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## The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment

Joel K. Goldstein

*Saint Louis University School of Law*

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## The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment

### Erratum

Law; Constitutional Law; Law and Politics; Law and Society; President/Executive Department; Legislation; Legal History

## THE BIPARTISAN BAYH AMENDMENT: REPUBLICAN CONTRIBUTIONS TO THE TWENTY-FIFTH AMENDMENT

Joel K. Goldstein\*

*It is appropriate that Senator Birch Bayh has been widely recognized as the author and person most responsible for the Twenty-Fifth Amendment. His work was indispensable, and he was helped by other Democrats and nonpartisan actors including the American Bar Association and John D. Feerick, among others. Yet the Amendment was also the product of bipartisan cooperation. Important provisions were based on work done during the administration of President Dwight D. Eisenhower, and Eisenhower and his Attorney General, Herbert Brownell, played important roles in supporting Bayh's proposal as did other Republicans in and out of Congress. Republicans like Representative Richard Poff pushed ideas and provisions that found their way into the Amendment, helped create important legislative history, and contributed in the legislative process. Bayh's legislative contribution included the inclusive manner in which he operated, and many Republicans deserve credit for participating constructively in a process they could not direct.*

*In describing the bipartisan character of the Bayh Amendment, this Article seeks to fill a void in scholarly writing since no prior work has this focus. It also uses the Twenty-Fifth Amendment as a case study of the sort of bipartisan effort on which any constitutional amendment depends. And it suggests that the dispositions that produced the Twenty-Fifth Amendment—in particular, communal problem solving based on a recognition of the need for interested parties to build from areas of agreement—would contribute to addressing other social problems.*

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\* Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful to Roy E. Brownell II and John Rogan for helpful comments on an earlier draft. I am most grateful to John D. Feerick for more than four decades of conversations about presidential succession and inability, a topic on which he is the nation's foremost expert. Katie Finnegan provided helpful research assistance. This Article was prepared for the symposium entitled *Continuity in the Presidency: Gaps and Solutions* held at Fordham University School of Law. For an overview of the symposium, see Matthew Diller, *Foreword: Continuity in the Presidency: Gaps and Solutions*, 86 *FORDHAM L. REV.* 911 (2017).

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#### INTRODUCTION

Senator Birch Bayh, deservedly, is recognized as the person most responsible for the Twenty-Fifth Amendment to the U.S. Constitution, which addresses presidential succession and inability and vice presidential vacancy.<sup>1</sup> The young, first-term Democratic Senator's skill, commitment, and leadership were indispensable to the development, proposal, and ratification of the Amendment during the mid-1960s.<sup>2</sup> Democratic Representative Emanuel Celler (New York) has also received credit for what was sometimes referred to as the "Bayh-Celler Amendment."<sup>3</sup> He performed important work on presidential inability during the 1950s and helped steer the Amendment through the House of Representatives in 1965.<sup>4</sup> President

1. U.S. CONST. amend. XXV.

2. See Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1006-07 (2010); Arthur Krock, *In the Nation: 'The Best Obtainable' Solution*, N.Y. TIMES, July 8, 1965, at 30 (praising Bayh).

3. See, e.g., John D. Feerick, *Vice Presidential Succession: In Support of the Bayh-Celler Plan*, 18 S.C. L. REV. 226, 234 (1966); George D. Haimbaugh Jr., *Vice Presidential Succession: A Criticism of the Bayh-Celler [sic] Plan*, 17 S.C. L. REV. 315, 316 (1965) (referring to the "Bayh-Celler proposed amendment").

4. JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 238-40 (1965); John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 180-81, 186, 190-92 (1965).

Lyndon B. Johnson's support helped too,<sup>5</sup> as did the testimony of Nicholas Katzenbach, Johnson's Deputy Attorney General and later Attorney General.<sup>6</sup> Crucial nonpartisan contributions came from the American Bar Association (ABA),<sup>7</sup> Lewis F. Powell Jr., then one of its leaders,<sup>8</sup> and John D. Feerick, who played an extraordinary and diverse role as a scholar, activist, and citizen.<sup>9</sup>

Republicans also contributed significantly to the Twenty-Fifth Amendment. They helped conceive, promote, and advance the Amendment to its ultimate ratification. Former Attorney General Herbert Brownell,<sup>10</sup> former President Dwight D. Eisenhower,<sup>11</sup> former Vice President Richard M. Nixon,<sup>12</sup> and Republican Representatives William McCulloch<sup>13</sup> (Ohio) and Richard H. Poff<sup>14</sup> (Virginia) were among those who played critical roles.

Although earlier works have discussed the steps leading to the Amendment,<sup>15</sup> no scholarly work has focused on the roles Republicans played in the achievement. Without detracting from the credit appropriately given Bayh, other Democrats, and nonpartisan actors, it is important to focus on Republican contributions as well. The Twenty-Fifth Amendment was the product of bipartisan cooperation.<sup>16</sup> Absent that quality, it would not have become part of the Constitution.<sup>17</sup>

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5. John D. Feerick, Letter to the Editor, *Presidential Succession*, N.Y. TIMES, Jan. 12, 1965, at 36 (crediting Bayh, Celler, and Johnson); Interview by Paige E. Mulhollan with Birch Bayh, U.S. Sen. from Ind. (Feb. 12, 1969) [http://www.lbjlibrary.net/assets/documents/archives/oral\\_histories/bayh\\_b/Bayh.PDF](http://www.lbjlibrary.net/assets/documents/archives/oral_histories/bayh_b/Bayh.PDF) [<https://perma.cc/Z9NP-Q7ST>].

6. See generally JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 80–82, 92–93 (3d ed. 2014).

7. See 111 CONG. REC. 7940 (1965) (statement of Rep. Poff) (stating that no one is “more deserving” than the ABA for the proposal of the Twenty-Fifth Amendment); 110 CONG. REC. 22,983 (1964) (statement of Sen. Bayh) (giving “particular credit” to the ABA for doing “more than any single group” to help advance the amendment).

8. JOHN C. JEFFRIES JR., *JUSTICE LEWIS F. POWELL, JR.* 201–04 (1994).

9. See LOWELL R. BECK, *I FOUND MY NICHE: A LIFETIME JOURNEY OF LOBBYING AND ASSOCIATION LEADERSHIP* 91 (2016) (“It’s impossible to express enough the contributions John Feerick gave to obtaining the solution to Presidential Inability and Succession.”); Joel K. Goldstein, *Introduction* to FEERICK, *supra* note 6, at ix, xii; Joel K. Goldstein, *Celebrating the 50th of the 25th Amendment!*, HUFFINGTON POST (Feb. 10, 2017, 3:31 PM), <http://www.huffingtonpost.com/entry/589e1bb7e4b080bf74f03bcc> [<https://perma.cc/BY2R-W8QU>] (referencing Feerick’s roles).

10. BIRCH BAYH, *ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION* 112 (1968) (describing Brownell as a “great help”); *id.* at 162 (noting that Brownell was “invaluable”).

11. *Id.* at 75–76 (praising Eisenhower for his support).

12. *Id.* at 73 (stating that Nixon’s “experiences and opinions” were “valuable”); *id.* at 77 (describing Nixon’s thoughts on succession and disability as “essential”).

13. *Id.* at 297 (noting that McCulloch was “very helpful”).

14. *Id.* (crediting Poff for his considerations and inquiries); Richard H. Poff, *Presidential Inability and the Twenty-Fifth Amendment*, STUDENT L.J., Dec. 1965, at 15, 15.

15. See, e.g., FEERICK, *supra* note 6, at 105–07; Goldstein, *supra* note 2, at 998–1012. See generally BAYH, *supra* note 10.

16. Feerick, *supra* note 4, at 203 (“The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation.”).

17. *Id.*

Far from diminishing the legislative achievement of Bayh and the other architects of the Amendment, its bipartisan nature is another significant reason to admire their work. Bipartisanship did not just happen on the Twenty-Fifth Amendment. It was deliberately sought and carefully cultivated by people on both sides of the aisle. The proponents understood the bipartisan requisite, and their successful efforts to practice an inclusive brand of problem-solving were an aspect of their accomplishment.

This discussion does not simply supplement historical understanding of the events that led to Congress proposing the Twenty-Fifth Amendment in the summer of 1965, although that is part of its intended contribution. It also furnishes an instructive case study regarding formal constitutional amendment and bipartisan legislative collaboration generally. Constitutional arithmetic makes bipartisanship a likely prerequisite to any constitutional amendment. Moreover, the factors that produced legislative bipartisanship for the Twenty-Fifth Amendment offer lessons not only for cross-party cooperation but also for common action in a variety of contexts.

This Article focuses on the bipartisan nature of the Twenty-Fifth Amendment by discussing events culminating with Congress's proposal of the Amendment to the states in July 1965. It is not a complete study of bipartisanship in connection with the Amendment because it does not discuss the ratification process in the states. Its account of the legislative process is also incomplete because it omits many contributions by Democratic figures. These have been recognized elsewhere and are outside the scope of this Article. Rather, this Article focuses on the contributions of Republican figures in the legislative process that culminated in Congress proposing the Twenty-Fifth Amendment to the states in July 1965.

Part I sketches the legal and political context in which the legislative deliberations occurred. Part II describes the different ways in which various Republicans contributed to the proposed Twenty-Fifth Amendment. Part III extracts some lessons from their contributions and the deliberations in general, especially the importance of bipartisanship during the legislative process. Finally, Part IV puts bipartisanship in a larger context.

## I. THE LEGAL AND POLITICAL CONTEXT OF THE TWENTY-FIFTH AMENDMENT

### A. *The Original Succession Clause and Eisenhower's Proposal*

The text of the Constitution as it existed in the early 1960s suggested that presidential inability—like presidential death, resignation, or removal—triggered some transfer of presidential power to the vice president.<sup>18</sup> Yet

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18. U.S. CONST. art. II, § 1, cl. 6 (“In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President,

whereas law or practice made the existence and operation of the other three contingencies clear, presidential inability was characterized by ambiguity. The Constitution did not define inability or indicate how it was determined. Unlike the other three contingencies, the existence of which tends to be evident, inability can be controversial. And whereas presidential death, resignation, or removal are inherently final events that separate the chief executive permanently from office, a presidential inability can be transitory, of indefinite duration, long lasting, or permanent.<sup>19</sup> The first three contingencies create an automatic vacancy in fact; whether the fourth also does turns partly on the legal consequence attached to presidential inability.

Vice President John Tyler's claim that William Henry Harrison's death in April 1841 made him President, not simply Vice President acting as President, was probably wrong,<sup>20</sup> but little turned on it since Harrison's death ended his claim to the office. But, the text of the Constitution suggested that whatever devolved on the Vice President following death also devolved following inability.<sup>21</sup> That textual symmetry created apprehensions that since the Vice President became President upon his predecessor's death under the Tyler precedent, he might also do so during a presidential inability even if the inability proved transient.<sup>22</sup> That concern was one factor that inhibited a transfer of power to Vice Presidents like Chester A. Arthur and Thomas Marshall during the incapacities of James Garfield and Woodrow Wilson, respectively.<sup>23</sup>

Eisenhower, who suffered three presidential incapacities between September 1955 and late November 1957,<sup>24</sup> focused on ensuring that presidential illness would not impede effective presidential leadership, an increasingly serious problem during the Cold War and nuclear age.<sup>25</sup> Although some thought Congress could address the issue by statute, most thought a constitutional amendment was necessary to address presidential

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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.”).

19. See Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT* 165, 198–200 (Robert E. Gilbert ed., 2000) (discussing various contingencies).

20. See FEERICK, *supra* note 4, at 50 (stating that original-intent evidence shows that the Vice President “was merely intended to discharge the powers and duties of the President temporarily”); Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 *ARK. L. REV.* 647, 668–74 (2016) (“[O]riginal history seemed to suggest that the Vice President would simply act as, but not become, President . . .”).

21. Goldstein, *supra* note 20, at 674.

22. Goldstein, *supra* note 2, at 966–67.

23. FEERICK, *supra* note 4, at 135–36, 170–72; Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, *POL. & LIFE SCI.*, Fall 2014, at 37, 46–47.

24. Eisenhower suffered a heart attack on September 24, 1955. IRWIN F. GELLMAN, *THE PRESIDENT AND THE APPRENTICE: EISENHOWER AND NIXON, 1952–1961*, at 260 (2015). He had an ileitis operation on June 9, 1956. *Id.* at 308. And he suffered a stroke on November 25, 1957. *Id.* at 364; see also FEERICK, *supra* note 6, at 19–23.

