

President's Disability and Succession

St. John's Law Review

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cases the government's position in *Rev. Rul.* 57-366 cannot be said to be contrary to the established trend of judicial decision, and in this writer's view, it is correct.

Conclusion

The utility of Article 8-A in the case of a small gift has been considerably diminished by the resignation requirements of the New York statute and the decision in *Matter of Strauss*. The estate tax consequences to the donor-custodian with the large estate are now no longer any better than those of trusts where a grantor-trustee is given powers similar to those of a custodian. Moreover, there is no preferential treatment accorded the custodian where income from custodial property is used to discharge a legal obligation. The donor is eligible for a gift tax exclusion. The gift tax credit mechanism,⁹⁰ on the other hand, does not provide an exact adjustment for the double tax that results when an estate tax is also levied. Hence, it would seem that the custodianship offers no real tax savings as compared to the trust and its utility is considerably limited.

However, although not especially attractive for small donors, or donors seeking tax savings, the Article does provide a great measure of protection for transfer agents and it is here that its greatest utility would appear to lie presently. This aspect alone would justify its existence. However, though there is little that can be done by the state legislature to better the tax picture, the state legislature can re-examine the need for the procedural protections provided by the New York statute, and, if possible, act to make the statute more useful, at least to the donor of a small gift, by cutting down on the expenses involved.



PRESIDENT'S DISABILITY AND SUCCESSION

Introduction

In the light of the recent developments concerning the question of presidential disability, it is appropriate to discuss the present legislative proposals before the Congress. The President's genuine concern with his own physical condition should be sufficient to impress

⁹⁰ See SURREY AND WARREN, *FEDERAL ESTATE AND GIFT TAXATION* 255, 263 (1956 ed.); INT. REV. CODE OF 1954, § 2012.

upon all the need of a clear picture of this vexatious constitutional headache.

The pertinent section of the Constitution reads:

In Case of the Removal of the President from Office . . . 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 . . . Inability, both of the President and Vice President, declaring what Officer shall then act . . . accordingly, until the Disability be removed¹

Historical Review

Scant attention has been given to the questions concerning presidential disability. The framers of the Constitution evidently believed it unnecessary to include further provisions for the performance of the duties of the President in time of his inability although they were aware of the ambiguity. John Dickinson first raised the question on the floor of the Constitutional Convention. "What is the extent of the term 'disability' & who is to be the judge of it?"² The question remains unanswered today.

This query has gained public prominence on three distinct occasions during the past one hundred and seventy years. The first instance appeared when President Garfield was shot on July 2, 1881. Important questions requiring his personal attention were ignored for a period of eighty days and but one extradition paper was signed by him because of his protracted infirmity.³ Concern appears to have been in abeyance until 1919 when President Wilson was stricken and failed to meet with his Cabinet for several months.⁴ His wife, physicians and friends created an aura of secrecy around the illness so that one could not accurately determine who was running our government. Many were of the opinion it was not Woodrow Wilson.⁵

President Eisenhower's recent illness has triggered the third amplification of the alleged weaknesses of the "inability clause" of the Federal Constitution.⁶

Explanation for Inertia

The founders of the Constitution realized that a definite line of succession was both necessary and desirable, but did nothing about it

¹ U.S. CONST. art. II, § 1, cl. 5.

² FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 427 (1911).

³ Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 140 (1957).

⁴ Rogers, *American Government and Politics*, 14 AM. POL. SCI. REV. 74, 87-88 (1920).

⁵ See Silva, *supra* note 3, at 142-47.

⁶ See Silva, *supra* note 3, at 147-48; N.Y. Herald Tribune, Feb. 28, 1958, p. 13, col. 4-5.

except to pass the responsibility to Congress. The Congress is given the power to declare, when there is neither a president nor a vice-president, what officer shall act as President.⁷ Pursuant to this power, Congress has passed three acts outlining the rules of succession,⁸ but it has never touched upon the realm of inability.

