The range of disputes submitted voluntarily also increases with time. There may be an inclination for one or both of the parties to reserve certain items in the agreement and refuse to allow them to be subject to arbitration. In time these reservations disappear and the area of the arbitrator's jurisdiction is enlarged by mutual consent. Voluntarism permits and encourages this kind of experimenting. There are instances where the parties will name a permanent umpire and, with increased experience and growing faith in the process, enlarge his role, sometimes even to the resolution of bargaining issues. The experience of arbitration in the labour-management dispute area encourages unions to submit jurisdiction issues also to an agreed arbitrator; there are even cases where unions have established an arbitral to cover the relationship between the union and its members. Thus, private arbitration, once it takes root tends to expand in role and to encourage industrial peace.

A second matter needs to be emphasized. There is some indication that many people oppose the idea of writing agreements provided for arbitration because of the erroneous belief that this is a return to compulsion. But the proposal is for voluntary arbitration. The union and management give up their respective rights to the strike and the lockout. In place of this they jointly establish an arbitral procedure. But it should be noted that first the decision to give up the strike and the lockout are their own decision. Secondly, this decision can be revoked at the end of the contract period. Thirdly, the choice of the arbitral machinery rests with the parties. Fourthly, the choice of the arbitrator and the arbitrator's jurisdiction rests also with the parties. Finally the whole system can be abandoned by either party at the end of the contract period if it should wish to revert to the use of the full sanctions of the strike or the lockout respectively. There is absolutely no compulsion on either of the parties. Voluntary arbitration is the product of a meeting of the minds of union and management as is any other clause of the agreement.

The solution to this problem is along two lines. First, the unions and managements should place a higher importance on dispute settlement machinery within the contract. This means the careful construction of a sound grievance procedure and the inclusion of arbitration clauses similar to the one quoted earlier. Secondly, where necessary there should be referral to the Court of Industrial Relations where either party fails to respect the *procedural* clauses of their agreement.

It is admitted that neither of these recommendations can be implemented easily or in a short time, but it is submitted that the long run results will be more satisfactory to those who are anxious to achieve the purpose of the Industrial Peace Act. Badly written contracts should not be the reason for an appeal for legislative changes particularly where the proposed changes will very probably do considerable damage to the development of constructive collective bargaining.

PRESIDENTIAL SUCCESSION

*Romeo P. Torres**

INTRODUCTION

During President Elpidio Quirino's medical treatment abroad in 1953, there was an extended discussion as to his status as President. The leaders of the opposition parties, Nationalista and Democratic Parties alike, held that his illness and trip to the United States constituted "inability" to discharge the powers and duties of the office of President. Consequently, they urged the Vice-President to assume the duties of President. The leaders of the administration, however, justified his governing the country by "remote control", saying that his medical treatment abroad did not constitute disability, citing tradition in support of their contention.

Such a state of affairs showed nothing but confusion and utter lack of agreement on the subject. The issue as such that it raised perplexing constitutional questions and those who had the power to act were often so influenced by partisan advantage, that, when the problem of the moment resolved itself, they deferred settling the general question of presidential succession until another emergency should arise.[1]

To avoid such a situation, as had happened in the past, it is imperative that a single clear-cut definition of what constitutes "inability" be made now, otherwise, it could lead to national calamity on some future occasion when there may be no time for correction or clarification.[2] The necessity of such a definition becomes indispensable when a President and Vice-President belonging to two opposing political parties, are elected.

Corollary to the question of what shall constitute presidential disability is the question of who shall determine the "inability" of the President to discharge the powers and duties of his office. This question is as important as the other.

The purpose of this study is precisely to make an examination of our law on presidential succession with special emphasis on the clause "inability to discharge the powers and duties of the office of President" and to make suggestions as to what shall constitute "inability" under the Constitution and who shall determine the same.

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[1] SILVA, PRESIDENTIAL SUCCESSION 3 (1951).

[2] *Id.* at 1.

Distinguished From American Law

The Philippine law on presidential succession is found in Sections 6 and 8 of Article VII of the Constitution of the Philippines and other enactments of Congress. Section 6 provides, that,

"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 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."

While Section 8 provides, that:

In the event 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 shall by law provide for the case of removal, death, 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 shall be removed, or a President shall be elected."

In pursuance to the above provisions, the Congress of the Philippines passed two laws providing for the order of presidential succession, when both the President and the Vice-President fail to qualify or to discharge the duties of the presidency. The first, Rep. Act No. 180, Section 19 provides as follows:

"When neither the President-elect nor the Vice-President-elect shall have qualified, as provided in Section six, Article VII of the Constitution, or in case of the removal, death, resignation, or inability, both of the President and Vice-President, as provided in Section eight, Article VII of the Constitution, the President of the Senate shall act as President until the President-elect or the Vice-President-elect shall have qualified or their disability has been removed or a President has been elected."

"In case of permanent vacancy in the offices of President and Vice-President, the Congress shall determine by joint resolution whether or not a special election shall be held to elect a President and a Vice-President or only a President. In the affirmative case, the date on which the special election is to be held shall be fixed in the resolution and said date shall be stated in the proclamation to be issued in accordance with Section twenty-two of this Code, which shall be signed by the Acting President. The officers elected shall qualify at twelve o'clock in the morning of the day next following the date of their proclamation by the Congress and shall hold office until thir successors, elected at the next regular election, shall qualify."

