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### John D. Feerick: From Falling Hands: The Story of Presidential Succession

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FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION. By John D. Feerick. New York: Fordham University Press. 1965. Pp. xiv, 361. \$6.95.

On eight occasions the American people have experienced the shock and grief attendant upon the death of their President.<sup>1</sup> In each case the American governmental system and the people passed a severe test, the orderly transfer of the rights and duties of the presidential powers. This significant characteristic of continuity is a tribute to the foresight of the constitutional fathers and the maturity of the American citizen.<sup>2</sup>

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1. William Henry Harrison (1841) died one month after his inauguration and was succeeded by John Tyler.

Zachary Taylor (1849-50) died unexpectedly after sixteen months in office. He was succeeded by Millard Fillmore.

Abraham Lincoln (1861-65), assassinated by John Wilkes Booth on April 14, 1865, was succeeded by Andrew Johnson. Lincoln was the first of four American Presidents to be assassinated.

James A. Garfield (1881), shot by a disappointed office seeker, died two months later on September 19, 1881, and was succeeded by Chester A. Arthur.

William McKinley (1897-1901) was assassinated in 1901 by anarchist Leon Czolgosz. McKinley was succeeded by Theodore Roosevelt.

Warren G. Harding (1921-23) died in office on August 2, 1923, and was succeeded by Calvin Coolidge.

Franklin D. Roosevelt (1933-45) died in office on April 12, 1945, and was succeeded by Harry S. Truman.

Finally, John F. Kennedy (1961-63), assassinated on November 22, 1963, was succeeded by Lyndon Baines Johnson.

In each instance, the Vice President succeeded to the powers of the Presidency.

2. 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.

U.S. CONST. art. II, § 1.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

U.S. CONST. amend. XX, §§ 3, 4 (1933).

The answers of the Constitution, however, to the questions of presidential successions are only partial,<sup>3</sup> thus posing the possibility of a crisis which could threaten the very survival of the nation. With the significant expansion of the role of the President, serious citizens have recognized more clearly that the provisions for succession, especially those dealing with presidential inability must be definitive, leaving no question as to who shall exercise those significant powers. That this is not just an idle academic question is demonstrated by the fact that within our immediate memory the problem has been raised by the illnesses of President Eisenhower, the tragic assassination of President Kennedy, and the record of illness in the life of President Johnson.

In this volume, John D. Feerick, a prominent New York attorney, who has made this problem one of special study since his law school days at Fordham University, describes how we have handled this dual constitutional problem of presidential succession and inability. He was a member of a special committee of the American Bar Association to review this question, and it was the work of this committee which was of assistance to Senator Birch Bayh of Indiana in the effective direction the Senator gave to the formulation of the proposed twenty-fifth amendment<sup>4</sup> on presidential succession and inability which was submitted to the

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3. The constitutional provisions pertaining to presidential succession require only that the line of succession begin with the Vice President. The provisions go on to authorize Congress to provide for the line of succession after the Vice President, as well as to provide for situations characterized as involving presidential inability. The Constitution's language does not define the term "inability." During the Constitutional Convention, John Dickinson raised the question of what was the extent of the "inability" which would disable a President. This query remains unanswered. See note 2, *supra*. See generally, SCHWARTZ, 2, THE POWERS OF GOVERNMENT 15-24 (1963).

4. Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both houses of Congress.

Section 3. Whenever the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law

states in July 1965.

Mr. Feerick's study is essentially an historical treatment, relating in depth the American experience regarding executive succession during the colonial period and under the three succession laws<sup>5</sup> during our own national history. His account is not only thorough but also catches some of the drama surrounding such critical moments as the operation on President Cleveland at the time of an economic crisis<sup>6</sup> and the serious illness of President Wilson during the critical debate over American entrance into the League of Nations.<sup>7</sup> Into this account the author has woven constitutional analysis which is sound and scholarly, and at the same time his volume represents a strongly-defended program of action for the solution of this knotty question.

