. The actual decision would still rest with the successor, where the Constitution vests it, and his decision would not await or be bound by the report. The investigation should probably be made by the Cabinet because the Cabinet consists of the President's appointees who would not be eager to displace him and the Cabinet is in the best position to know the facts. Once it is recognized that the successor does not displace a disabled President for the remainder of the term, the President would usually invite his successor to act for him for the duration of the inability. But if the President could not or would

not do so, the successor should decide on the President's inability with or without a report from the Cabinet.

The solution to the inability problem here proposed is an official declaration of the following principles: (1) One who acts as President because of the inability of the President or Vice President does so only until the disability of the President or Vice President is removed. (2) The term inability covers any de facto inability, whatever the cause or duration, which occurs when there is urgent public business requiring the President's personal attention. (3) The one on whom presidential power devolves is to be the judge of when an inability exists. In view of the intent of the Constitution, a declaration of these principles by concurrent resolution would be sufficient; but in view of our constitutional development and the great division of opinion, the declaration probably should be made by constitutional amendment. Finally, it is suggested that the Cabinet be authorized to investigate the President's inability and report thereon to the successor.

The Federal Convention provided for succession beyond the Vice President by empowering the Congress to declare by law what officer should act as President in case of the death, resignation, removal, or inability of both the President and Vice President. The Second Congress discharged this duty by designating the President pro tempore of the Senate. In case there was no President pro tempore or he was unable to serve, the Speaker of the House was to succeed to the presidential power. If both the Presidency and Vice-Presidency became vacant simultaneously, a President was to be supplied by special election. In 1886 this

law was repealed because of its inadequacy and doubt as to its constitutionality.

The first objection was that for nine months out of every twenty-four there was usually neither a President pro tempore nor a Speaker. Since the adoption of the Twentieth Amendment and the Senate rule of 1890, this objection to designating legislative officers is no longer valid. The second objection was that the President pro tempore was a member of the tribunal by whose decree a vacancy may be produced. This objection is still valid and applies to the Act of 1947 which also designates legislative officers as possible successors. The third objection was that the legislative officers were often not of the President's party.

At first glance the third objection may not seem to be valid in terms of the theory of popular government. It may appear that control of the Congress by the opposition indicates that the people have rejected the policies of the administration. More careful consideration, however, leads to the conclusion that such is not necessarily the case. The political complexion of the Congress may be dependent upon an accumulation of local issues. Similarly, it is a fallacy to assume that succession of a legislative officer is more in keeping with popular government than the succession of a Cabinet officer merely because the former is popularly elected to the Congress and then is chosen by the house over which he presides. His popular election is no indication that he has a national mandate. He may have been elected in his district or state on purely local issues.

Election to the Speakership or Presidency pro tempore is

largely dependent on seniority, personal popularity, and factional combinations. Seniority in turn depends on the Representative's paying a great deal of attention to local affairs or coming from a one-party constituency. This means that the representative with seniority is likely not to represent the nation as a whole. On the other hand, a Cabinet member presumably is appointed because he represents the policies of the administration approved by the people at the polls. For this reason, designation of a Cabinet member is likely to be more in harmony with popular government than designation of a legislative officer.

The first constitutional objection to the Act of 1792 was that Congress is only authorized to designate officers of the United States. Since the Constitution and the courts have defined such officers as those appointed by the President and the Senate, by the President alone, by the Department heads, or by the courts and who are commissioned by the President, the legislative officers were ineligible for designation. This objection seems to be valid and applies to the Act of 1947 as well as to the Act of 1792. The second constitutional objection to the law passed by the Second Congress was that Congress probably lacked the power to provide for the special election of a President. This objection, which is not valid, does not apply to the Act of 1947, because the law specifically states that the designated officer shall act as President until the end of the term during which the presidential power devolved upon him.

Study of the records of the Constitutional Convention leads to the conclusion that Congress has the power to provide

for special presidential elections. There are, however, two limitations on this power. Congress cannot provide for the election of a President who has a term of less than four years. Nor can Congress provide for the election of a President without also providing for the election of a Vice President. The Constitution provides that these two officials be elected together. If Congress decides that a special election is desirable, Congress can provide for the choice of presidential electors at the next congressional election. Congress probably lacks the power to provide for reassembling the electors chosen at the last quadrennial election. Even if Congress has this power, the reassembling of the electors would not be desirable because they would have no popular mandate.

In addition to these two objections which were raised to the Act of 1792, there are other objections which apply to the Act of 1947. In the first place, Congress is given power only to annex the presidential powers and duties to another office. Congress is not given power to designate what officer shall become President. The Act of 1947 assumes that the designated officer would become President and provides that he resign the office to which the presidential powers and duties are annexed. This means that the designated officer would forfeit his right to act as President by resigning the office, the incumbency of which authorizes him to exercise presidential power.