Upon the death of President Harrison, John Tyler was the first vice-president to succeed to the presidency during the same term.⁹ Despite objections from many of his contemporaries in high office, Tyler assumed the office and the title of "President," thereby creating a precedent which is with us today; for in the six later occasions when a president died in office,¹⁰ the vice-presidents entertained the same attitude relative to their status when they assumed the powers and duties of the office.¹¹

The language of the above quoted section of the Constitution, strictly followed, would seem to point to, or at least render possible, the construction that upon the death, removal, resignation or inability of the president, the vice-president *does not become* the president, but simply the powers and duties of the office "devolve" upon him.

The Senate is authorized to choose a President pro tempore in the absence of the vice-president, ". . . or when he shall exercise the Office of the President of the United States"¹² and *not* when he shall become president.

Other sentences bearing on this point appear in amendments XII and XX. When a president is not chosen or qualified by "the time fixed for the beginning of his term . . . the Vice President elect shall act as President . . ." ¹³ The provision continues ". . . as

⁷ U.S. CONST. art. II, § 1, cl. 5.

⁸ The first designated the President pro tempore of the Senate as third in succession (after president and vice-president) followed by the Speaker of the House. 1 STAT. 239 (1792). In 1886, Congress reversed itself and decided that the President pro tempore and the Speaker were not officers in the constitutional sense and therefore not eligible to succeed to the presidency. The Act of 1886 provided for the Secretary of State, the Secretary of Treasury, the Secretary of War, the Attorney General, the Postmaster General, the Secretary of the Navy, and the Secretary of the Interior, in that order. 24 STAT. 1 (1886). To remove the anomaly that the president was in the position of being able to select his potential successor, the law was changed again by the Act of July 18, 1947. It provides for the Speaker of the House to ". . . act as President in the absence of a President and a Vice President" followed by the President pro tempore of the Senate. The other Cabinet officers follow in the line of succession designated in the Act of 1886. 61 STAT. 380, 3 U.S.C. § 19 (1952). See Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 452 (1949), for a complete analysis of the present statute.

⁹ CORWIN, *THE PRESIDENT* 54 (4th ed. 1957).

¹⁰ Fillmore, Johnson, Arthur, Roosevelt, Coolidge and Truman have been the succeeding vice-presidents. See Note, 24 GEO. WASH. L. REV. 448, 450 n.11 (1956).

¹¹ CORWIN, *op. cit. supra* note 9, at 54; 3 WILLOUGHBY, *THE CONSTITUTION OF THE UNITED STATES* § 950 (2d ed. 1929).

¹² U.S. CONST. art. I, § 3.

¹³ U.S. CONST. amend. XX.

in the case of the death or other constitutional disability of the President."¹⁴ It should be noted that this amendment was framed and passed by some of the same men who had taken part in the making of the Constitution.¹⁵ In light of the foregoing considerations, we may conclude that in cases of removal, resignation, death and inability, the vice-president only *acts* as president and does not *become* president.¹⁶

Because the Tyler precedent was applied to the inability issue when Garfield was inactive for almost three months, such doubt existed as to the ability of a disabled president to resume his powers and duties that all were fearful to initiate any action.

All agreed upon the desirability of Vice-President Arthur's acting as President during President Garfield's illness; but four of seven Cabinet members, including the Attorney General, thought that the powers and duties of the office could not temporarily devolve upon the Vice-President.¹⁷

During Wilson's illness, the President's friends thought the devolution of presidential power upon the vice-president might be equivalent to a permanent removal of Wilson from office.

The Important Questions

The sundry proposals before the present Congress attempt to solve three essential problems: (1) Is a constitutional amendment necessary or will an Act of Congress suffice? (2) *Who* will make the determination that the president is unable to carry out the powers and duties of the executive office? (3) Assuming the president is adjudged disabled, what is the tenure and status of his successor?

