

1975

Accountability: The Constitutional Goal

William F. Swindler

William & Mary Law School

Repository Citation

Swindler, William F, "Accountability: The Constitutional Goal" (1975). *Faculty Publications*. 1599.

<https://scholarship.law.wm.edu/facpubs/1599>

Copyright c 1975 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

Accountability: The Constitutional Goal*

WILLIAM F. SWINDLER**

The agonizing judicial and political inquiries which accompanied the Watergate issue from the spring of 1973 through the summer of 1974 were at bottom compelled by an unsettled question of American constitutional theory and practice. This was, and is, the question of how the executive/administrative branch is to be held accountable to the sovereign power, an entity which itself was felicitously defined by Chief Justice Burger as "composed of the three branches" of the government.¹

In the constitutional crisis which bred three judicial tests of related issues,² the resignation of a Vice President and a President, the succession of an appointed Vice President and the appointing of a second under unanticipated uses of the twenty-fifth amendment to the Constitution,³ the question of accountability was perforce removed from the abstractions of the theory of separation of powers, as well as from the context of generalized judicial statements enunciated under far less parlous circumstances.

In a government of separate powers, John Locke had written, "the good of society requires that several things should be left to the discretion of him that has the executive power."⁴ This was necessitated,

* Based in part on a lecture presented at the College of Law, University of Oklahoma, November 8, 1974.

** John Marshall Professor of Law, College of William and Mary; Visiting Distinguished Professor of Law, University of Oklahoma, Fall 1974.

1. *United States v. Nixon*, 418 U.S. 904 (1974).

2. *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); Application of Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973).

3. See the discussion in Part III of this paper *infra*.

4. J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 199 (1924).

Locke concluded, because the legislative branch could not anticipate every detail of government responsibility to act under every circumstance; a “power to act according to discretion for the public good” was therefore to be found inherent in the executive.⁵ Locke concluded, however, that this latitude in the executive was susceptible of being defined and curtailed periodically by the people’s representatives “in those points where they found disadvantage from it.”⁶ Thus the discretionary power was not in fact to be treated as an inalienable attribute of the executive, but rather as a right left to him by the people for so long as it efficaciously served their needs.

The Age of Reason which was Locke’s intellectual heritage eschewed concentration of power in a single office. At the same time, however, James Madison conceded that American experience under the Articles of Confederation had demonstrated the fatal incapacity in a system where “the authority of the whole society [is] everywhere subordinate to the authority of the parts.”⁷ What the Constitutional Convention of 1787 sought, according to Madison, was a system of checks and balances as between three separate departments of government by providing that “these departments be so far connected and blended as to give each a constitutional control over the others.”⁸

Chief Justice John Marshall found that article II of the Constitution vested in the President “certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”⁹ Yet Marshall in the same opinion spoke of “a government of laws, and not of men”¹⁰—a concept which Justice Charles F. Miller cited 80 years later as unequivocal.¹¹

Miller wrote at the beginning of the modern constitutional age, on the eve of the first major regulatory enactments of Congress in the Interstate Commerce Commission Act of 1887¹² and the Sherman Anti-Trust Act of 1890,¹³ and the beginning of the flow of legislative authority toward the executive and administrative branches. The ultimate judicial doctrine seeking to cope with this trend, with reference to the administrative regulatory process, came to be expressed in the “intelligible standard” by which the legitimacy of agency authority could be tested.¹⁴ An analogous doctrine with respect to executive authority has not yet been developed, although the judicial and po-

5. *Id.* at 199.

6. *Id.* at 200.

7. THE FEDERALIST NO. 44, at 306 (J. Cooke ed. 1961) (J. Madison).

8. THE FEDERALIST NO. 48, at 332 (J. Cooke ed. 1961) (J. Madison).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

10. *Id.* at 163.

11. Justice Charles F. Miller stated that “[n]o man in this country is so high that he is above the law,” and that all officers of government “are creatures of the law and are bound to obey it.” *United States v. Lee*, 106 U.S. 196, 220 (1882).

12. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

13. Act of July 2, 1890, ch. 647, 26 Stat. 209.

14. See, e.g., *American Power and Light Co. v. SEC*, 329 U.S. 90 (1946); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

litical struggles generated by Watergate may prove to have been a period of gestation. With the accelerated movement, particularly after the New Deal and World War II, toward concentration of power in the executive, the feasibility of an accountability doctrine as applied to the Presidency has become increasingly difficult to articulate at the same time that it has become increasingly obvious as a need. An age of centripetal economy combined with chronic emergency has seemed inexorably to require a capacity for flexible initiative in the presidential office. At the same time, the temptation to exploit this combination as a means of merging public, political, and personal interests under color of an unqualified executive privilege was what Watergate was all about.

The fact is that the authority of the executive branch, only generally stated in the Constitution itself, developed largely from the necessities of the case, the force of personality in the individual officeholder, and the periodic desuetude of Congress or the courts. A narrow constructionist like Thomas Jefferson could nonetheless stretch his own authority to the limit (in his view) to justify acquisition of the Louisiana Territory, while an aggressively independent executive like Andrew Jackson had no difficulty deciding upon his duty in challenging an agency created by Congress itself, for example, the Second Bank of the United States.¹⁵ Theodore Roosevelt's philosophy of presidential power was unequivocal: In the face of what "was imperatively necessary for the nation," and absent any explicit constitutional bar, "it was not only his right but his duty to do anything that the needs of the nation required."¹⁶ William Howard Taft, from his unique dual perspective first as President and later as Chief Justice, arrived by his own method of reasoning at a substantially similar position in finding power in the executive to remove appointees at discretion when he concluded that it was in the national interest.¹⁷

Yet the Court under such differing Chief Justices as Charles Evans Hughes, Fred M. Vinson, and Earl Warren came to conclusions consistently opposed to Taft's. The discretionary power of the executive, it was held in 1935,¹⁸ was circumscribed by the statutory conditions respecting the subject-matter to which the power was being applied—a position the Court enlarged upon in 1952.¹⁹ In 1958 it further declared that such power "is [not] impliedly conferred . . . simply be-

15. See generally D. MALONE, *THOMAS JEFFERSON AND HIS TIME* (1948); M. JAMES, *THE LIFE OF ANDREW JACKSON* (1938).

16. T. ROOSEVELT, *AUTOBIOGRAPHY* 357 (1925). An example of such action was the *coup d'etat* leading to the clearing of Central American obstacles to United States construction of the Panama Canal.

17. *Myers v. United States*, 272 U.S. 52 (1926).

18. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

cause Congress said nothing about it.”²⁰ The nearest to judicial consensus on non-reviewable presidential discretion has been with reference to the functions of the Chief Executive in the area of international affairs.²¹ In domestic affairs, with their ready commingling with political considerations, it has been another matter, as Watergate proved in an ultimate extreme. Faced with Richard Nixon’s definition of executive privilege as exclusively a matter of executive definition, Congress discerned, in Locke’s phrase, “disadvantage from it,” and took up the challenge.

Accountability: The British Principle

The constitutional furor of 1973-74 inspired much discussion of the desirability of adopting some features of the British constitutional system as a means of overcoming the prospective dilemma of the Nixon-Congress confrontation, namely, the non-removability of the President except by impeachment. The practical difficulties are at least twofold: Adoption of a procedure which in Great Britain is based upon constitutional “convention” (that is, generally accepted custom) and in the case of the written Constitution of the United States requires a written and ratified amendment; and identifying and selecting from among the details of British practice those which can efficaciously be translated into a formal amendment.

