

1965

The Proposed Twenty-Fifth Amendment To the Constitution

John D. Feerick

Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

John D. Feerick, *The Proposed Twenty-Fifth Amendment To the Constitution*, 34 Fordham L. Rev. 173 (1965).

Available at: <https://ir.lawnet.fordham.edu/flr/vol34/iss2/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Proposed Twenty-Fifth Amendment To the Constitution

Cover Page Footnote

Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

THE PROPOSED TWENTY-FIFTH AMENDMENT TO THE CONSTITUTION

JOHN D. FEERICK*

THE Constitution of the United States does not contain any procedure for dealing with a case of either presidential inability or vice-presidential vacancy. Between 1789 and 1965, several Presidents of the United States have become disabled in office, and the Vice-Presidency has been vacant on sixteen different occasions totaling more than thirty-seven years.¹ Within the last twenty-one years, President Franklin D. Roosevelt suffered a fatal stroke, President Harry S. Truman was the object of an attempted assassination, President Dwight D. Eisenhower suffered a heart attack from which he recovered, and President John F. Kennedy was assassinated. The Vice-Presidency was vacant for approximately twenty per cent of this period. These situations pointed up the glaring defects in our system of presidential succession. After years of unsuccessful attempts to agree on a proposed solution to the problems of presidential inability and vice-presidential vacancy, the United States Congress was finally jolted into action by the assassination of President Kennedy. On Tuesday, July 6, 1965, Congress proposed the Twenty-Fifth Amendment to the Constitution, designed to solve these problems once and for all.

The proposed amendment, which is now under consideration by the state legislatures, 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.

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

Sec. 3. 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.

Sec. 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

* Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

1. See generally Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *Fordham L. Rev.* 457, 459 & nn.6-8 (1964).

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.²

The purpose of this article is to relate briefly the history behind the proposed amendment, to describe its legislative development, and to analyze its provisions.³

I. HISTORICAL DEVELOPMENT

A. *Presidential Inability*

There was little discussion at the Constitutional Convention of 1787 regarding presidential succession. The only reference to the matter of presidential inability was the unanswered question of John Dickinson of Delaware: "What is the extent of the term 'disability' & who is to be the judge of it?"⁴ As adopted, the Constitution provided in article II, section 1, clause 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, 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.

When President William Henry Harrison died on April 4, 1841, a great deal of attention was focused on this provision. There was some difference of opinion as to the meaning of the clause. Vice-President John Tyler asserted his right to the office and title of President for the remainder of Harrison's term. This unprecedented action was not without opposition. Several political leaders and newspapers argued that the Constitution

2. H.R. Rep. No. 564, 89th Cong., 1st Sess. 1-2 (1965).

3. This subject is treated extensively by the author in his book, *From Failing Hands: The Story of Presidential Succession* (1965) [hereinafter cited as *From Failing Hands*], and in his articles, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *Fordham L. Rev.* 73 (1963); *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *Fordham L. Rev.* 457 (1964); *Presidential Inability: The Problem and a Solution*, 50 *A.B.A.J.* 321 (1964).

4. *The Records of the Federal Convention of 1787*, at 427 (Farrand ed. 1937).

intended for him to remain Vice-President and discharge the powers and duties of President. They said that the words "the Same," in article II, section 1, clause 6, had reference to the powers and duties of the office and not the office itself.⁵ John Quincy Adams stated at the time:

I paid a visit this morning to Mr. Tyler, who styles himself President of the United States, and not Vice-President acting as President, which would be the correct style. But it is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.⁶

When Congress assembled in special session in May 1841, disagreements were voiced over Tyler's status.⁷ Congress, however, acquiesced in his claim to the Presidency, and the precedent was set. It was followed, in turn, by Vice-Presidents Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman, and Lyndon B. Johnson.⁸

On July 2, 1881, when the Nation was confronted with its first case of presidential inability, the Tyler precedent became a formidable obstacle to the Vice-President's acting as President. On that day President James A. Garfield was shot by an assassin, and for the next eighty days he wavered between life and death. Although it appeared at times that he would recover, he had frequent relapses and suffered periods of hallucinations. Toward the end of this period, he saw a few members of his Cabinet, but not once did he see Vice-President Chester A. Arthur. President Garfield's only official act during the eighty days was the signing of an extradition paper. The members of the Cabinet tried to keep the wheels of government turning, but there was much they could not do. Important matters such as the prosecution of post office swindlers and the handling of foreign affairs were neglected.

During the Garfield inability, scholars and politicians discussed the procedure to be followed in a case of presidential inability. Many contended that, if Vice-President Arthur undertook to discharge the powers and duties of President, he would become President for the remainder of the term whether or not Garfield recovered, since the Constitution provided the same result for inability as for death. Garfield's Cabinet

5. From *Failing Hands* 94-95.

6. 10 *Memoirs of John Quincy Adams* 463-64 (C. Adams ed. 1876).

7. From *Failing Hands* 95-96.

8. It is interesting to note that, shortly after Lyndon B. Johnson became President, Leonard C. Jones, a New Mexico attorney, unsuccessfully requested Attorney General Robert F. Kennedy and the United States Attorney for the District of Columbia to institute a suit to try President Johnson's right to the office. In June 1964, Jones instituted his own suit in the United States District Court for the District of Columbia, seeking an ultimate determination that Johnson's becoming President was unlawful, illegal and unauthorized by the Constitution. The suit was dismissed in September 1964.

discussed the matter and unanimously agreed that an Acting President was necessary. It divided four to three, however, on the question of the Vice-President's status if he assumed the President's duties. A majority, which included Attorney General Wayne MacVeagh, felt that, if Arthur acted, he would become President, as did Tyler, for the remainder of the term. The debate came to a close on September 19, 1881, when Garfield died and Arthur became President.⁹

Twelve years later, another President of the United States suffered an inability. On the night of June 30, 1893, President Grover Cleveland boarded a yacht in New York City and for the next five days cruised in Long Island Sound. Unknown to the public and to practically every member of the Government, including Vice-President Adlai Stevenson, was the fact that during that cruise President Cleveland was operated on for the removal of a cancerous growth on the roof of his mouth. Cleveland left the yacht on July 5 at his summer home where he convalesced until July 17, when he again boarded the yacht for a second operation to remove suspicious tissue which had been observed after the first operation.

Aside from an article appearing in the *Philadelphia Press* on August 29, 1893, there was no public reference to the operations. The article was condemned as a hoax and the substance thereof was refuted by the doctors and members of the Government. It was not until the publication of an article in the *Saturday Evening Post* in 1917 by one of the doctors involved in the operation that the public became aware of this inability.¹⁰ According to the doctor, the operation had been performed under complete secrecy because a financial panic existed in the country, and it was believed that, if the public were informed, a greater crisis would result.¹¹

This concealed inability was followed by another case of presidential inability. On September 6, 1901, President William McKinley was shot. The same day, he was operated upon while under the influence of ether. During the ensuing week, he remained confined to bed unable to perform his presidential duties. At first his condition seemed to improve, but after a few days it began to deteriorate, and on September 14, 1901, at 2:00 A.M., President McKinley died.

The next case of presidential inability became the most notorious in our history.¹² On September 25, 1919, President Woodrow Wilson, while on a speaking tour of the United States to gain support for the League of Nations, fell ill. His condition grew worse and, on the following day,

9. See generally From Failing Hands 117-39.

10. Keen, The Surgical Operations on President Cleveland in 1893, *Saturday Evening Post*, Sept. 22, 1917, p. 24.

11. Ibid. See generally From Failing Hands 147-51.

12. See id. at 162-80. See generally Smith, When the Cheering Stopped 89-261 (1964).

the tour was cancelled, and the presidential train was ordered to return to Washington. The public was informed that Wilson had suffered a complete nervous breakdown. On October 2, 1919, President Wilson suffered a stroke which paralyzed the left side of his body.

