concurrent vote of the two Houses. Such a concurrent vote was never obtained in any case, so that the decisions of the tribunal upon the disputed certificates were always unreversed. The result was that all of the disputes were decided by a vote of eight to seven in favor of Hayes and he was declared elected.

The constitutionality of the act thus passed by Congress was doubted by many able men, but it settled without convulsion, though not without strong dissent from its conclusions, a controversy which threatened the peace of the country and the integrity of the Union. A later act of Congress has been passed by which such contests may be decided without the intervention of any other tribunals than the concurrent act of the two Houses. One constitutional question may be deemed settled by the act creating the Electoral Commission and the late act just referred to, and that is that the claim of power asserted for the President of the Senate, to which reference has already been made, is without any foundation, and that the authority to count and to decide upon the count is vested by the Constitution in the two Houses of Congress.[1]

§ 344. What number of electoral votes is requisite to the election of a President? Under the original Constitution we have seen that no person was designated as President or Vice-President. Two persons are voted for, and "the person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed." The Constitution did not intend that any one should be President who could not command a majority

[1] The writer refers the reader on this historic subject to the debates in both Houses of Congress in the session of 1876–77; the report of the proceedings of the Electoral Commission, Congressional Record of the 44th Congress, Second Session, volume 5, pt. 4; the speech of Senator Conkling on the Electoral Commission Bill, and to the speech of the author on January 23, 1877, in the House of Representatives, in which will be found a full collation of the precedents, etc., connected with this question, and also the act of Congress. See also House Misc. Docs., No. 13, 2d Sess. 44th Cong., on counting the electoral votes.

of all of the electors appointed, because if a plurality of votes, merely, would make a President, this might be but a small proportion of the whole vote. If two have a majority of all, and have equal votes, the House of Representatives must choose between them, as was done in 1800, when Mr. Jefferson was elected. And now the clause goes on: "and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President."

How shall the House of Representatives elect? The clause provides for this: "But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all of the States shall be necessary to a choice." In the contingency of non-election of the President by the colleges, this election by the House of Representatives has several peculiarities. (*a*) States shall vote, the representation from each State having one and only one vote. (*b*) A quorum to elect must have two-thirds of the States represented by one or more members. (*c*) Of this quorum a majority of all the States is needful for a choice.

In reference to the Vice-President this provision is made: "In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President." It will be seen by this that the Vice-President may be elected when he has the next highest vote to him who is chosen President, although they may not be a majority of all of the electors appointed. This provision caused John Adams to be elected the first Vice-President by a minority of electoral votes. It will be further seen that where there are two who have the next highest vote, but equal votes, then the Senate shall choose the Vice-President from them by ballot.

The twelfth amendment of the Constitution changed in many respects the provisions already referred to in the original Constitution. After providing, as already stated, for a separate vote by the electors for President and Vice-President, and for transmitting and opening these certificates of these votes, and then counting the votes, and that the person having a majority of all of the electors appointed shall be President, the amendment further provides: "and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President." And then follows the same provision as in the original: "But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice." An important provision follows to meet the contingency which had been threatened in the election of 1800, when the House of Representatives failed to choose a President. It is in these words: "And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President." A change is then made in the election of a Vice-President, among those voted for, to fill that office, when the votes are equal or when no one candidate has a majority of the whole number of electors appointed. The provision is as follows: "The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice." This provision prevents any man from being Vice-President by the vote of the electoral colleges unless he has a majority of all of the electoral vote. Some remarks may be added on this extraordinary method of election: First. The primary plan for election is by the electors of the several States, appointed as each by its legislature may prescribe, each State having an electoral force determined on the basis of its co-equality as to statehood and the numbers of its population. Second. A majority of electoral votes, not a plurality, is required to elect; this prevents a minority President as far as the colleges are concerned. Third. If the colleges cannot make this majority, then from the three highest candidates (in the original Constitution it was five) the House of Representatives must choose the President by the representation of each State casting one vote only for the State, and a majority of all of the States may elect the President regardless of their respective numbers. Such a President is chosen by a majority of States, which may contain a decided minority of numbers. Fourth. If the colleges choose no Vice-President, then from the two highest candidates the Senate must choose a Vice-President, who must be the choice of the majority of the body, *i. e.*, of the senators of co-equal States, but this majority of States in the Senate may contain a decided minority of numbers. The last clause of the twelfth amendment makes eligibility to the offices of President and Vice-President precisely the same.

It is obvious from this review of the clause that the Constitution contemplated the selection of a person for the Presidency who should combine a majority of all the electoral representatives of the States meeting, deliberating and choosing, by their separate, distinct and independent action. The value of the selection was expected to be assured by this independence of State action, and this was supposed to be the better assured by a later clause which provides that the date of voting by the electors was to be the same though all acted separately. This secured more distinctly the

action of both colleges from any possible influence from any and all others.

