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PRESIDENTIAL DISABILITY: THE NEED FOR A CONSTITUTIONAL AMENDMENT

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THE realization has grown among thoughtful people that our very survival in this age may rest on the capacity of the nation's chief executive to make swift and unquestioned decisions in an emergency. As a result, a major constitutional problem, previously glossed over, has been brought to the fore. The problem is that posed by temporary presidential inability to discharge the powers and duties of the presidency at a time when emergency action is required. It has been emphasized during the Eisenhower administration by the President's three periods of temporary physical incapacity, even though, fortunately, no crisis required immediate presidential action during those periods. Now that the issue is so forcefully upon us, with our future existence possibly depending on the forethought that we exercise in resolving it, failure to take proper steps to answer promptly the constitutional question would be the height of irresponsibility.

Many people who have considered this problem have assumed that its most important aspect is the factual determination of presidential inability. But, as the history of a hundred and seventy years—including that of the six years immediately past—shows, no real difficulty attends the determination of *when* or *whether* a President is unable to perform the duties of his office. The disability of Garfield in a coma, or of Wilson during at least part of the time after his stroke, was undisputed. No factual doubts about President Eisenhower's physical condition were of significance during any of his three illnesses. The crux of the constitutional problem has been—and will be—to ensure that the Vice President can take over with unquestioned authority for a temporary period when the President's inability is not disputed, and that the President can resume office once he has recovered.

THE ORIGIN OF THE PRESIDENTIAL INABILITY CLAUSE OF THE CONSTITUTION

Students of the Constitution have differed for many years over the meaning of paragraph 6 of section 1, article II, of the Constitution. This paragraph, which deals with presidential inability, reads in part: "In case of the

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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 . . . ." Although it is this provision which primarily raises the constitutional problem here under consideration, the language quoted does not constitute all of paragraph 6. Immediately following the quoted words and, significantly, separated only by a comma, is the following clause: ". . . 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 clause delineating congressional power has been implemented from time to time through the enactment of statutes setting forth the succession to the office of President in the event of the removal, death, resignation or inability of both the President and Vice President. Some independent problems of constitutional interpretation have been raised by this clause; but these problems are extraneous to this Article.

An initial examination of the first clause poses several questions. The clause outlines four situations in which the Vice President may be required to act in some capacity. Three of the situations, namely, removal from office, death, or resignation, apparently contemplate the permanent exclusion of the President for the balance of his term. But was it intended that "Inability to discharge the Powers and Duties of the said Office" should exclude the President thenceforth, in the event of his recovery, from discharging those powers and duties? Another obvious question arises from the language of the clause which provides "the same shall devolve on the Vice President." To what do the words "the same" refer? What is it that "devolves" on the Vice President? Is it the *office* of President, in which case the President might thenceforth be excluded as in the other three instances of permanent exclusion; or do only the *powers and duties* devolve on the Vice President, in which case his tenure as the acting chief executive may very well be for only a temporary period?

Historical investigation discloses that the two main clauses of paragraph 6 were not originally created by the Constitutional Convention as part of the same paragraph. They were considered separately, approved in substance on different days and, in fact, drafted by different bodies. The first clause was composed by the Committee of Detail and by the Committee of Eleven and reported to the full Convention on September 4th; the second clause was offered as a motion from the floor on September 7, 1787. Indeed, the two clauses were not worded as they now appear when they were approved as to substance by the full Convention and referred to the Committee of Style. The Committee of Style had no power to make any change in meaning or substance, but only to edit the text for stylistic improvement.[1]

The true meaning of the first clause of paragraph 6 becomes apparent when the original articles, as agreed to by the Convention in substance, are set in

1. Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. 10, 11 (1918).

juxtaposition to the articles as they were reported by the Committee of Style and (with one change) as they now appear in our Constitution.

Articles Originally Agreed to by the Convention	*As Later Reported by Committee of Style and Finally Adopted*
Article X, section 2: . . . and in case of his 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.	Article II, section 1, paragraph 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,
Article X, section 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;	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 such disability be removed, or a President shall be elected.[2]	and such officer shall act accordingly, until the disability be removed, or a president shall be elected.[3]

Three important points appear by visual comparison of the two texts above. First, the articles as initially adopted by the Convention used the words "the Vice President shall exercise those powers and duties." One does not exercise an office, but one does exercise powers and duties. Clearly, then, the clause providing that "the same shall devolve on the Vice President" means that the Vice President shall exercise the powers and duties of the office, and not that the Vice President succeeds to the office itself. In other words, he acts as President, but he remains in the office of Vice President. This interpretation is borne out by the history of the Convention, which shows that the vice presidency was originally created to provide for an alternate chief executive who might function from time to time should the President be unable to exercise the powers and duties of his office. Only after creating this standby role did the Convention consider giving the Vice President something to do while he waited to act as President. The idea of assigning him the duty of presiding over the Senate was strictly an afterthought.[4]

Secondly, and of considerable significance, the articles as initially agreed to by the Convention definitely prescribed the period during which the Vice President was to act as President, that is, "until another President be chosen,

2. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 495, 499, 532 (1911); Davis, *supra* note 1, at 11.

3. 2 FARRAND, *op. cit. supra* note 2, at 598-99, 626.

4. Davis, *supra* note 1, at 12-13; WILLIAMS, THE AMERICAN VICE-PRESIDENCY: NEW LOOK 1-2 (1954).

or until the inability of the President be removed." This makes crystal clear that the exercise of the powers and duties of the presidential office by the Vice President was to be for a temporary period only.