The Act of 1947 places the Cabinet members in the line of succession after the Speaker and the President pro tempore, provides that the Cabinet officer resign his Cabinet post before undertaking the exercise of presidential power, and states that

he shall act as President only until a presiding legislative officer qualifies to displace him. It is doubtful if the presidential service of the Cabinet member can be terminated in this manner. Congress is given power to designate an officer to act as President. Congress is not given power to designate several successors, each of whom will serve until another successor qualifies. Even if Congress could do this, the executive power should not be shifted from one official to another in this manner. Unity and continuity in the exercise of executive power could be jeopardized by the application of this provision of the law of 1947.

In view of the considerations of constitutionality and policy set forth above, a plan for succession beyond the Vice President is here suggested. The person designated must be an officer of the United States. Congress should create the office of "assistant President," whose incumbent should be appointed by the President with the advice and consent of the Senate. Constitutionally this officer would be an officer of the United States. He could, therefore, be designated to act as President in case of the death, resignation, removal, or inability of both the President and Vice President. The President should be authorized to assign to this officer work calculated to ease the President's burden and at the same time train the officer for the duties which may devolve upon him. The incumbent of the office of "assistant President" would be chosen with reference to his abilities as a possible President, and consequently would probably be a person of presidential calibre. If the powers and duties of the President devolved

upon him, he would likely carry on the policies of the administration approved by the people at the polls because he would be a presidential appointee and presumably would be appointed because he stood for the policies of the administration. This plan of providing for succession beyond the Vice President has the merit of supplying a successor who would probably be a man of presidential stature, or providing for continuity of policy in the executive branch, and of being in harmony with the principles of popular government.

APPENDIX A

TABLE OF VACANCIES

1. Vice Pres. Geo. Clinton.....died Apr. 20, 1812
   Vacancy, Apr. 20, 1812-Mar. 4, 1813
2. V. P. Elbridge Gerry.....died Nov. 23, 1813
   Vacancy, Nov. 23, 1813-Mar. 4, 1817
3. V. P. John C. Calhoun.....resigned Dec. 28, 1832
   Vacancy, Dec. 28, 1832-Mar. 4, 1833
4. Pres. Wm. H. Harrison.....died Apr. 4, 1841
   Vacancy, Apr. 4, 1841-Mar. 4, 1845
5. Pres. Zachary Taylor.....died July 9, 1850
   Vacancy, July 9, 1850-Mar. 4, 1853
6. V. P. William King.....died Apr. 18, 1853
   Vacancy, Apr. 18, 1853-Mar. 4, 1857
7. Pres. Abraham Lincoln.....died Apr. 15, 1865
   Vacancy, Apr. 15, 1865-Mar. 4, 1869
8. V. P. Henry Wilson.....died Nov. 22, 1875
   Vacancy, Nov. 22, 1875-Mar. 4, 1877
9. Pres. James A. Garfield.....died Sept. 19, 1881
   Vacancy, Sept. 19, 1881-Mar. 4, 188
10. V. P. Thomas Hendricks.....died Nov. 25, 1885
    Vacancy, Nov. 25, 1885-Mar. 4, 1889
11. V. P. Garret Hobart.....died Nov. 21, 1899
    Vacancy, Nov. 21, 1899-Mar. 4, 1901
12. Pres. Wm. McKinley.....died Sept. 14, 1901
    Vacancy, Sept. 14, 1901-Mar. 4, 190
13. V. P. James Sherman.....died Oct. 30, 1912
    Vacancy, Oct. 30, 1912-Mar. 4, 1913
14. Pres. Warren G. Harding.....died Aug. 2, 1923
    Vacancy, Aug. 2, 1923-Mar. 4, 1925
15. Pres. F. D. Roosevelt.....died Apr. 12, 1945
    Vacancy, Apr. 12, 1945-Jan. 20, 194

APPENDIX B

Act of March 1, 1792

1 U. S. Stat. 240; Revised Stat., §146, 147, 148, 149, 150.

"Sec. 9. And be it further enacted, That in case of the removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate [pro tempore?], then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected.

"Sec. 10. And be it further enacted, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December next ensuing: Provided, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the next year ensuing, within which time electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceeding and duties of the said electors and others shall be pursuant to the directions prescribed in this act."

APPENDIX C

Act of January 19, 1886

24 U. S. Stat. 1; U.S.C. [1940 ed.], title 3, §21 and 22.

"Sec. 1. Be it enacted...etc..., That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior shall act as President until the disability of the President or Vice President is removed or a President shall be elected: Provided, That whenever the powers and duties of the Office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with the law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

"Sec. 2. That the preceding section shall only be held to describe and apply to such officers as have been appointed by the advice and consent of the Senate to the offices herein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

"Sec. 3. That sections 146, 147, 148, 149, 150 of the Revised Statutes is hereby repealed."

