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John D. Feerick

Fordham University School of Law, JFEERICK@law.fordham.edu

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Recommended Citation

John D. Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 American Bar Association Journal 915 (1965).

Available at: https://ir.lawnet.fordham.edu/twentyfifth_amendment_articles/1

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Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy

After eighty years of study and debate by scholars and politicians, the Congress has finally submitted to the states a Constitutional amendment to remedy a glaring flaw in the Constitution. Mr. Feerick sets forth the text of the proposed Twenty-Fifth Amendment and explains the thinking of its sponsors.

by John D. Feerick • of the New York Bar (New York City)

ARTICLE II, Section 1, Clause 6 of the Constitution provides:

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

This language does not answer some critical questions:

(1) In a case of Presidential inability does the Vice President succeed to the "office" of President thereby becoming President for the remainder of the term, or does he succeed to the "powers and duties" of President thereby becoming Acting President for the period of inability?

(2) Who is authorized to determine the existence of an inability and its termination?

Further, this provision does not set out any procedure for filling a vacancy in the Vice Presidency; nor does any other part of the Constitution.

Between the years 1787 and 1965

several Presidents were disabled in office and eight died in office.¹ Seven Vice Presidents also died in office and one resigned.² These occurrences revealed two glaring flaws in our Constitutional system: the absence of procedures to deal with a case of Presidential inability and the lack of means to fill a vacancy occurring in the Vice Presidency.

An Amendment at Last

After more than eighty years of study by Congressional committees, attorneys general, constitutional experts and bar committees, the United States Congress on July 6, 1965, proposed a long-needed Constitutional amendment to eliminate the void in these areas.³ Sponsored in the Senate by Senator Birch Bayh of Indiana and eighty-four cosponsors and in the House of Representatives by Representatives Emanuel Celler of New York, William M. McCulloch of Ohio, Richard H. Poff of Virginia and others, supported by the American Bar Association⁴ and by bar associations and civic organizations throughout the country, and wholeheartedly endorsed by President Lyndon B. Johnson, the proposed amendment probably has

received greater support and more consideration than any other amendment in our history. It stands as a striking example of bipartisan action in the best interests of the nation.

The proposed amendment, which has been submitted to the fifty state legislatures for ratification as the Twenty-Fifth Amendment, provides:

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

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office

1. These events are described in the author's book, *FROM FAILING HANDS; THE STORY OF PRESIDENTIAL SUCCESSION* (Fordham University Press, 1965).

2. The Vice Presidency has been vacant for a total of thirty-seven years, three months and two days.

3. The proposal passed the House of Representatives by voice vote on June 30, 1965, and the Senate by a vote of 68 to 5 on July 6, 1965. The same measure, with a few differences, previously had passed the Senate on February 19, 1965, by a vote of 72 to 0, and the House on April 13, 1965, by a vote of 368 to 29.

4. The principles embodied in the proposed amendment were recommended in January, 1964, by an American Bar Association Conference on Presidential Inability and Succession. The background to and the work at this conference are described in the author's book at pages 237-257 and his article *Presidential Inability: The Problem and Solution*, 50 A.B.A.J. 321 (1964). See also, 50 A.B.A.J. 237 (1964).

Presidential Inability Amendment

upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The measure is in the form of a proposed Constitutional amendment rather than a statute because of the predominant view among Constitutional authorities that Congress has no power to legislate on Presidential inability, or to establish a means for filling a vacancy in the Vice Presiden-

cy. An amendment setting out specific procedures was chosen over a short enabling amendment so that it would be self-executing and consistent with the Constitution's specificity in matters involving the Presidency.

Section 1 is designed to give express constitutional recognition to the precedent that a Vice President becomes President when there is a vacancy in the Presidential office because of the President's death, resignation or removal. When President William Henry Harrison died in office in 1841, Vice President John Tyler assumed the Presidential office despite vigorous objection that the Constitution intended that he remain Vice President and merely discharge the powers and duties of the Presidency. The Tyler precedent has been followed in turn by Vice Presidents Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman and Lyndon B. Johnson.

