

INABILITY OF THE PRESIDENT.

WHAT CONSTITUTES? AND WHO DECIDES?

MONOGRAPH BY HENRY E. DAVIS.

NOTE.—The greater portion of the following article was prepared in the summer and autumn of the year 1881, when its subject was of lively interest owing to the attack upon President Garfield. The additions due to the discussion in Congress over the bill which subsequently became law in the form of the act of January 19, 1886, respecting the performance of the duties of the office of President in case of the removal, etc., of both the President and Vice President, will readily be recognized. The reader of the act of January 19, 1886, and of the debates preceding the enactment of the same will observe that notwithstanding the fact that the question treated in the article was very fully discussed, no attempt to settle it was made by Congress and that it is accordingly as open as ever. The article is printed in the form in which it was originally put in final shape, 30 years ago.

The severe and protracted illness of President Garfield brought into prominence a provision of the Federal Constitution which, until that emergency, may be said to have been practically out of sight since the organization of the Government—the provision, namely, respecting the discharge of the duties of the Executive during an inability of the President. (Art. II, sec. 1, cl. 5: “In case of the removal of the President from office, or 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 cognate provision as to the discharge of those duties on the death of the President had three times been called into requisition—in the cases of Vice Presidents Tyler, Fillmore, and Johnson; that which refers to removal was, for a while, forcibly present to the mind of President Johnson at least; and that respecting resignation was, in all probability, one of the few jests which tempered the almost depressing earnestness of the Federal convention. But the inability provision slept a long sleep, to be awakened at last by a second “shot heard round the world.”

What does that provision mean? was at once the anxious general inquiry; and as the subject presented itself quite as a nova questio, many and various were the replies. Of such as found their way into print scarcely any two agreed; if they seemed to agree in one particular they differed in at least one other, and earnest as was the general discussion represented by these replies no digest of them could approach a harmony.

The question is still as interesting and important as when thus startlingly projected, for while the Congress is even now seeking some solution of the problem of the order of succession in case of inability of both President and Vice President, no effort is making (and it is difficult to perceive how any generally satisfactory effort could be made) by that department of Government to solve the many other problems touching the character, extent, and ascertainment of an inability, and the proper course of action by the officer or officers most nearly concerned.

What the provision means is then of vital interest, and in dealing with the question it is necessary to look closely not only at the provision itself, but also into the object which the framers of the Constitution thought they were attaining by it. And manifestly there are two points of view from which such examination may be made, the first in natural order being that of the proceedings of the convention, the other that of the language of the provision as it left the convention's hands—or, rather, as it now meets the eye; for, as indicated below, there would seem to be reason for this particularity in the form of the statement.

The general disposition has been to confine examination to the language, such resort as has been had to the proceedings being almost exclusively spasmodic and for purposes of illustration on some single point. Conforming for the present to that disposition, it is of interest to consider what may fairly be deemed representative specimens of the varying results of such examination.

The questions which, in this connection, suggest themselves upon the threshold are such as these: What is inability in the sense of the provision; and what its effect as to the Executive and executive duties? Each of these questions includes others: Who shall decide when the inability occurs, whether it is continuing at a given date, when it has ceased? And, in case of inability of the President, does the Vice President become President or merely acting President for the time being? And at the termination of the inability shall the President and the Vice President resume their normal functions?

The difficulties in the way of satisfactory answer to these questions are sufficiently attested by the varying conclusions already adverted to. As a general answer, some say that the inability contemplated by the Constitution is one that shall completely disable the President to discharge his duties during the remainder of his term, in fact, a quasi death; on which the Vice President, on his own decision of the necessity, shall become President; and that any other case of inability is *casus omissus* (ex-Judge Dittenhoefer in *New York Herald*, Sept. 13, 1881). Others find more difficulty in the subject. One maintains that the character of the contemplated inability must be decided according to the law sense of the term and must, therefore, be an intellectual incapacity of the President, on the happening of which and proof thereof in a manner to be prescribed by the Congress, the office of President devolves on the Vice President (Prof. Dwight, *North American Review*, Nov., 1881). Another thinks that the Constitution intends to provide for the case of an inability either physical or mental, which is to be known to the Vice President when "so open, notorious, and indisputable as to be recognized by all as existing"