From September 25, 1919, until the inauguration of President Warren G. Harding on March 4, 1921, the United States was without the services of an able President. For more than six months after the occurrence of the stroke, very few persons had any contact with the President. The medical bulletins regarding his health merely said that he was suffering from nervous exhaustion. As a result, rumors about his condition were circulated. Some supposedly authoritative sources stated that he had had an abscess of the brain; others, that he had suffered a cerebral hemorrhage; and still others, that he had gone mad.

The facts of the inability were concealed not only from the public, but also from the members of the Cabinet. Vice-President Thomas R. Marshall was dependent for his information on the newspapers and the grapevine. He resented being kept in the dark and remarked that it would be a tragedy for the people if he had to act as President under such circumstances.¹³ Edith Bolling Wilson, the President's wife, and Dr. Cary Grayson, his physician, were practically alone in their knowledge of the truth.

In an effort to keep the executive branch functioning, the Cabinet met over twenty times under the direction of Secretary of State Robert Lansing. For this initiative, Wilson dismissed Lansing in February 1920, on the ground that he had assumed presidential authority. Despite its efforts, there were many matters which the Cabinet could not handle. It could not sign bills into law, or make presidential appointments, or answer important letters sent to Wilson. Nor could it agree to amendments to the Charter of the League of Nations which would enable the United States to gain entry. As a result of the absence of presidential leadership by Wilson or a legitimate Acting President, United States participation in the League of Nations was defeated in the Senate, numerous governmental vacancies went unfilled, twenty-eight bills became law by default of any action by the President, foreign diplomats were unable to submit their credentials to the President as required, and, in many other respects, the operation of government was suspended. Anyone who wished to communicate with the President had to do so through Mrs. Wilson. She decided what matters were important enough to be brought to his attention.¹⁴

13. 2 Houston, *Eight Years With Wilson's Cabinet* 37 (1926).

14. Mrs. Wilson stated: "Woodrow Wilson was first my beloved husband whose life I was trying to save, fighting with my back to the wall—after that he was the President of the United States." E. Wilson, *My Memoir* 290 (1939).

On September 24, 1955, thirty-six years after the Wilson inability, President Dwight D. Eisenhower suffered a heart attack. During the next few months, a small group consisting mainly of members of the Cabinet and the White House Staff carried on the affairs of government while the President convalesced.¹⁵ On two other occasions during the Eisenhower administration, the President suffered disabilities (an attack of ileitis and a speech impairment). In "each of these . . . instances," said Eisenhower, "there was some gap that could have been significant in which I was a disabled individual—from the standpoint of carrying out the emergency duties pertaining to the office—I was fortunate that no crisis arose."¹⁶

The tragic death of President Kennedy on November 22, 1963, revived the question of presidential inability.

B. *Vice-Presidential Vacancy*

The Vice-Presidency was created in the closing days of the Constitutional Convention of 1787 and appears to have been an afterthought of the framers.¹⁷ What discussion occurred centered on the Vice-President's position as President of the Senate. Some of the delegates argued that the office, in combining the functions of succeeding to the Presidency and presiding over the Senate, would violate the principle of separation of powers. Others felt that, unless the Vice-President were President of the Senate, he would be without a job and that, if he were not President of the Senate, some member of the Senate, by being made President, would be deprived of his vote, except in cases of ties. There were those who thought the office unnecessary altogether.¹⁸ The office was created by a vote of eight states to two.

The Constitution gave the Vice-President only two duties: (1) to preside over the Senate, in which capacity he could cast tie-breaking votes and open the certificates listing the votes of the presidential electors,¹⁹ and (2) to discharge the powers and duties of the President in case of death, resignation, removal or inability.²⁰ His office was unique, combining legislative and executive functions.

The Vice-President, like the President, was to hold office for four years.²¹ He was to be elected at the same time and in the same manner as

15. See *From Failing Hands* 217-22; Eisenhower, *The White House Years: Mandate for Change 1953-1956*, at 535-46 (1963).

16. Address by General Eisenhower, American Bar Association National Forum on Presidential Inability, May 25, 1964, in 50 A.B.A.J. 638, 640 (1964) (partial text).

17. See 2 *The Records of the Federal Convention of 1787*, at 535-37 (Farrand ed. 1911).

18. See *From Failing Hands* 51-56.

19. U.S. Const. art. I, § 3.

20. U.S. Const. art. II, § 1.

21. *Ibid.*

the President. He was to be subject to impeachment but, while the Constitution provided that the Chief Justice of the United States Supreme Court would preside at a trial of the President, no presiding officer was mentioned for a trial of the Vice-President. The Constitution prescribed no oath of office for the Vice-President. Nor did it mention any qualifications for the Vice-Presidency; but since, under the original method of election, the Vice-President would be the presidential candidate who received the second highest number of votes after the choice of the President, he would have the same qualifications as President (*i.e.*, be a natural born citizen, at least thirty-five years of age, and fourteen years a resident within the United States).²²

The original method of election was designed to insure that the Vice-President be a person comparable in stature to the President. Its purpose was soon frustrated because the electors, each of whom had two votes for President, would cast one vote for the candidate they wanted as President and the other for their vice-presidential choice.²³ In the election of 1800, most of the Republican electors voted for Thomas Jefferson and Aaron Burr, intending Jefferson for President and Burr for Vice-President. Burr received as many votes as Jefferson so that the House of Representatives was required to choose between them for President. This occurrence caused the mode of election to be modified in 1804 by the adoption of the twelfth amendment, which provided that the electors would cast two distinct votes—one designated for President and one for Vice-President. In order to insure that the Vice-President would have the same qualifications as the President, the words "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President . . ." were inserted in the amendment.²⁴

Following the adoption of the twelfth amendment, the Vice-Presidency rapidly declined in prestige.²⁵ Candidates for the office were now selected with a view to balancing the ticket and appeasing dissident elements in the presidential candidate's party. Little attention was given to the vice-presidential candidate's suitability for the Presidency. It was not until the twentieth century that this decline was arrested and the office began to take on greater significance in the framework of government.

Today, the Vice-President is a vital part of the executive machinery. He sits as a member of the Cabinet and the National Security Council; he is Chairman of the Committee on Equal Employment Opportunity, of the National Aeronautics Space Council, and of the Advisory Council of the Peace Corps; he coordinates various government programs, acts as a

22. *Ibid.*

23. *Ibid.*

24. U.S. Const. amend. XII.

25. See *From Failing Hands* 79-88.

liaison between the executive and legislative branches and as a representative of the President at home and abroad.

While the Vice-President's duties have been relatively few during much of our history, the office proved to be of vital importance on several occasions. Eight Vice-Presidents succeeded to the Presidency upon the death of the President and successfully led the country through these crises.²⁶ Yet the Vice-Presidency has been vacant often. This has been the case each of the eight times when a Vice-President succeeded to the Presidency. It has also been the case when Vice-Presidents George Clinton, Elbridge Gerry, William R. King, Henry Wilson, Thomas A. Hendricks, Garret A. Hobart, and James S. Sherman died, and John C. Calhoun resigned. Between July 9, 1850, and March 4, 1857, the office was occupied for less than two months; and between September 19, 1881, and March 4, 1889, for less than nine months. In each of James Madison's two terms as President, the Vice-President died.

Despite the vacancies which have occurred in the Vice-Presidency through the years, no serious effort was made to devise a means for filling such vacancies until after the assassination of President Kennedy. It was then that politicians and scholars alike finally recognized the necessity of having a Vice-President at all times, since he is the official best able to prepare himself for succession to the Presidency in the event of an emergency.

II. LEGISLATIVE DEVELOPMENT

A. 1881-1962

During the inabilities of Presidents Garfield and Wilson, attempts by Congress to find an acceptable method of handling the inability problem were unsuccessful because of diverse views on the subject.²⁷ From 1921 to 1955, Congress gave practically no attention to the problem. In 1955, Representative Emanuel Celler of New York, Chairman of the House Committee on the Judiciary, ordered the Committee's staff to undertake a study of the inability problem. In November 1955, during the course of this study, the staff prepared and distributed to various jurists, political scientists, and public officials a questionnaire comprised of eleven fundamental questions.²⁸ Among these were: "What was intended by the term 'inability' as used in . . . the Constitution?" "Shall a definition be enacted into law?" "Who shall initiate the question of the President's inability to discharge the powers and duties of his office?" "Once raised, who shall make the determination of inability?" "If temporary, who raises the question that the disability has ceased to exist?" "Once raised, who shall make

26. See generally *id.* at 3-20, 89-233.

27. *Id.* at 133-39, 179.

