When No President is Elected

During the recent campaign, Albert E. Pillsbury, ex-attorney general of Massachusetts, wrote in The Independent the following: After the makeshift electoral commission of 1877 had cast the disputed presidency in favor of Hayes, an eminent scholar and publicist, referring to the fact that the constitution makes no provision in certain contingencies for succession to the presidency, said: "The methods of the presidential election and succession are now the only points in the constitution which can seriously threaten the perpetuity of the union; in them, if anywhere, lie concealed the germs of disintegration and destruction."

Events are impending which may again put a serious strain upon this historical weakest point in our frame of government. Various writers in the public press have called attention to the position of the political parties in the two houses of congress, especially in the house of representatives, in view of the fact that if neither of the three presidential candidates secures a majority of all the electoral votes, the election of a president will devolve upon the house and of a vice president upon the senate. But none of them, so far as I have observed, has traced or perceived all the consequences which may follow from the present situation, without precedent in our political history, nor disclosed the most dramatic and disturbing of its features. There can be no question but that it contains the seeds of possible mischief, and it ought to be fully understood, especially by congress, which alone has power to deal with it, while actual danger is yet afar off.

By the electoral count act of Febuary 3, 1887, 24 Statutes at Large 373, the electors are required to cast their votes on the second Monday of January following the election, and the two houses of congress are required to meet and count the electoral votes on the second Wednesday in February thereafter. If it appears that neither candidate for president has received a majority of all the electoral votes, Amendment XII of the constitution, which arose out of the Jefferson-Burr episode of 1801 and was substituted for the original electoral scheme of Article II, section 1, requires the house of representatives to "choose immediately, by ballot, a president." If the same failure of choice of vice-president by the electors appears, the amendment prescribes that "the senate shall choose the vice president," though without the injunction that it shall be done "immediately." The person so chosen by the house, if any, is president of the United States as completely as though chosen by the electors. In default of an election of president, the person chosen vice president by the senate, if any, "shall act as president," as in the case of any vacancy otherwise occurring.

It is now familiar that in electing a president the house of representatives votes by states, each state delegation having one vote, the choice being restricted to the three candidates having the highest number of electoral votes, and a majority of all the states being necessary to a choice. Different and conflicting statements have been made of the party alignment of both the house and the senate. In what is perhaps the most elaborate discussion of the subject, by the editor of the North American Review in the September number, it is assumed that the delegations of Maine, Nebraska, New Mexico and Rhode Island are evenly divided between republicans and democrats, so that they might be unable to vote, and that of the remaining forty-four states, twenty-two delegations are republican and twenty-two are democratic. According to late information, which ought to be authoritative, this classification is correct. It is, therefore, quite within the range of possibility, however unlikely it may be to occur, that neither candidate will be able to secure the votes of the necessary twenty-five states, and that the house of representatives will fail to make choice of a president if that duty devolves upon it.

If neither presidential candidate secures a majority of the electoral votes, it is probable that each candidate for the vice presidency also will be left without a majority, whereupon the senate is to elect a vice president. But here the senators vote by the head, their choice being restricted to the two candidates having the highest number of electoral votes. The votes of forty-nine senators, being a majority of the whole senate, are necessary to a choice. The political classification of the senate is sufficiently uncertain to make the result in that body at least a subject of interesting speculation. It is understood that there are nominally fifty republicans and forty-four democrats, with two present vacancies, in Illinois and Colorado respectively, which may be filled early in the ensuing year by the incoming legislatures of these states.

At this point appears the most remarkable feature of the situation. In the public discussion of this subject it seems, so far as I have observed, to be universally assumed that in event of the failure of the house to elect a president and of the senate to elect a vice president, the presidential succession act of January 19, 1886, 24 Statutes at Large 1, comes into operation and that the secretary of state, or if there be none, the secretary of war, and so down through the first seven cabinet officers in the order of their historical creation, would succeed as acting president to the powers of that office. This is a mistaken assumption. This act provides for the succession to the powers of the presidency only "in case of removal, death, resignation, or inability of both the president and vice president." The event which we are contemplating is neither removal, death, resignation nor inability, but a vacancy by failure to elect. The term of office of the president and vice president is limited by the constitution to four years, and runs from the fourth day of March, in virtue of the fact that the congress of the old confederacy fixed that day for the first inauguration of President Washington, whereupon it was adopted into the law of 1792, which is still in force (Revised Statutes U. S., Section 152), as the beginning of the term. It follows from the statutory beginning of the term at the fourth day of March, and the constitutional limitation of it to four years, that neither president nor vice president can hold over or exercise any of the powers of his office after that day.