(ex-Senator Trumbull, *Ibid.*). Still another contends that a temporary inability is not contemplated by the provision, but that the inability intended to be provided for depends upon its probable continuance and the condition of public affairs, and that the Congress is to declare when such exists; in other words, that "an inability, in the constitutional sense, is one that not only exists presently, but, in the opinion of Congress, is of such a nature and probable continuance that it causes or threatens inconvenience in public affairs"; on the happening of which, though the President may not again resume his powers, the Vice President is only to act as President, for he can not become President, the elected President still actually living (Judge Cooley, *Ibid.*). And, again, it is said that any inability, of whatever character and however transient, is what the Constitution aims to provide for; that the Vice President, himself determining when such inability has arisen, shall thereupon enter upon the discharge of the presidential duties; and that when the inability ceases the President is to resume his functions and the Vice President to go back to his place in the Senate (ex-Gov. Butler, *Ibid.*).

Perhaps the most natural explanation of these varying opinions is to be found in the character of the subject and its mode of treatment, above suggested; it is practically *res integra*, than which nothing is more inviting, and at the same time stimulating, to the human mind; and it has been dealt with from the point of view of the language of the provision. Did the solution of the problem depend upon "authority" and the citation of precedents, diverse enough would be the conclusions reached; and independence of authority and precedent, setting the matter at large, does not conduce to lessen the number of such conclusions or to promise for them any nearer approach to similarity.

But another explanation suggests itself, to be found in the constitutional nature of the provision; accounting as well for the simplicity of its statement and the different conceptions of its scope and meaning, as for the comparative absence of resort to authority or precedent in its consideration; not that much light may not be thrown on the inquiry by study of the origin and development of the provision, but the case almost wholly wants those direct declarations of intent and expressions of opinion which may be brought forward in almost every other constitutional discussion. The provision in question is matter of detail purely; no principle is involved in it, and the debates of the Federal convention, as also of the States in considering the Constitution, show an absence of any discussion of it whatever. Referred to it is, as a matter of course, but only by the way, not to be dwelt upon or even stated in an argumentative or explanatory way, and of the many amendments proposed by one State or another, no one makes any reference to the subject. The nearest approach to notice of the question of inability to be found in the debates is the amendment proposed by New York: "That all commissions * * * shall * * * be tested in the name of the President of the United States, or the person holding his place for the time being" (2 Dec., 408). But this is far from touching the questions in respect of which the provision is here under consideration; those, namely, above stated: What constitutes an inability, who shall decide

its existence, and what is the proper course of action on its happening and cessation.

But this apparent want of attention to the provision should not be misconceived; nor should it be overstated or misstated, as, from imperfect consideration of the subject, it not infrequently has been. Thus it has been repeatedly said that the provision for a Vice President was conceived in the closing days of the Federal Convention, when it was not possible to give the subject deserved attention; which statement, while apparently founded in fact, rests on a complete misconception. It is true that, in respect of succession to the powers and duties of the Presidency, the Vice President was provided for at that late day; but he was conceived merely as a substitute in that behalf for the President of the Senate for whom, as contemplated successor to those powers and duties, provision had been made from the first.

Again, so experienced a statesman as ex-Senator Trumbull has used these words: "The original Constitution did not prescribe the qualifications of age and citizenship of Vice President as it did of President. Hence a Vice President not eligible to the Presidency might, under the Constitution as it existed prior to 1804, have had devolved upon him the powers and duties of the presidential office" (*N. Amer. Rev.*, Nov., 1881, p. 419). And in debate in the Senate on January 8, 1883, Senator Dawes held language to the same effect: "So little considered was the provision in reference to the Vice President that they did not even provide that the Vice President should have the qualifications for office that the President should have" (*Cong. Rec.*, vol. 14, No. 29, p. 10). But a glance at Article II, section 1, of the Constitution as it originally stood will show that the third paragraph of that section provides for a balloting by every elector for two persons, and a list of all the persons voted for; of whom the person receiving the highest number of votes should be President, and in every case after the choice of the President the person having the next greatest number should be Vice President; and the fifth paragraph prescribes the qualifications for eligibility to the office of President. As the electors in voting could not designate their choice for President and Vice President, respectively, and as either of the two persons voted for by each of them might be chosen President, it followed as of course that the qualifications for eligibility must be had by all the persons voted for, of whom one must be Vice President. Wherefore the qualifications of the Vice President were necessarily prescribed by the method of his election; and those qualifications were the same as in the case of the President.