A third point should be observed. Each of the clauses which are now joined originally contained separate but similar language limiting the tenure of whoever was to exercise the power and duties of the presidential office. The words of the first clause have already been noted; the second clause provided: "and such Officer shall act accordingly, until such disability be removed, or a President shall be elected." When these two clauses were referred to the Committee of Style, the text was revised. The clauses were consolidated in one sentence, separated only by commas, and for terseness one of the phrases limiting the tenure of the person exercising the powers and duties of the presidential office was eliminated. The phrase at the end of the revised sentence was intended to refer to all of the situations described in that sentence.[5]

Still further proof of the original intention to have the Vice President assume only the duties of the President, not his office, can be inferred from the Convention's reaction to the version of paragraph 6 proposed by the Committee of Style. The only change made by the Convention in the Committee's draft was to strike the concluding words "or the period for chusing another president arrive," and to substitute the phrase as it now appears, "or a President shall be elected." This step was taken at Madison's insistence and in conformity with a motion previously adopted for the specific purpose of allowing the vacancy to be filled by a special presidential election.[6] Of course, the Convention's action does not necessarily amount to a clear-cut decision concerning the status of the Vice President while he should act as President, but it certainly suggests that, in the contemplation of the framers, the only occupant of the presidential office was to be the elected President himself—that if he left the office, a vacancy would exist requiring the election of a replacement.[7]

One may logically ask why doubt and controversy over the meaning of this clause has arisen in the past, if the framers' intent is so clear and certain. The answer is simply that a great deal more is now known about what went on at the Constitutional Convention of 1787 than was known in the past, even in the years immediately after the Convention. It was conducted in secrecy, and not until Madison's notes were published posthumously in 1840[8] was a fair picture available, although still not a complete one. Farrand's work,

5. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 148-50 (1957); SILVA, PRESIDENTIAL SUCCESSION 4-13 (1951).

6. Davis, *supra* note 1, at 10; Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 150 (1957).

7. SILVA, PRESIDENTIAL SUCCESSION 10 (1951).

8. THE PAPERS OF JAMES MADISON (1840). These papers, consisting of Madison's reports of the debates in the Constitutional Convention, were purchased from Mrs. Madison in 1837 by the United States Government, and published three years later.

Records of the Federal Convention of 1787, the definitive source on the subject, did not appear until 1911. Other important data has come to light subsequently through the research of biographers and historians dealing with persons and actions of the time. Understandably, it has taken years for scholars to bring the information together. Furthermore, confusing precedents have been established by officials who did not have access to this information.

HISTORICAL APPLICATION OF THE CONSTITUTIONAL CLAUSE ON PRESIDENTIAL INABILITY

It was not until 1841 that paragraph 6 of section 1, article II, became of practical importance. William Henry Harrison was the first President to die in office, and this event made John Tyler President. Or did it? As a matter of history, the first papers submitted to John Tyler for his signature had, below the space for his signature, the words "Acting President." Tyler was incensed; by a stroke of his pen he eliminated the word "Acting," and signed as President.[9] And so, President he did become. After him, six other Vice Presidents did likewise upon the death of the President in office.[10] Few now quarrel with this constitutional *fait accompli*, or want it changed. But it was to cause trouble later on when the constitutional question arose not from the death of a President, but from his inability.

Zachary Taylor died and was succeeded as President by Millard Fillmore; Abraham Lincoln died and was succeeded as President by Andrew Johnson; then James Garfield was shot in 1881. He lay in a coma for eighty days, completely unable to perform any of the duties of the presidency.[11] All were aware of his condition, and few disputed its seriousness. After sixty days, a cabinet meeting was held in which it was unanimously voted, seven to nothing, that Chester A. Arthur, Vice President, should assume the powers of the presidential office. But was he to become President? Opinion was divided. The Cabinet itself voted four to three, with Attorney General Wayne MacVeagh among the majority, that Arthur would become President and would thereby oust Garfield from office.[12] The three previous occasions on which the Vice President had become President upon the death of the existing chief executive were powerfully persuasive precedents because, after all, the language of the Constitution concerning death or inability was exactly the same; indeed, as the preceding analysis shows, the position of the Vice President, whether the President died or was disabled, was actually intended by the framers to be the same.

The Cabinet resolved, nevertheless, that before Arthur should take this momentous step, Garfield should be advised and consulted about the consequences which might attend Arthur's assumption of the powers of the Presi-

9. SILVA, PRESIDENTIAL SUCCESSION 14 (1951).
10. Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge and Truman.
11. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 140-41 (1957).
12. *Ibid.*

dent. Garfield's physician, however, gave his medical opinion that such consultation might very well kill the President. Arthur himself emphatically declined to take any steps whatsoever to assume the powers of the President. He would not be a party to ousting Garfield from office. His reluctance on this score may well have been augmented by the fact that he belonged to the opposite wing of the Republican party from Garfield's, and that Garfield's assassin, Guiteau, enthusiastically proclaimed both his admiration for Arthur and his loyalty to the political principles of Arthur's "stalwart" faction of the party.[13]

Garfield lingered for another twenty days, then died; and Arthur thereupon took office as President. But the eighty-day interim period had had a harmful effect on the country. Regular government business could not be conducted, because of the President's lengthy absence, and also because subordinate officials could not be appointed. The nation's foreign relations, lacking the direction of a chief executive, seriously deteriorated.[14] Furthermore, general uncertainty and political antagonisms were engendered by the fact that the dying President belonged to one wing of the party and Arthur to another.

