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## From Failing Hands. By John D. Feerick

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## BOOK REVIEWS

FROM FAILING HANDS. By JOHN D. FEERICK. New York: Fordham University Press. 1965. Pp. 368. \$6.95.

*From Failing Hands*, aptly provocative in its title, and scholarly and entertaining throughout its several hundred pages, presents the drama, the history, and the legal and political problems involved in presidential succession in the United States.

This book by Mr. Feerick<sup>1</sup> could scarcely be more timely. Coming off the press in early 1965, it antedated by several months the passage of a proposed constitutional amendment<sup>2</sup> on presidential inability and vice presidential vacancy by the 89th Congress of the United States. It should serve as a stirring and authoritative source of information and analysis to state legislators and private citizens during the ensuing ratification processes and the public debates in the states of the Union.

Well known even to school children is the fact that throughout the history of the United States executive power has passed bloodlessly<sup>3</sup> and almost instantaneously to the vice president upon the death of a president. Yet, how many people know that the framers of our Constitution probably intended a vice president to become only an "Acting President" when a president died in office? John Tyler in 1841 upon the death of William Henry Harrison established the precedent that a vice president succeeds as "President" to such an unexpired term.

Nevertheless, the Tyler decision to become "President," based on an interpretation of article II, section 1, clause 5<sup>4</sup> of the Constitution, would doubtless have horrified the "Committee on Style" of the Constitutional Convention. This "Committee," however, certainly

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<sup>1</sup> A member of the Advisory Committee of the American Bar Association's Special Committee on Presidential Inability and Vice-Presidential Succession.

<sup>2</sup> CONG. REC. S. J. Res. 1, 89th Cong., 1st Sess., III CONG. REC. 15028 (1965) (proposed 25th Amendment).

<sup>3</sup> Thus avoiding "the intestine shock, and furious close of civil butchery" Shakespeare, *Henry IV*, Part One, Act 1, Scene 1.

<sup>4</sup> "In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

facilitated Tyler's interpretation by an ambiguous condensation of two separate sections into one (pp. 48-51).

Certainly incalculable good has flowed from the prompt assumption by vice presidents of both the offices *and* the powers and duties of the eight presidents who have died in office (App. A). Several times a president has died when major crises,<sup>5</sup> national or international, have faced the nation. An executive, possessed of only temporary authority and disturbed by the uncertainties and vagaries of some sort of impromptu special presidential election, would need to be superhuman to make wise decisions.

Mr. Feerick, in his introduction, sketches the dramatic events in Dallas on November 22, 1963. The assassination of President Kennedy, the swearing-in of President Johnson, and the competent, thorough steps taken by the new chief executive are all vividly portrayed. The effective passing of the baton of leadership emphasized both the practical value of the Tyler tradition and the wisdom of President Kennedy's program of sharing executive department problems with Vice President Johnson. Not by "potent art"<sup>6</sup> but by knowledgeable, prearranged study of domestic and international problems can our vice presidents ably replace in this atomic age a president who dies in office.

Thus, the perpetuation of the Tyler precedent has enabled our executive department to function well. But suppose a president is only disabled, mentally or physically, or both? There exists no clear constitutional provision for temporarily transferring executive power to the vice president when the president is unable to carry out his duties. Article II, section 1, clause 5<sup>7</sup> of the Constitution exacts from the vice president the same obligations when the president dies as when he is unable to discharge the powers and duties of his office. Historically, vice presidents have been loath to step in and act for a disabled president; they have not wished to be usurpers. Furthermore, by acting, they possibly would be permanently depriving the president of his office even after the disability no longer existed.

Chapter 9 of Mr. Feerick's book discusses at great length the first case of presidential inability. President Garfield, shot four months

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<sup>5</sup> Witness President Truman's problem in April, 1945 with the nation engaged in a global war, and the cold war matters requiring President Johnson's decisions in November, 1963.

<sup>6</sup> Shakespeare, *The Tempest*, Act V, Scene 1.

<sup>7</sup> See note 4 *supra*.

after his inauguration by Charles Guiteau, hovered between life and death for almost three months. No real executive duties were performed by President Garfield between July 2, 1881, and his death on September 19 of that year. Chester A. Arthur, then vice president, refused to become acting president, even though as time dragged on Garfield's entire cabinet requested him to do so.