While, then, the framers of the Constitution were not remiss, yet the provision under consideration apparently did not receive the same attention at their hands as did the other provisions. But neither was this because of carelessness, nor is it strange. It is just what might be expected, considering the object in view.

The main features to be provided for as to the Executive were: First, the character of the office; second, the qualifications of the incumbent; third, the mode of his election; fourth, his powers and

duties; fifth, his tenure. Each of these was the fruitful source of earnest, often confused, and at times seemingly hopeless discussion. This was transferred, after the preparation of the Constitution, to the State conventions and there gone over again and again. In all these features the gravest principles were involved; but those principles once settled, there was left to consider only a possible vacancy during the term for which a President might be chosen. This was a matter wholly secondary to the main consideration, that, namely, of providing an executive; and it was disposed of by a provision wholly simple in its language and, doubtless to the minds of the Convention, also in its meaning and operation.

How a vacancy might occur was evident. It might happen by act of God, as death; by act of another branch of Government, as removal; or by act or condition of the incumbent himself. And this last might be either voluntary, as resignation or absence, or involuntary, as inability.

The death of a President is a matter about which no great doubt can exist; and the same is equally true of his removal from office and his resignation, when either is once a fact. But, it may be said, inability may exist as a fact and yet grave doubt of its being a fact exist at the same time. In turn, it may also be said and confidently that the Convention was not blind to this; yet it saw fit to leave the provision in its present shape. The questions, What is an inability? Who shall decide its existence? were put, but not answered or even discussed in the Convention, "What," asked Mr. Dickinson, "is the extent of the term 'disability' (that being the form originally), and who is to be the judge of it?" (5 Dec., 481). Here the whole question was broached, but nothing followed the inquiry; and in the State conventions the inquiry was not even put.

The care with which the Federal Convention worked out every provision incorporated into the Constitution is yet the theme of our wondering praise. Is the provision under consideration an exception in this particular? We must think not, but that the provision was left as it is, not through carelessness, nor because it was not thought probable that in the brief term fixed for the office an inability might occur; for the Constitution would, for either of those reasons, have been wholly silent on the subject. In fact, the Convention thought the provision as adopted self-explanatory, self-operative, and sufficient. Not only do the character of its members and the earnestness of its deliberations compel us to this view, but also especially must the silence on Dickinson's inquiry and its failure to reappear be deemed conclusive of the point. And additional weight is given this view by the amendment proposed by New York, above mentioned; it is inconceivable that that amendment could be suggested and not one providing for determination of the existence of an inability, etc., if the Constitution was thought to leave any doubt on the point.

That this is the real explanation in the premises, and that the provision was in fact not slighted in point of attention, will be made clearer by considering the question from the other point of view, that, namely, of the proceedings of the Convention, and by reviewing its successive steps on the way to the provision; and this consideration will also aid much in arriving at the construction now to be put upon its language.

The first provision touching the Executive was the seventh of Randolph's resolutions, which, when originally offered, on May 29, 1787, was wholly silent on the subject of succession or substitution (1 Deb., 144; 5 do., 128).

The next in order was Charles Pinckney's draft, submitted the same day, Article VIII of which provided in respect of the President that—

He shall be removed from his office on impeachment by the House of Delegates, and conviction, in the Supreme Court, of treason, bribery, or corruption. In case of his removal, death, resignation, or disability, the President of the Senate shall exercise the duties of his office until another President be chosen. And in case of the death of the President of the Senate, the Speaker of the House of Delegates shall do so (1 Deb. 148; 5 do. 131).

On being read, Pinckney's draft was referred to the committee of the whole (1 Deb. 150).