Section 2 deals with the problem of the Vice-Presidential vacancy. It would cover two sets of contingencies: (1) when the Vice President succeeds to the Presidency upon the President's death, resignation or removal; and (2) when the Vice President dies, resigns or is removed. In any of these cases, the President would nominate a Vice President who would take office upon confirmation by a majority vote of both Houses of Congress, each House meeting separately. If a nominee were not confirmed, the President would be expected to nominate another person.

Since the effectiveness of a Vice President depends almost completely on his relationship with the President, this method of filling a vacancy would insure that the President obtained a Vice President with whom he could work—one of the same party, of compatible temperament and views. It has other merits. The Presidential candidate now selects his running mate, so the procedure would be consistent to a large extent with present practice. As the people must give their stamp of approval to the Presidential and Vice Presidential candidates in order for them to be elected, so, too, here their representatives in Congress would have

to give their approval to the President's nominee before he could become the new Vice President.

Section 3 would permit a President to declare himself disabled and, in that event, to declare the end of his disability. The Vice President would act as President during the interim. This provision would eliminate the ambiguous wording of the succession provision which made it practically impossible for Vice Presidents Chester A. Arthur and Thomas R. Marshall to assume Presidential power during the inabilities of Presidents James A. Garfield and Woodrow Wilson, respectively, for fear that if they did so, the President would be ousted from office for the remainder of the term. The ambiguity lay in the words "the Same", which devolved on the Vice President in every case either the "office" or the "powers and duties" of President. Tyler had interpreted "the Same" as meaning "the office" and therefore, the argument went, "the office" would devolve on the Vice President in a case of inability as well as of death. Under Section 3 a President actually would be encouraged to relinquish his powers and duties if he were aware that he was disabled or could foresee that he would be.⁵

Section 4 is intended to cover situations in which the President is unable to declare his own inability or in which he refuses to do so when disabled.⁶ The proposed amendment would empower the Vice President and a majority of the "principal officers of the executive departments"⁷ (popularly known as "the Cabinet") to declare the President disabled. Should unforeseen circumstances indicate that the Cabinet is not a workable body in this matter,

5. A President's voluntary declaration could cover "either an indefinite or a specified period of time, and could specify a particular hour of commencement of the Vice President's role as Acting President". *Hearings Before the House Judiciary Committee, 89th Cong., 1st Sess.* at 240 (1965) (testimony of former Attorney General Herbert Brownell).

6. "Inability" is intended to cover any state of facts that would cause a President to be unable to discharge the powers and duties of his office, such as mental or physical illness, kidnaping, wartime capture or an airplane crash in an inaccessible location.

7. This expression is used in Article II, Section 2, Clause 1 of the Constitution, and it refers to the Secretaries of State; Treasury; and Defense; the Attorney General; the Postmaster General; and the Secretaries of the Interior; Agriculture; Commerce; Labor; Health, Education and Welfare; and Housing and Urban Development.

Congress would have the power to set up a body to replace the Cabinet and to function with the Vice President.

The members of the Cabinet would be a better group to handle a case of Presidential inability than any other proposed group (e.g., the Supreme Court, Congress, or a disability commission) for several reasons. Since they owe their appointments to the President, they would not be likely to take steps to have him declared disabled unless he actually were disabled. These persons work closely with the President and meet with him frequently. Consequently, they would be aware of his condition and of whether there was a need for an Acting President. Finally, since they have come to be considered an integral part of the executive machinery, their use is harmonious with the fundamental principle of separation of powers.

The involvement of the Vice President is proper. He is the person who would have to act as President. Therefore, he should have a say in determining when to act. The fact that his approval is necessary before a President can be declared disabled is an additional safeguard in favor of the President. As the only other nationally elected official and a person with political aspirations of his own, the Vice President would not give his approval except in a case of true inability.