APPENDIX D

Act of July 18, 1947

Public Law 199, 80th Congress [Chapter 264 - 1st Session]

"Be it enacted...etc..., That (a) (1) if, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) shall continue to act until the expiration of the then current Presidential term, except that

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b), then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of War*, Attorney General, Postmaster General, Secretary of the Navy*, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor.

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* Under the National Security Act of 1947, the Secretary for Defense is given the place in the line of succession formerly held by the Secretary of War, and the Secretary of the Navy is dropped from the list. Public Law No. 253, sec. 311, 80th Cong., 1st Sess.

APPENDIX D (Cont.)

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this Act, his compensation shall be at the rate then provided by law in the case of the President.

(g) Sections 1 and 2 of the Act entitled "An Act to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice President", approved January 19, 1886 (24 Stat. 1; U.S.C., 1940 edition, title 3 secs. 21 and 22), are repealed.

APPENDIX E

TABLE OF PRESIDENTS AND POTENTIAL SUCCESSORS, 1789-1949

[From 25 Congressional Digest 74 (March, 1946)]

1	2	3	4	5	6	7	8
Year Inaugurated	The Presidents of the United States	Years in Office	Political Affiliation	Age on Taking Office	Vice-Presidents of the United States	7A: Men Who Would Have Succeeded to Presidency Under The Act of 1792	8A: Secretaries of State Who Would Have Succeeded If Act of 1886 Had Prevailed at this Time
1789	George Washington	8	Fed.	57	John Adams	J. Langdon, R. H. Lee, R. Izard, H. Tazewell, S. Livermore, W. Bingham	John Jay, Thos. Jefferson, Edmund Randolph
1797	John Adams	4	Fed.	61	Thomas Jefferson	W. Bradford, J. Read, T. Sedgwick, L. Laurence, J. Ross, S. Livermore, J. Howard	Timothy Pickering, John Marshall
1801	Thomas Jefferson	8	Rep.-Dem.	57	Aaron Burr, George Clinton	A. Baldwin, S. Bradley, J. Brown, J. Anderson, J. Franklin, S. Smith, J. Milledge	James Madison
1809	James Madison	8	Rep.-Dem.	57	GEORGE CLINTON, ELBRIDGE GERRY	A. Gregg, J. Gaillard, J. Pope, W. Crawford, J. Varnum	Robert Smith, James Monroe
1817	James Monroe	8	Rep.-Dem.	58	Daniel D. Tompkins	J. Gaillard, J. Barbour	John Quincy Adams
1825	John Q. Adams	4	Rep.-Dem.	57	John C. Calhoun	Nathaniel Macon, Samuel Smith	Henry Clay
1829	Andrew Jackson	8	Dem.	61	*John Calhoun, M. Van Buren	L. W. Tazewell, H. L. White, George Poindexter, J. Tyler, Wm. King	M. Van Buren, E. Livingston, Louis McLane, J. Forsyth
1837	Martin Van Buren	4	Dem.	54	Richard M. Johnson	William R. King	John Forsyth
1841	WM. HENRY HARRISON	1 mo.	Whig.	68	John Tyler	Samuel Southard	Daniel Webster
1841	John Tyler	3-11 mo.	Dem.?	51	.....	Samuel Southard, Willie Mangum	D. Webster, Hugh Legare, Abel Upshur, John Calhoun
1845	James K. Polk	4	Dem.	49	George M. Dallas	David R. Atchison	James Buchanan
1849	ZACHARY TAYLOR	1½	Whig.	63	Millard Fillmore	William R. King	John M. Clayton
1850	Millard Fillmore	2½	Whig.	50	.....	William R. King	Daniel Webster, Edward Everett
1853	Franklin Pierce	4	Dem.	48	WILLIAM R. KING	D. R. Atchison, J. D. Bright, Lewis Cass, J. M. Mason, Thos. Rusk	William L. Marcy
1857	James Buchanan	4	Dem.	65	John C. Breckinridge	B. Fitzpatrick, J. D. Bright, Solomon Foot	Lewis Cass, Jeremiah Black
1861	ABRAHAM LINCOLN	4-1 mo.	Rep.	52	Hannibal Hamlin, Andrew Johnson	Solomon Foot, Daniel Clark, Lafayette Foster	William H. Seward
1865	Andrew Johnson	3-11 mo.	Dem.?	56	.....	Lafayette Foster, Benjamin Wade	William H. Seward
1869	Ulysses S. Grant	8	Rep.	46	Schuyler Colfax, HENRY WILSON	Henry B. Anthony, Matthew Carpenter, Thomas W. Ferry	Elihu Washburne, Hamilton Fish
1877	Rutherford B. Hayes	4	Rep.	54	William A. Wheeler	Thomas W. Ferry, Allen G. Thurman	William M. Evarts
1881	JAMES A. GARFIELD	½	Rep.	49	Chester A. Arthur	[illegible], Thomas F. Bayard	James G. Blaine
1881	Chester A. Arthur	3½	Rep.	50	.....	Thomas F. Bayard, David Davis, George F. Edmunds	James G. Blaine
						7B: Men Who Would Have Succeeded to Presidency Under	8B: Speakers of the House Who Would Have Succeeded Under The