On June 15 Mr. Patterson submitted his propositions, of which the fourth provided for a plural executive, ineligible for reelection, "and removable on impeachment and conviction for malpractices or neglect of duty by Congress on application by a majority of the executives of the several States" (1 Deb. 176; 5 do. 192); but these propositions also were wholly silent as to succession or substitution of any officer in the President's stead. The propositions, like Pinckney's draft, were at once referred to a Committee of the Whole House (1 Deb. 177).

On June 18 Hamilton, in a speech, presented his plan of government, Article V of which was as follows:

On the death, resignation, or removal of the governor (Hamilton's title for the executive), his authority to be exercised by the President of the Senate until a successor be appointed (1 Deb. 179).

Hamilton's plan contemplated the continuance in office of the executive during good behavior and made no provision for the case of inability (Cf. 5 Deb. 587).

No other general plans were proposed for the consideration of the convention. On May 30 the House resolved itself into a Committee of the Whole to consider the state of the Union, and took up Randolph's resolutions (1 Deb. 150), which furnished the basis of consideration throughout the convention. The resolution respecting the executive was taken up on June 1 (1 Deb. 154), and, on June 2, postponed to the consideration of the resolution respecting the second branch of the legislature (1 Deb. 156).

No definite action on Randolph's seventh resolution had been taken when, on June 19, the committee disagreed to Patterson's propositions, and a second time reported the resolutions of Randolph (1 Deb. 180; Cf. pp. 174-175). While in Committee of the Whole the convention had left Pinckney's draft untouched; and though in Randolph's resolutions as now reported it was provided by that touching the executive (now numbered 9), that the President should "be removable on impeachment and conviction of malpractice or neglect of duty," the resolutions were still silent on the subject of succession or substitution (1 Deb. 182). So the matter of a disability or an inability was still unprovided for.

The executive continued for a long time a stumbling block, and when, on July 23, the proceedings were referred to a committee for the purpose of reporting a Constitution, "what respects the supreme executive" was expressly excepted (1 Deb. 216). On the next day, July 24, the subject of the executive was taken up by the House, but almost immediately again postponed (1 Deb. 217). At the same time, the committee of the whole was discharged from acting on the propositions of Pinckney and Patterson, and the propositions were referred to the committee to whom the proceedings of the convention had already been referred, viz, Rutledge, Randolph, Gorham, Ellsworth, and Wilson (1 Deb. 217-218; 5 do. 357-358, 363).

Finally, on July 26, the resolution respecting the executive, as reported on June 19, was adopted and referred to the committee already provided (1 Deb. 219-220). So this committee now had before it the resolutions of Randolph as altered by the Convention, the draft of Pinckney, and the propositions of Patterson (1 Deb. 221; 5 do. 363, 374-376).

The Convention adjourned from July 26 to August 6, during the interval between which dates the committee did its work. We have no record of its proceedings, but when on the latter date it reported to the House the draft prepared by it, the article respecting the President (Art. X) contained, in section 2, the following:

He shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. In case of his removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall discharge those powers and duties until another President of the United States be chosen, or until the disability of the President be removed (1 Deb., 228; 5 do., 380).

The draft reported by the committee was then taken up and considered from day to day in Committee of the Whole. Article X was not reached until August 24 (1 Deb., 262), and on August 27, the last clause of that article being reached, its consideration was postponed (1 Deb., 267). On August 31 such portions of the draft as had been postponed, including this clause, were referred to a committee of a Member from each State, 11 in number (1 Deb., 280). This committee reported September 4, and in their report occur for the first time provisions respecting a Vice President, as distinguished from the President of the Senate. Among these was the following:

The Vice President shall be, ex officio, President of the Senate except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside, and excepting, also, when he shall exercise the powers and duties of President, in which case, and in case of his absence, the Senate shall choose a President pro tempore (1 Deb., 284; 5 do., 507).

And the committee recommended the following as the latter part of the second section of Article X:

(The President) shall be removed from his office, on impeachment by the House of Representatives and conviction by the Senate, for treason or bribery; 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. (Ibid.)

On September 7 that portion of the committee's report touching the election of President and Vice President was amended by adopting the following:

The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President, and such officer shall act accordingly until such disability be removed or a President shall be elected (1 Deb., 291; 5 do, 220-221).

