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STATEMENT

BY

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ON

PRESIDENTIAL INABILITY

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A matter of serious concern to the people of the country is the problem of what happens when a President is unable to discharge the powers and duties of his office in case of illness or other unexpected emergency. There is agreement that there should be clarification and improvement of our constitutional system relating to such inability. The question is what is the most desirable and appropriate procedure for accomplishing this objective.

After careful study, I believe that action to amend the Constitution is necessary to eliminate uncertainty and to provide for the orderly conduct of Government in time of future crises due to a President's inability to act. The plan which the Administration has recommended for favorable consideration by Congress I believe provides a workable and satisfactory solution.

The Administration Plan is attached as Appendix 1. Permit me briefly to describe its principal provisions.

A major provision of the plan is to make it abundantly clear that in event of a President's inability, the Vice President would serve only as Acting President, and only during the continuation of the Presidential inability. The President would resume the exercise of the powers and duties of his office as soon as he was again able to act. In the event of a President's removal from office or of his death or resignation, however, the Vice President would become President for the balance of the President's term.

The plan makes provision for two types of situations involving Presidential inability.

First: If a President should become unable to discharge the powers and duties of his office and so declares in writing, then the Vice President would become Acting President for the period of inability. Whenever the President is again able to act, he could so declare, and he would thereupon resume the powers and duties of his office. This provision would probably take care of most cases of Presidential inability.

A second type of situation might arise, however, in the event that a President is unable or unwilling to declare his inability. The plan provides in such case that the Vice President, if satisfied of the President's inability and upon approval in writing of a majority of the heads of Executive Departments who are Members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President. Whenever the President thereafter again becomes able to discharge the powers and duties of his office he may reassume them by declaring in writing that his inability has terminated.

You will note that the plan proposed by the President last year would be substituted for part of paragraph six of Section 1 of Article II of the Constitution. The whole of said paragraph in the present Constitution reads 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."

The portion of such paragraph for which the new proposal is a substitute is underlined in this statement.

1. Why Action is Needed

Strong disagreement prevails today concerning the status and tenure of a Vice President during the inability of the President. Distinguished students of the Constitution have contended that a Vice President would merely act as President for the duration of the inability. Other respected students of the Constitution have argued that a Vice President would actually become President and replace the disabled President for the remainder of the term. This difference in opinion respecting a Vice President's status and tenure during a President's inability fully demonstrates the compelling need to remove the existing doubt and confusion once and for all.

Soon after President William Henry Harrison died in 1841, Senator William Allen of Ohio objected to establishing the precedent of a Vice President's becoming President upon the death of the latter, because he thought that the precedent would complicate the situation in the

future when a President became disabled.[1] As Allen indicated, study of the records of the Constitutional Convention shows that a Vice President was not intended to become President under the succession clause, but merely to exercise the powers and duties of the President until his inability was removed.

This Committee's attention is directed to a chart which is attached to my statement. On the left side is the draft of the two clauses dealing with presidential succession that was sent to the Committee of Style with instructions "to revise the style of and arrange the articles agreed to by the House."[2] On the right side is the clause as it was reported. Of the two clauses in the draft dealing with presidential succession, one provided that the Vice President should "exercise those /presidential/ powers and duties." The other empowered Congress to designate an officer to "act as President" in certain contingencies. Each was modified by an adverbial clause which would limit the tenure of the Acting President until the inability was removed. The Committee of Style had no authority to alter or amend substantive provisions but merely to put them into clear and concise language. The Committee consolidated the two provisions into one and introduced the phraseology, "the same shall devolve on the Vice-President." The Committee also used the limiting adverbial clause, "until the disability be removed," only once instead of using it to modify each of the preceding clauses separately. The

Committee did, however, change the semicolon to a comma so that the adverbial clause would be part of a continuous sentence and modify each of the preceding clauses. Thus the records of the Constitutional Convention seem to establish clearly that in case of Presidential inability, the Vice President was not to become President, but to exercise the powers and duties of the President until his inability had ceased.

Regardless of the intent of the framers of the Constitution, seven Vice Presidents have, upon the death of the President, been recognized as having become the de jure President. As a result of the precedents established whenever a President has died, it seems to be assumed without question that the Vice President becomes President and does not merely act as such when the President dies. This appeared to be Daniel Webster's view at the time of President Harrison's death.--i.e. that Vice President John Tyler actually became President.[3/] These precedents make it easier to argue that a Vice President supersedes the President whenever he exercises presidential power. As we will note in a moment, both the Garfield and Wilson cases, the Vice President was not asked to act as President largely because of the fear that he would become President and thereby oust the incapacitated incumbent. As a result, the full extent of the disabilities was carefully guarded because of personal loyalty to the disabled President. More important, the public interest could not help but suffer from being deprived of an active President in both cases.