1869	Ulysses S. Grant	8	Rep.	46	Schuyler Colfax, HENRY WILSON	Henry B. Anthony, Matthew Carpenter, Thomas W. Ferry	Elihu Washburne, Hamilton Fish
1877	Rutherford B. Hayes	4	Rep.	54	William A. Wheeler	Thomas W. Ferry, Allen G. Thurman	William M. Evarts
1881	JAMES A. GARFIELD	½	Rep.	49	Chester A. Arthur	.....	James G. Blaine
1881	Chester A. Arthur	– 3½	Rep.	50	.....	Thomas F. Bayard, David Davis, George F. Edmunds	James G. Blaine
						7B: Men Who Would Have Succeeded to Presidency Under The Act of 1886	8B: Speakers of the House Who Would Have Succeeded Under The Act of 1947
1885	Grover Cleveland	4	Dem.	47	THOMAS A. HENDRICKS	Thomas F. Bayard (Del.)	John G. Carlisle
1889	Benjamin Harrison	4	Rep.	55	Levi P. Morton	James G. Blaine (Me.), John W. Foster (Ind.)	Thomas Reed, Charles F. Crisp
1893	Grover Cleveland	4	Dem.	55	Adlai E. Stevenson	Walter Q. Gresham (Ill.), Richard Olney (Mass.)	Charles Crisp, Thomas Reed
1897	WILLIAM MCKINLEY	4½	Rep.	54	GARRET HOBART, T. Roosevelt	John Sherman (O.), Wm. R. Day (O.), John Hay (O.)	Thomas Reed, David B. Henderson
1901	*Theodore Roosevelt	7½	Rep.	42	Charles W. Fairbanks	John Hay (O.), Elihu Root (N. Y.), Robert Bacon (N. Y.)	David Henderson, Jos. G. Cannon
1909	Wm. Howard Taft	4	Rep.	51	JAMES S. SHERMAN	Philander C. Knox (Penn.)	Joseph G. Cannon, Champ Clark
1913	Woodrow Wilson	8	Dem.	56	Thomas R. Marshall	Wm. J. Bryan (Neb.), Robert Lansing (N. Y.), Bainbridge Colby (N. Y.)	Champ Clark, Fred'k H. Gillett
1921	WARREN G. HARDING	2½	Rep.	55	Calvin Coolidge	Charles E. Hughes (N. Y.)	Frederick H. Gillett
1923	#Calvin Coolidge	5½	Rep.	51	Charles G. Dawes	Charles E. Hughes (N. Y.), Frank B. Kellogg (Minn.)	Fred'k Gillett, Nicholas Longworth
1929	Herbert Hoover	4	Rep.	54	Charles Curtis	Henry L. Stimson (N. Y.)	Nicholas Longworth, J. N. Garner
1933	FRANKLIN ROOSEVELT	12-3 mo.	Dem.	51	Garner, Wallace, Truman	Cordell Hull (Tenn.) E. R. Stettinius (Va.)	Henry Rainey, Joseph Byrnes, Wm.Bankhead, Sam Rayburn
1945	Harry S. Truman	...	Dem.	60	.....	James F.Byrnes (S. C.), George Marshall (Va.)	Sam Rayburn, Joseph Martin

*Resigned 1832 to become U. S. Senator from South Carolina.
#Elected to fill term following succession.

NOTE: The Presidents and Vice Presidents whose names appear in capital letters are those who died in office.

Men whose names appear in Column 7A were all Presidents pro tempore of the Senate; they are the gentlemen who under the Act of 1792 would have succeeded to the presidential power if vacancies had occurred in both the presidential and vice presidential offices. As is shown, there usually were several different incumbents of the presiding office in the Senate during the course of a single presidential term.

Men whose names appear in Column 8A were Secretaries of State who would have been in the line of succession to the presidential power if the Act of 1886 had been in effect since the adoption of the Constitution. The gentlemen listed in Column 7B were all Secretaries of State who were in the statutory line of succession under the Act of 1886.

Column 8B lists former Speakers of the House who would have been in the line of succession if the present law had been in effect instead of the Act of 1886.

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