28. Staff of House Comm. on the Judiciary, 84th Cong., 2d Sess., Report on Presidential Inability 2-3 (Comm. Print 1956).

the determination of cessation?" "In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?" "Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?"²⁹

The replies to this questionnaire were extremely varied.³⁰ The Eisenhower heart attack prompted the House Committee on the Judiciary to set up a special subcommittee to look into the matter. Hearings were held in April 1956, and more opinions, similarly varied, were heard.³¹ In April 1957, Attorney General Herbert Brownell appeared before the Subcommittee and, on behalf of the Eisenhower Administration, proposed a constitutional amendment containing the following provisions:³² If the President declared his inability in writing, the Vice-President would thereupon discharge the powers and duties of the office. If the President failed to declare his inability or was unable to do so, the Vice-President, "if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet . . ." ³³ would act as President. In either case the President would resume his powers and duties upon his written declaration of recovery.

Since this proposal allowed the President to declare the cessation of his inability, it was criticized on the ground that it would be ineffectual if a disabled President were unwilling to relinquish his powers and duties. It was pointed out that in such a case the President could nullify the action of the Vice-President and Cabinet by immediately declaring his recovery. Various other proposals were made involving either separately or in combination the Vice-President, Cabinet, Congress, Supreme Court, and an Inability Commission.³⁴ After much consideration, the Subcommittee was unable to reach agreement on an approach and so indicated to the full committee on May 16, 1957, which, in turn, made no recommendations to the House of Representatives.

In January and February 1958, the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, under the chair-

29. *Id.* at 3.

30. *Ibid*; Staff of House Comm. on the Judiciary, 85th Cong., 1st Sess., *An Analysis of Replies to a Questionnaire and Testimony at a Hearing on Presidential Inability* (Comm. Print 1957).

31. Hearings Before the Special Subcommittee on the Study of Presidential Inability of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 20 (1956).

32. Hearings Before the Special Subcommittee on the Study of Presidential Inability of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 3, at 7-8 (1957).

33. *Id.* at 8.

34. See Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *Fordham L. Rev.* 73, 112-20 (1963).

manship of Senator Estes Kefauver of Tennessee, held hearings on the subject.³⁵ A number of constitutional experts were heard and many others submitted their views in the form of memoranda and letters. Attorney General William P. Rogers testified and endorsed the Brownell proposal, adding a provision to cover the possibility of a President's disagreeing with a determination of inability made by the Vice-President and Cabinet. He suggested that in such a case the Vice-President, with the approval of a majority of the Cabinet, could bring the disagreement before Congress, which then would decide the matter. If a majority of the House of Representatives voted that the President was disabled and if the Senate concurred by a two-thirds vote, the Vice-President would then discharge the powers and duties of the President until a majority of both Houses decided that the inability had ended or until the end of the term.³⁶

The Brownell proposal, thus modified, was approved in substance by the Subcommittee on Constitutional Amendments on March 12, 1958, but Congress adjourned without considering the matter, and it took no action in 1959 or 1960. Why did Congress fail to solve this problem after the most concerted effort in history? Although there was general agreement on the need for a constitutional amendment as distinguished from a statute, considerable disagreement had manifested itself on a procedure for determining the existence and termination of an inability. Of the numerous proposals advanced, each had its adherents and critics. None was able to muster enough support for passage.

A significant development during this period occurred on March 3, 1958, when the White House released the text of an informal agreement between President Eisenhower and Vice-President Richard M. Nixon, under which the Vice-President would act as President in a case of inability.³⁷ In the event of an inability, the President would, if possible, inform the Vice-President. If he were prevented from communicating with the Vice-President, the Vice-President could decide, after such consulta-

35. Hearings on S.J. Res. 100, 133, 134, 141, 143 & 144, S. 238 & 3113 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958).

36. *Id.* at 136-40, 155-56.

37. See generally Eisenhower, *The White House Years: Waging Peace* 233-35 (1965). This extra-constitutional agreement has since been followed by President Kennedy and Vice-President Johnson, President Johnson and Speaker John W. McCormack, and President Johnson and Vice-President Hubert Humphrey. Its only application to date occurred when President Johnson entered the Bethesda Naval Hospital in October 1965 for the removal of his gall bladder. It was announced by the White House that Vice-President Humphrey would be standing by while the President was under anesthesia, and for an indefinite period thereafter, and during the period would be ready to make a presidential decision if any situation arose requiring such action. The operation took place without any decisions having to be made by the Vice-President. See *N.Y. Herald Tribune*, Oct. 7, 8, 9 & 10, 1965, p. 1.

tion as seemed to him appropriate, that there was an inability. In either case the President would be empowered to declare the end of his inability. This understanding was intended only as a temporary measure pending action by Congress. Since the agreement did not have the force of law and since it depended entirely on the good will of the President and Vice-President, it was recognized that it was not a permanent solution to the inability problem.

B. 1963-1964

With the election of John F. Kennedy to the Presidency, the problem of presidential inability receded from general congressional and public consciousness. Only a few members of Congress continued to press for action. The Administration seemed little concerned about a permanent solution to the inability problem. Early in 1963, Senators Estes Kefauver and Kenneth B. Keating, having decided to put aside their previous proposals, joined in sponsoring a resolution (S.J. Res. 35)³⁸ which, by constitutional amendment, would clarify the Constitution on the status of the Vice-President in a case of inability and would empower Congress to legislate on the matter of inability. Senator Keating stated:

... Senator Kefauver and I . . . agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best from among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it.³⁹

In an effort to revive interest in the problem, Senator Kefauver commenced hearings of the Subcommittee on Constitutional Amendments on June 11, 1963.⁴⁰ Testimony was taken from seven witnesses. The then Deputy Attorney General, Nicholas deB. Katzenbach, and others testified in support of S.J. Res. 35. Subsequently, on June 25, 1963, the Subcommittee on Constitutional Amendments favorably reported S.J. Res. 35 to the full Committee, but the sudden death of Senator Kefauver in August 1963 brought the progress of the movement virtually to a halt. The Kennedy tragedy revived the inability problem once again. As Senator Keating stated: "As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land."⁴¹

38. S.J. Res. 35, 88th Cong., 1st Sess. (1963).

39. S. Rep. No. 1382, 88th Cong., 2d Sess. 18 (1964).

40. Hearings on S.J. Res. 28, 35 & 84 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963).

41. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147 Before the Subcom-

Following President Kennedy's death, there descended on Congress a flurry of proposals dealing with the problems of presidential inability and the vice-presidential vacancy. Senator Birch Bayh of Indiana, Kefauver's successor as Chairman of the Subcommittee on Constitutional Amendments, announced in December 1963 that the Subcommittee would hold hearings on these problems early in 1964. Senator Bayh, together with several other Senators,⁴² introduced a proposal (S.J. Res. 139)⁴³ containing provisions on inability, the vice-presidential vacancy, and the line of succession beyond the Vice-Presidency. The inability provisions were essentially the same as those embodied in the revised Eisenhower Administration approach.

Meanwhile, the internal machinery of the most powerful legal group in the country—the American Bar Association—went into operation. President Walter E. Craig of the ABA sent out special invitations to twelve lawyers familiar with the problem of presidential inability, inviting them to attend a Conference on Presidential Inability and Succession at the Mayflower Hotel in Washington, D.C., January 20 and 21, 1964.⁴⁴

From this two-day Conference emerged a consensus that the Constitution should be amended to provide:

(1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

(2) The inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall

mittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. 22 (1964).

42. They were Senators Alan Bible of Nevada, Quentin N. Burdick of North Dakota, Frank E. Moss of Utah, Claiborne deB. Pell of Rhode Island and Jennings Randolph of West Virginia.