Since Harrison's illness was short, no question of inability was involved. However, President Garfield lingered for eighty days after he was shot on July 2, 1881. During this eighty days he performed only one official act -- the signing of an extradition paper.[4] Although his mind was clear during the first days of his invalidism, he was unconscious and it was reported that he suffered from hallucinations during the last days of his illness.[5] Moreover, he was physically unable to discharge the duties of his office during a substantial part of the entire eighty days.[6] It cannot be seriously contended that there was no important business requiring the President's attention. Actually, officers were unable to perform their duties because the President was unable to commission them. There was a serious crisis in our foreign affairs. Yet the department heads transacted only such routine business as could be transacted without the President's supervision. It was claimed that important questions of public policy which could be decided only by the President were simply ignored.[7]

Equally important, public opinion was sharply divided about the manner in which public business was handled. There was objection to having the affairs of the executive branch managed by the Cabinet, objection that Secretary of State Blaine was guilty of usurping the President's duties, and insistent demands that the Vice President exercise this power and that Secretary Blaine's alleged usurpation be ended immediately.[8]

After Garfield's illness had already dragged on for sixty days, his physicians thought he would recover; but his convalescence was expected to take another sixty days. Therefore, the Cabinet considered the possibility of asking Vice President Arthur to act as President during Garfield's recuperation. All seven Cabinet members agreed on the desirability of having Arthur act as President. Four of the seven, however, thought that Arthur's exercise of presidential power would actually make him President for the remainder of the term and thereby oust Garfield from office.[9/] It was reported that Attorney General Wayne MacVeagh shared these views. Consequently, the Cabinet decided that Garfield should not be advised to ask Arthur to act as President without first telling him of this possibility. Therefore, the whole matter was deferred because the physicians feared that the shock caused by such a discussion might result in the President's death. Garfield's death on September 20 made it unnecessary to solve the problem in 1881.

When President Arthur became President in September, there was no officer in existence legally capable of succeeding him. Under the Succession Act of 1792, the President pro tem of the Senate and the Speaker of the House were next in line, but since Congress was not yet in session neither officer had been elected. In 1886, after five years of debate and struggle, Congress finally remedied the situation by changing the Succession Law, but despite Arthur's efforts did nothing to clarify

the question of Presidential inability.[10] The whole matter was dropped until President Wilson became ill in 1919.

There can be no doubt that President Wilson was actually unable to perform the duties of his office during some part of the period after his collapse on September 25, 1919, and until the end of his term on March 4, 1921. Numerous domestic and international matters failed to receive his attention. More important, this inability occurred during the Senate debate on the Versailles Treaty.

The exact degree of Wilson's inability is uncertain. Whatever Wilson's condition, Vice President Marshall, the Cabinet and the public were not fully advised concerning it.[11] The President's family, his White House staff, and the Cabinet discharged public business in such manner and by such methods as to them seemed appropriate.

History seems to indicate that Mrs. Wilson and Dr. Cary T. Grayson, the President's physician, played an important part in many questions of public policy.

Soon after Wilson's stroke the Cabinet joined with the White House staff to keep the Government operating. Secretary of State Lansing called twenty-one Cabinet meetings to transact executive business. When Wilson heard of these meetings, he accused Lansing of usurping presidential power and forced him to resign.[12] Wilson seemed to think that the Constitution did not authorize the Cabinet to act in his absence,

as a result that government business was interrupted during his illness.[13]

Patrick Tumulty, Wilson's secretary, reported that Secretary of State Lansing had suggested that, in view of the President's inability, they should ask the Vice President to act as President. He quotes himself as saying: "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him."[14] Tumulty also reported that, when Lansing resigned, Wilson said: "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."[15]

Because of the belief that the Vice President would actually become President, asking Marshall to act as President during Wilson's inability was viewed as disloyalty. Consequently, Marshall was looked at with antagonism instead of as a person who could lighten the disabled President's burden. Instead of asking Marshall to exercise the powers devolved upon him by the Constitution, they attempted to keep the Government operating in their own way in order to forestall any serious attempt to declare the President's inability.[16]

A study of the Garfield and Wilson cases shows that there is a real need for a means of supplying an active President during periods of presidential inability. The belief that a Vice President actually becomes President when called to act as such has nullified the constitutional provision for the administration of the Government when a President is

incapacitated. In the only two serious cases of presidential inability to date, the Vice President was not called to act as President because of the fear that he would actually become President and thereby supersede the disabled President for the remainder of the term.

The problem of providing for the exercise of presidential power during periods of inability would not be solved merely by providing a means by which the inability could be established. Unless the President, his Cabinet, and his other friends are absolutely certain that he may resume his powers after the termination of his inability, they will tend to oppose any attempt to declare the existence of inability, viewing such a declaration as equivalent to removing the President from office. This problem would be solved by sections 2 and 3 of the Administration proposal, which provides that the presidential powers and duties "shall be discharged by the Vice President as Acting President" and that the Vice President shall "discharge the powers and duties of the office as Acting President."