History is replete with incidents involving the replacement, usurpation, or overthrow of crowned heads, but in our democracy every vice president confronted with a deteriorating executive department, directly caused by presidential inability, has refused to step into the breach. At President Eisenhower's request, at the very beginning of his first term, Vice President Nixon had an expanded role in executive matters, but he "walked on eggs" during President Eisenhower's convalescence following a heart attack in 1955 (pp. 221-23).

In 1958 President Eisenhower developed a written agreement covering any future disability he might have (p. 228). This agreement, essentially called for the President to declare, if he were able, his own disability to perform the powers and duties of his office. If unable to so communicate, then the Vice President with such consultations as he deemed desirable would act as president until the inability had ended. Finally, the President would decide when he would resume his duties and powers.

Substantially this same written agreement was adopted by President Kennedy and Vice President Johnson and later by President Johnson and Vice President Humphrey (pp. 228-29). Such an agreement does not, of course, have the force of law; furthermore, it could be countermanded at any time by a president who might become suspicious of the motives and good intentions of the vice president.

As an analogous example, President Wilson was largely unable to perform the duties of his office during the last year and a half of his second term. Vice President Marshall, despite many suggestions from the Cabinet and others that he act as president, firmly refused to do so. With serious domestic and international problems needing solution, Secretary of State Lansing frequently called together the Cabinet for conferences and discussions. Eventually President Wilson demanded Secretary Lansing's resignation for "assumption of Presidential authority" (p. 177). Whether or not this was the real motive for the request is not too clear. At any rate, it shows the potentially ephemeral nature of a written agreement of the type developed by

President Eisenhower, especially if the incumbent president should be impaired in judgment by virtue of his inability or for other reasons.

Mr. Feerick discusses (pp. 248-57) the pros and cons of methods for determining the inability of the president. Separation of powers, power politics, governmental cliques are all involved. The American Bar Association's "Conference Consensus" (App. D) represents a major non-political solution of the problem, a solution substantially embodied in the proposed 25th amendment.<sup>8</sup>

Another related problem, discussed in detail in chapter 20, involves the need for, and the method of, filling the office of vice president when that official becomes president, dies, resigns, or otherwise creates a vacancy. The nation for over twenty per cent of its existence (p. 258) has been without a vice president. Sixteen vice presidents (App. A) have not completed their terms; seven of these vacancies existed for more than three years. The Constitution has no provision for this contingency; article II, section 1, clause 5 authorizes Congress to "declare what Officer shall then act as President" when both the president *and* the vice president are unable to be the chief executive.

Perhaps in the eighteen hundreds the nation could sputter along without a vice president. Today, a vice president's embryonic executive role looms highly important. The high stakes being played in international politics demand a named, knowledgeable substitute always ready on an instant to play a dead or disabled president's hand. Sharp debates occurred in Congress prior to July 6, 1965,<sup>9</sup> as to how, by whom, and from what ranks a new vice president would be designated whenever a vice presidential vacancy occurred. Of major importance, however, is the recognition of the problem and the establishment of constitutional ways to settle it.

Finally, Mr. Feerick's book contains much more than can adequately be discussed in a book review. He lists a dozen pages of select bibliographical material; his footnotes are legion; his discussion of succession provisions of American colonies, states of the Union, and modern foreign nations is scholarly and interesting. He remains ob-

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<sup>8</sup> Of interest is the fact that the Chairman of the American Bar Association's Special Committee on Presidential Inability and Vice Presidential Vacancy is Herbert Brownell, the Attorney General during President Eisenhower's inability in 1955.

<sup>9</sup> The date of the passage of the proposed 25th amendment. Twenty states had ratified the proposed amendment as of February 8, 1966.

jective throughout the book by presenting the arguments for and against the issues and problems inherent in the subject matter of his book.

*From Failing Hands* is fascinating. It is filled with anecdotes. It moves. Here and there it achieves a sort of "Who-Done-It" urgency. I found that I preferred to read it again and again rather than take the time to write about it.

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