43. S.J. Res. 139, 88th Cong., 2d Sess. (1964).

44. The conferees were former Attorney General Herbert Brownell; Walter E. Craig and Lewis F. Powell of the American Bar Association; Professor Paul A. Freund of Harvard Law School; former Deputy Attorney General Ross L. Malone; Dean Charles B. Nutting of the National Law Center; Sylvester C. Smith, Jr., former President of the American Bar Association; Jonathan C. Gibson of Chicago, then Chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association; James C. Kirby, Jr., former chief counsel of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee; Martin Taylor of New York, chairman of the Committee on Federal Constitution of the New York State Bar Association; Edward Wright of Arkansas, then chairman of the House of Delegates of the American Bar Association; and the author.

not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress;

(4) In the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term; and

(5) When a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.⁴⁵

The consensus was immediately released to the press. It was endorsed by the ABA on February 17, 1964,⁴⁶ and formally presented to the Subcommittee on Constitutional Amendments on February 24 by President Walter E. Craig and President-elect Lewis F. Powell of the ABA.⁴⁷

At the Senate hearings held during the months of January, February, and March 1964, a number of witnesses, including the author, expressed their support for the ABA consensus. Former President Dwight D. Eisenhower indicated his basic agreement with the proposal in a letter to Senator Birch Bayh, dated March 2, 1964. He said:

Many systems have been proposed but each seems to be so cumbersome in character as to preclude prompt action in emergency. My personal conclusion is that the matter should be left strictly to the two individuals concerned, the President and the Vice President, subject possibly to a concurring majority opinion of the President's Cabinet.⁴⁸

Almost all of the witnesses who testified at these hearings expressed great concern about the glaring flaws in our system of presidential succession and emphasized the necessity for their early elimination. Senator Bayh stated:

Our obligation to deal with the question of Presidential inability is crystal clear. Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our Nation from the possibility of floundering in the sea of public confusion and uncertainty . . .⁴⁹

The hearings of the Subcommittee on Constitutional Amendments ended on March 5, 1964. On May 27, 1964, the Subcommittee favorably reported to the Senate Committee on the Judiciary a revised S.J. Res. 139, embodying the recommendations of the ABA Conference.⁵⁰

45. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147, *supra* note 41, at 87. See Kirby, *A Breakthrough on Presidential Inability: The ABA Conference Consensus*, 17 *Vand. L. Rev.* 463 (1964).

46. Special Committee on Presidential Inability and Vice-Presidential Vacancy, 89 *A.B.A. Rep.* 613 (1964).

47. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147, *supra* note 41, at 84-106.

48. *Id.* at 232.

49. *Id.* at 3.

50. 110 *Cong. Rec.* 22288 (daily ed. Sept. 28, 1964).

On August 4, 1964, the revised S.J. Res. 139 was unanimously approved by the Senate Committee on the Judiciary.⁵¹ On Monday, September 28, 1964, the Senate passed the proposal by voice vote.⁵² Since there were fewer than a dozen Senators on the floor at the time of the vote, Senator John Stennis of Mississippi moved, the following day, to reconsider the vote. He supported the proposal but felt that it would set a dangerous precedent to have a proposed constitutional amendment approved by voice vote and without a sufficient number of legislators present.⁵³ A roll call was taken, and the sixty-five Senators in attendance all voted in favor of the Bayh plan.⁵⁴ This unique achievement represented the first time in history that a House of Congress passed a proposal to deal with presidential inability or vice-presidential vacancy. Congress adjourned without any action having been taken by the House of Representatives.⁵⁵

C. 1965

S.J. Res. 139 was reintroduced in January 1965 as S.J. Res. 1 by Senator Birch Bayh and more than seventy other Senators. It was also introduced in the House of Representatives by Representative Emanuel Celler as H.R.J. Res. 1. Representatives Richard H. Poff of Virginia and William M. McCulloch of Ohio, ranking Republican member on the House Committee on the Judiciary, introduced similar proposals⁵⁶ with the difference that, if there were a disagreement, between the President on the one hand and the Vice-President and Cabinet on the other, as to whether the President had recovered from an inability, Congress would have ten days in which to decide the issue. If it failed to do so within such period, the President would automatically resume his powers and duties. In contrast to their proposals, S.J. Res. 1 and H.R.J. Res. 1 merely required Congress to decide the issue "immediately."

On January 28, 1965, President Lyndon B. Johnson sent a special message to Congress endorsing S.J. Res. 1 and H.R.J. Res. 1, and urging prompt action on them. The President stated:

Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly continuity in the Presidency that is imperative to the success and stability of our system. Action on these measures now will allay future

51. S. Rep. No. 1382, 88th Cong., 2d Sess. 14 (1964).

52. 110 Cong. Rec. 22288 (daily ed. Sept. 28, 1964). See Appendix A *infra*.

53. *Id.* at 22337 (daily ed. Sept. 29, 1964).

54. *Id.* at 22341.

55. This was due to a good deal of resentment in the House over the criticism directed at Speaker John W. McCormack of Massachusetts, who in his early seventies was the immediate successor to President Lyndon Johnson. His ability to act as President, should it become necessary, was questioned in various quarters, largely because of his age. As a result, it was felt that to consider the subject (particularly the vice-presidential vacancy aspect) would be a great insult to the Speaker.

56. H.R.J. Res. 3, 119, 89th Cong., 1st Sess. (1965).

anxiety among our own people, and among the peoples of the world, in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal Offices of our constitutional system. If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries.⁵⁷

On the following day, the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary held hearings at which Attorney General Nicholas deB. Katzenbach, former Attorney General Herbert Brownell, President Lewis F. Powell of the ABA, and others testified in support of S.J. Res. 1. Mr. Katzenbach presented his interpretation of the proposed amendment in several areas and concluded by stating that "Senate Joint Resolution 1 represents as formidable a consensus of considered opinion on any proposed amendment to the Constitution as one is likely to find."⁵⁸

On February 1, 1965, the Subcommittee unanimously approved S.J. Res. 1 and reported it to the full Judiciary Committee, which approved it on February 10, 1965, with several changes.⁵⁹ On February 19, 1965, the measure was debated in the Senate.⁶⁰ There was practically unanimous agreement on the part of all who participated in the debate on the need for an amendment to solve the inability and vice-presidential vacancy problems. Disagreement was expressed over whether the amendment should set forth specific procedures for dealing with them, as did S.J. Res. 1, or merely empower Congress to enact procedures by legislation. Senator Everett McKinley Dirksen of Illinois, Republican minority leader, offered a substitute amendment providing: "The commencement and termination of any inability shall be determined by such method as Congress may by

57. White House Press Release, Jan. 28, 1965, in Hearings on S.J. Res. 1, 6, 15, 25 & 28 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 14 (1965).

58. *Id.* at 11.

59. S. Rep. No. 66, 89th Cong., 1st Sess. (1965). It was specified that all written declarations be sent to the "Speaker of the House of Representatives" and the "President of the Senate" rather than "Congress," so as to provide a basis for Congress being called into session, if out of session, to consider a disagreement issue. The Speaker and President pro tempore would be required to call a special session if the President's declaration of resumption were questioned and the Vice-President acting as President did not call a special session.

The expression "principal officers of the executive departments" was substituted for "heads of the executive departments" in order to make it clear that only those who are members of the Cabinet would be permitted to participate in any decision regarding inability, and also to make the language of the amendment consistent with that used in Article II, Section 2, Clause 1 of the Constitution, i.e., the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . ." See note 144 *infra*.