25. See Herbert Brownell Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 *YALE L.J.* 189, 189 (1958); Goldstein, *supra* note 2, at 964.

inability.<sup>26</sup> Speaking through Attorney General Brownell, the Eisenhower administration proposed a constitutional amendment in April 1957 which distinguished presidential inability from cases of death, resignation, or removal.<sup>27</sup> In the latter three, consistent with the Tyler precedent, the Vice President became President;<sup>28</sup> in the former, he simply exercised presidential powers and duties during the inability.<sup>29</sup> The proposed amendment allowed the President to declare his inability in writing, at which point the Vice President acted as President.<sup>30</sup> If the President failed or was unable to declare his inability, the Vice President upon written approval “of a majority of the heads of executive departments who are members of the President’s Cabinet” could declare the President’s disability.<sup>31</sup> In either event, the President’s written statement of his ability would allow him to resume presidential functions.<sup>32</sup> The Eisenhower proposal kept decision-making within the executive branch and rejected any role for a presidential inability commission.<sup>33</sup> The proposal was criticized for not providing sufficient protection should a disabled President assert his capacity to act; as a result, other proposals were offered.<sup>34</sup> Ultimately, no legislative action followed.<sup>35</sup>

The following year, Brownell’s successor, William P. Rogers, endorsed Brownell’s proposed amendment with an added provision.<sup>36</sup> The modification stated that if the Vice President and Cabinet disagreed with the President’s assertion of ability to resume the discharge of the powers and duties of his office, Congress must resolve the dispute.<sup>37</sup> In March 1958, a bipartisan group of Senators introduced a revised form of this approach, which provided that if the Vice President and Cabinet disagreed with the President’s declaration of his capacity, Congress would decide the issue.<sup>38</sup> A two-thirds vote in both houses was needed to sustain the Vice President’s claim.<sup>39</sup> Even so, the President could later resume the discharge of his

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26. The Constitution empowered Congress to provide by statute “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.” U.S. CONST. art. II, § 1, cl. 6. The grant of power to address a dual vacancy was interpreted to preclude Congress from addressing simply presidential inability. See Ruth C. Silva, *Presidential Succession and Disability*, 21 L. & CONTEMP. PROBS. 646, 662 (1956).

27. *Presidential Inability: Hearing Before the Special Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. 4–5, 7–8 (1957) [hereinafter *1957 House Hearings*] (statement of Herbert Brownell Jr., Att’y Gen.).

28. *Id.* at 7.

29. *Id.*

30. *Id.*

31. *Id.* at 8.

32. *Id.*; Brownell, *supra* note 25, at 197.

33. Brownell, *supra* note 25, at 197–200.

34. Feerick, *supra* note 4, at 181.

35. *Id.*

36. Brownell, *supra* note 25, at 201.

37. *Id.* at 201–02.

38. *Id.* at 207; see S.J. Res. 161, 85th Cong. (1958).

39. S.J. Res. 161 § 4.



powers and duties by agreement of the “Acting President” or by a majority vote in each house.<sup>40</sup> Although the Senate Subcommittee on Constitutional Amendments endorsed the Eisenhower-Brownell-Rogers amendment,<sup>41</sup> Congress took no action in 1958 or the following years.<sup>42</sup>

With no sign that Congress would act, Eisenhower entered into a letter agreement with Vice President Nixon as a stopgap measure.<sup>43</sup> It provided that either Eisenhower or Nixon could determine that Eisenhower was disabled, thereby transferring presidential powers and duties to Nixon until Eisenhower concluded that he was able to resume their discharge, at which point he would do so.<sup>44</sup> Eisenhower rejected the formalistic conclusion that the Constitution’s textual symmetry extended the Tyler precedent to presidential inability.<sup>45</sup> Instead, he preferred the common-sense idea that the Constitution should allow a temporary transfer of presidential powers and duties to handle what might be a transient inability, even if custom dictated a permanent succession to the office when the triggering event produced an inherently enduring vacancy due to death, resignation, or removal.<sup>46</sup> Eisenhower established the idea that either the President or Vice President could trigger the transfer, but the President could reclaim power.<sup>47</sup> Finally, Eisenhower wrote to Nixon privately that if “any group of distinguished medical authorities” Nixon assembled concluded that the President had a permanent disability, Eisenhower would resign; however, if he did not, Nixon should assume the presidency nonetheless.<sup>48</sup> The Eisenhower-Nixon agreement was made public in part<sup>49</sup> and largely followed by President John F. Kennedy and Vice President Lyndon B. Johnson;<sup>50</sup> President Johnson and Speaker of the House of Representatives, John McCormack;<sup>51</sup> and President Johnson and Vice President Hubert H. Humphrey.<sup>52</sup>

Senator Estes Kefauver, Chairman of the Senate Subcommittee on Constitutional Amendments, had previously introduced Senate Joint

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40. *Id.*; see also Note, *Legislation: Presidential Disability and Succession*, 32 ST. JOHN’S L. REV. 357, 365 (1958).

41. Feerick, *supra* note 4, at 182.

42. FEERICK, *supra* note 6, at 53.

43. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958).

44. *Id.*

45. Goldstein, *supra* note 20, at 677–78.

46. *Id.*

47. *Id.* at 676 & n.199.

48. Letter from Dwight D. Eisenhower to Richard Milhous Nixon (Feb. 5, 1958), in 19 THE PAPERS OF DWIGHT DAVID EISENHOWER 711, 711–13 (Louis Galambos & Daun Van Ee eds., 2001).

49. See Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, *supra* note 43.

50. White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (Aug. 10, 1961) (describing the agreement between Kennedy and Johnson).

51. FEERICK, *supra* note 6, at 320–37 (providing the original agreements between Johnson and McCormack).

52. Statement of Procedures for Use in the Event of Presidential Inability, 2 PUB. PAPERS 1044 (Oct. 5, 1965).

Resolution 161 (“S.J. Res. 161”) in 1958<sup>53</sup> and Senate Joint Resolution 28 (“S.J. Res. 28”) in 1963,<sup>54</sup> both of which essentially followed the Eisenhower-Brownell-Rogers approach.<sup>55</sup> However, he subsequently joined with Senator Kenneth Keating, the ranking minority member of the Senate Subcommittee on Constitutional Amendments, in introducing Senate Joint Resolution 35 (“S.J. Res. 35”) in 1963.<sup>56</sup> This resolution provided that in the event of a presidential inability, the Vice President would simply discharge the powers and duties of the office without assuming the office, but also authorized Congress to provide by statute how and by whom the beginning and end of presidential inability would be determined.<sup>57</sup> The ABA supported this congressional-enabling approach,<sup>58</sup> Deputy Attorney General Nicholas deB. Katzenbach testified in favor of it for the Kennedy administration,<sup>59</sup> and the Subcommittee on Constitutional Amendments reported it to the Senate Judiciary Committee on June 25, 1963.<sup>60</sup> Kefauver, however, died on August 10, 1963, before further action occurred.<sup>61</sup>

In autumn of 1963, Congress seemed unlikely to address presidential inability. The title of John D. Feerick’s first article on the subject, “The Problem of Presidential Inability—Will Congress Ever Solve It?,”<sup>62</sup> suggested pessimism. His letter of November 8, 1963, which the *New York Times* published nine days later, observed that “Congress has consistently failed the American people by not acting” to address problems regarding presidential inability.<sup>63</sup>

President Kennedy’s assassination on November 22, 1963, created renewed interest in the subject of presidential continuity.<sup>64</sup> The Cold War was near its height in the nuclear age with the Cuban Missile Crisis occurring only thirteen months earlier, which added urgency to the question of presidential leadership.<sup>65</sup> The then-existing Presidential Succession Act of

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53. S.J. Res. 161, 85th Cong. (1958). Joining Kefauver were Democrats Thomas Hennings (Missouri) and Olin D. Johnston (South Carolina) and Republicans Everett Dirksen (Illinois), Roman Hruska (Nebraska), William Langer (North Dakota), Arthur Watkins (Utah), William Jenner (Indiana), and John M. Butler (Maryland).

54. S.J. Res. 28, 88th Cong. (1963).

55. BAYH, *supra* note 10, at 26–28.

56. S.J. Res. 35, 88th Cong. (1963); BAYH, *supra* note 10, at 27–28.

57. S.J. Res. 35.

58. *Presidential Inability: Hearings on S.J. Res. 28, S.J. Res. 35, and S.J. Res. 84 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 13–17 (1963) [hereinafter *1963 Senate Hearings*] (statement of Lewis F. Powell Jr., President-Elect Nominee, American Bar Association).

59. *Id.* at 32 (statement of Nicholas deB. Katzenbach, Deputy Att’y Gen.).

60. S. REP. NO. 88-1017, at 2 (1964).

61. Feerick, *supra* note 4, at 183; see JOSEPH BRUCE GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY 367 (1971).

62. John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

63. John D. Feerick, Letter to the Editor, *Fixing Presidential Succession*, N.Y. TIMES, Nov. 17, 1963, at E8.

64. Goldstein, *supra* note 2, at 965.

65. *See id.* at 964.

1947<sup>66</sup> placed the Speaker of the House and Senate President pro tempore immediately after the Vice President in the line of presidential succession and then extended the line through the Cabinet.<sup>67</sup> Concern was magnified by the fact that Johnson suffered a serious heart attack in 1955<sup>68</sup> and those next in line of succession, Speaker John McCormack and Senate President pro tempore Carl Hayden, were elderly<sup>69</sup> and not regarded as presidential timber.<sup>70</sup>

These circumstances focused attention on the line of succession following the Vice President in addition to presidential inability.<sup>71</sup> Legislative and Cabinet succession each had proponents and critics, and the recent rise of the vice presidency beginning with Nixon's term<sup>72</sup> prompted a belief that filling a vice presidential vacancy presented the best means to deal with presidential succession and one which would also reduce the importance of the rest of the line.<sup>73</sup>

Bayh, having succeeded Kefauver as chairman of the Senate Subcommittee in late September 1963,<sup>74</sup> seized the opportunity to use the national tragedy to galvanize Congress to act. The first step was to formulate a proposal. Congress had offered two bipartisan options for addressing presidential inability: the Eisenhower-Brownell-Rogers approach, which Kefauver had initially supported<sup>75</sup> and which specified procedures for transferring presidential powers voluntarily or involuntarily,<sup>76</sup> and the Keating-Kefauver congressional-enabling approach (Senate Joint Resolution 35), which Katzenbach<sup>77</sup> and the ABA had endorsed.<sup>78</sup> Two days after

66. The Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2012)).

67. 3 U.S.C. § 19(a)–(b).

68. FEERICK, *supra* note 4, at 6; Goldstein, *supra* note 2, at 965.

69. *Two Old Timers Next in Line for Presidency of U.S.*, CHI. TRIB., Dec. 1, 1963, at 30.

70. See James Reston, *The Problem of Succession to the Presidency*, N.Y. TIMES, Dec. 6, 1963, at 33 (discussing McCormack's unsuitability for presidency); *The Succession*, CHI. TRIB., Dec. 10, 1963, at 20 (referring to Johnson's heart attack and the advanced age of his potential successors); see also Robert E. Gilbert, *The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT*, *supra* note 19, at 25, 30; Goldstein, *supra* note 2, at 965.

71. See John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *FORDHAM L. REV.* 457, 457–458 & n.3 (1964) (describing the media's discussion of problems).

72. See generally JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* (1982).

73. Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 *WAKE FOREST L. REV.* 505, 536–40 (1995).

74. BAYH, *supra* note 10, at 29.

75. S.J. Res. 28, 88th Cong. (1963).

76. *Id.*

77. *1963 Senate Hearings*, *supra* note 58, at 32 (statement of Nicholas deB. Katzenbach, Deputy Att'y Gen.).

78. *Id.* at 15–16 (statement of Lewis F. Powell Jr., President-Elect Nominee, American Bar Association); see S.J. Res. 84, 88th Cong. (1963). Senate Joint Resolution 84 was proposed by Senators Roman Hruska and John McClellan. See S.J. Res. 84, 88th Cong. (1963). It resembled S.J. Res. 35, but required that congressionally mandated procedures be consistent with separation of powers and the system of checks and balances. *Id.* § 2.

Kennedy's assassination, the *New York Times* called for Congress to adopt the Keating approach.<sup>79</sup>

*B. Incorporating Eisenhower's Proposal*

Bayh determined that he preferred the Eisenhower-Kefauver "specific procedural constitutional amendment" to the Keating-Katzenbach congressional-enabling approach.<sup>80</sup> Bayh thought that S.J. Res. 35 insufficiently protected the President's position, doubted that state legislatures would give Congress a blank check, and worried that the proposal's failure to prescribe procedures might result in Congress deferring indefinitely the task of coming up with some.<sup>81</sup> Bayh thought that Congress needed to develop procedures promptly while the trauma of Kennedy's assassination still provided an incentive to act, not simply to obtain power to legislate in the future.<sup>82</sup> He also thought that filling a vice presidential vacancy was the most pressing problem<sup>83</sup> and proposed to remedy that deficiency by allowing the President to nominate a Vice President to be confirmed by Congress.<sup>84</sup> Such an innovation would diminish the importance of who followed the Vice President in the line of succession, but Bayh also favored replacing the legislative leaders with the Cabinet to keep succession within the executive branch.<sup>85</sup>

Within three weeks of Kennedy's assassination, Bayh had introduced Senate Joint Resolution 139 ("S.J. Res. 139"), a proposed constitutional amendment addressing presidential succession, vice presidential vacancy, and presidential inability, and he announced that his Subcommittee would conduct hearings early in 1964.<sup>86</sup> In crafting S.J. Res. 139, Bayh took the basic provisions regarding presidential inability from the Eisenhower-Brownell-Rogers proposal with some changes, while adding a new section to fill vice presidential vacancies by presidential nomination subject to confirmation by both houses of Congress.<sup>87</sup> As modified during the next nineteen months, S.J. Res. 139 formed the basis for the Twenty-Fifth Amendment, which Congress proposed in the summer of 1965 and which received the required three-fourths ratification of the states by February 10, 1967.

