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Presidential Inability

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MR. COOLEY.

THE Constitution provides that "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the duties of the said office, the same shall devolve on the Vice-president." Three of the contingencies here mentioned are cases in which the President's incumbency is absolutely terminated, and, according to the precedents, the Vice-president does not then succeed merely to the powers and duties of President, but becomes the incumbent of the office.

The fourth contingency, of "inability to discharge the duties of the said office," supposes a state of things that may be permanent or temporary. If it should occur, and the duties devolve upon the Vice-president in consequence, the latter would be acting President only, for the manifest reason that there would still be a President who had not in any manner vacated the office, though for the time unable to discharge the duties.

The question, What is a case of inability? is a momentous one, and not to be disposed of lightly or on any narrow or technical reasoning. It is a question involving the stability of government and the interests of the whole people. The words to be interpreted are part of an instrument which is supposed to deal only with general principles and matters of highest importance, and to leave all else to ordinary legislation. We must therefore assume that this provision was inserted for contingencies so

important as to render the devolution of the President's powers upon some other officer an absolute necessity.

In one sense, the President would be under inability to discharge the powers and duties of his office if he were in the delirium of fever, though there might be no reason to believe the delirium would last beyond a few hours. His constitutional advisers would not venture to present an official document for his signature at such a time, or permit any one to approach him on public affairs; and if in his delirium he were to sign a document or veto a bill without the consciousness of reason, he and every one else might treat the act afterward as a nullity, as he might if he had done it in a state of somnambulism.

It seems unnecessary to affirm that a case of merely temporary displacement of reason cannot be such a case of inability as the Constitution intends. If the Vice-president were immediately to come forward under such circumstances, and claim the right to perform the duties of the office, the common sense of the nation would feel a shock of pain and surprise at such a misconstruction of this important provision.

If the President were to be prostrated by sunstroke, and lie for a day or a week in a state of insensibility, there would be a plain case of present inability to act; but who believes that the Constitution intends the Vice-president shall immediately take up the reins of power, and displace the President before it is seen that the public interest requires it?

But a case of even present inability may not be so plain as those which have been indicated. The reason is sometimes dethroned by slow approaches of disease, and then gradually restored again; and the question of the actual mental condition at any particular time may be one of great nicety, which only experts can solve. It is plain there is no inability before the reason is overturned and none after it is restored; and the exact condition at any time is very likely to be the subject of differences of opinion among experts. If under such circumstances, with the fact disputed or not generally known, there were to be an attempt to displace the President for inability, it seems certain that it would not be peacefully submitted to. If the Constitution permits a change in the executive under such circumstances, without authoritative decision to the satisfaction of the public mind, it may confidently be affirmed that, instead of providing for the perpetuity of institutions, it has suggested and

invited civil disorders, a contested chief magistracy, and general anarchy.

The question of inability in the constitutional sense is complex, for it necessarily to some extent involves two others: First, whether, when the Vice-president becomes acting President, he is in for the term, or only while the inability continues; and, second, what officer or body shall pass on the question of inability and determine its existence?

The limits assigned to this paper preclude any examination of the first question, and we shall assume it to be unnecessary. The Vice-president is to act when there is inability; and he can do so no more after the inability has ceased than before it commences. From the nature of the case, therefore, the question of inability is continuous; it must be ever present even after the Vice-president has become acting President, and there must at all times be an authority competent to pass upon it. And if this authority is provided for by the Constitution, we must suppose the wise framers of that instrument had in view a tribunal as little liable to be swayed by personal interests and ambitions as is possible in the nature of things. We must suppose this because only such a tribunal could be satisfactory; and the case is peculiarly one in which it is of first importance that the public mind be satisfied.

That a mere temporary inability is not the inability the Constitution intends seems certain, because the evils the Constitution aims to provide against are not immediately present or imminent. They might not be present or imminent if the President's incompetency were to continue for several days or weeks; because there might during that time be no urgent necessity for executive action. To displace a President because he cannot act, when no action is needful, and when it is not known that his incompetency will continue so as to be detrimental, would be as foreign from any suggestion of true statesmanship as it would be possible to conceive. True statesmanship carefully guards against unexpected changes in government, instead of inviting them without apparent or probable benefit.

If, then, a mere temporary inability is not the inability the Constitution intends, we are forced to conclude it must be an inability that from its nature and continuance causes—or at least threatens—inconvenience in public affairs. It is this inconvenience, present or imminent, which will bring the inability to

notice, and require that it be passed upon and provided for. Other circumstances than that of duration may therefore have controlling force.