The change which circumstances have wrought in a century is certainly very marked. In effect the two or more great parties of the country, in general convention, decide upon the personality of the President and Vice-President, and the electoral colleges chosen as the representatives of these parties register the choice of the extra-constitutional conventions of these political parties. These conventions are composed of representatives in number corresponding to the numbers in the electoral college; but while analogous to the constitutional plan, in this it reversed all likeness by the union of all the representatives of the State in one body, and by counting Territories as well as States in the representation in the convention. Besides this, members of Congress and office-holders fill these conventions when no one of them could be constitutionally an elector. No wonder the choice now falls so often upon some unheard-of man, and does not always come to one of our most illustrious citizens, the cynosure of all eyes in every section of the Union. No wonder that one may be selected whose merits are only known to party managers.

When we read the words of Hamilton[1] and study the events of this later era we cannot esteem him a prophet, and yet can see his prophecy of the radical change of the constitutional method of election by the extra-constitutional methods of the political parties of the Union. He says: "This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and little arts of popularity may alone suffice to elevate a man to the first honors of a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."

[1] Federalist, No. LXVIII.

§ 345. It is very obvious that the practical operation of this scheme of election of the President is directly opposed to what was contemplated by the framers of the Constitution. Mr. Bryce has well said:[1] "In every American election there are two acts of choice, two periods of contest. The first is the selection of the candidate from within the party by the party; the other is the struggle between the parties for the place." This remark applies to all grades of political offices in the country.

The Constitution designed that a body of select men should choose a person that they esteemed fit for the Presidency. But a party convention of representatives from every State and Territory has done that for them, and public opinion compels them to obey its nomination. The electors were intended to nominate. In practice they merely confirm the nomination of an ultra-constitutional body, composed of material different from the electoral college of the Constitution. Second, the Constitution intended that not only the personal but the political principles of the President should be determined by the separate and independent judgment of the State college of electors, and the convention voted down a proposal that they should hold a general meeting and a union of the electors from all of the States.

The ultra-constitutional method in practice with the parties subordinates the separate colleges to the dictation of the party conventions, not only as to the *personnel*, but the political principles of the candidates. Third, it has come to pass that this ultra-constitutional body is made up of senators and representatives, of office-holders and office-seekers, whose great object is party success, from which they hope

[1] American Commonwealth, vol. 2, p. 142.

to realize the rewards in honors, emoluments and the spoils of victory which are foreshadowed by platforms providing for the collection and disbursement of enormous revenues. Fourth, this desideratum is only to be realized by dictating the unified sentiment of the party convention, in preference to their distinct duties, not only to the colleges of electors, but to all the senators and representatives of the States; thus centralizing the action of the government of the Union through the body which specially relates to the Presidential office, and subordinates all State and district action to its dominating influence. Fifth, the solidity of the vote in the large States in these party conventions, and through the electoral college in the election of President, is giving to the large States a potential influence in deciding the canvass and election of the President, which is unjust to the smaller States, enhancing the pretensions of public men in the large States, makes such men in the small States practically ineligible, and threatens to place a dominating force in the hands of a few large States who may by combination, dangerous to the Union and fatal to the liberties of the people, put the government in the hands of an oligarchy instead of the whole people of the country. If the present system is to be retained, it ought, at least, to be so amended as to divide the power of the large States, by making districts for the Presidential electors. This will break up the solidity of power of the large States; give representation to the minority in each, now easily captured for the election of one who can command a bare majority in a million of votes; will make money less potential, and the temptation to use it less strong; and will decentralize power by multiplying the nuclei of public opinion throughout the whole country.

These suggestions of dangers and their causes, and of changes which may avoid them, are made without expanding them into full exposition, but in the hope of availing something to check evil tendencies and to secure the desired objects of the Constitution.

§ 346. We proceed to the next clause, which leaves to Congress to determine the time of choosing electors, which is to be done as the legislature of a State may prescribe; and the day for the electors to give their votes, which day must be the same throughout the United States. This seems to allow Congress to fix a different time in the States for choosing electors, though the day they vote must be the same. The practice is to make both the same throughout the United States. It has become universal to appoint electors by the vote of the suffragans in the States, which amounts now to nearly fifteen millions.

§ 347. The next clause relates to eligibility to the office of President (the same rules applying to the Vice-President, as we have seen). He must either be a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution. This latter clause was intended to make eligible one who, though not a native, was a citizen at the date of the Constitution, if he had been fourteen years a resident of the United States. It made Hamilton eligible but not Gallatin. Thirty-five years of age is requisite to eligibility.