Although the Kennedy assassination focused attention on the subject, it did not produce an immediate consensus regarding a solution. The following period produced many suggested reforms regarding presidential succession

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79. Editorial, *The Presidential Succession*, N.Y. TIMES, Nov. 24, 1963, at 94.

80. BAYH, *supra* note 10, at 32, 34-35.

81. *Id.* at 30, 32, 34-35.

82. *See id.* at 34-35.

83. *Id.* at 32.

84. *Id.*

85. *See* S.J. Res. 139, 88th Cong. § 6 (1963).

86. 109 CONG. REC. 24,420 (1963); John D. Morris, *Study of Succession Is Planned in Senate*, N.Y. TIMES, Dec. 13, 1963, at 1.

87. BAYH, *supra* note 10, at 35; FEERICK, *supra* note 4, at 244.

and inability and vice presidential vacancy. Eisenhower, for instance, initially proposed changing the line of succession to run through the Cabinet whereas McCormack and former President Harry S. Truman endorsed the existing line beginning with legislative leaders.<sup>88</sup> Additionally, whereas Bayh thought a constitutional amendment was required,<sup>89</sup> some thought the issues of succession and inability could be addressed by statute.<sup>90</sup> Those who favored some constitutional amendment were nonetheless divided among a variety of ways to fill a vice presidential vacancy and address inability.<sup>91</sup> The proposals included holding a special presidential election following a succession during the first half of a presidential term,<sup>92</sup> selecting two Vice Presidents,<sup>93</sup> allowing one<sup>94</sup> or both<sup>95</sup> houses to elect a Vice President without a presidential nomination or from a list of prospective nominees,<sup>96</sup> or reconvening the Electoral College,<sup>97</sup> as well as several other options.<sup>98</sup> Regarding presidential inability, some, like Keating, favored an enabling amendment<sup>99</sup> whereas others suggested an “inability commission.”<sup>100</sup>

A constitutional amendment as Bayh proposed would, of course, impose a heavy burden. Article V of the Constitution, which governs constitutional amendment, requires common action by the House of Representatives, the Senate, and the states, and it imposes a daunting supermajority requirement at each stage.<sup>101</sup> The House and Senate must propose an amendment by a two-thirds vote and three-fourths of the states must ratify it for it to become part of the Constitution.<sup>102</sup> That extraordinary level of consensus makes constitutional amendments difficult and, accordingly, rare. Democrats held

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88. *Eisenhower Asks Succession Shift: Favors Secretary of State to Follow Vice President*, N.Y. TIMES, Dec. 8, 1963, at 69; Thomas P. Ronan, *Eisenhower, Truman and Nixon Weigh Presidential Succession*, N.Y. TIMES, Jan. 9, 1964, at 19.

89. *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 3 (1964) [hereinafter *1964 Senate Hearings*] (statement of Sen. Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary) (“These questions can be solved by amending the Constitution. Some say they could best be solved by statute. Frankly, I disagree. Many distinguished lawyers disagree. What most lawyers agree upon is that if there exists a reasonable constitutional doubt, the best method to eradicate any doubt is to amend the Constitution.”).

90. *Id.*; FEERICK, *supra* note 6, at 58 (noting that several “proponents felt that Congress had the power to legislate procedures” to resolve the questions of presidential inability and succession).

91. FEERICK, *supra* note 6, at 59–71.

92. S.J. Res. 13, 88th Cong. (1963).

93. S.J. Res. 143, 88th Cong. (1963); S.J. Res. 140, 88th Cong. (1963).

94. H.R.J. Res. 818, 88th Cong. (1963) (proposing a constitutional amendment whereby the Senate would elect a Vice President).

95. S.J. Res. 147, 88th Cong. (1963); S.J. Res. 138, 88th Cong. (1963).

96. *1964 Senate Hearings*, *supra* note 89, at 79–80 (statement of Sen. Frank Church).

97. *Id.* at 237 (statement of Richard M. Nixon, former Vice President).

98. See FEERICK, *supra* note 6, at 64–71; GOLDSTEIN, *supra* note 72, at 233–39 (presenting various plans regarding vice presidential vacancy); Feerick, *supra* note 71, at 487–89 & nn.168–77.

99. S.J. Res. 35, 88th Cong. (1963).

100. FEERICK, *supra* note 6, at 62.

101. U.S. CONST. art. V.

102. *Id.*

sixty-six of 100 seats in the Senate and 258 of 435 in the House between 1963 and 1964—not enough to reach the two-thirds threshold in either house even assuming perfect party discipline. Substantial opposition in either house would likely encourage resistance elsewhere. Any successful amendment would require bipartisan cooperation.

Yet issues regarding presidential succession and inability often sparked partisan conflict, not cooperation. In the early 1790s, when Congress first sought to create a line of succession behind the Vice President, Alexander Hamilton and his Federalist allies had favored a legislative line in part to avoid placing Secretary of State Thomas Jefferson second in line to the presidency,<sup>103</sup> whereas Jeffersonians, like James Madison, had argued for Cabinet succession.<sup>104</sup> In 1919 and 1920, Republicans seemed disinclined to contribute to a resolution of Woodrow Wilson's disability, concluding that it hurt the Democrats.<sup>105</sup> In 1947, Republicans seemed more enthusiastic about placing legislative leaders after the Vice President, perhaps because Republican Joe Martin was Speaker of the House rather than Democrat Senator Sam Rayburn, who held the position the year prior. Although the House voted on a bipartisan basis to elevate the speaker, the Senate voted along party lines in support of the measure, which placed two Republican legislators, not a Democratic Secretary of State, next in line.<sup>106</sup> Democratic congressional leaders reportedly balked at addressing inability issues during Eisenhower's second term for fear that a resolution would elevate Nixon's standing and suggest that Eisenhower was more ill than known.<sup>107</sup>

The questions about McCormack's fitness to be next in line introduced a further complication. They added urgency to reform efforts but also impeded them. Since some members of the House feared that action might seem to impugn McCormack's fitness, they resisted moving forward.<sup>108</sup> Bayh's original proposal, which would have placed Cabinet members rather than legislative leaders after the Vice President,<sup>109</sup> probably exacerbated the problem. Even when Bayh dropped that provision, McCormack was reportedly cool to the measure.<sup>110</sup> It became clear that the House of

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103. FEERICK, *supra* note 4, at 60–61.

104. Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 86 (2010).

105. Goldstein, *supra* note 23, at 42–43; see ROSE McDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS AND DECISION MAKING* 65–66 (2008).

106. Feerick, *supra* note 71, at 481–83, 482 nn.156–57. The bill, which made the Speaker, followed by the President pro tempore, next in the line of succession behind the Vice President, passed in the House by a vote of 365 to 11. *Id.* at 482. Only ten Democrats and one Republican opposed the bill. *Id.* at 482 n.157. In the Senate, the bill passed by a vote of 50 to 35. *Id.* at 482. Forty-seven Republicans and three Democrats voted in favor of the bill and thirty-five Democrats voted against it. *Id.* at 482 n.156.

107. HERBERT BROWNELL WITH JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF HERBERT BROWNELL* 277–78 (1993).

108. Feerick, *supra* note 4, at 186 n.55.

109. See S.J. Res. 139, 88th Cong. § 6 (1963).

110. *Change Doubted in Succession Law: Senate Panel Narrows Hunt for Solution on Presidency*, N.Y. TIMES, Mar. 15, 1964, at 40.

Representatives would not address presidential succession until after a new President and Vice President were inaugurated in January 1965.<sup>111</sup> Ironically, the House's delay allowed the Senate to claim the initiative and largely define the basic shape of the proposal.

## II. REPUBLICAN CONTRIBUTIONS

In this promising but uncertain environment, the actions of Republicans, as well as Democrats, helped produce the Twenty-Fifth Amendment. Bayh's proposal ultimately defined the basic terms of the Amendment, but Republicans made crucial contributions to the shape and legislative success of the Twenty-Fifth Amendment. Many of these contributions were interrelated and some Republicans contributed in diverse ways.

### A. *Incorporating a Republican Proposal*

The first way in which Republicans contributed to the Twenty-Fifth Amendment has already been mentioned—S.J. Res. 139 and its successor regarding presidential succession and inability largely followed the Eisenhower-Brownell-Rogers approach. Although Bayh's proposal differed in some particulars, like Eisenhower-Brownell-Rogers, it embraced the Tyler precedent for presidential death, resignation, and removal (but not inability), provided for the voluntary transfer of presidential powers and duties by the President on a temporary basis and the involuntary transfer of presidential powers and duties by the Vice President with Cabinet support, and specified that Congress would resolve a dispute regarding the President's subsequent ability to exercise presidential powers and duties.<sup>112</sup> Bayh acknowledged,<sup>113</sup> and perceptive Republicans<sup>114</sup> and observers<sup>115</sup> noticed, the Republican connection to these ideas.

### B. *Early Prominent Republican Supporters*

If Bayh had constructed a wish list of coveted Republican supporters, Eisenhower, Nixon, and Brownell would have likely been at or near the top. Eisenhower was the beloved, former two-term President who had experienced and taken responsible action to address presidential inability. Nixon, the 1960 Republican presidential candidate, was Vice President

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111. BAYH, *supra* note 10, at 92–93, 95.

112. *Id.* at 35–36.

113. *Id.* at 35 (stating that former Attorney General Brownell's first proposal, as modified by Rogers and Kefauver, "came closest to achieving the goals we believed to be important" and became the "basis for our constitutional amendment").

114. See, e.g., *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 72 (1965) [hereinafter *1965 House Hearings*] (statement of Rep. John V. Lindsay) (suggesting that the Bayh-Celler plan was "an almost exact restatement of the original Brownell proposal" made to the eighty-fifth Congress); see also 111 CONG. REC. 7948 (1965) (statement of Rep. Lindsay) (making same observation); BROWNELL, *supra* note 107, at 278 (describing the Eisenhower provisions as providing the "nucleus" of the Twenty-Fifth Amendment).

115. Feerick, *supra* note 4, at 184 (noting that Bayh's "provisions were essentially the same as those embodied in the revised Eisenhower Administration approach").

during both the office's migration to the executive branch and Eisenhower's incapacities. Brownell had studied the issue as Eisenhower's Attorney General during his disabilities and enjoyed great prestige. Within a few months, all three had endorsed most of S.J. 139 and played important roles in enhancing its prospects for success.

### 1. Herbert Brownell

Brownell played multiple roles and his multifaceted contributions were critical to the Amendment's success.<sup>116</sup> His past activities and conclusions made his early support of Bayh's approach unsurprising. He was a key participant in a blue-ribbon ABA group that met in January 1964 to consider the subject<sup>117</sup> and formulated principles consistent with Bayh's proposal, which the ABA endorsed on February 17, 1964,<sup>118</sup> thereby switching its support from Keating's to Bayh's approach. The ABA's support made an enormous difference in achieving the success of the proposal and the ratification of the Amendment.<sup>119</sup>

Brownell provided important support for Bayh's proposal as a witness when Bayh's Subcommittee on Constitutional Amendments held hearings on February 25, 1964.<sup>120</sup> In his testimony, Brownell agreed that a constitutional amendment was needed<sup>121</sup> and endorsed the presidential inability<sup>122</sup> and vice presidential vacancy<sup>123</sup> provisions of S.J. Res. 139. Brownell explained that the participants at the ABA conference the prior month had overcome their "widely" divergent views to achieve consensus because "they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences."<sup>124</sup> Brownell was a persuasive advocate for Bayh's proposal with enormous credibility. He was able to contradict Keating's view that state legislators would be more likely to support an enabling amendment rather than one detailing procedures;<sup>125</sup> Brownell's experience of five terms in the New York State Assembly no doubt added weight to his

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116. See BAYH, *supra* note 10, at 162 (stating that Brownell had become "invaluable" by December 1964).

117. *Id.* at 49 (describing Brownell as part of a "nucleus" in the ABA meeting favoring Bayh's approach).

118. See Feerick, *supra* note 4, at 185.

119. John D. Feerick, *The Twenty-Fifth Amendment: Its Origins and History*, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT, *supra* note 19, at 1, 15; see JAMES M. RONAN, LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION 59, 70 (2015).

120. Marjorie Hunter, *Presidential Succession Plan Given*, N.Y. TIMES, Feb. 26, 1964, at 16 (reporting that Brownell's testimony was consistent with Bayh plan).

121. 1964 Senate Hearings, *supra* note 89, at 135 (statement of Herbert Brownell, former Att'y Gen.).

122. *Id.* at 136.

123. *Id.* at 137.

124. *Id.* at 138.

125. *Id.* at 141-42.



opinion<sup>126</sup> and reinforced Bayh's own analysis based on his service in the Indiana General Assembly.<sup>127</sup>

When the ABA hosted the National Forum on Presidential Inability and Vice Presidential Vacancy in Washington, D.C., on May 25, 1964, to educate more than 500 leaders from around the country, Brownell was part of the featured panel along with Bayh, Celler, and Edward L. Wright, chair of the ABA House of Delegates.<sup>128</sup> Brownell presented the history of the problem and explained the need for a constitutional amendment to address presidential inability.<sup>129</sup> As shown below, however, Brownell's contributions that day went well beyond his public comments.