“Convention requires that all Ministers must sit in one or other of the Houses of Parliament, in order that their activities may be subject to Parliamentary supervision,” writes a leading authority on the British constitution.²² The supervision, in turn, most commonly takes the form of the parliamentary question directed to specific ministers and “[t]he asking of questions is now one of the most important functions of Parliament”²³ as it focuses public attention on matters of interest and serves as a check on executive action.²⁴

Questions are presumably directed to ministers as to “(i) public affairs with which they are officially connected, (ii) proceedings pending in Parliament, or (iii) matters of administration for which they

20. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

21. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

22. O. PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 267 (5th ed. 1973).

23. *Id.* at 170.

24. Professor Phillips states:

Questions are asked in order to focus attention on matters of topical interest either to individual constituents or to the public generally. Owing to the publicity given by the Press . . . the practice is indulged in more for the benefit of the electorate than of the House

Owing to the strictness of Party discipline in modern times, debates tend to run on Party lines. Question time therefore constitutes an important check on the activities of the Executive. It is then that the private members [i.e., back benchers or nonparty members] come into their own, for they can put forward the grievances of individual citizens who have suffered at the hands of Government Departments

Id. at 170-71.

are responsible."²⁵ Where accountability results in unfavorable parliamentary consensus, the individual may resign; where the collective responsibility or accountability of the Cabinet results in unfavorable parliamentary action, in the extreme instance of a vote of no confidence, the entire Government resigns.²⁶ Convention stipulates that the Prime Minister is to advise the Sovereign to dissolve Parliament as the means of effectuating this collective submission of the issue to the voters.²⁷

This recapitulation of the details of British procedure seems desirable as a background to the question of whether, and to what degree, British practice might be adaptable to the American constitutional process. The fundamental difference, of course, stems from the fact that separation of powers is a principle of American, and not of British, constitutional government.²⁸ In theory and practice, the executive agency has been encouraged to operate on its own initiative in the American system. British Cabinet officers appear before the Commons because, as a practical matter, they, as well as other ministers of government, are members of Parliament and therefore subject to its discipline; American Cabinet officers appear before committees of Congress as a matter of policy, but in the Nixon administration it was frequently stressed that executive independence, i.e., privilege, could either preclude their so appearing or limit their responses to questioning.

The crux of the matter is the fundamental difference between a form of government in which Parliament is supreme, and a form based upon separation of powers. British Cabinets are essentially the agents of Parliament; in American political practice, the executive and legislative branches are separately responsible to the electorate. The "administration" (Government) in Great Britain rests upon a party majority or a coalition in the House of Commons; in American political history, particularly of the mid-twentieth century, it has been common for one or both Houses of Congress to be controlled by the party in opposition to the President. A British Cabinet, at least in theory and to a large degree in practice, promulgates a program subject to

25. *Id.* at 169-70. Professor Phillips states:

The responsibility of Ministers . . . is both individual and collective. The individual responsibility of a Minister for the performance of his official duties is both legal and conventional: it is owed legally to the Sovereign, and also by convention to Parliament. "Responsible" here does not mean morally responsible or culpable, but accountable

Id. at 272. Also consider the Parliamentary surveillance of post-World War II nationalized industries: "The . . . chief opportunity for members to acquire information about the nationalized industries is by putting questions to Ministers in the House." *Id.* at 481.

26. *Id.* at 87.

27. *Id.* at 114.

28. *Id.* at 14-15, 28-30.

continual parliamentary review and approval; an American President and his administration, for the most part, translates congressional enactments into their own terms.

The Proposed Reuss Amendment

To adapt any part of the British constitutional process to the American problem of executive accountability would require a cataclysmic shift in both philosophy and law. Ministerial control through membership in the legislative branch is not possible; American constitutional prohibitions against dual officeholding are explicit,³⁰ and beyond the practical possibility of alteration by a single amendment. In other words, the use of legislative review of the proprieties of executive policy and action requires a recognized departure from the American version of separation of powers. The lessons of Watergate may logically point to this, but such a remedial step must be seen for what it actually would be.