§ 348. The disability of the President, and what is to be done in case of it, is next considered. (*a*) The twelfth amendment provides when a President is not elected, in case the duty of election devolves on the House of Representatives, then the Vice-President shall act as President, as in the case of the death or the constitutional disability of the President. It is probable that in such case the Vice-President would take the office of President, as the Vice-President does in the other cases referred to, and not merely act as President. (*b*) The President may be removed from office on impeachment.[1] In case of such removal the office devolves upon the Vice-President; that is, he becomes President, and does not merely act as President. (*c*) In case of the death of the President, the Vice-President takes the

[1] Const. U. S., Art. I, sec. 3, clause 7.

office. It has never been discussed how and to whom the President shall resign. Perhaps, as the Houses of Congress confirm his title, they should receive notice of his resignation, and a record be made of it in the State Department,[1] where the President deposits the acts of Congress approved by him. Congress has declared it shall be in writing, subscribed and deposited in the State Department.

In case of "inability to discharge the powers and duties of the said office," the Vice-President shall take it. In case of "inability to discharge the powers and duties of the said office," as well as in case of removal, death and resignation of the President, the office devolves upon the Vice-President. This suggests several curious inquiries, as to what is such inability, and how is it to be ascertained. And if such disability be removed, will the office be restored to the President? No answer is furnished by the express words of the Constitution. A subsequent clause provides for the inability of both President and Vice-President, by authorizing Congress to provide by law to declare what officer shall act as President, and that such officer shall act "until the disability be removed, or a President shall be elected." In this clause the word "disability" is substituted for the word "inability," because the removal of the President by death or resignation cannot be a disability capable of being removed. Hence the word "disability" must have been used as synonymous with "inability." It is probable that the power to remove for inability by impeachment may furnish a method for deciding whether "disability" exists. Can any other mode be conceived. But for insanity as an inability, for example, this method would be clearly proper. Would judgment in such case be for permanent removal, if the insanity ceased? How would its cessation be determined?

It is obvious, unless some such judicial procedure be proper, there is no way in which the President can be elected and

[1] Acts Cong. March 1, 1892, ch. 11.

the Vice-President succeed him. One resort still remains to be considered. The co-efficient clause[1] authorizes Congress "to make all laws necessary and proper for carrying into execution . . . all other powers vested by this Constitution in any officer" of the United States. Congress can therefore by law provide for the mode in which, in case of inability of the President, the Vice-President shall succeed to the office as President.

The "inability" might be adjudicated by a court of the United States as a case arising under the Constitution, and in such manner the President might be removed and the Vice-President succeed to the office. The latter part of this clause provides against "the removal, death, resignation or inability, both of the President and Vice-President," etc., by providing for a law by Congress declaring what officer shall act as President or Vice-President, who shall so act until the disability be removed, or a President shall be elected. Congress in 1792[2] provided that the President *pro tem.* of the Senate should act as President, and if there were none, then the Speaker of the House of Representatives should act as President. By a late law this has been changed, and it would seem on good reason. Neither the President *pro tem.* of the Senate nor the Speaker of the House of Representatives is an officer of the United States. We have already seen that neither a senator nor representative in Congress is such officer.[3] The law of Congress could not deprive a State of either. While either acted as President, could the State elect another? If not, it would be deprived by law of its representation.

A late law of Congress provides for the Secretaries in certain order to act as President in such case. The office of President does not devolve on such officer as it does on the Vice-President, but *virtute officii* the Secretary "acts as President." The office is vacant, but its functions are performed by the officer designated by law. If such Secretary ceases to be such, he can no longer act as President. His holding

[1] Const. U. S., Art. I, sec. 8, clause 18.

[2] Ch. 8.

[3] *Ante*, § 199.

his office as Secretary is his title to act as President. The Constitution says that he is to so act until the disability be removed. How is it to be ascertained that the disability is removed? If it be removed, the Constitution contemplates the President's return to office. His temporary inability suspended his right to exercise his office; his restoration to ability revests his title to hold and exercise it. The language is, "until the disability be removed, or a President shall be elected." This alternative suggests that if the disability be temporary, the disabled President must be restored; if the disability be permanent, a President must be elected to fill out the term of office. All these contingencies are provided for in the power of Congress granted by the co-efficient clause above referred to. Congress has not fully exercised this important power, but may do so by a law to carry these clauses into effect.