Under Section 4, if a President were declared disabled, the Vice President would become Acting President for the period of the inability. The President could announce his own recovery but he then would have to wait four days before he could resume his powers and duties. In the meantime, the Vice President and Cabinet would have an opportunity to discuss the situation. If the Vice President and a majority of the Cabinet disagreed with the President, they would send a written declaration of that fact to the President pro tempore and Speaker. However, if they agreed with the President, the President would assume his powers and duties at the end of four days, or earlier if all agreed.

In a case in which the Vice President and Cabinet disagreed with the President, the issue would be referred to Congress for a final decision. If Con-

gress were not in session, it would have to assemble within forty-eight hours from the time the Vice President and Cabinet transmitted their declaration to the President pro tempore and Speaker. From the time of the transmittal Congress would have twenty-one days in which to decide the issue.⁸ Pending the decision, the Vice President would continue as Acting President so that the powers and duties of President would never be in the hands of a person whose capacity had been seriously challenged. If Congress failed to arrive at a decision within the given period, or if more than one third of either House sided with the President, the President would resume his powers and duties. If two thirds of both Houses supported the Vice President and Cabinet, the Vice President would continue as Acting President.⁹

The presence of Congress as final arbiter is a built-in safeguard against what is sometimes referred to as the possibility of intrigue or cabal by the Vice President and Cabinet vis-à-vis the President. The President is given the opportunity for a speedy review of any action by the Vice President or Cabinet. Other safeguards are that the proposed amendment embodies checks on all concerned.

It may be asked how this proposed amendment would have worked during the disabilities of Presidents Garfield, Wilson and Eisenhower. It is suggested that the provisions of Section 3 would have applied during the Garfield and Eisenhower situations. The Wilson case is more difficult to answer.¹⁰ It is possible that the Cabinet might have prevailed on Mrs. Wilson and Dr. Cary Grayson to have Wilson voluntarily turn over his power to Vice President Marshall. However, Wilson's determination to have the United States participate in the League of Nations and the nature of his inability likely would have prevented him from voluntarily relinquishing his power, and Section 4 probably would have been implemented.

No one claims that this proposed amendment is perfect or that it covers every possible contingency. No such claim was made on behalf of the Constitution itself. As Benjamin Franklin said in asking for approval of the



A graduate of Fordham College (B.S. 1958) and of Fordham Law School (LL.B. 1961), John D. Feerick practices with a New York City law firm. A student of the Presidential inability problem, he is the author of *From Failing Hands; The Story of Presidential Succession* (Fordham University Press, 1965).

Constitution: "I agree to this Constitution with all its faults . . . because I doubt . . . whether any other convention we can obtain may be able to make a better Constitution." The proposed Twenty-Fifth Amendment is the best obtainable measure for handling a case of Presidential inability and a Vice-Presidential vacancy. It is a worthy measure, is desperately needed and deserves to be ratified promptly.¹¹

8. The time limitation is the product of the Republican members of the House Judiciary Committee (principally Representatives William M. McCulloch and Richard H. Poff) who felt that the Senate version of the measure requiring Congress "immediately" to proceed to decide the issue was too vague. Congress, they argued, might take an unreasonably long period of time to reach a decision or reach none at all. Such delay would be fraught with peril because of the critical nature of the matter under discussion. A twenty-one day provision was agreed upon by a conference committee as a reasonable outside limit on Congressional consideration. It is believed, however, that Congress would act swiftly under the circumstances, and public opinion would demand such action.

9. The President could thereafter set Section 4 in motion by another written declaration of recovery.

10. For a good account of the Wilson inability, see SMITH, *WHEN THE CHEERING STOPPED* (1964).

11. The proposed amendment has been ratified (as of September 15, 1965) by Wisconsin, Nebraska, Oklahoma, Pennsylvania and Massachusetts. Since many legislatures will not be in session in 1966, the proposal is not likely to be ratified by the necessary thirty-eight state legislatures until early in 1967.