And the second, Rep. Act No. 181, Section 1, provides:

"When neither the President-elect nor the Vice-President-elect shall have qualified, or in the event of the removal, death, or resignation of both the President and the Vice-President or of the inability of both of them to discharge the powers and duties of the office of President, the President of the Senate, or if there be none, or in the event of his removal, death, resignation or of his inability to act as President, the Speaker of the House of Representatives, or if there be none, or in the event of his removal, death, resignation, or of his inability to act as President, the Senator or Representative elected by the Members of the Congress in joint session shall act as President of the Philippines until the President or President-elect or the Vice-President shall have been elected and shall have qualified."

The two laws may be harmonized by eliminating the first paragraph of Section 19 of Rep. Act No. 180 and substituting in its place the provision of Rep. Act No. 181, since it is not in conflict with the later law.[3]

The provision of Rep. Act No. 181 (Section 1) differs from an American law in two or three different ways. The 1947 Act in the United States assumes that the person succeeding to the presidency after the Vice-President becomes President and must resign his previous position.[4] It also provides that the cabinet officers are in direct line of succession after the Speaker of the House and the President pro-tempore of the Senate. According to Silva, this law also assumes that a cabinet offices succeeding to the office may only act in such a capacity until some legislative official qualifies, thus raising a serious difficulty.[5] In the Philippines, cabinet officers are not in line of succession, and the legislative official only acts as President. Furthermore, the latter does succeed to the presidency, and specific conditions are established under which the legislative official shall step aside. Another difference is that the President of the Senate, rather than the Speaker of the House is placed first in the Philippines. This arises from the consideration that the Philippine Vice-President does not preside over the Senate as in the United States, and that Filipino Senators are elected not from districts or provinces but the nation at large. A Senator selected by the Senate to be its presiding officer is from the same constituency as the President and Vice-President, and theoretically, more representative of the people than someone from the Philippine House of Representative.[5] A similar idea was behind the succession law in the United States which places the Speaker of the House first in line after the Vice-President because traditionally the House has been considered the more popular body in the national legislature.[6]

A problem of presidential succession posed by the Philippine Constitution which does not arise under the American system concerns succession to the

[3] Carrfon, Philippine Political Law 231.
[4] 61 U.S. Statutes 380 (1947); Silva, *op. cit. supra* note 1, at 175.
[5] Silva, *op. cit. supra* note 1, at 175.
[6] Romani, The Philippine Presidency 55.

office after a man has served eight consecutive years, and this event occurs during a regular term. In 1952 it was believed that Yulo would automatically succeed Quirino in 1956 if the Liberal Party ticket were elected. The eight consecutive years constitute a disability under which the Vice-President may succeed the President, or if it is necessary for the Congress to call for a presidential election to choose a permanent successor. It would appear that this might be considered a disability which would allow the Vice-President to become President, but since Congress may provide for special elections and the manner of presidential succession, the exact course of action which might be taken remains in doubt.[7]

History of Presidential Succession

Up to this writing, three Presidents have died in office and have been succeeded by their Vice-Presidents. In all these occasions, no one seriously questioned the legality of the Vice-President's assumption to the office of the President upon the death of the incumbent.

Manuel Luis Quezon was the first President under our Constitution to have died in office. He was succeeded by Sergio Osmeña, Sr., who took the reign of the government immediately upon President Quezon's death on August 1, 1944 in Saranac Lake, New York.[8]

Manuel Acuña Roxas was the second President to have died in office. While delivering a speech before the American Servicemen in Clark Field, Pampanga, on April 17, 1948, he suffered a heart attack which immediately caused his death. The then Vice-President Elpidio Quirino, who was on a cruise to the southern island, had to cut short his cruise to rush back to Manila to take over the presidency. On that same date Elpidio Quirino took his oath as President in a brief ceremony in Malacañan.[9]

Another President who died in office was Ramon Magsaysay, Sr. He died in an airplane crash which shocked the whole world on March 17, 1957. For sometime the Philippines was without a President until President Magsaysay's death was confirmed by the Cabinet. Vice-President Carlos Garcia, who was then out of the country, had to rush back to Manila to succeed President Magsaysay. On March 19, 1957, he was sworn in as the fourth President of the Republic.

In the United States, seven Presidents died in office. On each of these occasions the Vice President took the presidential oath. And more important, all seven of these Vice Presidents are almost universally recognized as having been President of the United States. The origin of this precedent is found in the Harrison-Tyler case.

On April 4, 1841, William Henry Harrison died. The presidential office

[7] *Id.* at 56.
[8] Malcolm, First Malayan Republic 143 (1951).
[9] *Id.* at 56.

was vacant for the first time. It was then decided that in conformity with the constitution, Vice-President John Tyler was to be the President for the remaining three years and eleven months of Harrison's term.[10] Although there were some who contended that Tyler's assumption to office was in violation of the Constitution, it is a fact, however, that he was the President of the United States for the remaining term left by Harrison's death.