The proposed no confidence amendment of Representative Reuss³¹ is the most conspicuous current effort to implement executive accountability by a modified version of the British constitutional process. A threshold observation is that it would require the type of departure from American constitutional theory and practice just mentioned.

Sections 1 and 2 of the amendment provide for a resolution of no confidence which, if adopted by the requisite majority, would require a plebiscitary type of special election in which both the offices of President and Vice President, and all seats in Congress, would be filled. Aside from the effectiveness or ineffectiveness of such a special election for purposes of an ultimate enforcement of accountability, it may be observed in passing that it would put the incoming executive and legislative branches in much the position of the first Congress. In terms of disruption of seniority (an advantage in the view of some), committee organization and business, and other considerations, the cure might prove worse than the disease.³²

Section 1 suggests the British accountability principle without the requirement of executive membership in the legislative branch. This formal avoidance of the dual officeholding prohibition, however, does not diminish the basic fact that separation of powers as an American

29. On matters in which judicial review may be had concerning executive/administrative acts beyond the scope of Parliament's statutory grant of authority (*ultra vires*), see *id.* at 514-19.

30. This prohibition is embodied in article I, section 6 of the United States Constitution. Most state constitutions have a separate article on distribution of powers and a specific prohibition of the holding of an office in one department while an officeholder in another. See also NATIONAL MUN. LEAGUE, MODEL STATE CONSTITUTION (6th rev. ed. 1971).

31. H.J. Res. 1111, 93d Cong., 2d Sess. (1974).

32. The British system permits such a monolithic party process largely because of the virtually autonomous functioning of continuing government activity under the civil service. O. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 16 (5th ed. 1973).

constitutional principle has been drastically qualified, if not abrogated, by the concept of congressional review and ratification of executive action. There is, arguably, a safeguard in the requirement of a three-fifths majority vote for adoption of a no confidence resolution, as distinguished from the simple majority in Parliament; but this raises the even more fundamental problem of the difference from the parliamentary system of a government based upon a party organization of the House of Commons.

The no confidence principle in the British practice is an integral part of the policy of party control of the legislature. It is based on the premise that the Government is the creation of the party in control, and hence the responsibility of that party. Defeat of the Government requires the breaking of the controlling majority's solidarity.³³ Implementing the no confidence principle may result in either the formation of a new Government acceptable to the existing majority, or the dissolution of Parliament in order to seek a more definitive majority. Section 2 of the Reuss proposal assumes that the whole question of Congress' action on a no confidence resolution should be submitted to the electorate, but the procedure lacks the logic of the policy of parliamentary dissolution, which is a means of seeking a firmer legislative foundation upon which an executive program may be erected.³⁴

In theory, at least, the proposed amendment is one way of effectuating executive accountability. Section 1 would establish a means of initiating a process of terminating a presidential incumbency through a vote of three-fifths, which is more than the simple majority of parliamentary procedure and less than the two-thirds of the American impeachment procedure. Section 2 would submit the whole question of congressional action and presidential continuity to the electorate. This procedure might be warranted, not on any analogy to British constitutional practice, but on the simple pragmatic proposition that if a President were returned to office by such a plebiscite, the majority which sought to remove him should not be. One may conjecture on an endless variety of combinations of political circumstances which would breed in such a culture bed; and it is submitted that the whole process is cumbersome and potentially mischievous, particularly when there would appear to be alternatives already at hand.

33. Professor Phillips points out that a "majority" government has not been defeated in Commons on a matter of substance in this century; defeat on a matter of policy or motion of confidence would lead promptly to dissolution, unless a "minority" or coalition government undertakes to form a new government. *Id.* at 26.

34. The dissolution of Parliament may be at the initiative of the Government itself in an effort to convert itself from a "minority" to a "majority" government, as in the British elections of October, 1974.