Brownell chaired the ABA's Committee on Presidential Inability and Vice-Presidential Vacancy and in that capacity testified before Bayh's Subcommittee again on January 29, 1965, as a main witness during the single-day hearing.<sup>130</sup> Brownell again supported Bayh's proposal,<sup>131</sup> now Senate Joint Resolution 1 ("S.J. Res. 1"),<sup>132</sup> and responded to arguments and questions advanced by various Republicans.<sup>133</sup> Brownell supported Bayh's approach to hold separate votes of the House and Senate to confirm a vice presidential nominee<sup>134</sup> and to allow either the Cabinet or Vice President to initiate a disability determination,<sup>135</sup> and he supported the approach of S.J. Res. 1 generally on disability.<sup>136</sup> Brownell also testified before the House Committee on the Judiciary on February 17, 1965,<sup>137</sup> where he again emphasized the importance of Congress addressing the problem, supported the Bayh-Celler proposal, and responded to extensive questions, especially from Republican members.<sup>138</sup>

Brownell's influence was further reflected by the extent to which some of his ideas helped shape the defense of the proposals that became the Twenty-Fifth Amendment. For instance, in testifying before the Senate

126. BROWNELL, *supra* note 107, at 23–31.

127. BAYH, *supra* note 10, at 34–35.

128. ABA National Forum on Presidential Inability and Vice Presidential Vacancy (May 25, 1964) (transcript available at the Fordham University School of Law Maloney Library).

129. Herbert Brownell, The History of the Problem, Remarks at the ABA National Forum on Presidential Inability and Vice Presidential Vacancy, *supra* note 128, at 2–5.

130. *Presidential Inability and Vacancies in the Office of the Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 57–74 (1965) [hereinafter *1965 Senate Hearing*] (statement of Herbert Brownell, former Att'y Gen.).

131. *Id.* at 64, 67.

132. S.J. Res. 1, 89th Cong. (1965).

133. See, e.g., *1965 Senate Hearing*, *supra* note 130, at 63–64, 71 (responding to Folsom's preference for a joint session of Congress to confirm a vice presidential nominee); *id.* at 64 (responding to Senator Miller's view that the amendment should specify that the vice presidential nominee needed to be from the President's party); *id.* at 64–65 (responding to Senator Hruska's concerns regarding separation of powers); *id.* at 65 (responding to Folsom's concerns regarding the Vice President initiating disability determination); *id.* at 71–73 (responding to Senator Hruska's concerns).

134. *Id.* at 63–64.

135. *Id.* at 65–66.

136. *Id.* at 66–67.

137. *1965 House Hearings*, *supra* note 114, at 238.

138. *Id.* at 238–58.

Subcommittee on Constitutional Amendments in 1964, Brownell had repeated an idea from his 1958 *Yale Law Journal* article<sup>139</sup>—that “ultimately the operation of any constitutional arrangement depends on public opinion and . . . ‘constitutional morality’” rather than procedural guarantees and that “[n]o 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.”<sup>140</sup> Brownell went on to endorse the combination of the Vice President and Cabinet as the “the most feasible formula” consistent with constitutional principles.<sup>141</sup> Brownell’s formulation was incorporated without attribution in the Senate and House reports that accompanied S.J. Res. 139<sup>142</sup> and House of Representatives Joint Resolution 1 (“H.R.J. Res. 1”),<sup>143</sup> and the idea echoed in important discussions during congressional deliberations.<sup>144</sup>

Brownell’s skill, leadership, credibility, and commitment to the principles and procedures that led to the Twenty-Fifth Amendment played an important role in its eventual success.<sup>145</sup> He was a compelling witness but also played an important role in securing ABA support for Bayh’s proposal and in other behind-the-scenes roles described below.

## 2. Dwight D. Eisenhower

Eisenhower provided important support for S.J. Res. 139 even while disagreeing on some particulars. In a letter dated March 2, 1964, which Bayh made public on March 4, 1964,<sup>146</sup> Eisenhower agreed that a constitutional amendment was necessary and endorsed Bayh’s proposal to fill a vice presidential vacancy.<sup>147</sup> He thought the President should announce his own disability “[w]herever possible,” but if “circumstances made this impossible,” the Vice President should announce the disability and assume

139. Brownell, *supra* note 25, at 200. Brownell had also articulated this idea in his 1957 testimony before a subcommittee of the House of Representatives addressing presidential inability. *See 1957 House Hearings, supra* note 27, at 31 (statement of Herbert Brownell Jr., Att’y Gen.).

140. *1964 Senate Hearings, supra* note 89, at 136 (statement of Herbert Brownell Jr., former Att’y Gen.).

141. *Id.*

142. S. REP. NO. 89-66, at 13 (1965); S. REP. NO. 88-1382, 11–12 (1964).

143. H.R. REP. NO. 89-203, at 13 (1965).

144. *See, e.g.*, 111 CONG. REC. 15,591–92 (1965) (statement of Sen. Dirksen); *id.* at 7942 (statement of Rep. Poff) (“If one assumes that the Vice President and most of the members of the President’s Cabinet are charlatans, revolutionaries and traitors, we are foolish to attempt any solution. . . . Certainly, we want a government of laws and not of men, but somewhere in the process of administration of the laws, we must commit our fate to the basic honesty of the administrators. Somewhere, sometime, somehow, we must trust somebody.”).

145. *See BAYH, supra* note 10, at 67 (describing Brownell as “an extremely effective witness”); *id.* at 196 (describing Brownell “as usual, highly articulate and very helpful”).

146. *Eisenhower Lists Succession Views: Bids President Name a Vice President for Open Office*, N.Y. TIMES, Mar. 5, 1964, at 25. Brownell helped to obtain the letter and to ensure that it was generally consistent with Bayh’s proposal. *See BAYH, supra* note 10, at 61–62, 75.

147. *1964 Senate Hearings, supra* note 89, at 232 (statement of Sen. Birch Bayh) (reprinting Eisenhower’s letter).

presidential powers “with the concurrence of a majority of the Cabinet.”<sup>148</sup> In either case, Eisenhower strongly agreed that the Vice President was simply acting as president temporarily.<sup>149</sup> The one instance where Eisenhower departed from Bayh’s approach regarding presidential inability was in his suggestion that a dispute between the president and vice president should be resolved by a disability commission consisting of some Cabinet members, legislative leaders, and medical professionals.<sup>150</sup>

Eisenhower was the featured speaker at the ABA’s National Forum in May 1964. Brownell had recruited Eisenhower for that assignment and lobbied him to abandon his support for a disability commission.<sup>151</sup> Brownell and Bayh approached Eisenhower during the reception before his speech to argue against the commission proposed in his March 1964 letter.<sup>152</sup> In his speech, Eisenhower unequivocally supported section 2 of Bayh’s proposal and praised the vice presidency as a vehicle for succession.<sup>153</sup> Regarding inability, Eisenhower argued that presidential inability needed to be solved “now” through a constitutional amendment and supporting legislation.<sup>154</sup> Eisenhower thought the Vice President should make the decision, assuming the President did not initiate the transfer himself.<sup>155</sup> Although his remarks were ambiguous regarding how much the amendment should detail and how much should be left to statute, he made no reference to a commission and was open to Cabinet participation with Congress as an umpire of an intraexecutive branch dispute,<sup>156</sup> thus bringing his position close to Bayh’s proposal.

Eisenhower’s impact went beyond the immediate audience to the millions of those who read accounts of his speech across the country.<sup>157</sup> His unique stature guaranteed coverage and his popularity made his support significant. “Truly we had made great progress that day,” Bayh wrote later.<sup>158</sup> Bayh thought that Eisenhower “had fired the audience, and through the press the country at large, with the urgency of working out a solution to the problems of Presidential succession and disability.”<sup>159</sup> Eisenhower had provided “a real boost.”<sup>160</sup>

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148. *Id.*

149. *Id.*

150. *Id.*; BAYH, *supra* note 10, at 76.

151. BAYH, *supra* note 10, at 119–20; BECK, *supra* note 9, at 95.

152. BAYH, *supra* note 10, at 119–20.

153. Dwight D. Eisenhower, The Major Address, Remarks at the ABA National Forum on Presidential Inability and Vice Presidential Vacancy, *supra* note 128, at 23–24.

154. *Id.* at 26.

155. *Id.* at 25.

156. *Id.* at 25–26.

157. BAYH, *supra* note 10, at 124 (referring to the media coverage of Eisenhower’s remarks); BECK, *supra* note 9, at 96 (stating that “[t]he press turned out in droves”).

158. BAYH, *supra* note 10, at 123.

159. *Id.* at 124.

160. *Id.*; see also 1965 House Hearings, *supra* note 114, at 224 (statement of Lewis F. Powell Jr., President, American Bar Association) (referring to Eisenhower’s comments as “quite a dramatic demonstration of the need for action”).

### 3. Richard M. Nixon

Former Vice President Nixon was a third Republican luminary who provided important support for S.J. Res. 139. His testimony highlighted the final day of the first round of Senate hearings on March 5, 1964.<sup>161</sup> Nixon had previously proposed that a vice presidential vacancy be filled by a presidential nomination confirmed by the presidential electors from the most recent presidential election, and he adhered to that preference during his testimony.<sup>162</sup> However, Nixon backed the disability approach of S.J. Res. 139 and specifically criticized Eisenhower's then-recent disability commission proposal; he believed that Congress should resolve an intraexecutive branch dispute as Bayh's proposal provided.<sup>163</sup> Nixon also agreed that a constitutional amendment was needed.<sup>164</sup> He elaborated on the importance of the vice presidency, predicted its further growth, and opposed Keating's two-vice presidents proposal as likely to diminish the office,<sup>165</sup> all of which had particular credibility because of Nixon's own contributions to the growth of the vice presidency.<sup>166</sup> Nixon agreed with Bayh that a vice presidential vacancy needed to be filled.<sup>167</sup>

Bayh later described Nixon as "an exceptional witness" and his statement as "the most effective of our entire series of hearings."<sup>168</sup> Nixon's appearance attracted wide media coverage.<sup>169</sup> Bayh thought that Nixon's contribution "was of inestimable inherent value,"<sup>170</sup> not only for the positions recounted above but also for reasons discussed below.

The three Republican luminaries clearly had an impact. The *Washington Post* began its editorial of March 9, 1964, supporting a constitutional amendment by referencing the calls of Eisenhower and Nixon for action on presidential inability.<sup>171</sup> Their vocal support no doubt encouraged others to follow.<sup>172</sup>

#### C. Creating a Climate for a Cooperative Effort

Nixon's primary contribution was not, however, in his support for most of Bayh's approach but in his eloquent insistence that interested parties put

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161. *1964 Senate Hearings*, *supra* note 89, at 234–50 (statement of Richard M. Nixon, former Vice President).

162. *Id.* at 235–37, 249–50.

163. *Id.* at 241.

164. *Id.* at 242.

165. *Id.* at 245–46.

166. See JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN* 25–26 (2016).

167. *1964 Senate Hearings*, *supra* note 89, at 250.

168. BAYH, *supra* note 10, at 83; *id.* at 89 (describing Nixon as an "excellent witness").

169. *Id.* at 89 (stating that Nixon brought the media "in droves" and attracted "greatly needed publicity" for the issue).

170. *Id.*

171. Editorial, *To Narrow the Risk*, WASH. POST, Mar. 9, 1964, at A14; see also BAYH, *supra* note 10, at 182 (referring to the importance of support from Eisenhower and Nixon).

172. See Part ILC.

aside their differences and reach consensus. Nixon modeled that behavior in his testimony given extemporaneously for about thirty minutes.<sup>173</sup> Nixon began, and ended, his direct testimony by underlining the importance of Bayh's work, calling Bayh's hearings the "most important hearings"<sup>174</sup> being conducted in Washington because they involved "the future of the United States as no other hearings perhaps in recent years have."<sup>175</sup>

Nixon had "strong convictions"<sup>176</sup> that his proposals were "the best approach"<sup>177</sup> but did not insist that they were "the only way to handle the problem."<sup>178</sup> He stated, "what is important is not that this committee adopt my proposals, what is important is that this committee make a recommendation to the Congress, to the Senate, and to the Nation which will get action on these two problems, the problem of succession and the problem of disability."<sup>179</sup> Nixon thought that "the time ha[d] come" for Bayh's Subcommittee to identify "a united proposal" and to act while the sense of urgency from the Kennedy assassination remained.<sup>180</sup> It was "imperative that this problem [of disability] be dealt with and dealt with now."<sup>181</sup> When asked whether he would prefer an amendment specifying a procedure or enabling Congress to take further action, Nixon replied, "[t]he approach I would prefer is the one that this committee finally concludes has the best chance to success."<sup>182</sup> Nixon emphasized, "all of the nit-picking arguments" between approaches "make very little impression on me" and "our major concern . . . is to find a solution that will be least controversial but will get at the major problem."<sup>183</sup> In his view, the Subcommittee should collect ideas and adopt "the best idea in [its] opinion, and [] get the public support and go forward with it."<sup>184</sup> Nixon would support the Subcommittee's judgment because "the important thing is to get action and get it fast."<sup>185</sup> Nixon's promise set a powerful example; the most recent Republican presidential nominee was basically giving a blank check to a subcommittee with a Democratic chair.