When President Taylor died in office on July 9, 1850, no one questioned the assumption of Vice-President Fillmore to the presidency. The news of his death was communicated to Vice-President Fillmore in a note from the Cabinet addressed to the "President of the United States." Thus the precedent established by Tyler was confirmed by Fillmore.[11]

Andrew Jackson is the third in the gallery of "accidental Presidents." At the time of Lincoln's assassination it seems to have been generally assumed that the Vice-President becomes President when a President dies.[12]

The precedent set by Tyler and confirmed by Fillmore and Jackson has had four additional confirmation. The status and tenure of Arthur, Coolidge and Truman have never been seriously questioned. At the time of Garfield's death the succession of three Vice-Presidents had well established the custom that a Vice-President becomes President upon the death of the incumbent. This precedent was followed for the fourth time when Vice-President Arthur took the presidential oath in September 20, 1881.[13]

Twenty years after Garfield's death President McKinley died while in office. This made Theodore Roosevelt the fifth Vice-President upon whom the presidential powers and duties devolved.[14]

When President Harding died, Vice President Coolidge followed the precedent set by five Vice Presidents before him. In the early morning hours of August 3, 1923, he was sworn in as the twenty-ninth President of the United States by his father who was a notary public.[15]

Franklin D. Roosevelt died on April 12, 1945. Two and one-half hours after the President's death Chief Justice Harlan F. Stone swore Vice-President Harry S. Truman in as the thirty-second President of the United States. This was the seventh time a President had died in office and the seventh time a Vice-President had assumed the office with its title and tenure.[16]

The practice followed on these seven occasions seems to have established the rule that a Vice-President succeeds to the higher office in the event of a President's death.[17]

[10] Poore, Perley's Reminiscenses of Sixty Years in the National Metropolis 52 (1886).
[11] Barre, Life and Public Services of Millard Fillmore 318-319.
[12] Jones, Life of Andrew Jackson 139-140 (1901).
[13] Howe, Chester Arthur 1-2.
[14] Lewis, the Life of Theodore Roosevelt 170.
[15] Calvin Coolidge, Autobiography 173-176 (1929).
[16] New York Times, April 13, 1945.
[17] Horwill, the Usages of the American Constitution 58.

In the Philippines as well as in the United States there has been no case wherein a President resigned or was removed from office. But it would seem that the precedent established in case of a President's death would probably be extended to resignation and removal because under these two cases there would be an actual vacancy.

As regards, however, the question of "inability" of the President to discharge the powers and duties of his office, there have been conflicting claims of authority both here in the Philippines as well as in the United States in view of the lack of precision as to what constitutes "inability" under the Constitution.[18]

This question of "inability" arose in the Philippines during the terms of both Presidents Quezon and Quirino. President Quezon had been suffering from tuberculosis and had to go to the United States for medical treatment. But during all this time that he had been suffering from tuberculosis, he refused to relinquish the presidency. Vice-President Osmeña, neither acted as President nor became President. It was only after Quezon died on August 1, 1944 that Osmeña took over the presidency.[19]

The illness of President Elpidio Quirino had evoked the most heated controversy in the annals of Philippine politics. President Quirino made several trips to the United States for medical treatment. During one such trip, he entered John Hopkins Hospital in Baltimore. He was administered extreme unction, after which he was for sometime unconscious under an oxygen tent. Senator Claro M. Recto, an authority on Constitutional Law, urged Vice-President Lopez to take over the presidency, but Vice-President Lopez refused to heed Senator Recto's advice.[20] The leaders of the Democratic Party, to which the then Vice-President belonged, contemplated a court action against the President, but for one reason or another the contemplated action was not carried out.[21] This discussion continued until President Quirino recovered from his illness.

In the United States, there had been at least three cases where the President was unable to discharge his duties for extended periods. One such case was that of President Garfield who was shot on July 2, 1881 and who thereafter no longer discharged his duties until his death on September 19, 1881.[22] The other case was that of President Wilson who collapsed in 1919 but served out his term until he was succeeded by President Harding on 4, 1921.[23] And more recently, President Dwight D. Eisenhower suffered a heart attack which incapacitated him for sometime to discharge the powers and duties of the chief executive.[24] Notwithstanding the admitted inability

[18] SINCO, PHILIPPINE POLITICAL LAW 250 (10th ed. 1945).
[19] Pacis, *4 Post-Election Problems*, The Sunday Times Magazine, December 8, 1957.
[20] Manila Chronicle, June 26, 1953.
[21] *Ibid.*
[22] 2 TAÑADA & FERNANDO, CONSTITUTION OF THE PHILIPPINES 983.
[23] *Ibid.*
[24] PUSEY, EISENHOWER THE PRESIDENT 285 (1956).

of the Presidents in all these three case, the Vice-Presidents refused to take over the presidency because of personal loyalty to the President. But then it may be asked, suppose the Vice-President belongs to an opposition party, what would happen then? And suppose, further, that at the time the President is gravely ill and the Vice-President is not acting as President, the country is attacked from without, how shall the country be able to defend itself effectively?