Uses of the Twenty-fifth Amendment

Galvanized by the assassination of John F. Kennedy in 1963, along with the succession of Lyndon B. Johnson and his known history of heart trouble, the problem of presidential succession is addressed by the Congress in the twenty-fifth amendment. Section 1 of this amendment, as finally adopted, reiterates and clarifies the succession of a Vice President to the Presidency.³⁵ More importantly, section 2 provides for the filling of the office of Vice President when succession to the Presidency occurs, thus taking from Congress the primary responsibility for providing more than contingency steps in succession.³⁶ Sections 1 and 2, in other words, are intended to dispose of the matter of succession, and sections 3 and 4 are focused upon the matter of disability.³⁷

Although article II of the Constitution had originally provided for both of these matters to some degree,³⁸ the twenty-fifth amendment was generally endorsed as a desirable restatement of the subject in more appropriate contemporary context.³⁹ The uniform tenor of professional discussion, congressional hearings and debate, and probably general public understanding, was that this amendment sought to deal with instances of physical or mental inability of the President to discharge the duties of his office. It is safe to say, further, that few persons seriously anticipated the circumstances under which sections 1 and 2 of the amendment would actually be applied in the twelve-month sequence of Spiro Agnew's resignation, Gerald Ford's nomination to fill Agnew's office, Nixon's resignation and Ford's succession, followed by Nelson Rockefeller's nomination to succeed Ford as Vice President.

It is suggested that the remarkable events of 1973-74 have broadened the reach of the twenty-fifth amendment with respect to sections 1 and 2, and thus invite a broadening of the reach of section 3 and par-

35. John Tyler, upon succeeding William Henry Harrison in 1841, raised a question of whether he had legally become President in his own right or had simply become an Acting President. J. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 92 (1965); Longaker, *Presidential Continuity: The Twenty-Fifth Amendment*, 13 U.C.L.A. L. REV. 532, 535 (1966).

36. Somewhat ironically, as historical perspective now suggests, Senator Sam Ervin stated in debate on provisions of section 2 of the amendment, when it was being considered by Congress, that the filling of a Vice Presidency should be by constitutional provision, lest "power-hungry men in Congress . . . take charge of the Presidency." 111 CONG. REC. 3269 (1965). See also 3 U.S.C. § 19 (1970).

37. Cf. S. REP. NO. 66, 89th Cong., 1st Sess. (1965); H. REP. NO. 564, 89th Cong., 1st Sess. (1965).

38. See U.S. CONST. art. II, § 1, cl. 5.

39. See generally J. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1965). The author was a member of the American Bar Association's Committee on Presidential Disability and Succession. See also Longaker, *Presidential Continuity: The Twenty-Fifth Amendment*, 13 U.C.L.A. L. REV. 532 (1966) (excellent summary of historical developments and congressional considerations on the subject); Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 A.B.A.J. 915 (1965); Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173 (1965).

ticularly section 4.⁴⁰

In the final weeks of the Nixon administration, it was speculated on several occasions that the President could or should indeed avail himself of this provision, permitting Ford to become Acting President pending the outcome of the impeachment action.⁴¹ Such speculation assumed, at the outset, that the concept of disability was not in fact limited to physical or mental condition, an assumption which manifestly is bolstered by the general language of the constitutional clause as well as the established meaning of the concept in law. Disability, according to English common law usage, is the absence of legal ability to do certain acts or enjoy certain rights; it may be either general or special, personal or absolute.⁴² American courts have generally accepted the English definition, while adding a specific recognition that disability may be either physical or civil.⁴³

Congress has not thus far undertaken to enact implementing legislation for section 4, clause 1 of the twenty-fifth amendment, other than certain routine amplifications of 3 U.S.C. § 19 already noted.⁴⁴ With the object lesson of Watergate now indelibly inscribed in modern constitutional history, the same considerations which have generated the proposed Reuss amendment may well, if not better, be directed to a further amending of the United States Code section to accomplish the basic objective: fashioning a practical means for calling the executive to account in extraordinary circumstances which may now, in the light of experience, be regarded as potentially recurrent.