The second case of presidential inability occurred in 1919, less than forty years after Garfield's death, when Woodrow Wilson suffered a stroke while leading the fight for the adoption of the Covenant of the League of Nations. After unprecedented military and economic exertions in World War I, America had reached a new pinnacle in world leadership; and at that precise moment its leader was stricken. Vice President Marshall was in the wings as an understudy, but there he stayed. A great Senate battle over ratification of the Versailles Treaty and the Covenant of the League of Nations was waged, with presidential leadership missing. Marshall flatly declined to assume any of the powers of the presidency because of the constitutional uncertainty as to whether Wilson could resume his office when he recovered.[15]

The exact extent of Wilson's inability is not clear, but it is certain that for a period of weeks he was completely unable to perform any of the duties of the office. Precise information about his condition was carefully shielded from public view by his wife, his personal physician, and his personal entourage in the White House.[16] The President's personal advisers obviously feared the very thing that made Vice President Marshall hesitant to act—if the full extent of Wilson's disability should become known, public opinion would demand that Marshall exercise the powers of the presidency, and Wilson might face a constitutional fight to regain his office, should he recover.[17]

13. *Id.* at 141.

14. *Id.* at 140; see HOWE, CHESTER A. ARTHUR 153, 181 (1934).

15. WILLIAMS, THE RISE OF THE VICE PRESIDENCY 113-14 (1956); Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 146 (1957).

16. WAUGH, SECOND CONSUL 125-26 (1956); 2 HOUSTON, EIGHT YEARS WITH WILSON'S CABINET 36-37 (1926); Kerney, *Government by Proxy*, 111 CENTURY 481, 482 (1926).

17. WAUGH, SECOND CONSUL 127 (1956).

The jealousy with which the presidential prerogatives were guarded—and perhaps might again be guarded—is epitomized by the actions of Wilson and his personal staff from his collapse on September 25, 1919, until the end of his term on March 4, 1921. Without the direction of the President or Vice President, Secretary of State Lansing called twenty-one Cabinet meetings. Having heard of these meetings, Wilson accused Lansing of usurping presidential power and forced him to resign.[18] Upon Lansing's suggestion that the Cabinet request Vice President Marshall to act as President, Joseph P. Tumulty, Wilson's secretary, replied: "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."[19] The President himself is reported to have commented in a similar vein, and to have confided to his secretary, after Lansing resigned, "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."[20] Thus, Lansing's endeavors to ensure the normal functioning of the executive branch, either by the Vice President acting as President or by the Secretary of State calling Cabinet meetings at which executive business could be transacted, were viewed by the President and his personal staff with antagonism, rather than gratitude.

The pernicious result of the belief that a Vice President actually becomes President for the balance of the presidential term when called upon to exercise the powers and duties of the presidency, has been to nullify the intent of the drafters of the Constitution that the nation have an alternate chief executive to provide continuous executive leadership. It should be apparent that the original constitutional intent and the problem of providing for the exercise of presidential power in cases of inability would not be met merely by providing a new mechanism to determine the existence of the inability. No such determination was needed in the Garfield and Wilson cases; the inability was patent. The problem was to assure the President, his personal advisers, the Vice President and the public that the President would not be ousted from his office by a vice-presidential execution of the powers and duties of the presidency—to make certain that the President could "come back" of his own volition. Until this assurance can be given, a President and his personal entourage may be tempted to conceal or block an attempt to determine the existence of disability. Moreover, if every presidential retirement from power must be a permanent one, a President's illness—however serious—will have deep political significance activating diverse political currents. But if the reins can be relinquished only temporarily, as the original framers intended, they can be yielded with more grace and, as history shows, an elaborate mechanism to determine when they should be yielded is unnecessary.

18. *Ibid.*
19. TUMULTY, WOODROW WILSON AS I KNOW HIM 443-44 (1921).
20. *Id.* at 445.

PRESIDENT EISENHOWER'S ILLNESS AND HIS PROPOSAL FOR A CONSTITUTIONAL AMENDMENT

Immediately after President Eisenhower's heart attack in September 1955, the President's medical advisers informally and orally gave their opinions as to the President's condition and the probable duration and extent of his physical impairment. A survey was made regarding the magnitude and immediacy of the problems that would require presidential action then or in the near future. Congress was not in session and no international emergencies impended. Based upon the medical opinions and the survey, the Attorney General orally advised the Cabinet and the Vice President, who regularly sat with the Cabinet, that no present situation required the Vice President to take action under article II, section 1, of the Constitution. This opinion was accepted by all concerned and attention was then given to developing a *modus operandi* for the functioning of the executive branch during the continuance of the President's illness. This plan included a decision to have Vice President Nixon preside at meetings of the Cabinet and National Security Council during the President's absence.

On October 21, 1955, the Attorney General conferred with the President in his hospital room at Denver to advise him of the legal basis for the foregoing actions, and to reassure him that no written authorizations were required from him at that time to ensure that the Government's activities were carried on according to his previously established policies.