FAILURE TO DEFINE INABILITY

During the period of Garfield's fatal illness he performed only one official act, the signing of an extradition treaty.[25] Although his mind was clear during the first weeks of his invalidism, the daily bulletin of his physicians are sufficient evidence that he was physically unable to discharge the duties of his office. During his eighty days of illness a great deal of urgent business demanded the President's immediate attention: there were postal frauds; officers did not perform their duties because they had not been commissioned; the countries foreign relations were deteriorating. Yet the department heads transacted only such routine business as they could handle without the President's supervision.[26]

Wilson's disability was more serious than Garfield's not only because it lasted longer, but also because it occurred during the Senate debate on the League of Nations. There can be no doubt concerning Wilson's inability to perform the duties of his office during much of the time after his collapse on September 25, 1919. As evidence of his disability many indisputable facts can be offered, but only a few need be mentioned here. During the special session of the sixty-sixth Congress, twenty-eight acts of Congress became law because of the President's failure to pass on them within the requisite ten days. He did veto the Prohibition Enforcement Act on October 27, but from October 28 to November 18 he passed on only one of the sixteen acts presented to him.[27] The Senate Committee on Foreign relation was unable to get action on information from him on the Shantung Settlement, a situation which caused Senator Albert M. Fall to suggest that, if the President was too ill to discharge these duties, the Senate ought to recess until he became able to resume the responsibilities of his office.[28] Although the Constitution says that the President shall receive the representative of foreign states, Viscount Edward Grey, the British ambassador, spent four months in Washington without seeing the President even once.[29]

[25] HOWE, *op. cit. supra* note 13, at 152.
[26] *Id.* at 153.
[27] Rogers, *Presidential Inability*, 2 REVIEW 481, 482.
[28] SILVA, *op. cit. supra* note 1, at 58.
[29] HORWILL, *op. cit. supra* note 17, at 80-81.

This objective evidence is only a small part of that which could be presented to show that there was a real inability on the part of the President to exercise the powers and discharge the duties of his office. This matter was not merely of academic interest. Nearly every student of the period, even scholars, Cabinet members or journalists, agreed that public business in general, and the Versailles Treaty in particular, were affected by the President's illness. In November of 1919 Senator Hitchcock, the Democratic leader in the Senate, believed that he could get the Republicans to compromise on the treaty. But Wilson's physicians would not allow Hitchcock to see the President. As the Senator said at that time, he had to consult with the President before the Democratic Senator could agree to any compromise.[30] Although it was reported five days later that Hitchcock had seen the President three times, many felt that Wilson's isolation from public opinion, from his advisors, and from Congressional leaders was one of the principal causes for the defeat of the treaty.[31] Colonel Houce's Biography holds this view and David Lawrence went far to say that the United States would have joined the League if the President had been able to get the advice he so badly needed in his enfeebled condition.[32]

In the Philippines, there has been not much adverse effect upon the political and administrative functions of the government either during the inability of President Quezon or during that of President Quirino's. This is probably due to fact that at the time of President Quezon's illness during the war he was in the United States and had not much to do there to liberate the Philippines, except perhaps to plead to the American people to help hasten the liberation of the Philippines. But this could have very well been done by the Vice-President.

While during the time of President Quirino's illness, the Congress of the Philippines was no longer in session, hence, no bill had to be acted upon by the President. Besides, President Quirino's illness did not last long and before he left the Philippines for medical treatment in the United States he issued an Executive Order giving the Executive Secretary the authority to continue signing papers for the President, and orders released by the Executive Secretary were to have the same effect as if issued by the President himself.[33]

With this effect notwithstanding, there is still the necessity of making a specific definition of what shall constitute "inability." The conditions existing at the time of both Quezon and Quirino are very much different from the conditions now existing. The problem now has become very real with the development of weapons for mass destruction and the strategic importance of capital cities. A combination of circumstances may arise under

[30] New York Times, Oct. 14, 1919; SILVA, *op. cit. supra* note 1, at 58.
[31] WHITE, WOODROW WILSON 448-450 (1925).
[32] LAWRENCE, THE STORY OF WOODROW WILSON 299.
[33] Cf. Executive Order 229, Jan. 6, 1953 and Executive Order 605, Jan. 26, 1953.

which we would have no President. Such a situation would be disastrous because it is essential that there should be no interruption in the exercise of executive powers.

CONCEPT OF "INABILITY"

There have been variant suggestions as to what constitutes "inability". Senator Lorenzo Tañada of the Philippine Senate held that inability may arise from either mental or physical ailment.[34] This opinion was shared by Senator Claro M. Recto when he urged Vice-President Lopez to take over Malacañan upon learning of President Quirino's illness, saying that the same constitutes "inability".[35]

Another case of inability is that which arises when the President leaves the country. Is he then unable to discharge the powers and duties of his office? When President Quezon was confronted with that question, his decision was that he continued to exercise the full authority of his office no matter where he might be.[36] So that prior to leaving the Philippines he issued an Executive Order defining the manner in which the government business would be conducted in his absence and supposed disability.[37] This procedure was followed by Osmeña when he left for the United States.[38] When President Elpidio Quirino went to the United States, this question was again brought to light.

Mayor Arsenio H. Lacson of Manila, when informed that there was an attempt to suspend him from office by President Quirino in connection with the arrest of Rogelio Robles, said that he would not recognize the suspension contending that the law bars the President from exercising executive authority for inability or temporary incapacity to perform his duties. He, further, said that he would recognize only a suspension order signed by the Vice-President saying that "only the Vice-President can suspend me as he is the rightful administrator in the absence of the President."[39]

Judge Jesus Barrera, commenting on the decision of the President to govern the country by "remote control", said that if the purpose of the President's trip is purely personal and he stays abroad indefinitely, there may be legal grounds to question the exercise of official functions by President Quirino by "remote control".[40]

The leaders of the Democratic Party, headed by Senator Tomas Cabili and Lorenzo Sumulong and Rep. Jose J. Roy, branded as clear violation of the Constitution the announced decision of Quirino to exercise the pres-