On the following day the last clause of section 2, Article X, as reported by the committee (supra) was agreed to (1 Deb., 294), and a committee of five, viz, Johnston, Hamilton, G. Morris, Madison, and King, appointed "to revise the style of and arrange the articles agreed to by the House" (1 Deb., 295; 5 do, 530). To this committee went the provisions touching inability in the shape in which they are last above given; that is to say, in terms prescribing that in case of inability the Vice President or other officer of the United States exercising the powers and duties of President (or acting as President) should do so until such inability were removed.

The committee reported September 12; the clause providing for the case of removal, etc., as reported being, according to the Journal, 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 the period for choosing another President arrive (1 Deb., 302).

On September 15 this clause was amended by striking out the words "the period for choosing another President arrive" and inserting in place thereof the words "a President shall be elected" (1 Deb., 313). As thus amended the clause was written into the final draft of the Constitution, with this difference, according to Madison's Minutes: Instead of the two semicolons were two commas (5 Deb., 562), although in the Constitution as now frequently printed the semicolons appear (*e. g.*, see Porter's Outlines U. S. Const. Hist., 81).

In view of the stress which has been laid on these semicolons by some in discussing the provision (who could not, however, have examined the clause as it stands in the Revised Statutes, for there the commas are found and not the semicolons), this difference in the punctuation is of no slight significance; and Mr. Madison's form is entitled to be deemed correct, in preference to the other, not only because he found frequent occasion to note errors in the printed journal (in 17 instances at least, of which samples may be found at 5 Deb. 506, 543), but also, and especially, because he was himself a member of the committee on style which prepared the last draft submitted to the Convention. He says specifically that the copy given by him is the copy "as signed," himself italicizing the words (5 Deb. 536), and though the Convention compared "the report

from the committee of revision with the articles which were agreed to by the House, and to them referred for arrangement" (the comparison being made paragraph by paragraph), "no entry of the corrections and amendments adopted or proposed appears upon the journals," resort being had to the written interlineations, Mr. Madison's minutes, and the tally sheets to complete the journal (1 Deb. 307).

The exact effect of the committee's action in the premises may be perfectly seen from the following arrangement, side by side, of the clauses as they were adopted by the Convention and their consolidation as effected by the committee:

In case of (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or (the period for choosing another President arrive) a President shall be elected.

However much the outcome of the committee's efforts may cause us to doubt its qualifications in respect of style, this chronological examination of the Convention's proceedings in the premises would seem to make clear several things:

1. The Vice President was not, as some have thought, intended to sit in the Senate and act as president at the same time. Even the language of Article I, section 3, as it now stands, manifests this. ("The Senate shall choose their other officers, and also a president pro tempore in the absence of the Vice President, or when he shall exercise the office of President of the United States.")

2. When the provision under consideration left the hands of the Convention, to be put into shape by the committee on style and arrangement, it was distinctly provided that, in case of an inability of the President, the Vice President was not to become President, but to exercise the powers and duties of the President, which exercise was to cease with the inability of the President.

3. The officer intended to be designated by the Congress in case of the double inability was an officer of the United States.

4. The committee on style and arrangement regarded itself as merely bringing together and combining into one, without alteration of sense or intent, two cognate provisions found lying apart, by each of which provisions exercise of the presidential duties by a substitute was restricted to the period of actual inability. The committee had no authority to alter or amend; no objection was taken to their union of these provisions, which fact indicates that the revised form was not regarded as in any particular altering or amending "the articles agreed to by the House"; and Mr. Madison's punctuation (which is that actually adopted) makes the clause "until the disability be removed" part of a continuous sentence and therefore

constructively, if not strictly, referable alike to the case of the Vice President and the "officer" to be designated by the Congress. And this is a complete answer to Prof. Dwight's assertion that "the specific reference to powers and duties was deliberately rejected, as well as the words 'until the disability be removed,' so far as that assertion intends to imply that the new form imports alteration or amendment of the Convention's determinations.

These conclusions are not in any sense antagonized by the language of the provision as we now find it. The language is, "in case of * * * inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President." "The same" has reference to the object of the verb "discharge," which is not "said office," for that is the object of the preposition "of," but "the powers and duties of the said office": and the expression "in case of inability" may fairly be construed as equivalent to "during an inability," which would involve return of the executive duties to the President on cessation of the inability.