An implementing statute, for example, 3 U.S.C. § 19, could well accomplish the objective of accountability by establishing a disability and discipline commission quite analogous to the judicial commissions of this type now operating in various states.⁴⁵ Such a statute might include a section on the composition and powers of "such . . . body as Congress may by law provide,"⁴⁶ a definition of inability as physical or legal disability,⁴⁷ general or specific steps of procedure to be

40. The relevant portion of section 4 is the opening provision:

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

U.S. CONST. amend. XXV, § 4, cl. 1 (emphasis added).

41. Cf. Comments of former Justice Abe Fortas on presidential powers and proprieties. *N.Y. Times*, July 28, 1974, § 4, at 17, col. 3.

42. W. JOWITT, *DICTIONARY OF ENGLISH LAW* 633-34 (1959).

43. *BLACK'S LAW DICTIONARY* 548 (rev. 4th ed. 1968).

44. See note 36 *supra*.

45. See, e.g., CAL. GOV'T CODE §§ 68701-05, 68725-26, 68750-55 (1968); VA. CODE ANN. §§ 2.1-37.1 to 2.1-37.18 (1950).

46. U.S. CONST. amend. XXV, § 4, cl. 2.

47. Cf. notes 42 & 43 *supra*.

followed by this body when called upon to perform, and provisions for implementing clause 2 of section 4 of the twenty-fifth amendment, which concerns the procedures for granting or denying the President's declaration that the disability no longer exists.⁴⁸

The Appendix to this article contains a rudimentary draft of a statute which, as amended and refined, would provide the machinery for an inquiry which would apply sections 3 and 4 of the twenty-fifth amendment to the accountability principle. It may be objected that such a statute, rather than drawing upon British constitutional experience, looks back to the functions of the tribunes of the Roman republic. If so, perhaps this is an asset rather than a defect; the quest today, indeed, is for Gracchi. Or, to continue the Latinisms, the quest is for those who at last can respond to the law's age-old question, *quis custodiet custodes?*

48. This clause provides:

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of *such other body as Congress may by law provide*, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. Constr. amend. XXV, § 4, cl. 2 (emphasis added).

APPENDIX

Draft Statute for a Commission on Presidential Disability

Section 1. Whenever a three-fourths majority of both Houses of Congress shall by recorded vote determine, the President or President pro tempore of the Senate and the Speaker of the House of Representatives shall convene a fact-finding body to be known as the Commission on Presidential Disability. The commission shall be composed as follows:

The Vice President of the United States, the Chief Justice of the United States, and the majority and minority leaders of the Senate and House of Representatives shall meet at the call of the Vice President and elect four additional public members, one each to be chosen from lists of three nominations presented by the respective majority and minority leaders. The ten members of the commission thus chosen shall then elect, by majority vote, three other public members as nominated by members of the commission already designated or elected. These thirteen persons shall constitute the commission, at all meetings of which the Vice President shall preside, and in his absence the Chief Justice shall preside.

The commission, pursuant to the provisions of this act, shall meet within ___ days to elect the four public members as hereinbefore provided, and within ___ days thereafter to elect the remaining public members as hereinbefore provided. Within ___ days thereafter it shall prepare its rules of procedure as may be deemed necessary to implement the provisions of section 3 of this act, and within ___ days thereafter begin its inquiry into the question of Presidential disability.

The Congress shall provide the necessary funds for the use of the commission in the discharge of its functions, including the employment of clerical and professional staff, travel expenses of witnesses appearing before the commission, and publication and distribution of its hearings and reports.

Section 2. For purposes of this act, the term "disability" shall be defined as either (a) the physical, mental or emotional incapacity of the President to discharge the powers and duties of his office or (b) the legal incapacity of the President to discharge the same by virtue of allegations of malfeasance, misfeasance or nonfeasance in respect of the powers and duties of his office as provided by the Constitution of the United States and the laws of the United States enacted in pursuance thereof.