[34] 2 TAÑADA & FERNANDO, *op. cit. supra* note 22, at 981.
[35] Pacis, *op. cit. supra* note 19, at 5.
[36] HAYDEN, THE PHILIPPINES: A STUDY IN NATURAL DEVELOPMENT 84.
[37] ROMANI, THE PHILIPPINE PRESIDENCY 52-53.
[38] 2 TAÑADA & FENANDO, *op. cit. supra* note 35, at 985.
[39] Manila Chronicle, July 10, 1953.
[40] Manila Chronicle, June 26, 1953.

idential duties even during his absence from the country. They continued, further, saying that: "In the past, governing the country by "remote control" was tolerated because the President was on official business and stayed abroad for a definite period of time. In this particular case, his absence from the country will be for an indefinite period of time and he is leaving not as President of the Philippines, but as a patient, a private citizen, to undergo treatment in a hospital in the United States.[41]

This question of "inability" had been discussed more extensively in the United States at the time of Garfield's illness. During his illness a number of well-known legal authorities argued that the sole "inability" recognized by the Constitution was intellectual incompetence. Theodore W. Dwight, Professor of Constitutional Law at Columbia College, applied the common law which defined the term as "mental incapacity." He said that it was a disability which a civil court would recognize as disqualifying a man to make a grant. He did not think the term included physical disability.[42] Former Senator William W. Eaton, another respected student of the Constitution, stated that the succession clause provided for no disability of which the President could decide his own inability. Eaton continued by saying that an "inability" must be one such as insanity, which is patent to everyone except the President. As long as the President possesses reason, he is not disabled.[43] Secretary of Interior Samuel K. Kirkwood also thought that the Constitution provided only for mental incompetence,an opinion shared by Senator Joseph E. McDonald of Indiana.[44]

An equally respectable body of opinion can be cited in support of the proposition that inability is not restricted to mental incapacity. According to this view, a case of inability exists whenever the public interest suffers because the President is unable to exercise his powers, the cause of his inability being immaterial. Benjamin Butler, writing with reference to Garfield's illness, said that the existence of a disability was obvious to any right thinking person: If an emergency arises and the President is unable to act, the Vice-President is to assume presidential power.[45]

If "inability" is construed to mean only mental incapacity, the United States would have no chief executive when a President is physically disabled, when he is mentally competent yet unable to exercise his powers or in case he is captured by an enemy in wartime. Such a definition of "inability" fails to provide for the exercise of executive powers in all emergencies. Thus it is contrary to the legal principle that executive power is a continuing one, never ending, never dormant, and never allowed to lapse and that at all times there must be someone to exercise the power.[46]

[41] *Ibid.*
[42] Dwight, *Presidential Inability*, 133 NORTH AM. REV. 436.
[43] SILVA, *op. cit. supra* note 1, at 89.
[44] *Ibid.*
[45] Butler, *Presidential Inability*, 133 NORTH AM. REV. 428.
[46] Barret v. Duff, 114 Kan. 220, 223 (1923).

In deciding cases of gubernatorial succession no state court has limited inability" to mental incompetence. As a matter of fact, some state courts have said that the term covers all cases in which the general welfare requires the exercise of a certain executive power which the governor cannot exercise.[47] The highest court of New Hampshire was the first to rule that a successor should act as a governor during a temporary disability of the incumbent — and the inability which called forth this ruling happened to be physical illness.[48] It would seem that this same rule is the proper one to apply in cases of presidential disability.

The determining consideration in each case is not only whether the President is actually unable to exercise his powers but also whether there is any public business which requires his personal attention. It seems to be rather generally agreed that a mere inability, however severe or extended, does not constitute an inability in a constitutional sense unless the urgency of public affairs calls for action.[49] In time of serious national emergency, for example, an illness of a few days may jeopardize the public interest more than an illness of several months at another time. The situation is not likely to be the same in any two cases of presidential inability.

The question of whether or not absence constituted inability on the part of the President was raised by critics of President Wilson when he went abroad following the war on Germany during the negotiations for the Versailles Treaty. President Washington, the critics pointed out, had refused even to enter Rhode Island until that stiff-necked little Commonwealth had joined the union; and while President Taft had visited the Canal Zone, in 1910, being absent from November 9 to 23, he had been scrupulous to travel on a government vessel, and to remain on soil subject to American jurisdiction. To the critics of President Wilson, however, Corwin answers: But then President Wilson also traveled on a government vessel; and if such technicalities avail it would seem that wherever an American President treads, it is for the moment American soil.[50]

Even more extreme was the implication of a resolution adopted by the Democratic House of Representatives in 1876 that the President must perform his official acts at the seat of the government established by law. President Grant, who was the target of the resolution, had to satisfy his Democratic critics by demonstrating to them that of all Presidents, President Thomas Jefferson was the one who had been most persistently absent from the capital, his record of absenteeism being 796 days, or more than one-fourth of his eight years in office.[51] And any significance that the

[47] State of North Dakota ex rel. Olson v. Langer, 65 N. Dak. 68; Opinion of the Justices, 87 N.H. 489, 490 (1935).
[48] Attorney General v. Taggart, 66 N.H. 362, 25 L.R.A. 613 (1890).
[49] Cooley, *Presidential Inability*, 133 NORTH AM. REV. 422, 424-425; Attorney General v. Taggart, *supra* at 366.
[50] CORWIN, PRESIDENT: OFFICE AND POWERS 63.
[51] 8 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT 361-366.