Nor are Prof. Dwight's citations from Munroe and Martin inconsistent with this view. Munroe was objecting to the Vice President as an unnecessary officer and noting his dangerous influence from the standpoint of "advantage to the State he comes from" (3 Deb., 489-490). "He is," said Munroe, "to succeed the President in case of removal, disability, etc., and to have the casting vote in the Senate." In the connection in which Prof. Dwight cites the former part of this remark the word "succeed," as used by Munroe, is absolutely colorless. The same remark is applicable to the extract from Martin's letter. Martin was writing in almost the identical vein in which Munroe spoke, and in stating his objections to the Vice President he spoke of him as the officer "to supply (the President's) place" (1 Deb., 378). In neither instance was the question of inability under consideration; each used the quoted expression in the run of argument and by way of recital of features deemed objectionable. It would be as fair to cite against Prof. Dwight's contention that the "office" devolves Madison's assertion (in the same debate in which Munroe was arguing) that "the power will devolve on the Vice President" (3 Deb., 498); notwithstanding the remark, being made by Madison while arguing in favor of the provision touching the Executive, has no sort of reference to the point of view from which the provision is now being considered. Indeed, Madison might more justly be cited, for his exact language was, "(the House of Representatives) can impeach (the President); they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice President." But such remarks, made in such connections, are no more to the point than are the dicta of judges' law.

Reverting now, with the aid of this review of the Convention's proceedings, to the several views of the meaning and intent of the provision above noticed, that taken by ex-Gov. Butler would seem to be the correct one. He thinks that the inability may be of any kind, and that when it ceases both officers, President and Vice President, should return to their proper places. The "articles as agreed to by the House" incontestably manifest this, and "this view is in con-

sonance with the whole theory of an alternative officer in all parliamentary bodies and in executive offices" (North Amer. Rev., Nov., 1881, p. 434).

And the Vice President is the person to decide when the inability has arisen. In the absence of any designation to the contrary, "it may be taken to be axiomatic that when the Constitution imposes a duty on an officer, to be done by him, he must be the sole judge when and how to do that duty, subject only to his responsibility to the people and to the risk of impeachment if he act improperly or corruptly" (ibid, 433); a remark which gains weight from consideration of the complete isolation respectively of the executive, judicial, and legislative branches of our Government; than which no feature of our system was more in contemplation by its framers or has been more rigidly respected. The best judgments now agree even that the Supreme Court can not (except by mandamus in those cases of nonfeasance wholly independent of discretion), lay down law for the Executive; the function of that court being only to decide "cases arising" under the prescribed conditions. And the legislature can interfere with the Executive only by impeachment for malfeasance of a specific sort, so that neither the judiciary nor the legislature being either capable of affecting or responsible for the performance of the executive duties, the discharge of those duties is properly left where the responsibility belongs.

Of course, save in the exceptional case of an insane President, no Vice President would assume to insist to a President against his judgment that he was under an inability; and so long as a sane President would resist such intimation there would be no inability. The President may safely be trusted to help out the Vice President in the necessity of deciding to assume the functions of the office, save only in the case of insanity, as suggested; but the Constitution could not go into every exceptional case. Section 675 of the Revised Statutes provides that "in case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence." What is an inability in this case, and who decides it? Section 10 of the act of March 1, 1792 (1 Stat., 239; R. S., sec. 147), provides "that whenever the office of President and Vice President shall both become vacant the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State." Who decides when the two offices are vacant? In the one case the senior associate takes the seat of the Chief Justice because the latter is not in it, and in the other the Secretary of State, being charged with the duty, would discharge it when he himself deemed the occasion to have arisen. And, as Senator Ingalls said in the debate of January 8, 1883, already noticed, "By the Constitution itself, if the Constitution is self-operative or could be self-operative, the powers and duties of (the presidential) office did devolve upon Vice President Arthur on the 2d day of July, 1881."