In January 1956, upon President Eisenhower's return to Washington, he directed the Department of Justice to institute a full legal study of the problems raised by temporary presidential inability. His purpose was to draft a plan to protect the country fully if a President were to become disabled at a time when immediate executive action was needed. Later, it was decided not to formulate such a plan during the presidential campaign, lest it become entangled in partisan politics. Early in January 1957, the President reviewed several alternative plans and authorized the Attorney General to consult persons outside the Government to obtain their views and criticisms. The opinions of members of the Cabinet were sought at a Cabinet meeting. Finally, a definitive plan which proposed a constitutional amendment was approved by the President. It was to be sent to Congress with a special message from the President urging its adoption. But when the plan, in final form, was orally presented at a meeting of the congressional leaders of both parties, the Speaker of the House of Representatives raised the point that if the President should send a special message to Congress urging adoption of the proposed constitutional amendment, the people of the country, in the mistaken belief that some unannounced development in the President's condition had occurred, might become alarmed. Accordingly, the forthcoming special message was cancelled, and public announcement of the plan took the form of testimony by the Attorney General before a subcommittee of the Judiciary Committee of the House of Representatives.[21]

21. *Hearings Before a Special Subcommittee on the Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess. 4-35 (1957).

The operative clauses of the proposed constitutional amendment were as follows:

> *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.

The plan's major purpose was to make abundantly clear that, in the event of a President's inability, the Vice President would serve only as acting President and, then, only during the continuation of the presidential inability. The President was to have the express power to resume the exercise of his office as soon as he declared that he was again able to act. Also significant, however, were those provisions outlining a method for determining when these shifts in function were to occur. Thus, the plan envisaged that, through voluntarily declaring in writing that he was unable to discharge the powers and duties of his office, the President himself would initiate the Vice President's tenure as acting President for the period of inability. Similarly, whenever the President should declare in writing that his inability was terminated, he would thereupon resume the powers and duties of his office. This provision for voluntary action by the President would, in the light of history, probably cover most cases of presidential inability. In the less common situation where a President was unable or unwilling to declare his inability, the constitutional amendment proposed a shift in the responsibility for such a determination. The Vice President, if satisfied of the President's inability, and upon the written approval of a majority of the Cabinet, would become acting President for the period of the inability. In this situation also, the President would be entitled at any time to state in writing that his inability was terminated and thereupon to resume the powers and duties of the presidency.

The proposed constitutional amendment, it should be noted, made no express provision for a case in which the President would endeavor to take up the powers and duties of his office although he was clearly unable to do so. The situation envisages a disagreement between the President and Vice President regarding the President's disability. It was explained, in presenting the proposed constitutional amendment to Congress, that if such an unlikely situa-

tion developed, the existing constitutional provisions for impeachment could be relied upon to settle the disagreement.

Noteworthy also is the fact that section 1 of the proposed constitutional amendment expressly confirmed 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 actually becomes President for the unexpired portion of the current term. Thus, the precedent set seven times in cases of death of the President would be expressly adopted in the Constitution itself.

The Eisenhower Plan's Rejection of a "Presidential Inability Commission"

President Eisenhower's proposal rejected any idea of establishing some sort of inability commission or *ad hoc* body to determine the fact of presidential inability. One of the alternative plans first submitted to the President for his review had provided for such a commission.

Arguments for a group determination of presidential inability overlook the fact that throughout American history, not merely in the Garfield and Wilson instances, the problem has never been ascertaining presidential inability; the stalemate in executive activity has proceeded from a Vice President's reluctance to assume his superior's office and a President's (or his personal advisers') reluctance to turn over presidential duties with no assurance of their return.

Not only would such a fact-finding commission have been unnecessary and ineffective in every presidential inability problem so far encountered, but in the future it could have very serious and unfortunate consequences. Any law requiring complicated procedures, investigations, hearings, findings, and votes, would prevent immediate action in case of emergency. Today's need is for unquestioned continuity of executive power and leadership. A law establishing a fact-finding body on this issue might completely thwart that objective, to the nation's deadly peril.

Furthermore, it seems unwise to establish elaborate legal machinery to provide for examinations of the President. The question of the physical and mental capacity one needs to serve as President is, of course, far more than a matter of medical findings by a group of learned physicians. Providing for physical and mental examinations would, at the least, be an affront to the President's personal dignity and degrade the presidential office itself; more dangerously, it would give a hostile group power to harass the President for political purposes.

Aside from these objections to commission-type determination of presidential inability, grave difficulties would attend arriving at a satisfactory composition for such a group. Many earnest people have suggested that the prestige and impartiality of members of the Supreme Court be enlisted to head or to staff an inability commission, but the letter of Chief Justice Warren of January 1958 would seem to have removed—and wisely so—all possibility

of the Justices' participation in such a group.[22] Various officers of legal and medical societies have also been suggested for membership. Since they are not publicly elected officials and have no public responsibility, however, a better plan would be to ask these worthy persons to serve, if at all, in an advisory capacity.

If the power of initial determination is diverted from the executive branch, or even is shared in some fashion with those outside the executive, a way is opened for harassment of a President for political motives. A major shift in the checks and balances among the three divisions of the federal government could well result. Therefore, although individual members of Congress—the Speaker of the House, President pro tempore of the Senate, and the majority and minority leaders in both houses—have been mentioned as possible commission members to ensure participation by elected representatives in any decision on presidential inability, this suggestion, too, interjects some unwanted features. With the participation of congressional officials a presidential inability commission would be bound to assume a political appearance. Individual members of the Congress, though elected by the people, are elected by the people of a particular small district or state, and are not necessarily representative of the nation as a whole; only the President and Vice President are elected by the entire populace.

In keeping with the belief that the initial determination of presidential inability should be kept wholly within the executive branch of the Government, the Eisenhower plan limited the choice of persons or groups to make the decision to the Vice President and the Cabinet. This seems a realistic solu-

22. Letter from Chief Justice Earl Warren to Kenneth B. Keating, Jan. 20, 1950:

Supreme Court of the United States,
Washington, D. C., January 20, 1958.