issue may have had in the past has been pretty well eliminated by modern ease and speed of travel.[52]

Other Presidents of the United States like Benjamin Harrison, Theodore Roosevelt, and William Howard Taft left the country during their term of office. Despite these and other precedents, when President Wilson announced that he would attend the peace conference in Europe, it was suggested that the Constitution required him to remain in Washington while the Congress was in session. Former Attorney General George W. Wickersham even went so far as to say that a President's absence during a session of Congress would be an "inability" in the Constitutional sense, for he would not be present to attend to his legislative duties. Wickersham believed that during the President's absence Vice-President Thomas R. Marshall might veto an act of Congress and allow the courts to pass on the validity of his action. If Marshall refused to take the initiative, Wickersham said, a writ of mandamus would lie to compel him to act as President.[53]

William Howard Taft, Louis Marshall, Francis Lynde Stetson, and Samuel Untermeyer, all outstanding lawyers, answered Wickersham by saying that the Constitution did not forbid the President's trip to Europe and that his absence would not constitute an "inability". They pointed out that the Constitution contemplated a President's absence from the United States by making him the commander in chief and treaty-maker, two roles which might take him abroad. Henry W. Taft, another prominent attorney, doubted whether a court would issue a writ of mandamus to a Vice-President, for he thought that the question was political rather than legal.[54]

Franklin D. Roosevelt and Harry S. Truman have firmly established the precedent that mere absence from the United States is not an "inability" which requires the devolution of presidential power.[55]

In considering what constitues inability the last question is whether impeachment of a President is an "inability" which causes the devolution of presidential power on the Vice-President or the statutory successor.

While Andrew Jackson was under impeachment Senator Charles Summer argued that Jackson was legally disabled. It was conceded, however, that Jackson was entitled to act as President, and Congress made no attempt to suspend him during the trial. Suspension would have placed Congress in a delicate position, for such action would have favored Ben Wade, the President pro-tempore of the Senate, who was himself a member of a radical conspiracy to remove Jackson. The legality of Jackson's exercise of presidential power during this period seems never to have been seriously questioned.[56] Thus the single precedent follows the clear intent of the

[52] CORWIN, *op. cit. supra* note 51, at 67.
[53] SILVA, *op. cit. supra* note 1, at 93-94.
[54] *Ibid.*
[55] *Ibid.*
[56] 14 CONG. REC. 916; CONG. GLOBE, 40th Cong. 2d sess. 1676-1677.

framers of the Constitution — that impeachment is not an inability causing the devolution of presidential power on an impeached President's potential successor.

WHO SHALL DETERMINE "INABILITY"

The question of who shall determine the "inability" of the President has been the subject of a lengthy discussion among laymen, lawyers, students of law, Cabinet members and members of Congress both in the Philippines as well as in the United States. Each one has his own suggestion. And the suggestion of one conflicts with that of the other.

During President Quirino's stay in John Hopskins Hospital for medical treatment, Senate President Eulogio Rodriguez, Sr., urged the Vice President to take over the duties of the presidency.[57] This suggestion of Senate President Rodriguez was shared by Senator Claro M. Recto, President of the Constitutional Convention, when he advised Vice President Fernando Lopez to take over Malacañan saying that he alone could decide when the President had entered upon a state of "inability" to discharge the powers and duties of President but Vice-President Lopez did not heed this advice and so President Quirino found the presidency still waiting when he returned to the Philippines.[58]

While in the United States, there have been at least six theories relating to the proper method of establishing the existence and the termination of presidential inability. They are the following: 1) The power of deciding when a disability exists is vested in the Vice-President or the officer upon whom the presidential functions devolve. Some add that the Vice-President is to take the initial action, which is subject to ratification by Congress. Before ratification, they say, he is a de facto President, but after the ratification he is a de jure President. 2) The courts should decide when the President or an acting President, as the case may be, is disabled. 3) The Power of determining inability is vested in Congress. 4) Congress should provide the rules of evidence necessary to establish inability and create a tribunal to decide specific cases. 5) The President, the acting President, or the cabinet should make the decision. 6) The power is vested in the Supreme Court upon a resolution by Congress.

In 1881 the great weight of opinion favored the theory that the successor is to determine when a President is disabled. While Garfield was incapacitated, most students of the Constitution said that the Vice-President was obligated to exercise the powers and perform the duties of the president. This was his duty, they said, just as it was his duty to preside in the Senate, and no enabling action by the courts, the Congress, the Cabinet,

[57] Manila Chronicle, July 31, 1953.
[58] Pacis, *op. cit. supra* note 36, at 5.

or the President was necessary.[59] For example, Judge Lyman Trumbull thought that there was no need to provide a formal means of determining inability. In his opinion a disability must be so "notorious" that no one can reasonably doubt its existence. He said that, whenever there is such an obvious case of disability, the Vice-President is authorized to assume executive power if important public business requires executive action. When these conditions exist, Trumbull continued, the Cabinet should notify the Vice-President just as in the case of the President's death, but there is no constitutional requirement for this notification.[60]