The determination of the question of inability is an Executive affair altogether. The only other power said to be concerned in it is the Congress, but that body is under a limitation in the premises confining its participation to quite another matter. The Constitution has provided that when an inability exists in one case the Vice President shall act, and that the Congress may—do what? Determine

when an inability has arisen in any case? No; but provide what officer shall act when such inability exists in another case. This merely gives the Congress the right to designate an officer to succeed to the discharge of the Executive duties when the double disability exists; it does not even give that body the right to say under what circumstances such disability shall be deemed to have arisen, much less to determine when a wholly different disability occurs. *Inclusio unius exclusio alterius*; and the Congress recognized this by the act of 1792, which act is a distinct interpretation by that body of its constitutional rights and duties in the premises. That interpretation is perfectly expressed by the language of Senator Morgan (Dec. 29, 1882): "Whenever we proceed further than to declare what officer shall act as President, we transgress the bounds of our constitutional authority."

And immediately in this connection there at once presents itself a question which, even without its answer, not only indicates that the Constitution did not intend to vest the Congress with the power to determine when or under what circumstances an inability exists, but also suggests the reason for the shape in which we find that subject left by the Constitution: How could the Congress decide an inability to exist? Only in one of two ways: First, by special decision in each case as it arises; or, second, by a general provision prescribing a method in advance or conferring the power of decision upon some person or body, to be exercised in a prescribed manner and under prescribed conditions.

It may safely be said that the first of these methods needs no serious consideration. All that is urged against the power of the Congress to interfere at all in the determining the existence of an inability applies with more than double force to its interference without previous provision therefor, and the difficulties in the way of its acting at all in such case are apparent. The alleged or possible existence of an inability is a matter calling for instant consideration and decision, not a matter to be left to the consideration, discussion, perhaps wrangling, of a great number of variously disposed and diverse-minded men. Besides, suppose an inability to appear during a recess of the Congress, what is to be the proceeding?

And here is presented still another important consideration. 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. If provision were made or to be made for summoning the Congress by any other than the President to consider a supposed disability how would the body be summoned? Clearly some one person would be compelled to take the initiative; and how delicate would be his task, practically deciding the question in advance. Would such task be much less delicate than that of the Vice President assuming to declare an inability to exist and acting accordingly? And whom could the Congress choose so agreeable to the people as the second man in power, he who was distinctively put into his place to assume its great responsibilities?

Putting aside the constitutional objection, the second method of action by the Congress would be little, if any, more feasible or satisfactory than the first; and if the Congress should assume to regulate the subject at all, this second method, delegating power to a person or body, would be indispensable to provide for the case of an inability occurring during a recess.

If the Congress should confer the power of decision upon any one person the matter would be left just where the Constitution leaves it; with this difference in favor of the Constitution—save in the rare instance of the want of a Vice President, that instrument (if the view herein contended for be the proper one), confers the power upon one elected to his office by the people. On the other hand, if the power were committed to a body, the initiative would necessarily be taken by some one person; in any aspect of the matter, the necessity of beginning with some one person constantly meets us.

Is not this fact practically the explanation of the whole matter as we find it in the Constitution? The beginning, in every conceivable view of the case, must always be by some individual; whether the Vice President is to decide of himself, whether the Congress is to be called, whether any given person is to exercise the power or any designated body is to be convened for the purpose, that necessity can not be escaped. And why not leave the matter to the man chosen of the people as their possible ruler? nay, as the Constitution then stood, to the man possibly to be chosen as their ruler; for any one of the men voted for by the electors might be President, and some one of those voted for as President would be the Vice President.

The decision of such a question as the existence of an inability must be prompt and immediately effective; of all questions in the world this should be free from everything approaching delay or halting. There should in such case be no interregnum, be it of how short duration soever; a thing abhorred of all and repugnant to every system of government. A plural tribunal of any sort would involve danger of this great evil, and it needs no inspiration to conceive circumstances under which, with a tribunal of several to consider it, an inability of the President would be almost as great a calamity as an outbreak of treasonable hostilities. A single mind is the best conceivable tribunal for such a question and that tribunal may safely enough be the mind of him who is practically the choice of the whole people. For his right doing in so trying an emergency the Constitution rests its hope, as our entire governmental system rests its life, upon the earnest and patriotic intelligence of the American people and of each and every of them. He would be a rare man, indeed, who, in so responsible a moment, should misconceive, or, worse still, should intentionally disregard his high duty and the inconcealable public sentiment.