Had President Lincoln in April, 1861, been prostrated by some mental disorder likely to continue for weeks, the necessity for the constant attention and action of the Executive would have been so imperative that no one could question that the emergency the Constitution intends had arisen. In that time of supreme trial for the country, to leave executive powers in abeyance for a very brief time might have been disastrous. But many times before and since, if the President had withdrawn himself altogether from public business for weeks, or even months, no inconvenience whatever could have resulted, or if any at all, then such as would be utterly insignificant when compared with the mischiefs of a change. The ordinary business of government would have moved on without disorder, taxes would have been received, public debts paid; the courts, the army, and navy would have performed their allotted functions, and the absence of the President from his duties would have attracted attention merely as an item of current news.

To determine, then, whether the constitutional emergency has arisen, we must look beyond the existence of present inability, and consider, first, the question of probable continuance, and, second, the condition of public affairs, and the necessity for executive action. More difficult and delicate questions than these a human tribunal is never called upon to consider, and it would be a reproach to the Constitution and infinitely dangerous in government if these, and the further question of the continuance of the inability, were submitted for determination to any other than the most proper and suitable tribunal. But the Constitution is subject to no such reproach.

In the nature of things there is but one proper and suitable tribunal for making this decision, and the Constitution plainly points it out. Congress is expressly empowered to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. It may, therefore, make laws for this case.

It is especially proper that Congress should have the jurisdiction over this subject, for many reasons, a few of which will be mentioned. Congress, more directly than any other department

or officer, represents public opinion and the public will, and is more likely, in a great crisis which intensely interests the whole people, to give a decision which accords with the public judgment. Congress, better than any other authority, must know what the public exigencies demand, for its legislation deals with them with all the power of the Government. The questions involved in suggested inability must be considered in the light of facts, appearances, opinions, matters of public notoriety—in short, of all those matters which influence the public mind, and a popular body can alone deal with such evidence. If the inability seems likely to be temporary, Congress alone can make provision for determining when it has ceased. If any other authority should declare the inability, and the Vice-president should act upon it in opposition to the opinion of Congress, his authority would be paralyzed by the refusal of Congress to recognize it. No court could help him, for the courts cannot decide political questions. Congress, then, must deal with the question, first, because the Constitution provides for it; second, because reason dictates it; and, third, because the decision of Congress alone can be final.

The difficulties in the way of a Congressional decision will not be overlooked or belittled. It may be said, with truth, that Congress could only act by bill or joint resolution, either of which, before becoming effective, must be presented to the President for his action. To present a bill for approval or veto, by an officer whom the bill itself declares to be incompetent, would be an absurdity. But national powers were conferred in perpetuity, and it is the duty of Congress to see that they are perpetuated. Among the express powers is one to provide for the continuous exercise of executive authority. Now, it is entirely possible that a contingency may arise when there will be no Vice-president, or other officer with any claim under the law to act as President. Must the Union be dissolved and chaos come in consequence? How much wiser would such a notion be than that of James II., who thought that, when he had cast the Great Seal into the Thames, he had made the administration of government impossible? When Congress finds the Union without a head, its first duty is to provide for one; and if an impossibility exists in doing this, according to the very letter of the Constitution, no one need doubt that this is a case in which the spirit of the instrument is more imperative than the letter.

But it may be said, if the emergency should occur when

Congress is not in session, there would be no method of convening it for the purpose. But no American can doubt that, when the case arises and public opinion is firmly fixed in the belief of inability, Congress, if not invited to meet by the cabinet, or the speaker, or the Vice-president, will convene spontaneously to deal with the case and save the institutions intrusted to its care. Men charged with merely business interests would find ways to convene under such circumstances, and it is not likely that statesmen would be lacking who would possess at least ordinary shrewdness and efficiency.

If any one insists upon precedents to justify irregular action, where regular is impossible, we have a right to appropriate English precedents wherever they favor liberty and national perpetuity. The King, in England, is as inseparable a part of the legislature as the President is here; but the most important Parliament in English history, that of 1688, was convened on the invitation of one who was not even an officer or a subject; and it proceeded without executive assent to declare a vacancy, to change the succession, and to settle the government on new principles. The Parliament of 1808, which established the regency, was compelled to assume the concurrence of the King, after it had declared him insane, and that of 1788 would have done the same, had not the King recovered his reason while the Parliament was deliberating. No precedents could be more exactly in point, and none could be more reasonable.

It may be added that, while Congress could provide for such cases by general law, it could have no less power to provide by special law, and that almost inevitably every case would be peculiar, and require to be dealt with specially.

We conclude, therefore, that an inability, in the constitutional sense, is one that not only exists presently, but, in the opinion of Congress, is of such nature and probable continuance that it causes or threatens inconvenience in public affairs. It is possible for a case to arise so plain, and so unmistakably determined in the public judgment, that public opinion, with unanimous concurrence, would summon the Vice-president to act. But, though this would make him acting President *de facto*, he would become acting President *de jure* only after solemn recognition in some form by Congress.

THOMAS M. COOLEY.