Some have objected that allowing a successor to make the decision would be dangerous. If history can be taken as a guide in regard to the attitude of future successors, the danger of surpation on the pretext of inability is slight. Both Chester A. Arthur and Thomas R. Marshall were deterred from exercising presidential power by their sense of propriety. To say that a successor may abuse the power of determining a President's inability is not to deny the power. At least, the courts have often said that no power can be denied merely because it may be misused, for all power is susceptible of abuse. The courts, say, further, that in an elective government, in which popular opinion is a force, the danger of abuse is remote. The legal precept is that one in whom a power is vested must be presumed to have an honest devotion to the public interest.[61] Furthermore, sufficient restraint would be provided by public opinion and the Congressional power of impeachment.[62]

During Garfield's illness Theodore W. Dwight said that presidential inability is a judicial question and thus, is to be determined in the courts.[63] Only four of the standard commentators, John Randolph, David K. Watson, John W. Burgess, and W. W. Willoughby, consider the problem of who is to determine a President's disability; and three of the four say that the Federal Judiciary can perform this function. Tucker thinks the Federal courts can be given jurisdiction to make this determination because it is a question arising under the Constitution. Watson approvingly cites the case of Attorney General v. Taggart, in which the New Hampshire Supreme Court ruled that the existence of an inability may be determined on a petition for mandamus brought by the Attorney General against a governor's successor.[64] Burgess says that the Supreme Court could decide cases of inability but that cases should be decided by Congress.[65]

It seems almost certain that no court has power to issue a writ of mandamus to a President's successor directing him to act as President during

[59] 13 CONG. REC. 139.
[60] Trumbull, *Presidential Inability*, 133 NORTH AM. REV. 422.
[61] *Ibid.*
[62] U.S. News and World Report, April 5, 1957, p. 34.
[63] 1 WATSON, THE CONSTITUTION OF THE UNITED STATES 843-895.
[64] 1 WATSON, *op. cit. supra* note 43, at 436.
[65] 2 BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 240 (1891).

an incumbent's inability. The judiciary cannot interfere with executive action when an executive officer is authorized to exercise his judgment. The courts can direct the performance of an executive act by proceeding in mandamus only in those cases in which an executive officer is to perform a ministerial function.[66] Since a successor's exercise of presidential power is not purely ministerial, the question of a President's alleged inability cannot be determined in an action for mandamus.

Another suggestion for relieving the successors of this responsibility is that Congress decide whether a President is incapacitated.[67] John W. Burgess thought the matter could best be handled by concurrent resolution, with one resolution declaring the existence of an inability and a subsequent resolution declaring its termination.[68] In 1881 Governor Jacob B. Jackson of West Virginia argued that presidential disability is a political question and that Congress is the only tribunal in the country which can settle such questions.[69]

But attorney Urban A. Lavery objected to this theory on the ground that it is not in harmony with separation of powers and consequently is not necessarily a good American Law. Lavery agreed with Judge Trumbull that Congress has no such power. It would, he declared, be undesirable to place a President's tenure at the mercy of Congress.[70]

A number of students of the Constitution have agreed and argued that Congress has power under the elastic clause to provide a method for declaring the President's inability. They say that Congress has this power just as Congress has power to provide a method for the President's resignation. They do not think that the grant of power to Congress to designate a successor in case of double vacancy necessarily excludes congressional power to legislate on the subject of presidential inability. The proponent of this theory maintains that the power to provide for the determination of disability is a power necessary and proper to carry into execution the powers vested in the President.[71]

It is doubtful whether Congress has power either to determine specific cases of inability or to provide by general law a means for deciding such cases. Opinion on the matter is divided, but the great weight of opinion seems to support the position that Congress has no such power. The speeches in Congress have nearly all denied congressional power to provide for cases of inability on the ground that the delegation of power to Congress to provide for succession beyond the Vice-President excludes all other succession. It is a well-established rule of construction that enumeration in

[66] Gaines v. Thompson, 7 Wall. 347 (1869); Dudley v. James, 183 Fed. 345 (1897).
[67] 1 DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 644, 664.
[68] SILVA, *op. cit. supra* note 1, at 105.
[69] Lavery, *Presidential Inability*, 8 AMERICN BAR ASSOCIATION JOURNAL 13-17.
[70] 2 BURGESS, *op. cit. supra* note 65, at 440-441.
[71] Dwight, *op. cit. supra* note 65, at 440-441; Schoonmaker, *A Strict Constructionist*, New York Herald, Sept. 17, 1881; Barkley, 93 CONG, REC. 7775.

the Constitution of certain powers denies all others unless incident to an express power or necessary to its execution.[72]

It has been suggested that the Cabinet might declare a President's inability by notifying the Vice-President just as it notifies him when a President dies. Former President Grant suggested that Garfield's physicians certify the President's inability to the Cabinet, which could then consider the certificate and forward it to Vice-President Arthur accompanied by a request that he acts as President during Garfield's illness. Governor Jacob B. Jackson of West Virginia answered Grant by saying that the Cabinet could not — and should not — decide that matter since it is a mere creature of the President and has only advisory power.[73] During Wilson's illness two bills were introduced to vest this power in the Cabinet. The principal legal question then was whether Congress had power to authorize the Cabinet to determine a President's inability. Whether the Cabinet had power without an act of Congress was only of secondary interest.[74]