Senator Bridges and Representative Brooks believe the Congress has power to provide for the disability of the chief executive.¹⁸ Their bills create a commission which will determine when a disability exists.¹⁹ Since the Constitution only empowers the Congress to provide for presidential succession when there is neither a president nor a vice-president,²⁰ it would appear that power to deal with presidential inability is denied under the principle—*inclusio unius, exclusio alterius*—that the government of the United States is one of

¹⁴ U.S. CONST. amend. XII.

¹⁵ The Constitutional Convention was in 1787 and the amendment was proposed to the legislatures of the several states by the 8th Congress, Dec. 12, 1803.

¹⁶ CORWIN, *THE PRESIDENT* 54 (4th ed. 1957); WARREN, *THE MAKING OF THE CONSTITUTION* 635 (1928); Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 148-51 (1957).

¹⁷ 104 CONG. REC. 234 (daily ed. Jan. 13, 1958).

¹⁸ S. 3113, 85th Cong., 2d Sess. § 21 (1958); H.R. 9903, 85th Cong., 2d Sess. § 21 (1958).

¹⁹ *Ibid.*

²⁰ U.S. CONST. art. II, § 1, cl. 5.

limited and enumerated powers and those not delegated by the Constitution are denied.²¹ Therefore, every valid act of Congress must find in the Constitution warrant for its passage.

Justification for legislation in this area is found in the "elastic clause"²² by Representative Frelinghuysen of New Jersey.²³ Although Congress has the power ". . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution . . .,"²⁴ this presupposes that the grant is actually present or reasonably implied in some express delegation.²⁵

Resort to the proposition that since Congress has the power to legislate when *both* are disabled, it should be able to do likewise when only the president's disability is in issue,²⁶ is also overcome by the principle of "enumerated powers." This "incidental power" would return us to a concentration of all national powers in a Congress, which was not the intention of the founders.²⁷

If we concede that the Constitution denies Congress the power to legislate in this area, and eliminate the Supreme Court because of non-expansion of its original jurisdiction,²⁸ only the vice-president, save the president himself, remains. Authority to this effect is not lacking.²⁹

Recognizing that congressional power to legislate on the subject is debatable,³⁰ there are eight joint resolutions³¹ calling for a constitutional amendment before the present Congress.³²

²¹ *Gibbons v. Ogden*, 6 U.S. (9 Wheat.) 1, 13 (1824); *M'Culloch v. Maryland*, 4 U.S. (4 Wheat.) 415, 421 (1819); *Martin v. Hunter's Lessee*, 3 U.S. (1 Wheat.) 562, 564 (1816).

²² U.S. CONST. art. I, § 8, cl. 18.

²³ Frelinghuysen, *Presidential Disability*, 307 THE ANNALS 144, 149 (1956).

²⁴ U.S. CONST. art. I, § 8, cl. 18.

²⁵ OGD AND RAY, INTRODUCTION TO AMERICAN GOVERNMENT 308-09 (10th ed. 1951); see also 104 CONG. REC. 2953 (daily ed. March 4, 1958).

²⁶ Frelinghuysen, note 23 *supra*.

²⁷ OGD AND RAY, *op. cit. supra* note 25, at 9. The single Congress under the Articles of Confederation was obviously unsatisfactory because the framers specifically provided for three separate branches in the Constitution.

²⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁹ Celler, *The Problem of Presidential Inability—A Proposed Solution*, 19 F.R.D. 153, 156-57 (1956); Lavery, *Presidential Inability*, 8 A.B.A.J. 13, 17 (1922); Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 172 (1957); 104 CONG. REC. 234 (daily ed. Jan. 13, 1958).

³⁰ In the 85th Cong., 1st Sess., there were five bills introduced as compared with two this session. (S. 238, Payne; H.R. 7352, Burdick; H.R. 6510, Keating; H.J. RES. 296, Cole; and H.J. RES. 293, Celler.) See Silva, *supra* note 29, at 171 n.150.