Section 3. In the case of alleged physical, mental or emotional incapacity of the President, the commission shall forthwith engage a

panel of competent and expert professional persons, selected with the advice of the Surgeon General of the United States and representatives of the governing boards of the National Institutes of Health, to examine the President and to submit a comprehensive report of their findings to the commission, for transmission to both Houses of the Congress together with the recommendations of the commission.

Section 4. In the case of alleged legal incapacity as defined in part (b) of section 2 of this act, the commission shall undertake its inquiry in accordance with its rules of procedure as provided in section 1 of this act, and for the purposes of its inquiry it shall have the following powers:

(a) In the conduct of its inquiry and its formal proceedings, the commission may (i) administer oaths; (ii) order and otherwise provide for the inspection of books and records; and (iii) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts and documents in any form, and testimony relevant to its inquiry. The United States District Court for the District of Columbia shall have jurisdiction to compel enforcement of the subpoenas of the commission as may be necessary.

(b) In the conduct of its inquiry the commission may order the deposition of a person residing within or without the United States to be taken in such form and subject to such limitations as may be prescribed in the order. A subpoena for such deposition shall be issued by the commission and shall be enforceable in the United States District Court in the district where it shall be served.

(c) In the event that there be drawn into question the relevance of certain records, papers or documents of any form, by reason of their confidentiality or sensitivity in matters of public welfare and interest, the particular records, papers or documents shall be examined by the Chief Justice of the United States and his decision as to relevance shall be final.

The commission shall undertake its inquiry into Presidential disability with all deliberate expedition consonant with comprehensive and objective determination of the facts in the case.

Section 5. Upon the completion of its inquiry the commission shall prepare a report on its findings and recommendations, and shall submit this report to the President pro tempore of the Senate and the Speaker of the House of Representatives. The report shall be a declaration that the President is either able or unable to discharge the powers and duties of his office, and shall include supporting statements or documents produced in the course of the procedure set out in either sections 3 or 4 of this act.

If the declaration of the commission be that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Section 6. In the event of a finding of disability in terms of section

3 of the act, the Congress shall then proceed forthwith to consider the further responsibility of the commission in reporting on the periodic evaluation of the condition of the President by competent and expert professional persons as provided in section 3. In the event that the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, the commission shall meet and within four days of receipt of the President's declaration by the President pro tempore of the Senate and the Speaker of the House of Representatives shall submit its written declaration that the President is either able or unable to discharge the powers and duties of his office. If the declaration be that the disability of the President continues, Congress, within twenty-one days after receipt of this declaration, or, if not in session, within twenty-one days after it is required to assemble, shall determine by two-thirds vote of both Houses whether the President is able or unable to discharge the powers and duties of his office, and if the vote determines the continued inability of the President to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President and the commission shall continue to report on the periodic evaluation of the condition of the President as aforesaid.

Section 7. In the event of a finding of disability in terms of section 4 of this act, the Congress shall then proceed to consider the appropriate action to be taken. In the deliberations of any committee of either House of Congress on this question, all papers, records and documents of any form received by the commission shall be admissible into the record of the said committee, and the presiding officer of the commission shall be subject to call of the committee to testify on the commission's report.

If it be the sense of the Congress that the legal disability of the President warrants impeachment, the Committee on the Judiciary of the House of Representatives shall proceed to draft articles of impeachment and, if adopted by a majority of the full House, shall be presented to the Senate for a trial on the same. In the event of a two-thirds vote of the Senate for any such article, the President shall be removed from office and the Vice President shall become President.

If it be the sense of the Congress that the legal disability of the President consists of censurable conduct, each House shall proceed to vote on the question of censure. In the event of a failure of the Senate to vote by a two-thirds majority for any article of impeachment, or upon the recordation of the vote of each House of Congress on the question of censure (whether affirmative or negative), the legal disability of the President shall be declared terminated and he shall at once resume the powers and duties of his office.