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Staff of Senate Committee on the Judiciary, 84th Congress, Report on Presidential Inability

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REPORT
No. 1382

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

AUGUST 13, 1964.—Ordered to be printed

Mr. BAYH, from the Committee on the Judiciary, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. J. Res. 139]

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 139), proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, reports favorably thereon, with amendments, and recommends that the resolution, as amended, do pass.

AMENDMENTS

On page 1, line 7, following the word "States" strike the colon and add the following:

within seven years from the date of its submission by the Congress:

Strike all of SEC. 1, SEC. 2, SEC. 3, SEC. 4, SEC. 5, SEC. 6, and SEC. 7 and insert in lieu thereof the following:

Article —

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his 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.

SEC. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.

PURPOSE OF THE AMENDMENTS

To substitute perfecting language that was acquired by the reception of testimony from expert witnesses in the field of constitutional law and from discussion of the problem by members of the subcommittee.

PURPOSE

The purpose of the proposed Senate joint resolution is to provide for continuity in the office of the Chief Executive in the event that the President becomes unable to exercise the powers and duties of the Office, and further, to provide for the filling of vacancies in the Office of the Vice President whenever such vacancies occur.

STATEMENT

The constitutional provisions

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the Office of the Vice President. Article II, section 1, clause 5 reads as follows:

> In Case of the Removal of the President from Office, or at 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.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

> In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers of duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.
>
> The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

The inability clause and the Tyler precedent

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

> What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3–5, May 31–June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt,

Coolidge, Truman, and Lyndon Johnson all have become President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability, North American Review," vol. 133, p. 442 (1919)).

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice-President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5 of the Constitution which provides that:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of

Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417–446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232–235). The President's wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288–290; Hoover, "Forty-two Years in the White House," pp. 105–106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437–438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants of the President. It has been reported by a Presidential secretary of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443–444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444–445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

> 1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

President Kennedy entered into a similar agreement with Vice President Johnson as has President Johnson with Speaker John McCormack. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisons relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience

with the Constitution the inability clause remains an untested provision of uncertain application.

METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5 of the Constitution authorized Congress to provide by statute for the case where both the President ad Vice President are incapable of serving. By implication, Congress does not have the authority to legislate with regard to the situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18 gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Deputy Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii,

Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

Filling of vacancies in the Office of the President

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass.

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the office. Although much deliberation ensued regarding the official functions of the office, little thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect

was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

THE NEED FOR CHANGE

The death of President Kennedy and the accession of President Johnson has pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6 which states 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, and such officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties

and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4 provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers, including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22 can be, the President of the Senate.

One of the principal reasons for filling the Office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice-Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

ANALYSIS

Inability

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5 of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 139 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3, 4, and 5 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President. By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion and their possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most

familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted 4 to 3 that the President was fit and able to perform his Office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his Office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the Congress of his written declaration that no inability existed. However, should the Vice President and a majority of the heads of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress within 2 days. Once the declaration of the President stating no inability exists and the declaration of the Vice President and a majority of the heads of the executive departments stating that inability exists, have been transmitted to the Congress, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6 of the Constitution relating to impeachments.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

Vacancies

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person to be Vice President whenever a vacancy occurred in that Office. The nominee would take office as Vice President once he had been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy, there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the recent uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It concisely clarifies the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The Subcommittee on Constitutional Amendments approved this proposal after hearing testimony and receiving written statements from many distinguished students on the subject. The subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 139, with amendments, and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

INDIVIDUAL VIEWS OF MR. HRUSKA

The problem of Presidential inability and succession has long been neglected and ignored. It is for this reason that I welcome the opportunity to consider the joint resolution now presented to the Senate.

In the opinion of most legal scholars and writers who have given this problem careful study, the solution lies in a constitutional amendment. Considering the gravity of this issue and the ramifications of the solution, it is imperative that in any proposal advanced the paramount consitutional principle in our governmental framework is preserved. That is the doctrine of separation of powers.