60. See 111 Cong. Rec. 3167-204 (daily ed. Feb. 19, 1965).

law provide.”⁶¹ He said that “it has been pretty much of a rule in our constitutional history that we do not legislate in the Constitution. We try to keep the language simple. We . . . offer some latitude for statutory implementation thereafter, depending upon the events and circumstances that might arise.”⁶² Senator Sam J. Ervin of North Carolina opposed the Dirksen Amendment, noting that it “totally ignores one of the crucial questions which has brought this matter to the floor of the Senate. That is the fact that vacancies occur in the office of Vice President.”⁶³ He argued that the Dirksen proposal “would place dangerous power in the hands of Congress,”⁶⁴ since it would give Congress a new power over the President by which “any time that power-hungry men in Congress were willing to go to the extremes that men were willing to go to in those days [*i.e.*, when radical Republicans sought to remove President Andrew Johnson], they could take charge of the Presidency.”⁶⁵ Only by setting out specifics in the Constitution, Senator Ervin said, would the President be sufficiently protected.⁶⁶ Senator Birch Bayh of Indiana, the floor leader of the measure, agreed and pointed out that the Constitution was quite specific in its provisions regarding the Presidency, namely, article II and the twelfth amendment.⁶⁷ The thrust of Bayh’s argument was that the principle of separation of powers would be violated if this specificity were not maintained. He said that the state legislatures would prefer to deal with an amendment containing a specific proposal, and that, unless the amendment were specific, Congress might never settle on a procedure since interest would wane once the amendment had been ratified.⁶⁸ Upon the conclusion of this debate, a vote was taken on the Dirksen substitute amendment, and it was defeated 60 to 12.⁶⁹

An amendment by Senator Strom Thurmond of South Carolina to establish the electoral college as the method of filling a vacancy in the Vice-Presidency was rejected by voice vote.⁷⁰ Senator Roman L. Hruska of Nebraska then proposed an amendment to change from two to seven the number of days that the President would be required to wait before resuming his powers and duties after his declaration of recovery from an inability. Senator Hruska stated:

In these days when much traveling is done by members of our Cabinet, and when on

61. *Id.* at 3175.

62. *Id.* at 3183.

63. *Id.* at 3187.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. *Ibid.*

68. *Id.* at 3170-71, 3189.

69. *Id.* at 3190.

70. *Id.* at 3192.

occasion the Vice President also travels frequently, if there would be . . . a declaration by the President in the absence of these parties the 48-hour period would obviously prove to be much too small.

. . . I feel that 7 days would be an appropriate and adequate time for the members of the Cabinet to . . . inform themselves of the actual condition of the President, perhaps visit with him, perhaps visit with his personal physician.⁷¹

This amendment was accepted.⁷²

Senator John O. Pastore of Rhode Island urged that the amendment should require Congress to decide a disagreement issue without transacting any other business in the interim. "[W]e ought to stay here," said Pastore, "until we decide that question, even if we must sit around the clock, or around the calendar, because this problem involves the Presidency of the United States."⁷³ Senators Hruska and Ervin remarked that such a restriction would be unwise as evidence might have to be taken in committee, or the President examined, before a decision could be reached.⁷⁴ While this was going on, an urgent situation could arise necessitating Congressional action.⁷⁵ The force of this reasoning led to the rejection of Pastore's suggestion.⁷⁶

Senator Ross Bass of Tennessee referred to the possibility of Congress' delaying in filling a vacancy in the Vice-Presidency in an effort to keep the Speaker first in line of succession.⁷⁷ He, therefore, offered an amendment which would require the President to nominate "immediately" a person to fill the vacancy. His amendment, however, was rejected by voice vote.⁷⁸ S.J. Res. 1, as amended, was then unanimously approved by a vote of 72 to 0.⁷⁹

Meanwhile, the House Committee on the Judiciary had held hearings on February 9, 10, 16, and 17, 1965, during which support was expressed for the McCulloch-Poff ten-day time limitation with respect to congressional action on a disagreement issue. It was maintained that a limitation was essential because of the possibility that Congress might delay unreasonably in deciding the issue or make no decision at all, with possible disastrous consequences to the country. On the other hand, it was pointed out that situations might arise where ten days or any other time limitation would be insufficient time for testimony to be heard and a considered

71. *Ibid.*

72. *Id.* at 3194.

73. *Ibid.*

74. *Id.* at 3195.

75. *Id.* at 3195-97.

76. *Id.* at 3197.

77. *Ibid.*

78. *Id.* at 3199.

79. *Id.* at 3203.

decision reached.⁸⁰ Former Attorney General Herbert Brownell testified that the possibility of a disagreement was remote, but that, if it did occur, Congress would act with all due speed. He stated: ". . . I have always found in my experience that men under the pressure of national or international crisis do act responsibly, but if the occasion arose when they didn't, I think public opinion would force them to do it, or destroy their usefulness as public officials thereafter."⁸¹

H.R.J. Res. 1 was approved by the House Committee on the Judiciary on March 24, 1965.⁸² Several changes were made. Section 3 was clarified to permit the President, in a case where he had voluntarily declared his inability, to resume his powers and duties upon his declaration of recovery.⁸³ The ten-day time limitation was adopted, and words were added requiring Congress to assemble immediately, if not in session, to pass on a disagreement issue.⁸⁴ The Committee retained the two-day provision relating to the President's resumption of his powers and duties after his declaration of recovery where he had been involuntarily declared disabled.

H.R.J. Res. 1 was cleared by the House Rules Committee on March 31,⁸⁵ and it was considered by the House of Representatives on April 13. In his opening remarks to the House, Representative Emanuel Celler observed that "everyone will agree that amending . . . the charter . . . of our Nation is not a task to be undertaken lightly. Today, however, we are faced with filling a gap which has existed since our beginnings, and this

80. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 234-36, 244-45 (1965). Compare *id.* at 4, 169.

81. *Id.* at 243.

82. 111 Cong. Rec. 5621 (daily ed. March 24, 1965).

83. In his statement to the House Committee on the Judiciary, Attorney General Katzenbach urged that there be a provision "which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared." Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 107 (1965). The language of the Senate proposal was unclear whether the President, in a case where he had declared himself disabled, would have to follow the recovery procedure prescribed for situations where an inability was declared by the Vice-President and Cabinet. See S. Rep. No. 66, 89th Cong., 1st Sess. 12-14 (1965); S.J. Res. 1, 89th Cong., 1st Sess., §§ 2-5 (1965), as amended. Senator Birch Bayh said that, under S.J. Res. 1, a President did not have to follow this procedure in a case of voluntary disability. 111 Cong. Rec. 3188-89 (daily ed. Feb. 19, 1965); *id.* at 14830 (daily ed. June 30, 1965).

84. See H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). Certain language changes made by the Senate Committee on the Judiciary in S.J. Res. 1, see note 59 *supra* and accompanying text, were also made in H.R.J. Res. 1. "President pro tempore of the Senate," however, was used instead of "President of the Senate."

85. The vote was six to four. Representative William Colmer of Mississippi disliked the method for declaring a President disabled, saying that it might lead to a coup headed by the Vice-President. Representative James J. Delaney of New York expressed a preference for a means of filling a vacancy in the Vice-Presidency through the elective route. N.Y. Times, April 1, 1965, p. 20, col. 1.

gap becomes more threatening as the complexity of the domestic and foreign policy grows."⁸⁶ Representatives Celler, McCulloch, Poff, and others forcibly urged the adoption of the proposal endorsed by the Judiciary Committee. They underscored the great need for the amendment and argued that it represented as good a solution as can be found to the problems of presidential inability and the vice-presidential vacancy. In the words of Representative Celler:

This is by no means . . . a perfect bil [sic]. No bill can be perfect. . . . The world of actuality permits us to attain no perfection. . . . But nonetheless, this bill has a minimum of drawbacks. It is [a] well-rounded, sensible, and efficient approach toward a solution of a perplexing problem—a problem that has baffled us for over 100 years.⁸⁷

Relying on Walter Lippmann's words regarding the proposed amendment, Representative Celler added:

It is a great deal better than an endless search for the absolutely perfect solution, which will never be found and, indeed, is not necessary.⁸⁸

Representative McCulloch stated:

We must provide the means for an orderly transition of Executive power in a manner that respects the separation of powers doctrine, and maintains the safeguards of our traditional checks and balances. I believe that House Joint Resolution 1, as amended . . . answers these needs, and will undoubtedly correct the shortcomings of the Constitution with respect to presidential inability and succession.⁸⁹

There was some opposition, however, to H.R.J. Res. 1. Representative Clarence J. Brown of Ohio thought it unwise and unnecessary. He criticized its method of filling a vacancy in the Vice-Presidency. He said that the amendment would take away "from the House a constitutional right it now has to select a President"⁹⁰ (by selecting the Speaker who is the successor to the President when there is no Vice-President) and that "the man named Vice President could be an individual who was never elected to any public office."⁹¹ Representative Roman C. Pucinski of Illinois moved to strike the vice-presidential vacancy section from the measure.⁹² The motion was rejected by a vote of 140 to 44.⁹³ Representative Charles M. Mathias, Jr. of Maryland moved to substitute a new vice-presidential vacancy section, as follows:

Sec. 2. The Congress may by law provide for the case of a vacancy in the office

86. 111 Cong. Rec. 7668 (daily ed. April 13, 1965).