³¹ ". . . [J]oint resolutions proposing an amendment to the Constitution which must be approved by two-thirds of both Houses and are thereupon sent directly to the Administrator of General Services for submission to the several states for ratification, and which are *not* presented to the President for his approval." ZINN, HOW OUR LAWS ARE MADE 10 (1952) (emphasis added).

³² S.J. RES. 161, 85th Cong., 2d Sess. (1958); S.J. RES. 144, 85th Cong., 2d Sess. (1958); S.J. RES. 143, 85th Cong., 2d Sess. (1958); S.J. RES. 141,

As already noted, the vice-president and many others were fearful of permanently ousting the president from his office during the latter's incapacitation. Such reluctance is eradicated by provisions in all the proposed constitutional amendments that the vice-president would be an "Acting President" until the disability is removed or an election takes place.³³

Since there is no definition of "inability," nor is there anything in the Constitution which aids in clearing the matter of its vagueness,³⁴ *who* shall make the decision that the president is no longer able to carry on the duties of his office? Is the president to confess it and hand over the duties to the vice-president?³⁵ Since ". . . the Vice-President may occasionally become a *substitute* for the President . . ." and since under certain circumstances he may be empowered ". . . to exercise the authorities and discharge the duties of the President,"³⁶ there seems to be no logical reason why the president should not be able to notify his proxy to handle, ad interim, the executive department.³⁷

Or is the vice-president to declare that the president is in a state of mind, or a physical condition, or other predicament which renders him unable to perform the duties of his office? This contingency cannot be found within any of the present proposals; the dangers apparently being usurpation, reluctance and lack of congressional support.³⁸

As the alternative to singular action by the members of the executive department, all eight resolutions provide for group activity in one form or another. They may be classified into determinations made by: (1) a committee,³⁹ generally consisting of the majority and minority leaders of both houses, cabinet member(s) and Supreme

85th Cong., 2d Sess. (1958); S.J. RES. 134, 85th Cong., 2d Sess. (1958); S.J. RES. 133, 85th Cong., 2d Sess. (1958); H.J. RES. 525, 85th Cong., 2d Sess. (1958); H.J. RES. 490, 85th Cong., 2d Sess. (1958).

³³ *Ibid.*

³⁴ OGG AND RAY, INTRODUCTION TO AMERICAN GOVERNMENT 390 n.21 (10th ed. 1951).

³⁵ S.J. RES. 161, 85th Cong., 2d Sess. (1958); S.J. RES. 141, 85th Cong., 2d Sess. (1958); H.J. RES. 525, 85th Cong., 2d Sess. (1958); H.J. RES. 490, 85th Cong., 2d Sess. (1958).

³⁶ HAMILTON, THE FEDERALIST 427-28 (Lodge ed. 1888) (emphasis added).

³⁷ 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES § 949 (2d ed. 1929); Celler, *The Problem of Presidential Inability—A Proposed Solution*, 19 F.R.D. 153, 156 (1956); Green, *Presidential Succession*, 61 DICK. L. REV. 323, 330-31 (1957); Heinlein, *The Problem of Presidential Inability*, 25 U. CIN. L. REV. 310, 320 (1956); Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 154-55 (1957); Note, 24 GEO. WASH. L. REV. 448, 456 (1956); cf. 2 BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 240 (1891).

³⁸ Frelinghuysen, *Presidential Disability*, 307 THE ANNALS 144, 147-49 (1956).

³⁹ S.J. RES. 143, 85th Cong., 2d Sess. (1958); S.J. RES. 134, 85th Cong., 2d Sess. (1958); H.J. RES. 525, 85th Cong., 2d Sess. (1958); H.J. RES. 490, 85th Cong., 2d Sess. (1958).