Other Republicans showed dispositions consistent with Nixon's guidance. Republican Senator Jacob Javits (New York), for instance, had previously amended his Senate Joint Resolution 138 ("S.J. Res. 138") to bring it closer

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173. Russell Baker, *Nixon, in Capitol, Essays 2 Roles*, N.Y. TIMES, Mar. 6, 1964, at 15.

174. *1964 Senate Hearings*, *supra* note 89, at 234.

175. *Id.*; *id.* at 242–43 ("[T]here is no decision that is more vital to the future of this country . . .").

176. *Id.* at 234.

177. *Id.*

178. *Id.* at 238.

179. *Id.* at 234.

180. *Id.* at 235.

181. *Id.* at 241.

182. *Id.* at 244.

183. *Id.*

184. *Id.* at 250.

185. *Id.*

to S.J. Res. 139,<sup>186</sup> which he later agreed to cosponsor.<sup>187</sup> Keating, though still preferring his two-Vice Presidents-and-enabling approach, suggested in late March 1964 that he would support S.J. Res. 139 if the Senate preferred it to his proposal.<sup>188</sup>

When House Democrats subjected Bayh to aggressive and skeptical questioning as he testified before the House Judiciary Committee on February 7, 1965,<sup>189</sup> Poff modeled behavior consistent with Nixon's urging.<sup>190</sup> Poff urged that all should "recognize candidly what hasn't yet been articulated"—that the Bayh-Celler proposal "is the end result, the precipitant of a long process of distillation and filtration in which many hands have played a part."<sup>191</sup> Poff emphasized that it was "not a carelessly drawn measure" because he was "anxious" that Congress take "expeditious action . . . on this vitally important matter."<sup>192</sup> Poff disclaimed any intent to "unduly" probe Bayh's proposal, telling Bayh, "I want to see this thing done as expeditiously as possible and I am willing to compromise."<sup>193</sup> Later during the hearings, Poff expressed disagreement with allowing the Cabinet (as opposed to just the Vice President) to initiate a presidential disability determination, but indicated that he was "prepared to make a compromise, if necessary, to get something done," because he "want[ed] to see something done promptly."<sup>194</sup>

Some independent witnesses who promoted different proposals also called for cooperation. Marion B. Folsom, Eisenhower's former Secretary of Health, Education, and Welfare, testified on behalf of the Committee on Economic Development<sup>195</sup> and suggested an approach that differed somewhat from Bayh's proposal.<sup>196</sup> Nonetheless he said that Senators should

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186. *Id.* at 53 (statement of Sen. Jacob K. Javits) (announcing an amendment to S.J. Res. 138 that would require Congress to elect a Vice President in a joint session "by and with the advice and consent" of the President). The change would grant the President the "authority to reject a nominee who is unsuitable to him. *Id.*

187. BAYH, *supra* note 10, at 135–36.

188. *Id.* at 99–101.

189. 1965 *House Hearings*, *supra* note 114, at 39–70, 77–95 (testimony of Sen. Birch Bayh).

190. *Id.* at 45–63.

191. *Id.* at 63.

192. *Id.*

193. *Id.* at 86.

194. *Id.* at 167.

195. 1965 *Senate Hearing*, *supra* note 130, at 46–55 (statement of Marion B. Folsom, Chairman, Committee for Improvement of Management in Government, Committee for Economic Development).

196. *See id.* at 48 (favoring the confirmation of the Vice President by a joint session of Congress and the initiation of an inability determination by Cabinet rather than the Vice President); *id.* at 49 (opposing the use of Congress as the decider of a disagreement between the President and Vice President regarding presidential inability and suggesting that the Cabinet is better suited for that role).

pass Bayh's proposal without changes if they thought it most likely to win approval.<sup>197</sup>

#### *D. Legislative Efforts*

Republicans also played crucial roles at virtually every stage of the legislative efforts that resulted in the passage by the House and Senate of the proposed Twenty-Fifth Amendment in summer 1965.

##### 1. 1964 Republican Collaboration: The Senate

Although Bayh initially introduced S.J. Res. 139 with only the cosponsorship of Democratic Senator Edward V. Long (Missouri), Republican Senators James Pearson (Kansas) and Hiram Fong (Hawaii) joined as cosponsors in March<sup>198</sup> and April<sup>199</sup> of 1964. By the time the Senate considered S.J. Res. 139, ten of the thirty cosponsors were Republicans.<sup>200</sup>

Republicans, including Fong and Keating, worked with Bayh to refine S.J. Res. 139 in May 1964 before reporting it to the Senate Judiciary Committee with the understanding that Keating would seek to amend it with his proposal on the floor.<sup>201</sup> Although the Republican Minority Leader, Senator Everett Dirksen (Illinois), was not yet prepared to support the measure<sup>202</sup> and Keating preferred his own approach, the Subcommittee voted unanimously to report S.J. Res. 139 to the full Committee<sup>203</sup> on May 27, 1964.<sup>204</sup> In early August 1964, the full Judiciary Committee unanimously reported S.J. Res. 139 to the Senate with the understanding that amendments could be offered to it including by Committee members.<sup>205</sup>

When Senate Majority Leader Mike Mansfield advised Bayh on September 28, 1964, that the Senate could consider S.J. Res. 139 that very afternoon,<sup>206</sup> both Keating and Senator Roman Hruska, who wanted to propose changes, were out of town.<sup>207</sup> Both Republicans agreed to release

197. *Id.* at 50; *see 1965 House Hearings, supra* note 114, at 166 (statement of Marion B. Folsom, Chairman, Committee for Improvement of Management in Government, Committee for Economic Development) ("That is why we think you ought to have this amendment, one way or the other. Whether you go along with the Bayh amendment or not, we think it is necessary that something be done.").

198. *1964 Senate Hearings, supra* note 89, at 250–52.

199. BAYH, *supra* note 10, at 101–02.

200. The Republican cosponsors were Senators Clifford Case (New Jersey), John Sherman Cooper (Kentucky), Peter Dominick (Colorado), Jacob Javits (New York), Thomas Kuchel (California), James Pearson (Kansas), Leverett Saltonstall (Maine), Hugh Scott (Pennsylvania), Milward Simpson (Wyoming), and Hiram Fong (Hawaii). *See* S.J. Res. 139, 88th Cong. (1964).

201. BAYH, *supra* note 10, at 127–28.

202. *Id.* at 106–07, 127.

203. *Id.* at 128.

204. Cabell Phillips, *Presidential Disability Amendment Is Voted by Senate Panel*, N.Y. TIMES, May 28, 1964, at 22.

205. BAYH, *supra* note 10, at 130–33; *see also* S. REP. NO. 88-1382, at 1 (1964).

206. BAYH, *supra* note 10, at 138.

207. *Id.* at 140.

Bayh from the understanding that they would have the opportunity to offer amendments so he could proceed in their absence.<sup>208</sup>

Four<sup>209</sup> of the eleven Senators who spoke in favor of S.J. Res. 139 that day were Republicans.<sup>210</sup> The measure carried on a voice vote.<sup>211</sup> After Democratic Senator John Stennis (Mississippi) objected the following day that a proposed constitutional amendment should require a recorded vote,<sup>212</sup> the Senate passed the measure by a vote of 65 to 0 with Republicans providing 21 of the aye votes, including those of Minority Leader Dirksen and Republican Whip Thomas Kuchel, respectively.<sup>213</sup> Some nine of the absent thirteen Republican Senators were recorded as supporting S.J. Res. 139.<sup>214</sup> Accordingly, thirty of the thirty-four Republican Senators, or 88 percent, supported the measure.<sup>215</sup>

The House of Representatives predictably took no action in 1964.<sup>216</sup> The November 1964 election of Senator Hubert H. Humphrey as Johnson's Vice President and his inauguration on January 20, 1965, mitigated the appearance that section 2 was directed against McCormack.<sup>217</sup> Johnson's landslide election had coattails that produced a new Senate in which Democrats held sixty-eight (of 100 seats) and a House in which they held 295 (of 435) seats. Keating, the leading proponent of the congressional-enabling approach, lost his seat to Robert F. Kennedy.<sup>218</sup>

## 2. Winning Celler's Support: Calling on Brownell Again

Bayh reintroduced his proposal in the new Congress as S.J. Res. 1. He hoped to have Celler, the House Judiciary Committee chair, offer the identical measure in the House given his position, long association with the issue, and standing in the House.<sup>219</sup> Celler had served in Congress since 1923, forty years more than Bayh, and worked on presidential inability for a decade,<sup>220</sup> so understandably might not have been disposed to defer to a

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208. *Id.*

209. 110 CONG. REC. 22,992–93 (1964) (statement of Sen. Saltonstall); *id.* at 22,993–94 (statement of Sen. Fong); *id.* at 22,999–23,000 (statement of Sen. Javits); *id.* at 23,000–01 (statement of Sen. Pearson).

210. In addition to the four Republican Senators, seven Democratic Senators spoke in favor of S.J. Res. 139. *Id.* at 22,983, 22,986–88 (statement of Sen. Bayh); *id.* at 22,988–92 (statement of Sen. Ervin); *id.* at 22,990–92 (statement of Sen. Monroney); *id.* at 22,994 (statement of Sen. Bible); *id.* at 22,997–99 (statement of Sen. Church); *id.* at 23,000 (statement of Sen. Hart); *id.* at 23,001 (statement of Sen. Mansfield).

211. *Id.* at 23,000–01.

212. *Id.* at 23,056.

213. *Id.* at 23,061.

214. *Id.*

215. *Id.*

216. BAYH, *supra* note 10, at 159–60.

217. *Id.* at 161–62.

218. *Id.* at 181.

219. *Id.* at 162–63.

220. *See, e.g.*, Rep. Emanuel Celler, Chairman, House Comm. on the Judiciary, Address: The Problem of Presidential Inability—A Proposed Solution (Aug. 2, 1956), in 19 F.R.D. 153



newcomer. In 1958, he had introduced legislation calling for the establishment of a commission on presidential inability composed of members of the executive and legislative branches to determine the beginning and end of a presidential inability.<sup>221</sup> At the ABA's National Forum in May 1964, Celler proposed incorporating Cabinet succession such that the Secretary of State would become Vice President rather than Bayh's method for filling a vice presidential vacancy.<sup>222</sup>

Soliciting Celler's support for Bayh's proposal required someone of uncommon skill and stature. Bayh and ABA officials decided that "the obvious person" to handle the delicate assignment was Brownell, who had already been "invaluable" in advancing Bayh's proposal.<sup>223</sup> Brownell went to see Celler and successfully persuaded him.<sup>224</sup>

### 3. 1965 Republican Collaboration: The Senate

Because the Senate held extensive hearings in 1964 (and approved S.J. Res. 139 unanimously)<sup>225</sup> and because S.J. Res. 1 had seventy-six cosponsors,<sup>226</sup> Bayh held only a single day of hearings on January 29, 1965, to consider S.J. Res. 1 and four other proposals.<sup>227</sup> He announced that the hearings would "emphasize . . . views from those who differ in part or entirely from the consensus which has developed over the past year on this issue."<sup>228</sup> Nonetheless, during the 1965 Senate hearing, Fong supported S.J. Res. 1,<sup>229</sup> as did Republican Senators Pearson,<sup>230</sup> Javits,<sup>231</sup> Leverett Saltonstall (Massachusetts),<sup>232</sup> Karl Mundt (South Dakota),<sup>233</sup> and Strom Thurmond (South Carolina), although Thurmond preferred to use the most recent presidential electors to fill a vice presidential vacancy.<sup>234</sup>

After Bayh's Subcommittee unanimously sent S.J. Res. 1 to the full Judiciary Committee in early February 1965,<sup>235</sup> even Republicans with misgivings about the proposal worked to advance it. Hruska acceded to a request by James Eastland, chairman of the Senate Judiciary Committee, to

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(proposing that the President or Vice President have the power to declare the President disabled).

221. H.R. 10880, 85th Cong. § 3 (1958).

222. Emanuel Celler, *The Legislative History, Remarks at the ABA National Forum on Presidential Inability and Vice Presidential Vacancy*, *supra* note 128, at 9; Discussion, *ABA National Forum on Presidential Inability and Vice Presidential Vacancy*, *supra* note 128, at 16.

223. BAYH, *supra* note 10, at 162.

224. *Id.* at 162–63.

225. *See supra* note 213 and accompanying text (noting that the Senate passed S.J. Res. 139 by a vote of 65 to 0).

226. *1965 Senate Hearing*, *supra* note 130, at 6 (statement of Sen. Birch Bayh).

227. *Id.* at 1–5.

228. *Id.* at 5–6.

229. *Id.* at 30–32.

230. *Id.* at 101–02.

231. *Id.* at 105.

232. *Id.* at 103.

233. *Id.* at 106–07.

234. *Id.* at 105–06.