Hon. Kenneth B. Keating,
Member of Congress,
Washington, D. C.

My Dear Mr. Congressman: During the time the subject of inability of a President to discharge the duties of his office has been under discussion, the members of the Court have discussed generally, but without reference to any particular bill, the proposal that a member or members of the Court be included in the membership of a Commission to determine the fact of Presidential inability to act.

It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.

I realize that Congress is confronted with a very difficult problem, and if it were only a matter of personal willingness to serve that anyone in the Government, if requested to do so, should make himself available for service. However, I do believe that the reasons above mentioned for nonparticipation of the Court are insurmountable.

With best wishes, I am, Sincerely, Earl Warren,
Chief Justice

See also Editorial, Washington Post, Jan. 27, 1958; Krock, N.Y. Times, Jan. 24, 1958, p. 22, col. 5.

tion. The Garfield and Wilson precedents indicate strongly that a Vice President, in order to assure wide public support and to eliminate a possible charge of usurpation, would in fact consult with the Cabinet before making the momentous decision involved in a declaration that the President is unable to exercise the powers and duties of the presidency. The Cabinet members are in a position to know at once whether a President is disabled. Moreover, the public would accept the Cabinet's opinion as reflecting the views of persons close to the President and alert to any unconstitutional attempt to deprive him, even temporarily, of his powers.

Under the proposed amendment, two courses of action would be possible. The Cabinet could notify the Vice President when a majority of its members believes that the President's inability was sufficient to warrant a devolution of presidential power to the Vice President. In the past, the Cabinet has always notified the Vice President when a President has died, and this custom would thus be extended to the case of inability. The Vice President would make the decision to assume presidential power, but the constitutional validity of the decision would depend upon the approval of that decision by a majority of the Cabinet. Alternatively, the Vice President might take the initiative without the Cabinet's first inviting him to make the decision; in this case also, written approval by a majority of the Cabinet would be required before the Vice President could undertake the exercise of presidential power.

Ultimately, the operation of any constitutional arrangement depends on public opinion and upon the public's possessing a certain sense of what might be called "constitutional morality." Absent this feeling of responsibility on the part of the citizenry, there can be no guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative and judicial branches of the Government.

By way of contrast, the advocates of some specially constituted group to determine presidential inability face many dilemmas. If the President is so incapacitated that he cannot declare his own inability, no need exists for a fact-finding body. Nor is a fact-finding body necessary if the President can and does declare his inability to exercise the powers of his office at a given moment. If, however, the President does suffer from an inability which he is unwilling to admit, and the Vice President and most of the Cabinet and other government officials are aware of this and believe that the President should step aside temporarily, then a genuine dispute exists. But this dispute—and it certainly can become serious—should not be determined by a special commission composed of persons outside the executive. If the controversy is sharp, the inclusion of political appointees or of officials representing relatively small electorates would give any decision a political complexion. Worse,

such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able to perform his office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his office? If, conversely, the vote were four to three that the President was unable to discharge the functions of his office, and the Vice President were installed as acting President, what power could the Vice President exert when everyone would know that one vote the other way would cause his summary removal from the exercise of those powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

Thus, in the presentation of President Eisenhower's original proposal for a constitutional amendment in 1957, it was stated that any dispute between the President and the Vice President regarding termination of the President's disability could be resolved by Congress's taking impeachment proceedings against whichever official was wrongfully attempting to exercise the powers of the presidency. In subsequent public discussion of the proposal, however, it was pointed out that impeachment and trial are complicated and lengthy processes, that the Congress is not always in session, and that nothing in the Constitution now empowers the Vice President to call Congress into special session. Furthermore, conviction would remove the President permanently, and the odium attached to impeachment might very well cause many Congressmen to hesitate to take such action—especially against an ill man.

The Revision of Section 4 of the Eisenhower Proposal

In response to criticisms of the impeachment process as a method of resolving a dispute between the President and Vice President, Attorney General Rogers on February 18, 1958, presented to the Subcommittee on Constitutional Amendment of the Senate Judiciary Committee a revised section 4 for the President's proposal, which now reads:

> *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.[23]

In substance, the revised section 4 provides that if the President undertakes to resume the exercise of the powers and duties of the presidency, but has misjudged his condition, the Vice President and a majority of the heads of the executive departments who are members of the Cabinet may signify that the President's inability has not terminated, and Congress must step in to determine the issue. If the Congress is not in session, it would be required to convene immediately for the purpose of considering the President's inability under procedures presently established only for impeachment and trial. A two-thirds vote of the Senate would determine the existence of the President's inability; a majority vote of both houses would restore the powers of his office to the President.

In submitting the revision to the Judiciary Committee of the Senate, Attorney General Rogers pronounced:

> 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.[24]

Public interest in the question of presidential disability, reawakened by the revision of section 4 greatly increased when, less than a month later, President Eisenhower announced his "understanding" with Vice President Nixon, a dramatic presentation of the legal problems involved and the Administration's viewpoint.

The Eisenhower-Nixon Understanding on Presidential Inability

After the President's heart attack in September 1955, informal discussions were had between the President and the Vice President concerning what the Vice President's role should be in the event of a similar unfortunate occurrence, or any other happening which would disable the President temporarily at a time when presidential action was required. As a result, at the time of President Eisenhower's ileitis operation in 1956, Vice President Nixon stood by fully prepared to initiate, as acting President, whatever action would be necessary in case of international emergency; for it was realized that the announced intention of the President to undergo a serious operation might entice a hostile foreign power to make some drastic move in the expectation

23. Statement of Attorney General Rogers on Presidential Inability, app. III, Feb. 18, 1958 (U.S. Dept. of Justice, mimeographed).