Accordingly, the actual situation is that in default of a choice of president at the polls and of an election of president by the house or of vice president by the senate, each office will become vacant on the fourth day of March, and no clause of the constitution nor any existing federal statute provides for the filling of either office. The executive power of the United States, except such minor parts of it as particular statutes have conferred upon the heads of departments or other administrative officers it is suspended and adrift, without any law providing for its exercise or for the choice of a person to exercise it.

The succession act of 1886 repealed the clauses of the act of 1792, which provided for the calling of a new election in such an event (Revised Statutes U. S., sections 147-150). prescribing that the cabinet officer succeeding to the powers of the presidency, if congress is not then in session, shall summon it to meet on twenty days' notice, leaving the situation to be dealt with by that body as best it may within such constitutional powers as it may have for the purpose. But as this act does not come into operation upon a vacancy by failure of election, there is no existing law for calling a new election or for summoning congress to provide for an election.

It can not be denied that this conjunction of events, though doubtless so remote as to be beyond the bounds of probability, would be highly interesting if it should actually occur. It is reasonable to believe, indeed in view of what we have lately seen and heard of the third term claimant it would be difficult to believe anything else, that if and whenever it should occur he will be crying aloud that he has been cheated of the election, and that a large number of people will believe him. It needs the addition of but one element to set the stage and furnish all the paraphernalia of a revolution, and that element is supplied by the circumstance that the original creation and bosom companion of one candidate is in command of the army.

We are accustomed to think that revolutions are made of blood and gunpowder. It is not so. The thing may be done, and has been done, without the firing of a shot. A revolution around the corner, as it were, while the people are not looking, might be regarded as impossible but for the fact that there are just such events in recorded history. We have long been in the habit of regarding ourselves as exempt from the calamities that afflict and sometimes destroy other nations. This is only the delusion of ignorance. What has happened to others may, under similar conditions, happen to us.

I do not think, however, that there is any occasion for excitement or the burning of red fire. There are several reasons for this conclusion. First, failure of election of a president, both at the polls and by the house of representatives, is highly improbable. In the most unfavorable view, a change of position by less than half a dozen representatives, perhaps by two or three, would enable the house to make an election. Still more unlikely does it appear that the senate would fail to make choice of a vice president. Neither is there at present any substantial reason for believing that the commander of the army would lend himself to an attempt to seize the presidency by force, nor that our army could be made the instrument of so desperate an enterprise. Finally, and of most importance, there is in my opinion a constitutional way out of such a difficulty, which may be and ought to be perfected in advance of the event.

The specific grants of particular powers to congress, in section 8 of article 1 of the constitution, are supplemented in the same section by a general power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof."

Omitting the words which are immaterial to the present purpose, this clause may properly be read as an express grant of authority to congress "to make all laws necessary and proper for carrying into execution all powers vested by this constitution in any officer of the United States." The event against which it is necessary to provide is the suspension of the powers of the president, through failure to choose at the proper time any person who may lawfully exercise them and through lack of any standing law authorizing their exercise by any person. This is plainly a case for the making of a necessary and proper law for carrying into execution the powers vested by the constitution in the president, which seems to be directly authorized by that clause of section 8 above quoted.

It is, so far as I know, unaccounted for and unaccountable that provision was not made in the succession act of 1880 against an emergency of this character, and others which might lead to the same result of putting the presidency in limbo. The actual purpose of that act seems to have been principally if not wholly partisan, though perhaps not more in the interest of one party than of another. The act of 1792, in force in 1886 as section 146 of the Revised Statutes, enacted under the authority of section 1 of article II of the constitution, which declares that "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," prescribed that in such event the president of the senate, or if none, the speaker of the house of representatives shall act as president until the disability is removed or a president elected. It was deemed anomalous and objectionable that the powers of the presidency should pass, in the middle of a presidential term, to an officer who may be and often has been of the political party opposed to the president, thus changing the political character of the administration without any action of the people. The succession act of 1886 removed this objection by repealing the succession of the president of the senate and speaker of the house and substituting succession by the cabinet officers, and it accomplished nothing else.

Public attention has been sharply called on more than one occasion to this dangerous gap in the fundamental law especially in the election of 1801, which exposed the weakness and led to the abolition of the original electoral scheme of the constitution, again in connection with the election of John Quincy Adams by the house of representatives in 1824, and in the Hayes-Tilden controversy of 1876. The hand-to-mouth policy of our national legislature in providing for the day only what is sufficient unto the evil thereof, leaving this menace perpetually overhanging the government, has been the subject of severe and deserved criticism by political and historical writers at home and abroad, and goes far to justify the opinion that the American congress, in view of the vast scope and magnitude of the interests which it has in charge, its manifold sins of omission no less than of commission, and its general incapacity to rise to the level of statesmanship on the most important occasions, is the most incompetent legislative body in the world.