With this history to guide us, and with a need for uninterrupted continuity of government, we must conclude that action is vital to solve the problem of Presidential inability.

II

Why the Administration Plan is Preferable to other Proposals

Section 1 confirms the present generally accepted interpretation of the Constitution -- that in case of removal of the President from office,

or his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. This specifically affirms the result accepted by the Nation seven times in cases of death of a President.

Section 2 of the proposal states that, if a President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President. This section authorizes a President to announce his own inability and allows him to do so, knowing that his powers and duties will be restored to him when he recovers. Section 2 of this proposal also would require the President to make this announcement in writing. The reason for adding this requirement is to preclude a dispute about whether a President actually declared his inability. The existence of a written document will prevent anyone from seriously denying that the President recognized his inability. I believe that Section 2 encompasses most of the cases of Presidential inability which are likely to arise. It removes the reason which caused responsible government officials to fail to act in the Garfield and Wilson cases.

The only objection I have heard to Section 2 is that a President might use this section to shirk his duties and responsibilities. The obvious answer is that a President who used this section to shirk his duties would be breaking his oath to "faithfully execute the Office of

President" and, therefore, would be subject to impeachment for high crimes and misdemeanors. If a President should ever become so anxious to be relieved of his duties and responsibilities, he would not need to declare his inability--he could simply resign in conformity with Article II of the Constitution and with Section 20 of the Third Title of the United States Code.[17/]

Section 3 of the Plan deals with cases in which the President is unable or unwilling to declare his own inability. In such cases, the Vice President with the approval of a majority of the President's Cabinet would make the decision.

The Cabinet is the proper body to participate along with the Vice President in declaring a President's inability. The Cabinet is an executive body, the President's official family. Its loyalty to the President is generally unquestioned. A decision of this body is least likely to be suspected of enabling a Vice President to usurp power on the pretext of inability. Moreover, the Cabinet is in a position to know at once whether a President is disabled.

Under Section 3, there are several possible courses of action. The Cabinet could notify the Vice President when a majority of that body believed that the President's inability was sufficient to warrant a devolution of presidential power on the Vice President. The Cabinet has always notified the Vice President when a President has died; and Section 3 would extend this custom to the case of inability. Under Section 3 the Vice

President might take the initiative without the Cabinet's first inviting him to make the decision. Unlike the provision of the present Constitution, however, Section 3 would require approval by a majority of the Cabinet before the Vice President could undertake the exercise of presidential power.

A Vice President who undertook the exercise of presidential power would be assured that his action could not seriously be branded as usurpation because that action was previously approved by the President's own appointees in the Cabinet.

In addition to the safeguard provided in Section 3 by the Cabinet's role in the process, Section 4 contains a second safeguard. It provides that, whenever the President declares in writing that his inability is terminated, the President shall immediately resume the exercise of the powers and duties of his office. Thus, Section 4 does, I think, provide a disabled President with a constitutional guarantee that he can regain the powers of his office without the concurrence of any other official or group if he is of the opinion that his inability has been removed.

As a practical matter, if the determination of presidential inability is left where the Constitution places it now--in the Vice President, or placed in the Vice President and Cabinet--as suggested, the Vice President would never venture to assume the duties of the Presidency unless it were clear beyond challenge in any quarter that the President was in truth and in fact actually disabled from performing the functions of his office. With

a constitutional provision spelling out that the Vice President only acts as President in a case of inability, and a constitutional provision granting to the President the right to reassert his powers at any time, the Vice President as a practical, political necessity in all probability would secure the approval of the Cabinet, of the leaders and a great majority of the Congress, and of a large segment of public opinion before venturing to assume the presidential duties. On the other hand, with a constitutional provision negating any motive of usurpation in the Vice President by clear language that he only acts as President for a temporary period, no Vice President would hesitate--as did Vice Presidents Arthur and Marshall in the two most serious examples of this problem--to perform his constitutional duty of serving as the alternate executive for a temporary period. The President's immediate family and friends would be stripped of any motive to oppose the Vice President, as in Wilson's case, for on regaining his health the President could simply assert his right to the office.

This leaves open one extreme contingency. What will the machinery be for resolving questions of the President's inability where there is a difference in opinion between the President and the Vice President as to whether the former's inability has ended?