Hearings on these bills disclosed the belief that the Cabinet is the safest body in which to vest the power. Determination by the Cabinet would cause the least friction because the decision would be made by the President's own appointees. Cabinet members presumably are his friends and are not eager to displace him. Moreover, the Cabinet is in the best position to know whether a President is really disabled or not.[75] In spite of this relationship between a President and his Cabinet, Charles F. Reavis of Nebrasca objected to having so great a power vested in a small group of appointed officials.[76] James W. Husted of New York thought that the bills gave too much discretion to the Cabinet. He favored the enactment of legislation defining inability and vesting in someone the power simply to find the facts under rules of law.[77] Mr. Brownell, shared the opinion that the President's inability should be decided by the Cabinet provided it is approved by a majority of the Cabinet in writing.[78] On the other hand President Dwight D. Eisenhower suggested that this procedure be followed in case the President were incapable or unwilling to make a decision as to whether he should continue in office.[79]

Recently, as a consequence of President Eisenhower's heart attack, a new suggestion was made. It is suggested that Congress may by joint resolution call upon the Supreme Court, not to examine the man, which is

[72] U.S. v. Harris, 106 U.S. 629, 635-636 (1883); 3 STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1243 (1883).
[73] Butler, *op. cit. supra* note 46, at 431.
[74] H. R. 12629, Introduced by Madden and H. R. 12647, Introduced by MacArthur, 66 CONG, REC.
[75] *Id.* at 5, 10-11, 35.
[76] *Id.* at 5.
[77] *Id.* at 8.
[78] Brownwell, *Presidential Inability*, Commonweal, April 19, 1957 p. 53.
[79] *When A President Is Disabled*, U.S. News and World Report, April 5, 1957, p. 34.

beyond the Court's competence, but to weigh the evidence, which is the Court's business. If the Court certified to Congress that the weight of expert, scientific testimony showed disability, Congress could, again by joint resolution, call upon the Vice-President to assume the duties of the office until the disability should be removed. Upon the President's recovery, the process could be reversed.

This would, according to Gerald W. Johnson, involve action by the executive branch, but not on its own initiative. The legislative would have made the first move and the judiciary would have examined its grounds for action and found them tenable. Thus, all three branches would have admitted that the authority of the man in the Presidency was legitimate and there would be no chance for mischief-makers to mislead public opinion with cries of usurpation and tyranny. He continues, further, saying that at the same time it would repudiate the silly and bitterly unfair theory that a sick man should be responsible for diagnosing his own case. A sick man almost always thinks he is better than he is.[80]

CONCLUSION AND RECOMMENDATIONS

It is plain that from the foregoing discussion, the same produces nothing but confusion and utter lack of agreement on the subject. This state of affairs was certainly grievous during those times. Today it would be fatal considering the fact that we are now living in an era of sputnik and satellites and at a time when the world powers are trying to outdo each other in the invention of nuclear weapons of destruction.

To avoid such a situation, it is proposed that our law on presidential succession be made up-to-date so as to conform to the advancing progress of science.

The first problem to solve is the question of what shall constitute presidential disability. Many think that mental inability is the only one covered by the Constitution. Others hold that any case in which a duty should be discharged, but which the President is unable to perform for any reason whatsoever should be considered as inability. While other eminent lawyers and legislators contend that disability must be permanent and must extend throughout the entire term in order to be "inability" in the constitutional sense.

It is submitted that "inability" may be either physical or mental. However, such illness must be of such a nature that the President can not exercise the functions of his office without thereby endangering his life.

The question of his absence from the Philippines will have to depend on the conditions and circumstances under which he leaves the country. If the purpose of his trip abroad is for medical treatment alone his ab-

[80] Johnson, *Presidential Disability*, New Republic, April 29, 1957, p. 8.

sence shall be considered as inability. If, on the other hand, he is on official business, the same should not be considered as inability. But, if absence is caused by his capture by the enemy in times of war, he should be deemed as disabled, for there is a clear case that he would not be able to discharge his duties however physically or mentally sound he may be.

During an impeachment proceeding against the President, he should not be allowed to exercise the functions of his office. His position is so powerful that in most probability, he may use the power of his office to procure his acquittal from the charge. The reason for suspending a local official during his investigation should be applied with more reason to the President who is under impeachment. Thus, a president who is under impeachment should be regarded as disabled.

With the definition of what shall constitute inability having thus been made, the problem of presidential succession does not end there yet. Another problem which needs the same consideration is the determination of who shall declare the inability of the President to discharge the powers and duties of his office. The suggestions proposed by different authorities are as conflicting as the suggestions of what shall constitute inability.

One school of thought contends that the President should alone determine whether he is disabled or not. This view seems to have been adopted in the Philippines by at least two Presidents. Others claim that the Vice-President is the only person who must determine the President's inability. Of equal force is the view that the Cabinet should alone declare the inability of the President. While others claim that a mandamus may lie to compel the Vice President to take over the presidency in case of the incumbent President's incapacity to exercise the functions of his office. The reasons behind these various suggestions have their respective merits. But it is also recognized that they too have some disadvantages.

More recently, however, a new proposal was made. And this, in the opinion of the author, is the best. This proposal would involve an action by the three departments of government. The Congress should take the initiative by passing a joint resolution calling upon the Supreme Court to inquire into the President's supposed inability. If after due hearing the Supreme Court is satisfied that the President is disabled, then it shall certify such fact to the Congress. Based on this certification, the Congress shall, again, pass a joint resolution calling upon the Vice-President to assume the duties of President. Thus, the danger of usurpation under this procedure would be very slight.

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