87. *Id.* at 7667.

88. *Id.* at 7668, citing N.Y. Herald Tribune, June 9, 1964, p. 20, col. 5.

89. *Id.* at 7673.

90. *Id.* at 7664.

91. *Ibid.*

92. *Id.* at 7690.

93. *Id.* at 7693.

of Vice President and for the case of removal, death, resignation or inability both of the President and the Vice President, declare what official would then act as President and such official would act accordingly until disability be removed or a President would be elected.⁹⁴

The amendment was rejected by voice vote.⁹⁵

Representative Arch A. Moore, Jr. of West Virginia sought to amend that part of the measure under which the Vice-President would continue to act as President, pending resolution by Congress of a disagreement as to the President's restoration to capacity. Moore, and several others, felt that the President should act during this period. "[A]ll presumptions," he said, "should be in favor of the President of the United States."⁹⁶ If the Vice-President is permitted to act during this period, Moore added, "he could resort to many manipulations that would never permit the President of the United States . . . to present his case to the Congress of the United States."⁹⁷ In answer to this objection, the argument was made that, since the capacity of the President would have been seriously challenged, it was the wiser and less hazardous course not to have him act during this period.⁹⁸ The Moore Amendment was rejected by a vote of 122 to 58.⁹⁹ Representative H. R. Gross of Iowa proposed an amendment to H.R.J. Res. 1, requiring a roll-call vote whenever Congress voted on the President's nominee for Vice-President, and said that he would make the same proposal regarding a vote on a disagreement issue in the inability situation.¹⁰⁰ Representative Celler opposed this amendment. He argued that the House or Senate could demand such a vote under its rules and that it, therefore, was unnecessary.¹⁰¹ Thereupon, the Gross Amendment was defeated by votes of 102 to 92 and 130 to 115.¹⁰²

Representative Richard H. Poff successfully amended the proposed amendment by inserting words under which Congress, if not in session, would have to assemble within forty-eight hours after receiving a challenge, from the Vice-President and a majority of the Cabinet, directed at a presidential declaration of recovery.¹⁰³ The debate concluded with

94. *Ibid.*

95. *Id.* at 7694.

96. *Ibid.*

97. *Ibid.*

98. Representative Peter W. Rodino of New Jersey pointed out that the matter might never get to Congress if the President immediately resumed his powers and duties and discharged the Cabinet before a declaration of challenge could be sent to Congress. *Id.* at 7695. See note 156 *infra*.

99. 111 Cong. Rec. 7696 (daily ed. April 13, 1965).

100. *Id.* at 7696-97.

101. *Id.* at 7697.

102. *Ibid.* A roll-call vote requirement may be found in the Constitution with respect to Congress' overriding of a presidential veto. U.S. Const. art. I, § 7.

103. 111 Cong. Rec. 7697-98 (daily ed. April 13, 1965). The "forty-eight hour"

Speaker John W. McCormack giving his full support to the measure. He stated:

I have lived for 14 months in the position of the man who, in the event of an unfortunate event happening to the occupant of the White House, under the law then would have assumed the Office of Chief Executive of our country. I can assure you, my friends and colleagues, that a matter of great concern to me was the vacuum which existed in the subject of determining inability of the occupant of the White House, if and when that should arise.

I have in my safe in my office a written agreement. As has been well said, it is outside the law. It is an agreement between individuals. But it was the only thing that could be done under the circumstances, when we do not have a disability law in relation to the President in existence.

We have made a marked contribution by this resolution, and particularly by section 3 and section 4.¹⁰⁴

He added:

We cannot legislate for every human consideration that might occur in the future. All we can do is the best that we can under the circumstances. The considerations of the committee and the deliberations of the members of both parties have resolved the problem confronting us in the best manner possible, having in mind the fact that with all our strengths we have weaknesses as human beings.¹⁰⁵

A vote was then taken, and H.R.J. Res. 1, as amended, was approved 368 to 29.¹⁰⁶

In order to resolve the differences between the House and Senate versions of the amendment, a Conference Committee was appointed.¹⁰⁷ It met several times during the following weeks and was divided, along House and Senate lines, on whether a time limitation should be placed upon Congress in deciding a disagreement issue. The House conferees insisted on a ten-day limitation, while the Senate conferees wanted no limitation at all.¹⁰⁸ On June 23, 1965, after a two month deadlock, agreement was reached on a twenty-one day limitation.¹⁰⁹ In addition, the Conference Committee accepted the House version of section 3, permitting the President, in the event of a voluntary declaration of inability, to resume his powers and duties immediately upon transmitting his declaration of recovery to the President pro tempore and Speaker.¹¹⁰ The Com-

amendment was introduced at the suggestion of Speaker McCormack. Letter from Representative Richard H. Poff to Donald E. Channell of the American Bar Association, April 15, 1965.

104. 111 Cong. Rec. 7698 (daily ed. April 13, 1965).

105. *Ibid.*

106. *Id.* at 7699. See Appendix C *infra*.

107. The conferees were Senators Birch E. Bayh, James O. Eastland, Sam J. Ervin, Everett M. Dirksen and Roman L. Hruska, and Representatives Emanuel Celler, Byron G. Rogers, James C. Corman, William M. McCulloch, and Richard H. Poff.

108. H.R. Rep. No. 564, 89th Cong., 1st Sess. 4 (1965).

109. *Ibid.*

110. *Id.* at 3.

mittee compromised on a four-day period within which the Vice President and Cabinet could challenge a President's declaration of recovery where the inability determination had not been made by the President.¹¹¹ It also agreed to accept the provision in the House version requiring Congress to convene within forty-eight hours, if not in session, to settle a disagreement.¹¹² The expression "the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide" was changed to "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."¹¹³ This change was made at the suggestion of Senator Hruska in order to make it clear that, when and if Congress designated another body to replace the Cabinet, it could not eliminate the Vice-President.¹¹⁴

The Conference Report was passed by voice vote in the House of Representatives on June 30, 1965.¹¹⁵ It was considered in the Senate later that same day. Senators Robert F. Kennedy of New York and Eugene J. McCarthy of Minnesota expressed reservations about the method prescribed for determining inability. Senator Kennedy said a President might discharge his Cabinet. A conflict could arise, he said, as to

whether the President had, in fact, fired the Cabinet at the time they had met and decided to put in a new President. What we could end up with, in effect, would be the spectacle of having two Presidents both claiming the right to exercise the powers and duties of the Presidency, and perhaps two sets of Cabinet officers both claiming the right to act.¹¹⁶

The concern of these two Senators was lessened by virtue of the provision allowing Congress to establish a body to replace the Cabinet in functioning with the Vice-President. Senator Albert Gore of Tennessee, referring to this "other body" provision, argued that it would permit the Vice-President to choose between the Cabinet and the other body created by Congress.¹¹⁷ He said that the use of the expression "either/or" put the two groups on a par.¹¹⁸ Senator Bayh, pointing to the abundance of legislative history on the point, said that under the proposed amendment, the Cabinet would have the responsibility unless Congress passed a law appointing another body, in which case the "newly created body and not

111. *Id.* at 4.

112. *Ibid.*

113. *Id.* at 2.