My predecessor was of the opinion that the federal courts would disclaim jurisdiction in such a case upon the ground that the question presented was political, and that the only remedy was impeachment.[18/] The consensus of opinion is in agreement with Mr. Brownell that the sole remedy is impeachment where there is a wrongful assertion of authority to exercise the powers and duties of the Office. The attempt of a President to perform his

duties when he was in fact clearly unable to perform might be classed as a wrongful assertion of authority.[19/]

It should be noted, however, that impeachment proceedings may be delayed if Congress is not in session. Article II, Section 3 of the Constitution provides that the President may on "extraordinary Occasions, convene both Houses, or either of them." It is unlikely that a President under attack for attempting to assert the powers while still suffering inability, would convene the Congress to conduct impeachment proceedings against himself. Further study is required to determine how Congress may be convened in event impeachment proceedings are required in a dispute involving Presidential inability.[20/]

Therefore Congress may think it wise to avoid the odium of an impeachment by providing another but a similar process whereby the question of inability could be determined in the unlikely event a President and Vice President were at an impasse. The Administration Plan could be modified by the addition to Section 4 of such a provision.

Referring to Appendix III, this alternate Section 4 would still allow the President to resume the functions of his office at any time, but provide for the immediate action of Congress, whether then in session or not, to resolve the question of Presidential inability raised in writing by the Vice President supported by a majority of the Cabinet. By making the charge one of inability rather than impeachment for some offense, the necessary proceedings could be conducted in a more appropriate atmosphere. Members of Congress who might be reluctant to impeach the President would not have

the same reluctance in removing a President physically unable to perform the duties of his office.

In my opinion this alternate Section 4 would place the President, Vice President, and Congress in exactly the proper relationship to the question of inability. The President could always reassert his power, the Vice President would acquiesce except in the unfortunate situation where the President had misjudged his true capacity. In that event Congress would step in and by its consideration of a charge of inability determine the issue. A two-thirds vote of the Senate would determine the existence of a President's inability; a majority vote of both Houses would restore the powers of his office to him. Impeachment would remove the President permanently; a determination of inability would leave to the President an opportunity later to reassume the powers of his office. The difference between the result reached by impeachment and by an inability proceeding would justify the enactment of the separate inability proceeding, and would render the whole proposed solution more acceptable to the public.

Let me stress that the very existence of this ultimate power in Congress - which is the only power it needs in relation to this question - would in all probability insure that this extreme situation would never arise. No Vice President would resist a President reasserting his claim to the powers of the Office unless the President were in fact unable to perform. No President - in fact unable to perform - would be permitted by his family and close personal counsellors to reassert his claim and precipitate an issue likely to be resolved against him by Congress.

We must recognize that in this area as in others, not everything is soluble and not everything may be controlled by law. Whatever machinery is adopted, it must not be able to be used as a vehicle for harassing the

President. So long as the determination of inability is left within the Executive branch, either by the President, or by the Vice President as is now true under the Constitution, or by the Vice President and Cabinet under the circumstances proposed by the Administration, there can be no harassment of the President or diminution of his stature in the eyes of the people. The Vice President is of the President's own party; the Cabinet is of the President's own choice; if there is a provision that the President can reassume the duties of his office at any time, he is safeguarded.

But if we transfer the power of initial determination of inability out of the Executive Branch, or in some fashion share it with others outside the Executive branch, then the way is opened for a harassment of the President for political and personal motives. We may not always have as President a figure of the national and international stature of President Eisenhower, nor one who has so completely demonstrated his respect for Congress as a coequal branch of government, whether dominated by his own or the opposition party, as has President Eisenhower. Our solution must contemplate the testing of it - if need be - in circumstances similar to the time of President Johnson and the Reconstruction Congress, when violent personal differences and party controversy would invite the Congress to use any power it had to determine presidential inability as a weapon of harassment--if such a weapon were easily at hand. A possibility of such political harassment could severely impair the Presidency at the very time when assertion of its full power was most needed.

With these guiding principles in mind, let us now examine some other proposals.

Various plans for the creation of a special commission have been considered which would be empowered to employ physicians, to require the President to submit to physical and mental examinations, and to declare the existence of an inability by a majority or a two-thirds vote of the commission. We think these plans should be rejected for a number of reasons.

First, it seems unwise to establish elaborate legal machinery for giving the President physical and mental examinations. This would give a hostile commission power to harass the President constantly, and risk danger of irresponsible demands for commission action. Not only would provision for such physical and mental examinations be an affront to a President's personal dignity but it would also degrade the presidential office itself.

Second, it seems ill-advised to establish complicated procedures which would prevent immediate action in case of emergency, because there is a need for continuity in the exercise of executive power and leadership--especially in time of crisis. Investigations, hearings, findings, and votes of a commission could drag on for days or even weeks and result in a governmental crisis, during which no one would have a clear right to exercise presidential power.

Third, such a committee would be <u>totally unnecessary</u> except where there was a dispute between the President and the Vice President in the Executive Branch itself. In my opinion such a situation would be most

unlikely, once the principle is constitutionally established that the Vice President's assumption of power is only temporary and the President can resume his power at any time. In other circumstances, where the presidential inability might not be so publicly clear, the Vice President would only venture to assume the presidential duties if it were certain that the President were in fact disabled, whether the President recognized it or not.