Court Justices; (2) congressional action by way of a resolution or law;⁴⁰ and (3) a majority vote of the cabinet.⁴¹

One plan provides for a committee of the Chief Justice, the Senior Associate Justice, two Cabinet members and four members of Congress.⁴² A second would create a six-member congressional committee composed of the president pro tempore of the Senate, the speaker of the House of Representatives and the majority and minority leaders of both houses.⁴³ The remaining two plans also include the leaders of both houses, with the Chief Justice and all the Cabinet members on one,⁴⁴ while the vice-president, secretary of state, and the speaker of the House would sit on the other.⁴⁵

The objections most frequently made to these types of committees are that they would be time-consuming, inflexible and partisan.⁴⁶ A perfect example of the latter can be seen in the Electoral Commission of 1876, which settled the Hayes-Tilden dispute. The commission split five Republicans to four Democrats on every vote. It has been said, speaking of that body: "If the majority were right it was because they were Republicans. If the minority were right, it was because they were Democrats. If either were right, it was because they were politicians."⁴⁷

It is likely that in the case of "inability," either one of two situations will arise: (1) The "inability" will be open and notorious, as where the president would be stricken with total paralysis, or become openly insane. (2) The "inability" will be open to doubt, and a momentous controversy will at once arise; one faction or party will assert that the "inability" exists, while the followers of the president will surely deny it.

In the first case the Constitution would become self-executing. Public opinion would everywhere recognize the "inability" and insist on the vice-president taking over the powers and duties of the office. In the second case public opinion would be split along party lines, dividing the country into two great camps. It is obvious that in actual practice the committee would be needed in the case of disputed "inability," and the dispute would be endless and fraught with the severest consequences for the country.

An authority in the presidential succession and inability area quotes ex-Attorney-General Brownell with approval:

⁴⁰ S.J. RES. 144, 85th Cong., 2d Sess. (1958); S.J. RES. 141, 85th Cong., 2d Sess. (1958); S.J. RES. 133, 85th Cong., 2d Sess. (1958).

⁴¹ S.J. RES. 161, 85th Cong., 2d Sess. (1958).

⁴² H.J. RES. 525, 85th Cong., 2d Sess. (1958).

⁴³ S.J. RES. 143, 85th Cong., 2d Sess. (1958).

⁴⁴ S.J. RES. 134, 85th Cong., 2d Sess. (1958).

⁴⁵ H.J. RES. 490, 85th Cong., 2d Sess. (1958).

⁴⁶ Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 165-66 (1957).

⁴⁷ See Lavery, *Presidential Inability*, 8 A.B.A.J. 13, 16 (1922).

The great need is for continuity in the exercise of executive power and leadership in time of crisis, and investigations and hearings and findings and votes of a commission, I am afraid, could drag on for days, or even weeks, and result in a governmental crisis, during which no one would have the clear right to exercise presidential power.⁴⁸

The ancient "Separation of Powers Doctrine"⁴⁹ must also be considered in any discussion of legislative activity affecting the executive branch of the government. The Supreme Court has construed this doctrine to mean that the powers allocated to the different branches may not be combined in any one branch, nor those given to any branch delegated by it to any other branch.⁵⁰ Nothing was more manifest to the Constitution's authors, however, than that the principle could be carried too far. To prevent separate branches from "running wild" and to avert deadlock and breakdowns, some checks by one branch upon another must be allowed. And so too the principle of separation was joined that of "checks and balances," designed to promote unity and equilibrium. Thus, the president shares in the legislative power through his veto;⁵¹ the courts share in the legislative power through their right to interpret laws and even invalidate them as unconstitutional;⁵² and Congress shares in the executive power through senatorial confirmation of appointments and assent to treaties.⁵³ Notwithstanding such exceptions, our national government operates primarily in accordance with the principle of separation as visualized by Montesquieu.