24. *Id.* at 16.

of finding, at the critical moment, confused and uncertain leadership in the United States.

On March 3, 1958, a historic step was taken when the President and Vice President, in consultation with the Attorney General, reduced to memorandum form their understanding of the constitutional role of the Vice President as acting President. The Eisenhower-Nixon understanding is stated in these terms:

> The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.
>
> 1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.
>
> 2. In the event of an inability which would prevent the President from communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.
>
> 3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.[25]

The understanding represents the Eisenhower Administration's interpretation of the Constitution as it now stands. The only addition to present constitutional requirements is that the Vice President take action "after such consultation as seems to him appropriate under the circumstances." Although the Constitution does not require the Vice President to consult anyone, it was felt that, as a matter of good judgment, the Vice President would want to consult members of the Cabinet, congressional leaders of both parties, and perhaps other prominent citizens before presuming to exercise the powers and duties of the presidency. The Eisenhower-Nixon understanding, in effect, gives the Vice President the comfort of being directed to seek opinion from other persons and thus strengthens his position if he should be obliged to take these steps. Appropriately, in view of constitutional silence on the matter, the persons with whom the Vice President is to consult are not mentioned. Presumably, the Vice President's choice would depend on the circumstances of the moment; in a time of international crisis the opportunity for consultation might be very brief. On other occasions, the Vice President might find consultation with a large number of people not only feasible but desirable, for, obviously, the broader the base of opinion, the greater the support would be for his decision.

25. N.Y. Times, March 4, 1958, p. 1, col. 2, p. 17, col. 1.

Consistent with the Constitution as it now stands is the agreement's provision that in cases where the President is unable to notify the Vice President of his disability the Vice President is sole judge of the necessity for his exercising the powers and duties of chief executive. This is so because the Constitution does not state who should determine the President's inability in the many circumstances in which, as the founders themselves must have foreseen, it cannot be the President himself. The Cabinet could not have been intended to judge the issue, since this body is not referred to in the Constitution. It is not the Congress, except by the negative sanction of impeachment and conviction for a wrongful attempt to exercise power. Nor is it the Supreme Court, because the question of presidential inability is hardly one which fits any type of jurisdiction conferred by the Constitution on that tribunal. But the power to determine the inability of the President rests in the Vice President not simply because the Constitution places it nowhere else. By a well-known principle of law, whenever any official by law or person by private contract is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises. Similarly, under the present Constitution, it is the President who determines when his inability has terminated and he is ready once more to execute his office. The Eisenhower-Nixon understanding, by providing, first, for the Vice President's determination of presidential inability and, second, for the President's determination of when that inability terminates, thus coincides perfectly with article II, section 1, of the Constitution as originally drafted in 1787 and analyzed in this Article.

Although the understanding purports to bind only the present occupants of the presidency and vice presidency, it may well prove powerfully persuasive in the future since, as most constitutional authorities now believe, it presents a very correct interpretation of the Constitution. Still, the Eisenhower-Nixon memorandum, or anything similar to it, can only operate between two persons who are in complete agreement about their respective positions. The understanding embodies no mechanism, and there is no mechanism in the present Constitution except the complicated process of impeachment, to resolve a dispute between the President and the Vice President as to the President's capacity to perform. By its very nature, this question is something that no agreement between a President and a Vice President alone can resolve. It is something which has not been settled satisfactorily by the present Constitution. Herein is the great virtue of revised section 4 of President Eisenhower's proposed constitutional amendment, under which a dispute between the President and Vice President on the question of inability would immediately be placed in the hands of Congress.

The Eisenhower-Nixon understanding also does not cover the problem of the presidential oath. Speaker of the House Rayburn has stated that, in his opinion, it would be necessary for the Vice President to take a new oath of

office to serve as acting President.[26] Most authorities, however, would say that this step is unnecessary since, when the Vice President originally takes his oath, he swears to perform the duties of the office of Vice President, one of which—and the one first created by the drafters of the Constitution—is to act as an alternate chief executive. His other duties are to serve as presiding officer of the Senate and to vote in the Senate in case of a tie. It seems no more necessary for the Vice President to take the presidential oath when he acts as President than it is for him to recite the senatorial oath when, in casting a decisive vote, he acts as senator. In both instances, he is performing one of the functions of his own office, that of Vice President, which his original oath covers. Surely, however, these and more vital questions concerning the very exercise of the presidential power itself should be cleared up before a time of crisis forces us to resolve the issue. It is precisely in times of crisis that unquestioned leadership is mandatory. If any question remains of the Vice President's status as acting President, that issue should be resolved by a clear and definite constitutional amendment.

WHY A CONSTITUTIONAL AMENDMENT IS NECESSARY

In light of what is now known about the origins of the presidential inability paragraph, the intent of the framers of the Constitution should be clear to most people. But one cannot ignore that a division of opinion exists over the constitutional validity of a temporary devolution of presidential power; nor can one ignore the precedents established by the Garfield and Wilson cases and the confusing original interpretation in Tyler's succession, followed in six subsequent instances. Opinions and precedents, whether well-founded or not, are operative facts which must be taken into consideration in plotting a course of action.