Some constitutional authorities have pointed to the extraordinary ad hoc commission of 15 members set up to decide the disputed Hayes-Tilden election in 1876. This was a desperate remedy for a desperate situation. In my opinion it forms no basis for a carefully considered long term constitutional arrangement which will be tested at some indefinite time in the future with unknown personalities involved.

Let us now consider some of the objections to the particular composition of proposed Commissions.

I think it is now generally agreed that the Supreme Court should not be represented on any Presidential inability Commission. This leaves Congress and the Cabinet as the logical source from which the members of such a Commission would be drawn.

It would appear to be a violation of the doctrine of separation of powers for officials of the Congress to participate in any decision of Presidential inability. Especially is it the case where under proposed plan more than a majority of the Commission empowered to vote would

come from the Legislative branch. In effect, it would enable Congressional leaders to put the President out of office, and to keep him out, by declaring that he lacks the ability to perform his duties.

The lack of wisdom in any such proposal is indicated by considering a converse proposal. Consider for a moment a proposal under which a Commission, composed of four members of the Cabinet and one member either from the House of Representatives or Senate was empowered to look into the alleged inability of members of the House and Senate.

Any such astounding proposal would promptly and accurately be branded as an unwarranted intrusion by the Executive branch into the affairs of the Legislative branch. It seems equally unwise to give a committee consisting of a majority of members of Congress the power to remove the President of the United States.

The framers designed the President as the sole repository of the executive power of the nation. He and the Vice-President--the alternate executive--are the only two officials to be chosen by all the people. In time the presidency has grown as the national symbol, a unifying symbol in any time of stress or crisis. No solution to the problem of temporary disability should dilute the prestige of the presidency, diminish its stature, or endanger its tenure.

Summarizing my views on the various proposals of a presidential commission on inability, I am convinced that this type of scheme is unnecessary, would be unworkable in practice, and would drastically alter

the concept of separation of power which has worked so well throughout our nation's history.

III

Why a Constitutional Amendment is Essential

There are various bills and resolutions pending in the Congress which attempt to deal with the problem of Presidential inability by statute. However, there is considerable doubt and sharp division as to whether Congress has the power to legislate on the subject.

Testifying last year before the Subcommittee of the House Committee on the Judiciary,[21] former Attorney General Herbert Brownell, Jr. summed up the situation in these words:

> "I believe that the Constitution now vests the power of determining inability in the Vice President; and that the Vice President could not constitutionally be divested of this power without a constitutional amendment."

In my opinion, this is an eminently sound position.

Most scholars take the position that the power to determine Presidential inability rests solely in the Executive branch.[22] This is not only true now but has been true for a long time.[23] It would be wise to leave this principle intact. The fact that Congress has never tried to alter this concept by legislation would also seem to support this conclusion that the power to determine Presidential inability properly resides in the Executive branch under the Constitution.

Any statute which purports to give Congress such power to determine the inability issue must be a statute which attempts to transfer a constitutional grant of power. Obviously, such a constitutional power can only be transferred by Constitutional Amendment--no statute can have that effect, any more than any statute may override the Constitution in any other respect.

Another reason I favor a Constitutional Amendment stems from another sharp division in authority as to whether there can be any temporary devolution of Presidential power on the Vice President during periods of Presidential inability. As I have pointed out there are respectable authorities who believe that if a Vice President displaced a President during the latter's inability, the Vice President would serve for the remainder of the term. 24/

I do not agree with that argument. But the fact remains that there will always be a group to urge that there can be no temporary devolution of Presidential power on the Vice President during periods of Presidential inability, as the Constitution stands today. A concurrent resolution or statute would not resolve that doubt. Obviously, the doubt that has been raised has been far too persistent to be disregarded. They were apparently considered to be of sufficient substance to stay Vice President Arthur from acting during Garfield's lengthy inability.

The Constitution should be so clear that there would be no room for a dispute about its meaning. For the time when the question would arise

is the very time when the country should be united and the very time when a Vice President should have general support. The Constitutionality of the statute would not be tested until the event of inability, and it is uncertainty and confusion at this very time that we are trying to avoid. This is another reason that a constitutional amendment is preferable to a statute or a concurrent resolution even if the proposal were limited to merely a declaration that a Vice President was to be Acting President and only during the inability.

Professor Arthur E. Sutherland put it well when he said:[45]

> "The problem seems to me to involve a constitutional amendment. * * *. The Founding Fathers wisely wrote into our Constitution the doctrine of separation of powers, from which the country derives many benefits, but which somewhat complicates provision for Presidential inability. * * *. However, under the Constitution as it was well drafted, Congress can no more remove the President than the President can remove a Congressman. An exception, of course, is the provision for impeachment * * *. To turn over provision for suspending or ending his duties to ordinary legislation would alter, in an important respect, the present distribution of governmental powers between the executive and the legislative branches."