Arthur T. Vanderbilt has stated "the doctrine . . . is not a mere theoretical, philosophical concept. It is a practical, workaday principle. The division of government . . . does not imply . . . three watertight compartments."⁵⁴ This we have already noted to be the case under our Constitution. He characterizes the doctrine as ". . . not . . . a technical rule of law but . . . a guide to the sound functioning of government . . ." ⁵⁵ The question here seems to be one of wisdom, not of law. This discussion naturally leads into the constitutional amendment proposals empowering Congress to pass a concurrent resolution⁵⁶ or a law⁵⁷ determining the inability of the

⁴⁸ Silva, *supra* note 46, at 165.

⁴⁹ See Conway, *Separation of Powers Doctrine: Historical Sources*, 2 N.Y.L.F. 351 (1956).

⁵⁰ See A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

⁵¹ U.S. CONST. art. I, § 7, cl. 2.

⁵² A. L. A. Schechter Poultry Corp. v. United States, note 50 *supra*.

⁵³ U.S. CONST. art. II, § 2, cl. 2.

⁵⁴ VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 50 (1953).

⁵⁵ *Id.* at 143.

⁵⁶ S.J. RES. 144, 85th Cong., 2d Sess. (1958); S.J. RES. 141, 85th Cong., 2d Sess. (1958).

⁵⁷ S.J. RES. 133, 85th Cong., 2d Sess. (1958).

president and at what point such inability ceases. Predesignated officers can convene Congress if it is not in session.

Representative Frelinghuysen does not believe Congress is the appropriate body to make the final decision.

Were Congress to be given exclusive power to make the inability determination, I fear the decision might frequently be dependent upon the outcome of a political power struggle. The procedure could well prove disorderly. Stalemates could develop. Passions might easily be inflamed.⁵⁸

The least involved scheme for solution of the problems of disability is apt to be the most workable. The committee and congressional plans appear to involve the compound weaknesses of spectacular complexity and the probability of causing unnecessary agitation to the public.

The third and most recent plan put forward by Senator Kefauver concludes that if a president fails to declare his inability, the vice-president, with the written advice and consent of a majority of the heads of the executive departments, will be able to declare his inability. The vice-president will thereupon assume the powers and duties of the office of the Presidency as "Acting President," and he will serve until the president has recovered, which the president himself will determine. In case he fails to make the determination, the vice-president, with the consent of the majority of the Cabinet, is authorized to seek congressional action.⁵⁹ Representative Frelinghuysen once again dissents from this type of an arrangement. He feels that devotion would outweigh objectivity, thereby preventing a dispassionate determination.⁶⁰

Conclusion

It would appear unwise to propose any solution to this problem except by way of a constitutional amendment, which is as close to an expression of the people of the United States as is possible under our constitutional system. The adoption of an amendment would clarify completely just what course should be taken when the president's ability is impaired. Practically speaking, in a "notorious case" of disability, the American people, through public opinion, would make the determination. This would cover a great number of the situations. In order to determine a "doubtful disability" expeditiously a

⁵⁸ Frelinghuysen, *Presidential Disability*, 307 THE ANNALS 144, 150 (1956).

⁵⁹ S.J. RES. 161, 85th Cong., 2d Sess. (1958). If Congress determines the inability has not terminated, notwithstanding any further announcement by the President, the vice-president shall be "Acting President" until (1) the "Acting President" proclaims that the president's inability has ended; (2) the Congress determines by concurrent resolution that the disability has ended; or (3) the president's term ends. *Ibid.*

⁶⁰ Frelinghuysen, note 58 *supra*.

simple formula will be required. Senator Kefauver's plan is adequate in this respect. It is also laudable because it is the only measure which protects the integrity of the presidential office by keeping the determination confined within the executive branch of the government and at the same time insures that it will be cautiously arrived at, which is a desirable factor. However, the procedure as to termination appears too cumbersome and it is submitted that that too should remain within the realm of the executive department. The essential provision is that the vice-president is the "Acting President" when a president is determined disabled. However, when the office is actually vacant, as in the cases of death, removal or resignation, it would not appear objectionable to have the vice-president succeed to the office, as well as the powers and duties, of the chief executive.