In regard to the general problem, the author favors a reexamination of the present statutory line of succession.<sup>8</sup> In this area he is particularly

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provide, transmit within four days to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

See *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 1-30 (1965); and STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT (Comm. Print 1965).

5. The first succession law, enacted on March 1, 1792, provided that the President Pro Tempore of the Senate should succeed the Vice President, to be followed by the Speaker of the House. In the event that these offices were vacant, the Secretary of State was to inform the executive of each state and give public notice that electors were to be appointed in each state to elect a President and Vice President. 1 Stat. 239 (1792).

The death of Vice President Hendricks while serving in the administration of Grover Cleveland in 1886, prompted congressional enactment of the Presidential Succession Act of 1886. 3 U.S.C. § 21 (1886). This act provided that the line of succession following the Vice President be: the Secretaries of State, Treasury, and War; the Attorney General, and the Secretaries of the Navy and the Interior.

Subsequently, by a congressional act of July 18, 1947, the Speaker of the House and President Pro Tempore of the Senate were placed ahead of the Cabinet members. Pub. L. No. 199, 80th Cong., 1st sess. (1947).

6. Commonly called the "Panic of 1893," the economic crisis included a mass hoarding of gold, the failure of banks, and the twenty-seven state Pullman Company strike which ended in Cleveland's use of federal troops to restore mail service.

7. In September, 1919, President Wilson began what was to have been a speaking tour of the United States in an attempt to foster public support for the Senate's ratification of the Treaty of Versailles. While on this tour, Wilson suffered a nervous collapse at Wichita, Kansas, on September 26, from which he never fully recovered.

8. See note 5, *supra*.

helpful in pointing out the arguments that are relevant to the question as to whether the line of succession should run from the Vice President to the Speaker of the House and the President Pro Tempore of the Senate or to the members of the Cabinet. The one solution raises question relative to the principle of separation of powers, while the other would mean executive leadership by individuals who had not stood before the people in a popular election.

Mr. Feerick is more concerned about the vagueness surrounding the question of the disability of the President. It is evident that he does not consider as adequate the memorandum of understanding as was formulated by President Eisenhower and the succeeding Presidents.<sup>9</sup> He likewise considers unsatisfactory the proposal of a number of students of government that the presidential memorandum be endorsed by a joint resolution of the Congress. He contends that the formulation of an amendment would contribute the element of certainty, establishing beyond legal question the transfer of power, and would be especially valuable in establishing procedure in cases where the Vice President because of presidential inability succeeds to the office only temporarily. On the question posed by the possibility of refusal by the President to declare his inability, the author prefers an arrangement that would rest on the findings of the Vice President and majority of the Cabinet.

Beyond the value to the Republic of a sound and scholarly treatment of this sticky but potentially threatening problem, the volume also points up the growing importance of the Presidency and the corresponding concern that the citizenry should have over the preparation of the Vice President for that position. The author emphasizes that the Vice President should be chosen as if he were actually to be President and that the office continue to expand to include a larger role in decision-making and a greater share of responsibility in administrative matters.

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9. The agreement between President Eisenhower and Vice President Nixon, executed in March 1958 provided in part that in the event of presidential inability, the Vice President would serve as Acting President exercising the powers and duties of the office until the inability ended, at which time the President would resume the full exercise of the powers and duties of the office.

A similar (but not identical) agreement was executed in August, 1961, between President Kennedy and Vice President Johnson. On January 28, 1965, President Johnson and Vice President Humphrey agreed to an arrangement similar to the Eisenhower-Nixon plan. See *New York Times*, Jan. 28, 1965, p. 13, col. 1. For the original Eisenhower-Nixon agreement, see *New York Times*, March 4, 1958, p. 1, col. 2. The Kennedy-Johnson agreement, unlike the other two, included the provision that on the issue of inability, the Cabinet was an appropriate body for consultation. See *New York Times*, August 11, 1961, p. 1, col. 3.

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