Those urging that the Congress has this authority rely chiefly on the "necessary and proper" clause contained in Article I, Section 8, Clause 18 of the Constitution. This elastic clause provides as follows:

> "The Congress shall have 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 in the Government of the United States, or in any Department or Officer thereof."

The Supreme Court has declared that this clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned."[26] So too, the Supreme Court has said "every valid act of Congress must find in the Constitution some warrant for its passage."[27] If the power which Congress seeks to assert is not expressed in the Constitution, the next inquiry must be whether it is incident to an express power and necessary to its execution. If it is, Congress may exercise it. "If not, Congress cannot exercise it."[28]

Now what express power does the Constitution confer upon the Congress in this connection? The only power expressly given to Congress is the power to declare what officer shall act as President when both the President and Vice President are unable to function.

This is quite clear both from the language and its context in the Constitution. Let us look carefully at the words used:

The first half of Section 1 of Article II of the Constitution reads:

> "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."

Now, as you can see, there is no express reference to any action by Congress whatsoever in this part of the Section. Nor was there in the original draft of this clause, as you can see by reference to this chart. Accordingly, a majority of the scholars take the view that where only the

President has suffered inability, the Vice President alone may make the determination. It is an executive matter exclusively. Congress has nothing whatever to do with this portion of the Section.

Now let us look at the second portion of Section 1 of Article II. It reads:

> "* * * 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." (Emphasis added).

This part expressly permits Congress to act, but only where both the President and Vice President are not functioning.

As a matter of sound construction, therefore, based upon the manner in which this Section was drafted, and the precise words used, it would seem to deny Congressional power to deal with inability when the President alone is involved. This would be in accord with the familiar rule that enumeration of a specific grant of power shall be construed as precluding the exercise of a general grant over the subject matter. The rule has been stated as follows by Benjamin F. Butler: 29/

> "Now, a rule of interpretation of statutes and constitutional law, and more especially as to the latter, always regarded as controlling, is found in the maxim, inclusio unius, exclusio alterius. Or, freely translated, a special grant of power is always held to be the withholding of a general grant of power over the same and correlative subject matter. And the Constitution providing expressly what Congress may do in case of inability of both President and Vice-president, excludes the idea that Congress may by law add to or diminish the constitutional

> provision as to what shall be done in case of the inability of the President only, and the constitutional devolution of the duties of his office upon the Vice-president."

During the debate on the law on Presidential Succession in 1881, the Senate had occasion also to consider whether Congress had authority to deal with Presidential inability. Senator Garland of Arkansas engaged in a scholarly discussion of the problem, during the course of which he said: 30/

> "Certainly the power to determine the 'inability' of the President is not conferred by article 2, section 1, clause 5, which gives power to Congress only to declare what officer shall succeed. To get under the general clause (article 1, section 8, clause 18) to make all laws necessary and proper for carrying into execution the granted powers, &, is too general, too latitudinous, and would really make Congress as powerful as De Lolme says the British Parliament is, that can do anything and everything except make a man a woman or a woman a man. * * *
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> "The makers of the Constitution spoke as wisely as they could speak on the question. In other words, the portions of the Constitution in relation to the President and Vice-President of the United States are self-executing. That is the doctrine. It is not intended for Congress to put its fingers into that business at all, because it is interfering with a separate, coequal, co-ordinate department of the Government. * * *"

In 1918, Henry E. Davis prepared a monograph on the "Inability of the President" which was reproduced as a Senate Document. Mr. Davis advanced still another reason why Congress lacked authority to deal with Presidential inability. He said: 31/

> "* * *The very fact that the Constitution contains no provision for summoning the Congress by any other than the President is almost proof conclusive that that branch was intended to have no part in determining the existence of an inability; for to say that the Vice President might so summon that body is to yield the whole question; the very act by the Vice President would determine the inability to exist."

It seems clear to me that the necessary and proper clause of the Constitution does not give the Congress power to determine the inability of a President.

Another objection that has been raised to dealing with Presidential inability by Constitutional Amendment is that it may take too long to secure its passage. This objection becomes less formidable when it is recalled that several of the more recent Amendments to the Constitution were ratified in less than a year or slightly more than a year.

Thus the Seventeenth Amendment providing for the election of Senators by popular vote was proposed on May 16, 1912 and ratified May 31, 1913--about thirteen and a half months. It took three-fourths of the States from February 20, 1933 to December 5, 1933--less than ten months--to repeal the Eighteenth Amendment on prohibition by ratification of the Twenty-First Amendment. It took from May 19, 1919 to August 26, 1920--about 15 months--for ratification of the Nineteenth Amendment dealing with Woman's Suffrage. It took from March 3, 1932 to February 6, 1933--merely eleven months--for ratification of the Twentieth or "lame duck" Amendment. These periods of time may be

compared with the five years it took Congress to enact a new Law of Succession.