It is probable, certainly it is possible, that, in any future crisis concerning presidential inability, the same conflicts in opinion would arise. History and logic demonstrate that if a Vice President is to take the momentous step of assuming the powers of the presidency, even for a specific, temporary period, he must do so by reason of unquestioned authority. Since the problem here concerns constitutional powers, questions raised about constitutional powers and precedents established through the interpretation of constitutional powers, a statute cannot settle the matter. Ordinary legislation would only throw one more doubtful element into the picture, for the statute's validity could not be tested until the occurrence of the presidential inability, the very time at which uncertainty must be precluded. This defect is especially apparent in nearly all the statutory proposals advanced on the subject of presidential inability, for they involve a transfer or diminution of the Vice President's constitutional power to determine the existence of presidential inability and to act in such a contingency. The simple fact is that no mere statute can alter, transfer or diminish vested constitutional power. Thus, no statute which con-

26. N.Y. Times, March 5, 1958, p. 18, col. 3.

tained the additional measures needed—a designation of persons to share with the Vice President the power to make the initial decision, or a provision for a solution of disputes between the President and Vice President—would alter the existing powers of the President and Vice President. Even a statute which sought to do nothing more than declare the original intent of the framers would have to be construed in the light of previous constitutional interpretations and the precedents based on those interpretations, and would therefore be valueless in resolving doubt and uncertainty.

Despite these difficulties, some authorities have urged that Congress can enact simple legislation under the "necessary and proper" clause of the Constitution. According to the Supreme Court, however, this clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned."[27] Since the Constitution confers no power upon Congress in connection with presidential inability so long as the Vice President is in office and able to act, congressional action under the "necessary and proper" clause would seem restricted to the uncommon situation in which both the President and the Vice President are incapacitated. As one recognized authority on the subject puts it:

> The only power expressly given to Congress to provide for presidential succession is the power to declare what officer shall act as President when there is *neither* a functioning President nor a functioning Vice President. This would seem to deny congressional power to deal with inability, because enumeration in the Constitution of certain powers denies all others unless incident to an expressed power or necessary to its execution—*inclusio unius, exclusio alterius.*[28]

The records of the Constitutional Convention support this conclusion. Reference to the parallel texts of paragraph 6 set forth in the first section of this Article will show that the first clause of paragraph 6, which deals with presidential inability only, never contained a reference to congressional action of any type whatsoever. Moreover, the first clause was originally drafted and adopted completely independently of the second portion of paragraph 6, which permits Congress to act where both the President and Vice President are unable to function. The history of the paragraph and rules of sound construction thus combine in an irrefutable negation of congressional power to legislate where presidential inability alone is involved.[29]

A common objection to removing current doubts about presidential inability by constitutional amendment is that the amendment process is dangerously slow. History shows, however, that a constitutional amendment can be speedily effected when the objective to be obtained is a popular one, if, of course, Congress is disposed to act in the first place. The seventeenth amendment, providing for the election of senators by popular vote, took thirteen and a half

27. Kansas v. Colorado, 206 U.S. 46, 88 (1907).
28. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 171 (1957).
29. See Butler, *Presidential Inability*, 133 NORTH AMERICAN REV. 417, 432 (1881).

months. The twenty-first amendment, repealing the eighteenth (prohibition) amendment, took less than ten months. Woman's suffrage, the nineteenth amendment, required only fifteen months, and the twentieth amendment, limiting Presidents to two terms, was ratified in eleven months. These periods may be compared with the five years it took Congress to enact a new statute establishing the sequence of presidential succession after the Vice President.

THE PROPOSED BIPARTISAN CONSTITUTIONAL AMENDMENT RELATING TO PRESIDENTIAL INABILITY

On the day following the Eisenhower-Nixon announcement, a bipartisan majority of the members of the Senate Judiciary Committee joined in sponsoring a proposed constitutional amendment on presidential inability.[30] The text of the proposed amendment reads as follows:

> 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 that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the office as Acting President.
>
> Section 4. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.
>
> Section 5. The Congress may by law provide for the case of the removal, death, resignation or inability, both of the President and Vice

30. S. Res. 161, 85th Cong., 2d Sess. (1958). Sponsors included Senators Kefauver, Dirksen, Hruska, Hennings, Johnston of South Carolina, Langer, Watkins, Jenner and Butler.

> 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. If at any time there is no Vice President, the powers and duties conferred by this article upon the Vice President shall devolve upon the officer eligible to act as President next in line of succession to the office of President, as provided by law.

The first two sections of this proposal are identical with the constitutional amendment prepared by President Eisenhower. Section 3, which provides for the situation in which the President is unable to declare his inability, is similar to the corresponding Eisenhower proposal. It diminishes the Vice President's sole power to determine presidential inability, as it exists under the present Constitution, by requiring that he shall have the written approval of a majority of the "heads of the executive departments in office." The phrase "who are members of the President's Cabinet," which appears in the Eisenhower draft, is omitted in the bipartisan bill, presumably because the Cabinet is not presently recognized in the Constitution. The "heads of the executive departments" referred to in both proposals are determined by Congress in section 1 of title 5 of the United States Code; so the substance of both proposals is probably the same.

Section 4 advances the design of the present Constitution and the Eisenhower-Nixon understanding that the President himself determine when his inability has terminated. As stressed before, all-important in persuading a President to step aside is the assurance that he will be allowed to return on his own determination that his inability is ended. The proposed amendment does not provide, however, for his instantaneous resumption of duty. It stipulates that he resumes the duties of his office "the seventh day after making such announcement" of the termination of inability. This seven-day provision is designed to cover the possible situation in which a President, though in truth unfit to resume his job, is determined to assert his power once again because of some unfortunate mental delusion or sheer perverseness. The seven-day requirement affords a period in which a disabled President might be persuaded by his personal advisers to withdraw his announcement, in which the Vice President can assay the situation and gauge general public feeling about the President's capacity, and in which each party can deliberate on the necessity of precipitating the unfortunate situation of an open conflict before Congress.