One cannot predict the political crisis in which the Presidential powers may hang in balance. A review of the cases involving a disabled President reveals the anxiety and confusion which can prevail. It is also helpful to review the one case involving the impeachment clause of the Constitution. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers when Congress is called upon to consider where to place the mantle of the Presidential powers.

For these reasons our examination of proposed solutions should carefully weigh the wisdom of adopting a method which does not explicitly adhere to the principle of separation of powers. The exact procedure prescribed, if clear and direct, is not my concern. Nor am I wedded to any particular language. It is only the principle which pervades the Constitution which I strongly feel should be respected by any amendment.

With regard to Senate Joint Resolution 139, my preference would be to leave the matter of providing a method to subsequent legislation, so long as it is limited to a determination within the executive branch, and not lock in any specified plan in constitutional terms. It is therefore of considerable concern to me that Senate Joint Resolution 139 not only sets forth a particular method in an amendment but goes further to provide a procedure whereby Congress can be thrust into a controversy better left in the domain of the Executive.

ROMAN L. HRUSKA.

INDIVIDUAL VIEWS OF MR. KEATING

I heartily join in reporting favorably, with the amendments approved by the committee, this proposed constitutional amendment to the full Senate.

It is a great forward step, in my judgment, toward the final adoption of a workable solution of these twin problems, the problems of succession and inability which from the adoption of the Constitution have loomed as the most serious single threat to the stability and continuity of the American Presidency as an institution.

Yet much remains to be done. There is the task of shepherding this measure, or some version of it, through both Houses of the Congress by the required two-thirds vote in each; and then, for ratification by the States, through the required three-fourths of the State legislatures.

The process of amending the Constitution poses an additional dimension to the problem. It is not enough that we devise a solution which on its merits appears to be workable. More is required. The solution which we adopt here in the Senate must also be acceptable elsewhere. It must be acceptable to at least two-thirds of our colleagues in the House, many of whom have their own deeply held convictions, as evidenced in various bills and resolutions, as to how the problem should be handled. It must be acceptable also to as many members of 50 State legislatures as will make possible its approval in at least three-fourths of them. At bottom, of course, this means that the solution must be acceptable to the American people, who through their understanding of what needs to be done and their expression of confidence in what is being proposed, will ultimately decide the day in the Halls of Congress and in the State houses of the Nation.

It is not enough, therefore, that Senate Joint Resolution 139, as it is reported to the Senate, is a good solution and one that I myself can thoroughly and conscientiously support. What is involved, in addition, is the extent to which it will muster the support of others, so that these efforts will not be in vain. This is a weighty practical consideration. As many who have been concerned with these issues over the years have said, it is ever so much more important to reach an attainable solution than to strive for perfection at the considerable risk of bogging down in disagreement as to precise detail.

It is this reason, among others, which impels me to offer certain substitute language to this resolution which, if adopted, would in my judgment considerably enhance the chances of ultimate success as well as providing an equally workable and in some respects, superior plan.

These changes, which I shall describe and explain below, would leave unaffected in their entirety sections 1 and 2 of the proposed constitutional amendment. Both of these sections, one confirming the so-called Tyler precedent and extending it to cases of resignation and impeachment as well as death, the other providing for filling a vacancy in the Office of Vice President by Presidential nomination with confirmation by majority vote of both Houses of Congress, have my unqualified and wholehearted endorsement.

Sections 3, 4, and 5, on the other hand, which would enshrine quite detailed procedures on Presidential inability into the Constitution, give me serious pause. In my judgment, it would be preferable to simply provide by constitutional amendment that Congress shall have the authority to establish inability procedures by ordinary legislation. This would avoid freezing any particular method into the Constitution itself, make it easier to change the method if unforeseen defects are revealed by the actual operation of any congressionally prescribed plan, and most important, so simplify the amendment as to make it more readily understood and, hopefully, more likely of final congressional approval and ratification in the States.

I therefore intend to offer an amendment to Senate Joint Resolution 139, which would strike present sections 3, 4, and 5, and insert instead the following new sections 3, 4, and 5:

> SEC. 3. In case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed.
>
> SEC. 4. 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 be President, or in the case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in the case of inability, until the inability shall be earlier removed.
>
> SEC. 5. The Congress may prescribe by law the method by which the commencement and termination of any inability shall be determined.