When the people recognize the pressing need for an Amendment to the Constitution, as there unquestionably is in this case, we can expect state legislatures to be fully responsive to the country's need and to do everything within their power to expedite ratification.

In summary, I think, first, the sounder logic is strongly in favor of a Constitutional Amendment, and second, if there is this large body of opinion which regards a Constitutional Amendment as necessary, it would be illogical, to say the least, to deal with this problem by statute, and leave it in the same state of uncertainty as it is in now.

Finally, I should like briefly to comment on the plan under which the Congress would enact a statute and submit an identical Constitutional Amendment to the States at the same time. There is a precedent for this dual procedure. In 1866 Congress passed the Civil-Rights Act over President Johnson's veto. During debate on the bill in Congress, opponents to it pressed with great force their arguments to demonstrate that the bill was unconstitutional. The Fourteenth Amendment was adopted to obviate these objections that threatened the validity of the Act.

There is, however, grave danger in this procedure when applied to Presidential inability cases. Resort to the Constitutional Amendment route at the same time that a statute was enacted would be construed as

a confession of the unconstitutionality of the statute, and lead to great public tension and unrest if there were any attempt to invoke it in a crisis. Indeed, it might well stir up heated litigation in a national emergency--the very time that the Country can ill afford to await the outcome of protracted litigation, or be divided by it.

For still another reason the 1866 precedent involving civil rights is not an apt one in connection with the Presidential inability issue.

There is no question but that the federal courts have the jurisdiction to consider the validity of civil rights statutes and to hold them invalid when they do not meet constitutional standards. In keeping with our traditions, decisions of the courts in cases of this kind which the courts have long determined, would generally be acceptable to the people. But, as several scholars have pointed out, statutes dealing with Presidential inability involve political questions--questions which the court have steadfastly refused to assume. In the leading case of Colegrove v. Green,[32/] Mr. Justice Frankfurter speaking for the Court stressed once again that it should stay out of political controversies.

The Court said:

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

What would the result then be if a statute were enacted? It would merely invite a long drawn out legal battle at the end of which the Court might decide it has no power to decide the matter, and that it is bound by the Vice President's decision; or if it did decide it, either the President or Vice President might claim that its decision was worthless because the Constitution never gave the Court authority to determine such a case. Thus we would be back where we had started from, except that now the confusion, chaos and dissension among the people would be greater than ever.

If we are ultimately to rely on a Constitutional Amendment anyway, it is my considered opinion that we should follow this course exclusively now, and set all doubts to rest for the future. The machinery to be provided to resolve the inability dispute under any plan, must not only be such as to achieve a just result, but also to insure its widespread acceptance by the people. And this can only be accomplished by a Constitutional Amendment, simple on its face, plain for everyone to understand, free of radical change, and so eminently fair to all parties involved as to have universal appeal.

Footnotes

1/ Cong. Globe, 27th Cong., 1st sess., 4-5 (1841).

2/ Davis, Inability of the President, Sen. Doc. 308., 65th Cong., 3d Sess., (1918).

3/ George Ticknor Curtis, 2 Life of Daniel Webster 67n (1870); James D. Richardson, 4 Messages and Papers of the Presidents 22, 31-2 (1897); Lyon Tyler, 2 Letters and Times of the Tylers 12 (1885); Herbert W. Horwill, Usages of the American Constitution 70-71 (1925); Oscar D. Lambert, Presidential Politics in the United States 1841-1845 5 (1936); Ruth C. Silva, op. cit. supra note 2, 14-24.

4/ George F. Howe, Chester A. Arthur 152-53, 181 (1934); N.Y. Herald, p. 5, col. 3 and p. 6, cols. 2-3 Sept. 1, 1881; id., p. 4, cols. 1-3, and p. 6, cols. 2-3 Sept. 5, 1881; N.Y. Times, p. 1, col. 7 and p. 4, cols. 2-3 Aug. 11, 1881; Silva, op. cit. supra, note 2, pp. 52-57.

5/ Boston Evening Transcript, p. 1, col. 5 Sept. 16, 1881.

6/ See the daily bulletins of his physicians published in various newspapers from July 2 to September 20, 1881.

7/ Howe, op. cit. supra, note 4, 153, 181; N.Y. Herald, p. 3, cols. 1-3 Sept. 1, 1881.

8/ N.Y. Times, p. 4, cols. 2-3 Aug. 11, 1881; N.Y. Herald, p. 6, cols. 2-3 Sept. 5, 1881; Boston Evening Transcript, p. 4, col. 2 Aug. 1, 1881; N.Y. Tribune, p. 4, cols. 2-3 Sept. 6, 1881.

9/ N.Y. Times, p. 1, cols. 2-3 Sept. 4, 1881; p. 1, col. 3 Sept. 2, 1881; N.Y. Tribune, p. 5, cols. 1-2 Sept. 2, 1881.