§ **349.** The compensation of the President is provided for in the next clause. He "shall at stated times receive for his services a compensation." This is very precise. Congress must by law appropriate it, not as a gift, but as compensation for services rendered. Further, this compensation shall not be increased or diminished during the period for which he shall have been elected. Not increased, lest Congress may thus seek to influence the President, or lest he may secure it as a personal favor for official actions; nor diminished, that Congress may not thus constrain the Executive by menaces. Nor shall the President, within the period for which he is elected, "receive any other emolument from the United States or any of them." This precludes all extraneous money influence upon the official action of the President but his regular compensation, fixed before his term begins, and unchangeable during his term.[1]

§ **350.** The oath the President must take before entering upon the execution of his office is prescribed in the last clause of this section. In article VI, section 3, the oath prescribed

[1] Federalist, No. LXXIII.

for other officers requires them "to support this Constitution." The oath of the President is very specific and comprehensive: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States." This is a very emphatic obligation on the President by positive and negative action to keep the Constitution, in all of its integrity, secure from his own violation, and against that of all others in so far as his power can do so; to preserve from his own acts; to protect from outside influence, and to defend against all invasion.

Having thus considered the mode of election of President and Vice-President, one question remains. The term of office was made four years, with an intimation that re-eligibility should attach to these offices. It was clearly so intended; and the absence of limitations makes re-eligibility the fixed principle of the Constitution. And though the first President declined a third term, and the practice has conformed to his action so as almost to have become a settled principle in the public mind, there is nothing in the Constitution nor in the debates of the convention, nor in the *Federalist*, to make an election of a man to more than two terms inadmissible on constitutional grounds. Mr. Hamilton, in an able paper,[1] has stated the reasons for re-eligibility with great force, to which the reader is referred.

Powers and Duties of the President.

§ **351.** It has been already said, in accordance with the maxim of Baron Montesquieu, that the powers and duties of the President are executive, as contradistinguished from those which are legislative and judicial. This principle is well defined by the words of the first clause of this article: "The executive power shall be vested in a President of the United States of America." The qualified effect of this,

[1] Federalist, No. LXXII.

arising from the veto power, must, however, be noted. Let us consider these powers and duties in their order.

Article II, section 2, clause 1, is as follows: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States." This clause must be read with the clauses in the comprehensive section as to the powers of Congress.[1]

Congress declares war — that is a legislative power; though the Crown declares war in England, yet the power is in its legislature, and not in its executive. Such declaration changes the relations of nations to each other; puts the individuals of each into *quasi*-hostile relations; forbids commerce, and interferes with the life, liberty and property of the people; dispels peace and enacts war. The Constitution gave to the legislative department the sole power to do this tremendous thing, and did not entrust it to the "one-man power" of the President. It discriminated between the law which called forth a new status for the people in their international relations and the conduct of the war. Congress might legislate war, but it is incapable of executing. The executive, with unified will powers, though alone, can well direct the movements of armies and navies. The Crown in England is *generalissimo*. But, as in England, the raising of armies and navies and the money for their support and maintenance are in the hands of the Congress. We have, in considering the English Constitution, pointed out the value of this power secured to the Congress. The commander-in-chief is subordinate to Congress in all respects, and he cannot use his military power to the injury of the country, except with the concurrence and consent of Congress. Besides, he is made commander-in-chief of the militia when called into actual service. How are they to be called into actual service? By the fifteenth clause of the eighth section of article I, Congress has power "to provide for calling forth the militia to execute the laws

[1] Const. U. S., Art. I, sec. 8.

of the Union, suppress insurrections, and repel invasions." This is a provision under which the call may be made. The act of Congress of 1795 and other acts define the cases in which the call may be made by the President. As soon as called, under the act of Congress, the President commands and directs the militia. The implication of authority to regulate and govern the army and navy which might here result from the President being commander-in-chief is negatived by the express power given to Congress "to make rules for the government and regulation of the land and naval forces."[1] The execution of these rules is for the President, but the rules have the legislative character.

The use of the army and navy and of the militia when called for the purposes named above by acts of Congress devolves upon the President in the cases specifically designated in them. It is for Congress to prescribe the purpose of the call for the militia; and while the power of the President to take care that the laws be faithfully executed might seem to give the President power to do so by the use of the army and navy, it may be doubted whether it does not require the exercise by Congress of the all-embracing coefficient power to pass a law as necessary and proper to carry into execution the executive power, to take care that the laws are faithfully executed, by the use of the army and navy. During the war of 1812 it was doubted whether the President could delegate the command of the militia to another officer.[2] But President Washington gave the command of the militia to Governor Lee in 1794, to put down the Pennsylvania insurrection. The President may not, without authority of law, create a new military office and fill it in order to give the command of the militia to such officer.[3]

[1] Art. I, sec. 8, clause 14.

[2] 8 Mass. 548,— a letter from the Governor of Massachusetts to the Justices of the Supreme Judicial Court, and the answer thereto.

[3] Marshall's Life of Washington, ch. 8; Rawle on the Constitution, ch. 20.