These three sections which I am proposing to substitute are identical to the last three sentences of Senate Joint Resolution 35, sponsored by the late Senator Kefauver and myself. Senate Joint Resolution 35 had earlier been approved by the Subcommittee on Constitutional Amendments and at this moment is still pending on the agenda of the parent Judiciary Committee.

Section 3 as I propose to amend it would make it clear that it is not the "office" but the "powers and duties of the office" of the President which devolve on the Vice President in cases of Presidential inability. By establishing the title of Acting President, the proposal would further clarify the status of the Vice President during the period when he is discharging the powers and duties of a disabled President. In addition, it would make clear that the President may reassume the powers and duties of his office when his inability has ended. In all these respects, section 3 as I offer it would be identical to section 3 of Senate Joint Resolution 139, except that no specific provision would be made for a Presidential declaration of his own inability which would temporarily displace him from the exercise of his powers and duties. Rather, under this proposal, the method by which the commencement of any period of inability is to be determined would be left for Congress to decide by ordinary legislation, as explained below.

The section 4 that I propose would clarify the authority of Congress to legislate on the subject of Presidential succession, both in cases of removal, death, and resignation, and also in cases of inability. It would permit Congress to declare "what officer shall be President" where both the President and Vice President have been eliminated by removal, death, or resignation. Then, if neither the President nor the Vice President is able to discharge the powers and duties of the Presidency due to their inability, the Congress would also be enabled to declare what officer shall—

> act as President * * * until a President shall be elected,
>
> or * * * until the inability shall be removed.

Finally, the section 5 that I will offer would authorize Congress to prescribe by law "the method by which the commencement and termination of any inability shall be determined." This provision

is at the heart of the amendments I propose, and represents my chief point of difference with Senate Joint Resolution 139 as reported.

Past efforts to frame a constitutional amendment on inability have endeavored, like Senate Joint Resolution 139, to set out in detail the procedure to determine commencement and termination of a period of Presidential inability. At one time, I myself favored the inability commission approach, and even at this late date there are quite a number of bills and resolutions in Congress to set up a commission. These proposals have varied greatly in detail as to the membership of such a commission, but most of them provide for either Cabinet, congressional, judicial, or medical representation, or a combination of one or more of these. Every such proposal, however, has become bogged down in argument as to whether, for example, Cabinet members who presumptively owe their primary loyalty to the President would overcome reluctance to take action adverse to him; or whether the service of legislators or judges on a commission would violate the spirit of the separation of powers doctrine; or whether doctors can be expected to participate wisely in the formulation of what is, at bottom, a political decision.

At long last, and after much debate, Senator Kefauver and I, simply as two Senators who had long sought a practical solution to this problem, agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best form among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it. Senate Joint Resolution 35 was introduced to carry out the consensus we had reached.

The language of Senate Joint Resolution 35 stemmed initially from the New York Bar Association, and presently has the support of its committee on constitutional law. Its basic provisions were also favorably recommended by the American Bar Association's Committee on Jurisprudence and Law Reform in 1960, and in 1962 the American Bar Association reaffirmed its endorsement of what is now Senate Joint Resolution 35. At that time, the Association of the Bar of the City of New York endorse it, too. As recently as June of 1963, the then president-elect nominee of the American Bar Association testified in behalf of the association before the Constitutional Amendments Subcommittee in support of Senate Joint Resolution 35. Finally, the Deputy Attorney General, speaking for the Department of Justice, who testified in 1963 and who has reaffirmed his earlier testimony this year as still reflecting the Department's views, is in favor of the approach of Senate Joint Resolution 35. In short, at one time or another, Senate Joint Resolution 35 has had the approval of all of the bar associations which had devoted years of careful study and consideration to this problem. And while neither President Kennedy nor President Johnson chose to take a personal stand on any particular proposal, it may be fairly said that the Justice Department's continued endorsement of Senate Joint Resolution 35 is closely tantamount to an administration position.