114. This statement is based on information given to the author by persons who worked with the Conference Committee.

115. 111 Cong. Rec. 14668 (daily ed. June 30, 1965).

116. *Id.* at 14832.

117. *Id.* at 14834-39.

118. *Id.* at 14834.

the Cabinet would act with the Vice President."¹¹⁹ Senator Jacob Javits of New York remarked that, if the power to establish another body were exercised, he would interpret it "to give exclusivity to the other body," since it would be "completely contrary to the purpose of Congress to create two bodies which could compete with one another."¹²⁰ Senator Gore requested and obtained postponement of further discussion in order to study the point in greater detail.¹²¹

On Tuesday, July 6, 1965, the measure again came up for consideration in the Senate. Senator Gore reiterated his objection to the proposed amendment because of the "either/or" expression. By virtue of this wording, argued Gore, "a Vice President would be in a position to 'shop around' for support of his view that the President is not able to discharge the duties of his office."¹²² Senator Birch Bayh said that the language was clear—that, if Congress designated another body, that body would supersede the Cabinet.¹²³ Senator Dirksen agreed and said that he could not imagine a Vice-President acting in this manner, but that if he did, the people would not tolerate it and his political future would be ruined.¹²⁴ Dirksen noted:

[L]anguage is not absolute. . . . [I]nterpretations of all kinds can be placed upon language

Fashioning language to do what we have in mind, particularly when we are subject to the requirement of compression for constitutional amendment purposes, is certainly not an easy undertaking.¹²⁵

He added: "I believe we have done a reasonably worthwhile job insofar as the feeble attributes of the language can accomplish it."¹²⁶ Senator Ervin observed that "the conference report . . . would submit to the States the very best possible resolution on the subject obtainable in the Congress of the United States as it is now constituted."¹²⁷

At the conclusion of the debate, the Senate approved the measure by a vote of 68 to 5,¹²⁸ and a few days later it was on its way to the state legislatures for ratification as the Twenty-Fifth Amendment to the Constitution.

119. Id. at 14835.

120. Id. at 14838.

121. Id. at 14838-39.

122. Id. at 15023 (daily ed. July 6, 1965).

123. Id. at 15029.

124. Id. at 15027.

125. Id. at 15026.

126. Id. at 15028.

127. Id. at 15030.

128. Id. at 15031-32. The five Senators who voted against it were Senators Gore, Frank J. Lausche of Ohio, McCarthy, Walther F. Mondale of Minnesota, and John G. Tower of Texas.

III. ANALYSIS OF THE PROPOSED AMENDMENT

A. *Section 1*

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

This section would specifically confirm the Tyler precedent whereby a Vice-President becomes President when there is a vacancy in the presidential office because of the President's death. It would also extend the precedent to cover vacancies in the Presidency due to resignation¹²⁹ and removal, neither of which has occurred in American history. In any of these cases, the Vice-President would serve as President for the remainder of the unexpired term.

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

This section is designed to cover the situation where the Vice-President succeeds to the Presidency upon the President's death, resignation or removal, or where the Vice-President dies, resigns, or is removed.¹³⁰ The President would nominate the person that he would like to have for his Vice-President. Congress would then vote upon the nomination. If a majority of each House confirmed the nomination, the person would become Vice-President for the remainder of the President's term.¹³¹ The nominee would have to be a natural born citizen of the United States, at least thirty-five years of age, and a resident within the United States for a minimum of fourteen years.¹³² The Houses of Congress would vote separately on the nomination, and the vote required would be a majority of those members present and voting, provided a quorum were present.¹³³

129. See 3 U.S.C. § 20 (1964), which sets out the procedure for resignation.

130. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 87, 196, 246 (1965).

131. Confirmation by Congress is necessary so that, if a vacancy occurs when Congress is out of session, it could not be filled until the next regular session or at a special session called for that purpose by the President. *Id.* at 45, 49. Until a vacancy is filled, the Speaker of the House of Representatives, or whoever might be first in the line of succession at the time, would be the heir apparent. The proposed amendment leaves intact the power of Congress to establish a line of succession beyond the Vice-Presidency. U.S. Const. art. II, § 1. The present succession law, 3 U.S.C. § 19 (1964), would be operative if there were simultaneous vacancies in the offices of President and Vice-President. See 111 Cong. Rec. 3200 (daily ed. Feb. 19, 1965) (remarks of Senators Bayh and Holland); *id.* at 7682 (daily ed. April 13, 1965) (remarks of Representatives Mathias and Poff).

132. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 48 (1965).

133. That separate sessions are called for under § 2 and under § 4 as well, see 111 Cong. Rec. 3203 (daily ed. Feb. 19, 1965) (remarks of Senator Hruska); *id.* at 7675-76

Before making a nomination, the President probably would seek the advice and views of the congressional leaders. His nominee might be asked to undergo hearings in the House and Senate. If the nomination were not confirmed, the President would nominate another Vice-President.¹³⁴

Since the House of Representatives has never had any constitutional vote in approving presidential nominees, that being reserved for the Senate, the amendment would give the House a different type of function to perform. In so doing, the amendment would elevate the Vice-Presidency above executive appointments and would give the people a greater voice in the selection of a Vice-President than if the power of confirmation were given to the Senate alone.

In giving the President a dominant role in filling a vacancy in the Vice-Presidency, the proposed amendment is consistent with present practice whereby the presidential candidate selects his own running mate who must be approved by the people through their representatives. It is practical because it recognizes the fact that a Vice-President's effectiveness in our Government depends on his rapport with the President. If he is of the same party and of compatible temperament and views, all of which would be likely under the proposed amendment, his chances of becoming fully informed and adequately prepared to assume presidential power, if called upon, are excellent.

C. 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.

This section would provide for an Acting President in a case of presidential inability.¹³⁵ Under section 3, a President would be authorized to

(daily ed. April 13, 1965) (remarks of Representatives Celler and Basil L. Whitener); id. at 7677-78 (remarks of Representatives Celler, Poff and Edward Hutchinson); Hearings on S.J. Res. 1, 6, 15, 25 & 28 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 10 (1965); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 45, 60, 106 (1965). See also *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1919).

134. There is no limit on the number of nominations which can be made. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 50 (1965).

135. The legislative history indicates that the term "inability" is intended to cover any state of facts preventing the President from discharging the powers and duties of his office. It might be due to physical or mental illness, kidnapping, capture by an enemy, etc. As was stated by Senator Birch Bayh: "[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability

declare his own disability, and he would be encouraged to do so, since, if he did, his declaration of restoration to capacity could not be challenged.¹³⁶ "A President would always hesitate to utilize the voluntary mechanism if he knew that a challenge could be lodged when he sought to recapture his Office."¹³⁷

The Vice-President would become Acting President under this section as soon as the President transmitted a written declaration of inability to the President pro tempore of the Senate and the Speaker of the House of Representatives.¹³⁸ The Vice-President would cease to be Acting President as soon as the President transmitted his declaration of recovery to these two officials.¹³⁹

This is the section that can be expected to be used in most future cases of presidential inability. Former Attorney General Herbert Brownell has said:

under the terms that we are discussing." Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 20. "[T]he word 'inability' and the word 'unable' . . . mean that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office." 111 Cong. Rec. 3200 (daily ed. Feb. 19, 1965) (remarks of Senator Bayh). See *id.* at 14832-33 (daily ed. June 30, 1965) (remarks of Senators Robert F. Kennedy and Bayh).

136. *Id.* at 7669 (daily ed. April 13, 1965) (remarks of Representative Celler); *id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff); *id.* at 14830 (remarks of Senator Bayh); see S. Rep. No. 66, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 2 (1965). See also note 83 *supra*.

Although, in this situation, there could be no challenge to the President's restoration, the Vice-President and the Cabinet would not thereafter be precluded from declaring the President disabled under § 4 of the proposed amendment.

137. 111 Cong. Rec. 7672 (daily ed. April 13, 1965).