10/ Lavery, "Presidential Inability," 8 Am. Bar. Ass'n. J. 13, 14 (1922).

11/ Statement of Attorney General A. Mitchell Palmer, id., p. 2, cols. 1-3 Oct. 14, 1919; of former Secretary of Commerce William C. Redfield, id., Dec. 4 & 6, 1921; and of former Secretary of the Treasury David Houston, Eight Years with Wilson's Cabinet II, 36-37 (1926).

12/ N.Y. Times, p. 1, col. 6-8 Feb. 14, 1920; id;., p. 2, col. 1 Feb. 15, 1920; Houston, op. cit. supra, note 14, II, 64-70.

13/ Silva, "Presidential Inability," 35 Univ. of Det. L.J. 139, 147 (1957).

14/ Tumulty, op. cit. supra, note 15 at 443-44.

15/ Id., 445.

16/ Silva, Presidential Succession, 66-7 (1951).

17/ Everett S. Brown, "Resignation of the President and Vice President," 22 Am. Pol. Sci. Rev. 732 (Aug. 1928).

18/ Hearings before the Special Subcommittee on Study of Presidential Inability, House Judiciary Committee, April 1, 1957, 30.

19/ Cf. Wrisley Brown, "The Impeachment of the Federal Judiciary," Sen. Doc. No. 358, 63rd Cong. 2d Sess. p. 8, 14, 17.

20/ Consideration should be given to these Constitutional provisions among others. Article I, Section 4, paragraph 2 provides:

> "The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different day." (Emphasis added).

Amendment XX, Section 2 provides:

> "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day." (Emphasis added).

Corwin has expressed the view that under these provisions Congress, by legislation, could render itself "a practically permanent body," (Corwin, The President: Office and Powers, 285 (Ed. 1957). On the other hand, these provisions may be construed to be limited to setting a different day to assemble in each year, rather than to convene for a special session.

21/ Hearings of April 1, 1957, supra note 18, 21.

22/ Silva, supra note 13, 156 footnote 82.

23/ See e.g. Senator Garland, Cong. Rec. Vol. 13, pt. 1, Dec. 15, 1881, p. 139.

24/ Hearings of April 1, 1957, supra note 18, 18-19; Silva, supra note 13, 149 footnote 51.

25/ Hearings before Special Subcommittee to Study Presidential Inability, House Judiciary Committee, April 11 and 12, 1956, 18-19.

26/ Kansas v. Colorado, 206 U.S. 46, 88.

27/ United States v. Harris, 106 U.S. 629 636.

28/ Id. 106 U.S. at 636 quoting from Mr. Justice Story's Commentaries on the Constitution.

29/ Benjamin F. Butler, "Presidential Inability", 133 No. Amer. Rev. 417, 432 (1881).

30/ Cong. Rec. Vol. 13, 139-140 (Dec. 15, 1881).

31/ Sen. Doc. No. 308, 65th Cong., 3d Sess., 1, 14 (1918).

32/ 328 U.S. 549, 553-554.

Appendix I

Resolved by the Senate and House of Representatives of the United States in Congress (two-thirds of each House concurring therein). That in lieu of so much of paragraph six of Section 1 of Article II of the Constitution of the United States as relates to the powers and duties of the Presidential office devolving on the Vice President in the 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 following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

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

Article --

Section 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term.

Section 2. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Section 3. If the President does not so declare, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President.

Section 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

Section 5. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission.

Appendix II

Articles as Agreed to by the Convention	As Reported by Committee on Style and Finally Adopted
Art. X, § 2: ". . . and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.	Art. II, § 1, cl. 6: "In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, (comma)
Art. X, § 1: "The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation or disability of the President and Vice President; (semicolon)	and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, (comma)
and such Officer shall act accordingly, until such disability be removed, or a President shall be elected. 2 Max Farrand, Records of the Federal Convention of 1787, 575, 573 (1911 and 1937).	and such officer shall act accordingly, until the disability be removed, or a President shall be elected" 2 id. 598-599, 626.

Appendix III

(Alternate Section 4)

Section 4. Whenever the President declares in writing that his inability has terminated, the President shall forthwith discharge the powers and duties of his office: Provided, however, that if the Vice President and a majority of the heads of executive departments who are members of the President's Cabinet shall signify in writing that the President's inability has not terminated, thereupon:

(a) The Congress shall forthwith consider the issue of the President's inability in accordance with procedures provided for impeachment, and if the Congress is not in session, shall forthwith convene for this purpose;

(b) If the House of Representatives shall on record vote charge that the President's inability has not terminated, and the Senate so finds by the concurrence of two thirds of the members present, the powers and duties of the office of President shall be discharged by the Vice President as Acting President for the remainder of the term, or until Congress by a majority vote of the members of both Houses determines that the President's inability has terminated.