235. BAYH, *supra* note 10, at 202–03.

expedite consideration of the proposal rather than deploy procedural tactics to delay action since Senate floor time was most available early in the session.<sup>236</sup> Dirksen accepted sections 1 and 2<sup>237</sup> but proposed amendments to other portions.<sup>238</sup> For instance, he pointed out that section 3 did not specify to whom the President's disability declaration should go.<sup>239</sup> Discussion between Senators Dirksen, Javits, Hruska, and Samuel Ervin produced a formulation contemplating a presidential declaration to the President of the Senate and Speaker of the House, which was adopted with Bayh's approval.<sup>240</sup> Some other relatively cosmetic changes were made.<sup>241</sup> Although Hruska objected to Congress playing an umpire role on separation of powers grounds,<sup>242</sup> and he and Dirksen favored an enabling amendment similar to the one Keating had introduced in the prior Congress,<sup>243</sup> the Committee unanimously reported S.J. Res. 1 as amended.<sup>244</sup>

When the Senate considered S.J. Res. 1 on February 19, 1965, its advocates included Republican Senators Milward Simpson (Wyoming),<sup>245</sup> Fong,<sup>246</sup> Saltonstall,<sup>247</sup> Frank Carlson (Kansas),<sup>248</sup> and ultimately, Hruska<sup>249</sup> in addition to Bayh and Ervin. Some Democratic Senators seemed critical or questioning of provisions of S.J. Res. 1,<sup>250</sup> and the debate between Bayh and various Democrats was characterized as "heated" and "hot and acrimonious."<sup>251</sup> When Bayh was on the verge of accepting a change that

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236. *Id.* at 206–07.

237. *Id.* at 209.

238. *Id.* at 208–09.

239. *Id.* at 210.

240. *Id.* at 210–11.

241. *Id.* at 212 (providing that other disability notifications by the President or Vice President would go to the Speaker and President of the Senate and replacing "immediately decide the issue" with "immediately proceed to decide the issue" in the section regarding Congress's role in resolving an intraexecutive branch dispute).

242. S. REP. NO. 89-66, at 22–24 (1965) (providing the individual views of Senator Roman L. Hruska).

243. BAYH, *supra* note 10, at 212–13; *see also* S.J. Res. 6, 89th Cong. (1965); S. REP. NO. 89-66, at 17–21 (1965) (providing the individual views of Senator Everett Dirksen); *id.* at 22–24 (providing the individual views of Senator Roman L. Hruska).

244. BAYH, *supra* note 10, at 213; Feerick, *supra* note 4, at 187.

245. 111 CONG. REC. 3257–58 (1965).

246. *Id.* at 3261–63.

247. *Id.* at 3262–63.

248. *Id.* at 3265.

249. *Id.* at 3285.

250. *See, e.g., id.* at 3253–54 (statement of Sen. Ellender) (suggesting that Congress could legislatively address presidential inability); *id.* at 3256–57 (questioning a provision allowing Congress to create another body to act regarding presidential inability); *id.* at 3275, 3281 (statement of Sen. Bass) (questioning the propriety of allowing congressmen from an opposing party to vote on vice presidential confirmation and suggesting a time limit for section 2); *id.* at 3275–76, 3278–79 (statement of Sen. Pastore) (calling for a time limit for Congress to act on presidential inability); *id.* at 3277 (statement of Sen. Harris) (calling for a time limit in section 2); *id.* at 3279 (statement of Sen. Hart) (suggesting a time limit for Congress to act on presidential inability).

251. Tom Wicker, *Senate Votes Amendment on Presidential Disability*, N.Y. TIMES, Feb. 20, 1965, at 1.

would have introduced procedural complications, the more experienced Hruska and Ervin dissuaded him. Bayh later recognized that Hruska had helped in the February 1965 debate.<sup>252</sup>

When Dirksen moved to substitute an enabling amendment for S.J. Res. 1, Republicans Simpson, Fong, Carlson, and Saltonstall were among those who spoke in favor of S.J. Res. 1 or against Dirksen's proposal.<sup>253</sup> The Dirksen substitute was defeated by a vote of 60 to 12.<sup>254</sup> Although twelve Republicans voted for their leader's proposal<sup>255</sup> and five absent Republican Senators expressed support,<sup>256</sup> thirteen Republican Senators voted against the Dirksen substitute and the absent Javits opposed it.<sup>257</sup>

Although some like Republican Senator Hugh Scott (Pennsylvania) preferred the Dirksen substitute, they supported S.J. Res. 1 in order to adopt a "workable proposal."<sup>258</sup> S.J. Res. 1 carried 72 to 0, with 24 of the votes coming from Republicans. The eight absent Republicans all were recorded as supporting the proposed amendment.<sup>259</sup> In other words, 100 percent of Republican Senators were ultimately recorded as supporting S.J. Res. 1 on February 19, 1965.

In addition to their votes and their voices, Republicans contributed in other ways during the Senate debate on S.J. Res. 1. Hruska's amendment to increase from two to seven days the time the Vice President and Cabinet would have to contest the President's declaration of his capacity<sup>260</sup> was accepted. Some Republicans helped shape important legislative history. Saltonstall established that a Vice President acting as President would lose the ability to preside over the Senate.<sup>261</sup> Senator Gordon Allott helped Bayh to establish legislative history supporting the view that the Vice President would continue to act as President during the period in which the Vice President and Cabinet could contest the President's declaration.<sup>262</sup>

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252. BAYH, *supra* note 10, at 273.

253. *Id.* at 253–260; *see* 111 CONG. REC. 3257–58 (1965) (statement of Sen. Simpson); *id.* at 3261–63 (statement of Sen. Fong); *id.* at 3265 (statement of Sen. Carlson); *id.* at 3271 (statement of Sen. Saltonstall).

254. 111 CONG. REC. 3272 (1965). It had been reported that Democratic Senator Eugene McCarthy (Minnesota) opposed a constitutional amendment and would support Dirksen's enabling amendment rather than S.J. Res. 1. C.P. Trussell, *M'Carthy Fights Disability Plan*, N.Y. TIMES, Feb. 16, 1965, at 20. McCarthy did not vote on the Dirksen substitute but was paired as supporting it. 111 CONG. REC. 3272 (1965).

255. 111 CONG. REC. 3272 (1965). Those voting for the Dirksen substitute were Senators Bennett, Boggs, Case, Cotton, Dirksen, Hickenlooper, Prouty, Scott, Smith, Thurmond, Tower, and Williams. *Id.*

256. *Id.* Senators Dominick, Miller, Morton, Jordan, and Kuchel, though absent, also preferred Dirksen's substitute as did Democratic Senators Eugene McCarthy and Quentin Burdick. *Id.*

257. *Id.*

258. *Id.* at 3263.

259. *Id.* at 3285–86.

260. *Id.* at 3274, 3276.

261. *Id.* at 3270.

262. *Id.* at 3285.

## 4. 1965 Republican Collaboration: The House

If anything, Republicans played an even more active role in the House of Representatives. While Celler introduced H.R.J. Res. 1,<sup>263</sup> which was identical to Bayh's original S.J. Res. 1, McCulloch, the ranking minority member on the Judiciary Committee, and Poff each introduced amendments that largely tracked the Bayh-Celler proposal with an important difference. H.R.J. Res. 1 provided that if the Vice President and Cabinet contested the President's declaration of capacity, Congress must "immediately decide the issue."<sup>264</sup> By contrast, S.J. Res. 1, as amended by the Senate Judiciary Committee, provided that Congress must "immediately proceed to decide the issue."<sup>265</sup> Unlike the Bayh and Celler proposals, McCulloch<sup>266</sup> and Poff<sup>267</sup> each imposed a ten-day time limit for Congress to resolve such an intraexecutive branch disagreement. However, their proposals differed slightly in that McCulloch's ten-day period ran from the transmittal of the President's declaration of fitness<sup>268</sup> whereas Poff gave Congress ten days from receipt of the Vice President's letter challenging the President's declaration.<sup>269</sup>

The House began four days of hearings on February 9, 1965, ten days before the Senate passed S.J. Res. 1.<sup>270</sup> In his opening statement, McCulloch spoke of the urgency of the issues that the Bayh-Celler amendment addressed; however, he expressed unease at the "speed" with which the proposal was progressing since "[u]ndue haste could lead to oversight, imperfection, and regret."<sup>271</sup> He explained that in most respects, his proposal was identical to H.R.J. Res. 1,<sup>272</sup> but that he thought that "a definite time period should be established"<sup>273</sup> for Congress to resolve an executive branch dispute regarding presidential inability, even though he was "not wedded to a particular time period."<sup>274</sup> McCulloch viewed the concept of immediate action in the Bayh-Celler proposal as too indefinite.<sup>275</sup>

Republican members of the House Judiciary Committee participated actively in its 1965 hearings. Representatives Arch Moore, Charles Mathias,

263. H.R.J. Res. 1, 89th Cong. (1965).

264. *Id.* § 5.

265. S.J. Res. 1, 89th Cong. § 5 (1965); BAYH, *supra* note 10, at 212.

266. H.R.J. Res. 119, 89th Cong. § 5 (1965); 1965 *House Hearings*, *supra* note 114, at 3–4 (statement of Rep. William M. McCulloch).

267. H.R.J. Res. 3, 89th Cong. § 5 (1965); 1965 *House Hearings*, *supra* note 114, at 68 (statement of Rep. Richard Poff).

268. 1965 *House Hearings*, *supra* note 114, at 4 (statement of Rep. William M. McCulloch).

269. *Id.* at 68.

270. *See id.* at I.

271. *Id.* at 3 (statement of Rep. William M. McCulloch).

272. *Id.* at 4.

273. *Id.*

274. *Id.* at 67–68 (statement of Rep. William M. McCulloch) (describing the ten-day limit as "arbitrary").

275. *Id.* at 231–32, 236.

and McCulloch questioned Bayh regarding the meaning of “principal officers of the executive departments” in the disability provisions of S.J. Res. 1.<sup>276</sup> Moore asked whether someone other than the President or Vice President should be able to initiate an inability determination.<sup>277</sup> He and other Republicans raised concerns regarding forcing Congress to resolve an intraexecutive dispute quickly.<sup>278</sup> Mathias discussed the use of impeachment against a Vice President who refused to relinquish power to the President,<sup>279</sup> challenged the vice presidential vacancy provision,<sup>280</sup> and questioned the impact of allowing Congress to umpire an intraexecutive branch dispute on presidential inability.<sup>281</sup> During Bayh’s testimony, Moore observed that “it is fair to determine from the manner of the questions and the questions themselves that we are interested in this. We want to see the problem and it is a very severe problem as far as the administration of our Government is concerned, solved.”<sup>282</sup> Later Poff, McCulloch, Mathias, Moore, and Lindsay engaged intensively with Katzenbach.<sup>283</sup>

No Republican worked harder to improve the amendment than did Poff. During Bayh’s House testimony, Poff made numerous suggestions that reflected the careful attention he had given the Bayh-Celler proposal.<sup>284</sup> Poff and McCulloch pressed Bayh about the need for a specific time limit for Congress to decide an intrabran­ch dispute<sup>285</sup> and Poff repeatedly advocated a time limit on congressional action during hearings.<sup>286</sup> Bayh resisted the idea, owing to the sensitivity of time limits for some Senators and because a more flexible approach would allow handling different situations differently.

Although the discussion of the time limit signaled a difference between the Bayh-Celler and McCulloch-Poff approaches, Poff helped Bayh in other respects. When a number of predominantly Democratic representatives

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276. *Id.* at 59–60 (statements of Reps. Arch Moore, Charles Mathias, and William M. McCulloch).

277. *Id.* at 79–81 (statement of Arch Moore).

278. *Id.* at 85–86.

279. *Id.* at 88–89 (statement of Charles Mathias).

280. *Id.* at 89–92.

281. *Id.* at 92–93.

282. *Id.* at 85.

283. *Id.* at 97–98, 100–02, 104 (statements of Reps. Richard Poff, William M. McCulloch, Charles Mathias, Arch Moore, and John Lindsay).

284. *See id.* at 64–65 (statement of Rep. Richard Poff) (suggesting that the Acting President “discharge” rather than “assume” the presidential powers and duties as Acting President); *id.* at 66 (requiring the President to “promptly” nominate a Vice President); *id.* at 78 (discussing the merits of allowing the “person next in line of presidential succession” to initiate a disability action in absence of a Vice President); *id.* at 81–84 (discussing the merits of allowing the Cabinet to initiate a disability determination); *id.* at 85 (arguing that only the Vice President, not the Cabinet or other body created by Congress, should be able to initiate proceedings); *id.* at 86–87 (proposing language to address vice presidential and presidential inability in the absence of a Vice President). Poff was helped by a letter from John D. Feerick outlining areas of inquiry. *See* Letter from John D. Feerick to Richard Poff (Feb. 7, 1965), [http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&coconte=twentyfifth\\_amendment\\_correspondence](http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&coconte=twentyfifth_amendment_correspondence) [https://perma.cc/8RH9-5RCT].

285. *1965 House Hearings*, *supra* note 114, at 66–70 (statements of Reps. Richard Poff and William M. McCulloch).