As I understand it, the principal objection to the approach taken by Senate Joint Resolution 35 has been that it would give Congress a "blank check" in the area of presidential inability, and that State legislators especially would balk at a "blank check" constitutional amendment. Apart from the fact that the Constitution in major part is full of "blank check" provisions—the enumerated powers of Congress under article I provide the most noteworthy example—and that, moreover, the States have previously ratified "blank check" amendments such as, for example, the income tax amendment, and the prohibition amendment which left all enforcement details to Congress, the short answer is that Congress here would not be left free to do whatever it wishes. Here is what the Deputy Attorney General, speaking for the Justice Department, had to say on that point:

> One objection may be that this provision is a blank check which, if abused, could upset the balance of power between the legislative and executive branches, and place the President at the mercy of a hostile Congress. I think this danger is quite remote, and at all events not great enough to outweigh the advantages of conferring this authority upon the Congress which represents the national electorate over more complex constitutional provisions. If the methods adopted by Congress for dealing with the problem do not meet the standards of the separation of powers or otherwise satisfy the President, he may veto the bill, and his veto could be overridden only by two-thirds of each House. Moreover, if Congress enacts a measure which is approved by the President, and thereafter attempts to amend or repeal it, its action will also be subject to approval or veto by the President. It seems unlikely, therefore, that any bill would ever be enacted into law which was not acceptable to the President, and which did not afford adequate protection to the people and to the office of President (1964 hearings, p. 201).

It should be added to this, of course, that the President's approval is not required for a proposed constitutional amendment to go to the States for ratification. In my judgment, it is very important, both as a matter of substance and symbolically, that the Presidency as an institution place its imprimatur upon whatever concrete procedures on presidential inability are ultimately decided upon. Establishing inability procedures by ordinary statute, as would be authorized by my proposed section 5, would permit the President, in behalf of himself and the office he occupies, to participate in the process of setting up proper inability procedures.

I cannot too enthusiastically join in the fine analysis of the Deputy Attorney General as to the other overriding advantages of the flexible approach embodied in Senate Joint Resolution 35. The Deputy Attorney General has stated:

> * * * The wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The chances are that sup-

plemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future * * * where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35 makes this possible.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, *we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures.* We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35, * * *. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding. [Emphasis supplied.] (1964 hearings, p. 203.)

And finally, I repeat that the simpler amendment, so capable of being readily understood by the people and by their representatives in the State legislatures, is in the tradition of constitutionmaking. The States have ratified a whole series of amendments giving Congress the power to enforce them "by appropriate legislation," including the 13th amendment prohibiting slavery; the 14th amendment's due process, equal protection and other civil rights clauses; the 15th amendment's voting guarantees; the 16th amendment's broad grant of income-taxing authority; the 18th or prohibition amendment; the 19th or women's suffrage amendment; and the 23d or District of Columbia vote amendment. There is absolutely no reason why State legislators should not wish to grant similar broad powers to Congress here where, unlike as in many previous amendments, no fundamental clash is involved between the respective powers of the Federal and State governments and the matter merely goes to the mechanics, although very important mechanics to be sure, of coping with potential emergencies in the office of Chief Executive of the Federal Government.

So that there may be no basis for misunderstanding, I intend to offer my proposed amendments not out of intransigent opposition to Senate Joint Resolution 139 but out of a firm belief that the Senate should be afforded an opportunity to exercise its best political judgment in choosing between two reasonable alternatives. Most if not all of us are well enough acquainted with our respective State legislatures to form a rough "guesstimate" as to which alternative will fare better in the process of submitting an amendment to the States for ratification. And all of us, I am sure, have our firm notions as to the nature of constitutionmaking and how best to frame a provision which the American people may have to live with for a long time.

If the amendments I intend to offer are approved by a majority of the Senate, other members of the Subcommittee on Constitutional Amendments, we have agreed, will be prepared to endorse the new sections and work for their approval in the States. On the other hand, if my amendments are not approved here, I shall fully and

unreservedly vote for Senate Joint Resolution 139 as it presently stands and do all within my power to finally bring about its adoption as a solution to this most important and fundamental problem of American Government.

KENNETH B. KEATING.

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