After the measure was introduced by the sponsoring senators, Attorney General Rogers pointed out that if the President and Vice President were in complete agreement that the President should resume the powers of his office, there seemed no good reason why he should not do so immediately. As the proposed amendment is drafted, the President could not declare in advance that in seven days from a certain date he would be able to assume his duties. He must make "public announcement in writing that his inability *has* terminated"; and it is certainly wise to require that the President not forecast his

eventual recovery, but certify to the public that he has indeed recovered. But if the President were prepared to make a present certification and everyone were in full agreement that he was fully restored to health, the seven-day delay would be unwarranted. Therefore, the Senate Subcommittee inserted the words, "or at such earlier time after such announcement as he and the Vice President may determine," after the seven-day provision in order to provide for the situation in which no dispute should exist over the President's capacity.

Section 4 also delineates very precisely the procedure for initiation of the Vice President's challenge to the President's capacity if grounds for such challenge exist. To question the President's decision that his inability has terminated, the Vice President must have the written approval of a majority of the heads of executive departments in office at the time of the presidential announcement. This ensures not only that the Vice President will be precluded from contesting unless he has the backing of a majority of the heads of the executive departments but that, for the purposes of determining Cabinet support, the identities of the executive heads will be fixed as of the time of the President's pronouncement. Hence, a President would be prevented from changing the effect of the Vice President's action by demanding the resignation of all in the Cabinet not siding with the incumbent chief executive.

Having secured the necessary endorsement, the Vice President must transmit to Congress his written declaration contesting termination of the President's inability. If Congress were then in session, presumably it would give immediate consideration to this vital matter. If Congress were not in session, absent section 4's special provisions, the Vice President's challenge would be ineffective during a crucial period until the next regular session of Congress, since presently the Vice President has no power to assemble the Congress in special session, and a President would be highly unlikely to do so for the purpose of considering his own inability. The proposed amendment therefore authorizes the Vice President to call a special session of Congress when necessary.

For the Vice President to establish his contention and the President to be temporarily denied the resumption of his duties, the President's inability must be established by the same margin required for impeachment and conviction —two thirds of the members present in each house. The issue before the Congress will not be that of an alleged high crime or misdemeanor, however, but the issue of the President's inability. If Congress decides that the inability has not terminated, the Vice President is to serve as acting President until the occurrence of one of the three specified events, and is to do so "notwithstanding any further announcement by the President." This phrase was inserted to guarantee that a President could make only one announcement of the termination of his inability; if his judgment is challenged, he must justify

his position at that time. Thus, once Congress has determined that the President's inability has in fact not terminated, restoration of the President to office would thenceforth depend not on his own announcement, but on other contingencies.

As stated in the bipartisan proposal, these contingencies are: the acting President (Vice President) proclaims that the President's inability has ended; or the Congress determines by a concurrent resolution requiring only a simple majority of the members present in each house that the inability has ended; or the President's term ends. Allowing the acting President to proclaim that the President's inability has ended is consistent with other provisions of the amendment and with the theory that if the two persons most vitally concerned—the chief executive and his alternate—are in accord, no one else either inside or outside the executive branch has an interest in the matter. Although the proposed amendment requires a two-thirds majority to oust the President temporarily, if a simple majority of the Congress feels that the President's inability has terminated, it seems only just and proper that he be restored to the full exercise of his powers.

Section 5 of the bipartisan proposal repeats the present constitutional provision that Congress may by law provide for the case of the removal, death, resignation or inability, both of the President and Vice President, and may declare what officer shall then act as President until the disability is ended or a President elected. It then adds a separate sentence providing that "if at any time there is no Vice President," the functions envisaged for the Vice President by the proposed new constitutional amendment "shall devolve upon the officer eligible to act as President next in line of succession to the office of President, as provided by law."

For clarity, this section probably should refer to "no Vice President *able to act as President*," since the intent is to cover not only a vacancy in the vice presidency, but inability as well. Furthermore, except for the Vice President, "the officer [next] eligible to act as President" is not "next in line of succession to the office of President." He is, under the Constitution and the Law of Succession, an officer who *acts* as President, but he never succeeds to the office. The words "to the office of President" should be omitted from the proposed amendment.

Conclusion

The proposed constitutional amendment sponsored by the bipartisan majority of the Senate Judiciary Committee adopts the basic provisions of the Eisenhower proposal, adding a more precise definition of the procedures to be followed in the unlikely event of a dispute between a President and a Vice President over the termination of the President's disability. Both proposals deal with the presidential inability question by constitutional amendment. Both make abundantly clear that, when the President is disabled, the Vice President takes over the powers and duties of the presidency only as the acting

President for the period of disability. Both provide that the President may voluntarily declare his inability and that, if he does not, the initial determination of fact shall be made within the executive branch—that is, by the Vice President on the written approval of a majority of the heads of the executive departments in office. Finally, both the Eisenhower and bipartisan proposals would allow the President to resume the powers and duties of the presidency upon his own declaration that he is again able to handle them. Most important, either proposal would achieve these goals in consonance both with the original intent of the framers of the Constitution and with the balance of powers which is the permanent strength of the Constitution.