286. *Id.* at 187, 233–34, 236–37 (statement of Rep. Richard Poff).

posed critical questions at the outset of the hearing,<sup>287</sup> Poff interjected to point out the care and deliberation that had gone into the Bayh-Celler proposal.<sup>288</sup> Poff defended the provisions of H.R.J. Res. 1 during hearings.<sup>289</sup> Poff also helped Bayh to craft important legislative history on a number of points.<sup>290</sup> In fact, when Bayh misstated one conclusion, Poff interjected to indicate that Bayh had misunderstood the question, thus allowing Bayh to correct his testimony.<sup>291</sup>

When the House Committee on the Judiciary reported H.R.J. Res. 1 to the House on March 24, 1965, two facts suggested the Republican influence. First, ranking member McCulloch, not Committee chair and H.R.J. Res. 1 author Celler, presented the report.<sup>292</sup> Second, the reported version of H.R.J. Res. 1 had been amended to include a ten-day time limit for congressional action measured from receipt of the written declaration of the Vice President and Cabinet contesting the President's declaration of fitness.<sup>293</sup> H.R.J. Res. 1 was still Bayh-Celler, but in this respect, it was also Poff-McCulloch.

When H.R.J. Res. 1 came to the floor on April 13, 1965, Celler began his opening remarks by noting that the measure had "bipartisan support" and singling out for praise "particularly" McCulloch and Poff, "who participated in the fashioning and polishing of this resolution. They did so most wisely and painstakingly. They immersed themselves into the intricacies of the legislation. Their help was immeasurable."<sup>294</sup> Celler went on to praise "the constructive work done by most of the members of our committee, Democrats, and Republicans alike," and specifically mentioned Republicans John V. Lindsay (New York) and William C. Cramer (Florida), along with six Democrats.<sup>295</sup>

When Republican Representative Durward Hall (Missouri), a physician, questioned the lack of medical testimony during the hearings and inquired whether medical personnel would be consulted in a disability determination,<sup>296</sup> Poff came to Celler's aid.<sup>297</sup> Poff pointed out that Brownell had relied on medical opinions in advising Nixon and the Cabinet that no

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287. *See id.* at 45–63 (statements of various Reps.)

288. *Id.* at 63–64 (statement of Rep. Richard Poff).

289. *See id.* at 206–07 (defending the provision for filling a vice presidential vacancy).

290. *Id.* at 87 (establishing that presidential inability or vice presidential inability did not create a vacancy and that the Vice President, as Acting President during a presidential inability, need not take the presidential oath); *id.* at 94 (interrupting after Bayh initially, and mistakenly, suggested that the President could not reassert ability after an unfavorable congressional decision); *see id.* at 196 (discussing the meaning of a vice presidential vacancy); *id.* at 246 (establishing, with Brownell, that a vice presidential disability is not a "vacancy").

291. *Id.* at 94 (establishing that the President could reassert the ability to discharge the powers and duties of his office after an adverse decision by Congress).

292. *See* H.R. REP. NO. 89-203, at 1 (1965).

293. *Id.* at 2–3.

294. 111 CONG. REC. 7936 (1965) (statement of Rep. Celler).

295. *Id.*

296. *Id.* at 7938–39 (statement of Rep. Hall).

297. *Id.* at 7939.

formal transfer was needed and suggested that future decision-makers would surely consult medical professionals,<sup>298</sup> a point Republican Representative Clark McGregor (Minnesota) reinforced.<sup>299</sup>

Poff described H.R.J. Res. 1 as involving “some degree of compromise,” praised Celler as “an impartial, fair-minded arbiter” who “stood firm when firmness was necessary but has yielded when logic dictated,” and said no “partisan consideration was advanced” in the Committee’s deliberations.<sup>300</sup> Poff provided a scholarly justification for H.R.J. Res. 1, which explained and justified the changes made during the Committee’s deliberation. In particular, H.R.J. Res. 1 as amended made clear that a President who voluntarily transferred power could resume powers immediately upon his written declaration of his fitness, required Congress to assemble if not in session, and added a time limit for Congress to act within ten days.<sup>301</sup> McCulloch largely echoed Poff’s defense.<sup>302</sup> Other Republicans, including Representatives Frank Horton (New York),<sup>303</sup> Willard S. Curtin (Pennsylvania),<sup>304</sup> Robert Stafford (Vermont),<sup>305</sup> Robert McClory (Illinois),<sup>306</sup> James Battin (Montana),<sup>307</sup> Lindsay,<sup>308</sup> William Cahill (New Jersey),<sup>309</sup> Seymour Halpern (New York),<sup>310</sup> and F. Bradford Morse (Massachusetts),<sup>311</sup> also filed statements supporting H.R.J. Res. 1.

Poff, McCulloch, and other Republicans helped defend H.R.J. Res. 1 from amendments on the House floor (some proposed by other Republicans). When Democratic Representative Roman Pucinski (Illinois) sought to strike section 2, Poff argued that his premise was wrong in thinking that section 2 would repeal the 1947 succession law which placed the Speaker after the President and Vice President.<sup>312</sup> Lindsay offered other passionate arguments in opposition.<sup>313</sup> When Republican Representative Charles Jonas (North Carolina) suggested that the Vice President’s appointment be temporary pending a special election,<sup>314</sup> McCulloch pointed out that a special election would be costly and might produce a Vice President from the opposing party.<sup>315</sup> When Moore proposed amending H.R.J. Res. 1 so that the President would exercise powers while Congress resolved a dispute over his

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298. *Id.*

299. *Id.*

300. *Id.* at 7940 (statement of Rep. Poff).

301. *Id.* at 7941.

302. *Id.* at 7942–43.

303. *Id.* at 7943–44.

304. *Id.* at 7945.

305. *Id.*

306. *Id.* at 7946–47.

307. *Id.* at 7947.

308. *Id.* at 7947–48.

309. *Id.* at 7951.

310. *Id.* at 7951–52.

311. *Id.* at 7952.

312. *Id.* at 7960.

313. *Id.* at 7961–62.

314. *Id.* at 7962.

315. *Id.*

capacity,<sup>316</sup> McClory was among those who objected that Moore's amendment would contribute to instability.<sup>317</sup>

Poff, at McCormack's request, offered the one floor amendment that was accepted.<sup>318</sup> It required Congress to reassemble within forty-eight hours if not in session in response to the Vice President's challenge to a President's assertion of his ability to resume his powers and duties.<sup>319</sup> Poff's willingness to accommodate the Speaker was further evidence of the bipartisan spirit that pervaded the treatment of H.R.J. Res. 1.

Just as he had during hearings, Poff helped make important legislative history through his comments during debate.<sup>320</sup> Of the 140 Republicans, 122 voted for H.R.J. Res. 1 and only eight opposed it on April 13, 1965.<sup>321</sup>

### 5. Collaboration: The Conference and Adoption

To resolve the differences between the House and Senate regarding the content of the proposed amendment, a conference committee was appointed.<sup>322</sup> The committee included, from each body, three Democrats—Senators Eastland, Ervin, and Bayh, and Representatives Celler, Byron G. Rogers (Colorado), and James C. Corman (California).<sup>323</sup> The committee also contained two Republicans from each body—Senators Dirksen and Hruska, and Representatives McCulloch and Poff.<sup>324</sup> The conferees ultimately resolved the differences, the major one being a compromise between the House's ten-day McCulloch-Poff limit for Congress to resolve an intraexecutive branch dispute and the Senate formulation that encouraged "immediate" action without any time limit.<sup>325</sup> McCulloch was, apparently, reluctant to move from the House's position.<sup>326</sup> Although the Democratic majority would have allowed the conference committee to complete its work on a partisan basis, Bayh and Celler were anxious to reach a bipartisan and unanimous agreement.<sup>327</sup> After two months of meetings, both sides agreed to a twenty-one day period.<sup>328</sup> Quicker agreement was reached on other

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316. *Id.* at 7963–64.

317. *Id.* at 7966.

318. Feerick, *supra* note 4, at 192 n.103.

319. 111 CONG. REC. 7966–67 (1965).

320. *Id.* at 7946 (statement of Rep. Poff) (stating that a vote for Vice President required action in each house separately, not in a joint session); *id.* at 7951 (establishing that the proposed amendment would not supplant Article II's language that allowed Congress to provide for death, resignation, removal, or inability of both the President and Vice President); *id.* at 7963 (stating that absent a Vice President, sections 3 and 4 are inapplicable, but noting that Congress could deal with the issue of double vacancy or inability by statute).

321. *Id.* at 7968–69.

322. Feerick, *supra* note 4, at 193.

323. *Id.* at 193 n.107.

324. *Id.*

325. *Id.* at 193.

326. BAYH, *supra* note 10, at 296–97, 303.

327. *Id.* at 303–04.

328. Feerick, *supra* note 4, at 193; *see also* BAYH, *supra* note 10, at 282–304 (describing the events leading to the compromise).



matters. The House version of section 3 was adopted, which allowed a President who had voluntarily transferred power to reclaim it based on a similar declaration.<sup>329</sup> The conferees compromised between the two- and seven-day limits for the Vice President and Cabinet to respond to the President's declaration by agreeing to a four-day period.<sup>330</sup> Poff's amendment that required Congress to convene within forty-eight hours was accepted.<sup>331</sup> In addition, at Hruska's urging, language in section 4 was modified to make clear that even if Congress created some "other body" to replace the Cabinet, the Vice President would remain a necessary actor.<sup>332</sup>

Although the House quickly agreed to the conference report on June 30, 1965,<sup>333</sup> Senate proceedings provided more drama. Bayh presented and explained the conference report and thanked all who had contributed, "especially" Hruska,<sup>334</sup> and Hruska called for approval of the report.<sup>335</sup> The discussion became contentious as Democratic Senators Eugene McCarthy (Minnesota) and Al Gore Sr. (Tennessee) began to criticize the amendment. Gore, in particular, suggested that the language of section 4 allowed Congress to supplement the Cabinet by creating an "other body" that could allow the Vice President to shop between the Cabinet or that "other body" for an agreeable partner to oust the President.<sup>336</sup> Gore's point was directed at language added during the conference at Hruska's insistence to clarify that the Vice President was a necessary participant in a determination of presidential inability even if Congress created "[an]other body" to replace the Cabinet.<sup>337</sup>

Once again, Republicans came to Bayh's aid to help address arguments advanced by Democrats. John Sherman Cooper (Kentucky) engaged in a colloquy with Bayh to establish legislative intent that creation of "[an]other body" to act with the Vice President would supplant, not supplement, the Cabinet<sup>338</sup> and that the vice president would be a necessary party to the decision in any case.<sup>339</sup> After Gore persisted, another Republican, Javits, came to Bayh's aid to argue that Congress could specify that an "other body" would be exclusive but that in any event he did not think the language was ambiguous.<sup>340</sup>

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329. Feerick, *supra* note 4, at 193.

330. H.R. REP. NO. 89-564, at 70 (1965) (Conf. Rep.).

331. *Id.*

332. Feerick, *supra* note 4, at 194.

333. 111 CONG. REC. 15,212-16 (1965).

334. *Id.* at 15,378-79.

335. *Id.* at 15,379-80.

336. *Id.* at 15,382-83.

337. FEERICK, *supra* note 6, at 101, 364 n.118.

338. 111 CONG. REC. 15,383 (1965).

339. *Id.*

340. *Id.* at 15,385-86.

When the Senate returned to the matter on July 6, 1965, Javits promptly reaffirmed his support.<sup>341</sup> Although Ervin assumed the burden of replying to Gore, so, too, did Dirksen,<sup>342</sup> Javits,<sup>343</sup> and Cooper.<sup>344</sup>

Ultimately, the conference report passed sixty-eight to five, with the opponents consisting of four Democrats and one Republican.<sup>345</sup> Twenty-one Republicans voted for the proposed amendment and eight of the ten absent Republicans announced their support.<sup>346</sup>

### III. LESSONS FROM A BIPARTISAN ACCOMPLISHMENT

The Twenty-Fifth Amendment is properly called the Bayh Amendment in recognition of Bayh's able and indispensable leadership. Yet the proposed amendment went to the states covered with Republican fingerprints. Sections 1, 3, and 4 followed the basic approach of the Eisenhower-Brownell-Rogers proposal from 1958. Hruska added the seven-day challenge period for the Vice President under section 4<sup>347</sup> (later compromised to four days)<sup>348</sup> and language to clarify that the Vice President was a necessary party to a section 4 determination.<sup>349</sup> Poff added the requirement that Congress reconvene in response to the Vice President and Cabinet challenging a presidential declaration.<sup>350</sup> The twenty-one-day time period for Congress to resolve an intraexecutive branch conflict was a compromise forced by the McCulloch-Poff ten-day limit.<sup>351</sup> Eisenhower, Brownell, and Nixon helped shape the public and congressional disposition to find a solution; McCulloch, Poff, Hruska, Dirksen, Javits, Cooper, and others made helpful floor statements; Poff and others helped create important legislative history; and many Republicans and Democrats compromised and supported a product different from the one they would have preferred.<sup>352</sup>

The bipartisan character of the effort was celebrated. During the September 1964 Senate debate, Mansfield expressed pleasure that S.J. Res. 139 commanded support "on both sides of the aisle."<sup>353</sup> President Johnson's message to Congress on January 28, 1965, supporting S.J. Res. 1 and H.R.J. Res. 1 acknowledged a "consensus of an overwhelming"

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341. *Id.* at 15,584.

342. *Id.* at 15,591-93.

343. *Id.* at 15,595.

344. *Id.*

345. *Id.* at 15,596.

346. *Id.*

347. 111 CONG. REC. 3274, 3276 (1965).

348. H.R. REP. NO. 89-564, at 4 (1965) (Conf. Rep.).

349. FEERICK, *supra* note 6, at 101.

350. 111 CONG. REC. 7966-67 (1965).

351. H.R. REP. NO. 89-564, at 72.

352. *See* Feerick, *supra* note 4, at 203 ("The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation.").

353. 110 CONG. REC. 23,001 (1964).

congressional majority “without thought of partisanship” committed to prompt action.<sup>354</sup>

Some unique factors invited bipartisan behavior. The onerous and multiple supermajority requirements associated with constitutional amendment provided special incentive for bipartisanship. Even the Johnson 1964 landslide, which gave Democrats 68 percent of each house of Congress, did not render bipartisanship unnecessary. While some Democrats, like Gore and McCarthy, were vocal Senate critics,<sup>355</sup> and twenty-one House Democrats voted against H.R.J. Res. 1 in April 1965,<sup>356</sup> several Republicans, like Poff, McCulloch, Dirksen, Hruska, Cooper, and Javits, advocated for Bayh-Celler. House Republicans supported H.R.J. Res. 1 at roughly the same rate as Democrats. Bayh recognized that the two-thirds requirement cautioned against making the issue partisan.<sup>357</sup> When Dirksen stated at a 1965 markup that something was agreeable to “the Minority,” Bayh’s antennae went up for fear that the issue would become partisan.<sup>358</sup>

The fact that presidential succession and inability and Vice Presidential vacancy were not campaign issues mitigated partisan pressures. Since a legislator’s position on Bayh-Celler would affect few, if any, election votes, lawmakers felt free to act based on their perception of the public interest with limited regard to partisan considerations. The Amendment did not favor one party or the other (and, ironically, the first six applications of the Twenty-Fifth Amendment have been in Republican administrations).<sup>359</sup> Interest groups were not heavily engaged and the ABA was an independent and respected nonpartisan endorser.

Finally, the two parties were not as ideologically aligned in the mid-1960s as they later became. Republican liberals and moderates held seats in industrial states and in New England, and Democratic conservatives still dominated the South. Although ideology did not drive behavior on the Twenty-Fifth Amendment, the nonideological nature of the parties made bipartisan cooperation more the norm than the exception. Many other measures in the mid-1960s—such as the Civil Rights Act of 1964, the Gulf of Tonkin Resolution, and the Voting Rights Act of 1965—had bipartisan support.

Yet bipartisanship did not simply happen. Bayh and others contributed to the bipartisan quality of the Twenty-Fifth Amendment by structuring the proposal and proceedings to encourage Republican participation. By incorporating the Eisenhower-Brownell-Rogers 1958 amendment as the

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354. *1965 Senate Hearing*, *supra* note 130, at 13 (reprinting Johnson’s message).

355. *See* 111 CONG. REC. 15,381–86 (1965).

356. *Id.* at 7969.

357. BAYH, *supra* note 10, at 209.

358. *Id.*

359. Gerald R. Ford and Nelson Rockefeller became Vice President under Section 2. GOLDSTEIN, *supra* note 72, at 239–46. Ford became President under Section 1. Goldstein, *supra* note 2, at 969. Presidents Ronald Reagan and George W. Bush (twice) briefly transferred powers to their Vice Presidents under Section 3. GOLDSTEIN, *supra* note 166, at 255–57, 259.

framework for the disability provisions of his resolution, Bayh made it more likely that Eisenhower Republicans would support his proposal.

Bayh and his ABA allies adopted an inclusive approach. They consciously included Republicans like Brownell and Eisenhower in visible roles and were solicitous to Republican legislators. They made a point to work closely with Republicans including Dirksen and his staff, and with McCulloch and Poff, knowing that their support would be important.<sup>360</sup> Bayh encouraged exchange with others, including Republicans, to improve the measure and broaden support. When Poff justified his probing questioning during the 1965 House hearing, Bayh replied that no apology was needed because “[t]he more questions we ask and the more we try to delve into each other’s minds, the more all of us can see the difficulty of solving this problem and the more opportunity we will have of finding a solution. So fire away.”<sup>361</sup> McCulloch justified the extensive questioning regarding a proposed constitutional amendment and criticized some (but not Bayh, he hastened to add) “who have raised the question of some of the minority to try to improve” the Bayh-Celler proposal.<sup>362</sup> Bayh repeatedly expressed his willingness to consider objections and compromise.<sup>363</sup> Many on both sides of the aisle had reason to feel part of the process.

This inclusive disposition developed and spread because leaders on both sides of the aisle preached and modeled a collaborative, problem-solving approach to the issue. That was Nixon’s message in his March 1964 testimony, and it was apparent when Keating accommodated Bayh’s wish to bring S.J. 139 to the floor, when Javits abandoned his proposal in favor of Bayh’s, and when Dirksen and Hruska championed S.J. Res. 1 after their amendments were defeated. Bayh argued at the Senate’s 1965 hearings that the failure to solve problems regarding presidential inability was not due to a lack of proposals but rather because of “a refusal or reluctance on the part of the proposers to sit down and work out an agreement which we admit is not perfect, but which is better than no solution at all.”<sup>364</sup> Democrats, like Bayh, Ervin, and Katzenbach, also compromised. Partisans on both sides of the aisle seemed to respond to the words and deeds that encouraged and modeled accommodation.

Bayh also recognized that Eisenhower, Nixon, and Brownell could speak powerfully regarding presidential inability and the rise of the vice presidency from their experiences during the Eisenhower administration. He gave them prominent roles in the hearings he held, the ABA made Eisenhower and Brownell featured speakers at its forum, and Bayh and other Democrats often cited them as authorities in discussions of the proposal. In arguing that letter agreements were insufficient, Bayh pointed out that both Eisenhower and

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360. See BAYH, *supra* note 10, at 98–99, 105–06, 150; BECK, *supra* note 9, at 92, 98–100.

361. 1965 House Hearings, *supra* note 114, at 86 (statement of Sen. Birch Bayh).

362. *Id.*

363. *Id.* at 67; *id.* at 84 (referring to the importance of “give and take”); *id.* at 86 (discussing the importance of questions).

364. 1965 Senate Hearing, *supra* note 130, at 42 (statement of Sen. Birch Bayh).

Nixon had taken that position.<sup>365</sup> When Folsom spoke of the difficult position of the Vice President during presidential disability deliberations based on the Eisenhower experiences,<sup>366</sup> Bayh replied that Eisenhower thought that the Vice President had an inescapable constitutional responsibility.<sup>367</sup> Celler invoked Brownell's earlier rationale for why a constitutional amendment was needed<sup>368</sup> and quoted Brownell in response to criticism from Republican Representative Clarence Brown (Ohio).<sup>369</sup> Democratic Senators often invoked Eisenhower's observations.<sup>370</sup>

A proposal supported by Eisenhower and Johnson; Brownell and Katzenbach; Javits, Cooper, and Ervin; and Poff, McCulloch, and Celler became harder to challenge. Alternatives, like the enabling approach, could not overcome the bipartisan pedigree of Bayh's proposal. Ultimately the arguments ended up being over details, like whether to include time limits and whether creation of an "other body" would supplant or supplement the Cabinet. It was easier to obtain the two-thirds majorities in the House and Senate since proponents of the proposal could seek support from all members, not simply Democratic ones. And the bipartisan support of the measure strengthened the prospects of ratification of the proposed Twenty-Fifth Amendment.

What produced the Twenty-Fifth Amendment was the willingness of legislators of both parties to focus on the national interest and on problem solving and to operate in a way that encouraged those dispositions. Democrats and Republicans agreed that existing provisions regarding presidential succession and inability were inadequate, presented perils, and needed to be addressed. They agreed that the status quo was unacceptable and presented a less attractive option than alternative courses. This disposition informed much behavior and persisted and grew as the proposal passed the various stages of the bicameral amendment process before being submitted to the states for ratification.

Rather than allowing disagreements to prevent achievement, the participants emphasized and built upon their common ground. In so doing, Republicans and Democrats together effectively addressed a problem that had confounded the founding fathers and America for 180 years.

#### IV. PARTISANSHIP (AND BIPARTISANSHIP) IN A BROADER CONTEXT

Partisanship is, of course, one, but only one, of the ways in which legislators and voters organize themselves to compete for political power and to pursue policy objectives. Bipartisanship involves a recognition that

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365. *1964 Senate Hearings*, *supra* note 89, at 3 (statement of Sen. Birch Bayh).

366. *1965 Senate Hearing*, *supra* note 130, at 53–54 (statement of Sen. Birch Bayh).

367. *Id.* at 54.

368. *Id.* at 55.

369. 111 CONG. REC. 7936 (1965).

370. *Id.* at 3255 (statement of Sen. Ervin) (recalling Eisenhower's emphasis on the importance of party continuity in the vice presidency); *see also 1965 Senate Hearing*, *supra* note 130, at 54 (statement of Sen. Birch Bayh) (invoking Eisenhower's observations regarding the Vice President's role in determining presidential disability).

sometimes it is advantageous to work with partisan rivals to identify and pursue objectives collaboratively rather than competitively.

Partisanship is by no means the only obstacle to cooperative political behavior. People organize based on a range of demographic and other factors. Sometimes institutional commitments dictate political behavior and impede cooperation, such as when different legislative committees battle over jurisdiction, when Senators and representatives insist on the product of their own house, or when congressmen and executive officials divide regarding separation of powers issues. Sometimes egotism presents the obstacle as when people are unwilling to relinquish their own proposal or cede or share credit. Many of these divisions appeared when Congress considered how to address presidential succession and inability during the mid-1960s.

The hearings and debates on the Twenty-Fifth Amendment included numerous statements from members of Congress and other experts on the issue, all of which ran to nearly 1000 pages. Yet the voluminous legislative record contains no wiser or more eloquent statement of the challenge of collaborative problem solving than three paragraphs in the remarks of a twenty-seven-year-old lawyer testifying before Congress for the very first time during the hearings of the Senate Subcommittee on Constitutional Amendments on February 28, 1964. Here are those words:

Perhaps one of the main reasons for the continued failure to solve this problem has been the great diversity of proposals. All have some merit. None is completely without objection. Each proposal has its adherents. No proposal has ever commanded enough support to be adopted. I am convinced that this problem can be solved.

However, I am equally convinced that the problem will never be solved if the trend persists whereby each of us stubbornly adheres to his own point of view. If this problem is ever to be solved men must agree and if they are to agree, they must actively work at it.

The time has come for those who are genuinely interested in the safety of this Nation to stop emphasizing those points on which they differ and to start emphasizing those points on which they agree. It is urgent that the problem be solved now. To miss this opportunity and again leave unsolved one of the most serious problems ever to confront the Congress would be to trifle with the security of this great Nation. Therefore, we must make every human effort to agree on a workable solution.<sup>371</sup>

This comment diagnosed the perennial problem that had prevented progress on presidential succession and inability as well as in many other areas. It is easier to disagree than to agree, but a chorus making “My Way” the common creed is not the route to solving communal problems. Instead, we must prioritize problem solving, talk to one another, focus on the common objective, and build from areas of agreement, rather than emphasize

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371. 1964 Senate Hearings, *supra* note 89, at 150 (statement of John D. Feerick).

differences. And work, work, work! The message was optimistic in its faith that the problem could be solved but realistic regarding the challenges. It was prescient in suggesting the urgent need for a solution and wise in recognizing that focusing on common interests and shared ideas was the route to collaboration and agreement.

Bayh embraced the message he heard at the February 28, 1964, hearings and professed it. During the January 29, 1965, Senate hearing, Bayh remarked that the obstacle to dealing with presidential inability historically had been the “many different proposals and a refusal or reluctance on the part of the proposers to sit down and work out an agreement which we admit is not perfect, but which is better than no solution at all.”<sup>372</sup> Bayh closed his testimony before the House Judiciary Committee on February 9, 1965, by expressing a thought quite similar to the one he had heard a year earlier:

The main barrier, I want to emphasize, to our ability to find a solution has been the fact that so far we have had so many different opinions that we have never been able to come close to a consensus . . . . This in no way precludes this body from making improvements to the consensus, but I would ask you to consider once again the impossibility of finding perfection and the gravity of the situation which now exists in which we have no answer whatsoever.<sup>373</sup>

People of Fordham no doubt recognize those words of that young witness as the voice of John Feerick and recognize in the 1964 statement the enduring message and course of a lifetime. Those words resonated in Congress, and the suggested approach helped Bayh, the ABA, and their Republican allies to bridge the various partisan and institutional divides in order to propose the Twenty-Fifth Amendment.

Of course there are problems that resist solution, where the common ground is too small or the divisions too deep or the emotions too raw. It takes two to tango, and sometimes there is not a willing partner. And, not all parties will have the patience or the wisdom or the skill to find the sweet spot where collaboration can occur.

But one-half century ago, the “Feerick Way” helped Congress solve problems that the likes of George Washington, Alexander Hamilton, and James Madison had left to future generations—problems their successors had exacerbated and failed to solve for nearly 180 years. Perhaps that same approach—the approach that provided the foundation for the bipartisan effort that led to the Twenty-Fifth Amendment—can also help us to solve many of the problems that currently afflict our communities, our nation, and the world in which we live. I hope so.

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372. *1965 Senate Hearing*, *supra* note 130, at 42 (statement of Sen. Birch Bayh).

373. *1965 House Hearings*, *supra* note 114, at 95 (statement of Sen. Birch Bayh).