138. Whenever the Vice-President acted as President, he would lose his title as President of the Senate. *Id.* at 3188 (daily ed. Feb. 19, 1965). The President pro tempore would become President of the Senate. The question of whether the Vice-President would have to take the presidential oath before becoming Acting President is left for future resolution. It would seem that he should not, since the duty of acting as President would be encompassed in his vice-presidential oath to perform faithfully his duties. See 23 Stat. 22 (1884), 5 U.S.C. § 16 (1964), for the form of oath taken by the Vice-President and other officials in the government. The legislative history on this point is inconclusive. See Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 87 (1965).

139. The intention of Congress regarding written declarations was summarized in the Report of the Senate Committee on the Judiciary: "It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President [pro tempore] of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country. . . . It is further understood by the committee that should the President [pro tempore] . . . and the Speaker . . . not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment." S. Rep. No. 66, 89th Cong., 1st Sess. 2 (1965).

A typical situation that is covered by this section is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad and might be out of reliable communication with the White House for a short period.¹⁴⁰

This section can be viewed as sufficiently broad to permit the President to declare himself disabled either for an indefinite or a specified period of time, and to name the hour when the Vice-President is to begin as Acting President.¹⁴¹ It can be argued that his declaration could be conditional, stating, for example: "[I]f in the event I am under anesthesia or similarly unable, I wish you to assume those duties"¹⁴² The legislative history indicates that this section should be broadly interpreted.¹⁴³

D. *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.

This section also provides for an Acting President in a case of inability. It covers the most difficult case, that is, where the President cannot or

140. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 240 (1965).

141. *Id.* at 98-99, 240; see Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 20-21, 64-65.

142. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 99 (1965) (remarks of Attorney General Katzenbach). Once the Vice-President had commenced his role as Acting President, the proposed amendment contemplates that he would continue in such capacity until the President terminated it by a subsequent declaration.

143. See notes 140-42 *supra*.

refuses to declare his own inability. In that event the Vice-President and a majority of the "principal officers of the executive departments"¹⁴⁴ (popularly known as the Cabinet) would be empowered to declare the President disabled by transmitting a written declaration of this fact to the President pro tempore and the Speaker. Although it need not be, the declaration would most probably be a joint one.¹⁴⁵ The question of whether an inability had occurred could be initiated for discussion purposes by the Vice-President or any member of the Cabinet.¹⁴⁶

The President could announce his own recovery but he would then have to wait four days before resuming his powers and duties.¹⁴⁷ In the meantime, the Vice-President and the Cabinet would have an opportunity to review the situation. They could agree to the President's taking over immediately or at any time short of four days.¹⁴⁸ If they disagreed with

144. The expression refers to the Secretaries of State, Treasury, and Defense; the Attorney General; the Postmaster General; and the Secretaries of the Interior, Agriculture, Commerce, Labor, and Health, Education and Welfare, and Housing and Urban Development. See note 59 *supra*. For clear manifestations of congressional intent on the point, see 111 Cong. Rec. 3175, 3200-01 (daily ed. Feb. 19, 1965) (setting out the study of the Library of Congress' Legislative Reference Service); *id.* at 7669, 7676 (daily ed. April 13, 1965); *id.* at 14835 (daily ed. June 30, 1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 52-55, 103, 256 (1965). The House Committee on the Judiciary stated in its report: "In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination." H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). See 111 Cong. Rec. 14833 (daily ed. June 30, 1965) (remarks of Senator Robert F. Kennedy). But see *id.* at 3202 (daily ed. Feb. 19, 1965) (remarks of Senators Bayh and Hart). The expression "executive departments" is used in § 4 in both the singular and the plural. The plural was what was intended. The use of the singular was inadvertent.

145. *Id.* at 14837 (daily ed. June 30, 1965) (remarks of Senators Bayh and Javits); see *id.* at 14831, where Senator Hruska states that Congress itself has no right to initiate action.

In answer to the question of how a written declaration might be prepared under § 4, former Attorney General Brownell stated: "Undoubtedly the Justice Department would prepare the papers, and the action would be taken at a joint meeting of the Vice President and the Cabinet members. It might not even be a matter of public knowledge as to who signed first. That particular point would fade into insignificance in getting the group action." Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 247 (1965).

146. *Id.* at 79, 82 (remarks of Senator Bayh).

147. 111 Cong. Rec. 7670-71 (daily ed. April 13, 1965) (remarks of Representative Celler); *id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff); *id.* at 14830 (remarks of Senator Bayh); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 58 (1965); S. Rep. No. 66, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965).

148. 111 Cong. Rec. 3203 (daily ed. Feb. 19, 1965) (remarks of Senator Bayh); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 243 (1965) (remarks of former Attorney General Brownell).

the President's declaration, they would send a written declaration of this fact, within four days, to the President pro tempore and the Speaker of the House, and Congress would be required to decide the issue. If Congress were not then in session, it would be obliged to assemble within forty-eight hours from the time the Vice-President and Cabinet transmitted their declaration to the President pro tempore and Speaker. It would be incumbent upon the Vice-President who is acting as President to fix a time certain within forty-eight hours as to when Congress must assemble. If he failed to do so, the President pro tempore and Speaker would be obliged to call their respective Houses into session within the forty-eight hour period.¹⁴⁹ Upon their failure to do so, Congress would have to come into session within forty-eight hours on its own initiative.

Congress would have twenty-one days from the time of the transmittal, or from the time it is required to assemble, as the case may be, in which to decide the disagreement. The Vice-President would continue to act as President, pending the decision of Congress, so that the powers and duties of President would never be in the hands of a person whose capacity had been seriously challenged.¹⁵⁰

Congress would have three choices under the twenty-one day limitation: to decide in favor of the President or the Vice-President or to reach no decision at all.¹⁵¹ If Congress failed to reach a decision within this time, or if more than one-third of either House sided with the President,¹⁵² the President would immediately resume his powers and duties. If two-thirds of both Houses supported the Vice-President and a majority of the Cabinet, the Vice-President would continue as Acting President.¹⁵³ In deciding the issue, Congress could proceed as it thought best. It might request the President to undergo medical tests and examinations, or to submit to questioning at hearings.¹⁵⁴

149. 111 Cong. Rec. 7697-98 (daily ed. April 13, 1965).

150. See text accompanying notes 96-99 & note 147 *supra*.

151. "Circumstances may be such that the Congress by tacit agreement may want to uphold the President in some manner which will not amount to a public rebuke of the Vice President who is the Acting President. . . . [This] . . . option furnishes the graceful vehicle." 111 Cong. Rec. 7673 (daily ed. April 13, 1965) (remarks of Representative Poff).

152. *Id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff). "[I]f one House voted but failed to get the necessary two-thirds majority, the other House would be precluded from using the 21 days and the President would immediately resume the powers and duties of his office." *Id.* at 14831 (remarks of Senator Bayh).

153. A two-thirds vote was decided upon so as to weight the procedure as heavily in favor of the elected President as practicable. *Id.* at 3187 (daily ed. Feb. 19, 1965) (remarks of Senator Ervin). It takes only a majority vote in the House of Representatives to impeach a President and two-thirds in the Senate to remove him. U.S. Const. art. I, §§ 2, 3.

154. Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 21-23, 29, 35; 111 Cong. Rec. 3195-96 (daily ed. Feb. 19, 1965) (remarks of Senators Ervin and Hruska).

The Vice-President's participation in determining presidential inability is proper. Since he is the person who would act as President in a case of inability, he should have a voice in determining when to act. As Representative Richard H. Poff said during the debates in the House of Representatives:

The Vice President, a man of the same political party, a man originally chosen by the President, a man familiar with the President's health, a man who knows what great decisions of state are waiting to be made, and a man intended by the authors of the Constitution to be the President's heir at death or upon disability, surely should participate in a decision involving the transfer of presidential powers.¹⁵⁵

There are several reasons why responsibility in inability determinations was placed upon the Cabinet. Since they are appointed by the President, they would not be likely to take steps to have him declared disabled unless he actually were disabled. Since they work closely with the President and meet with him frequently, they would be more readily aware than some other body of his condition and of whether there was a need for an Acting President. The chances of the Cabinet's acting unanimously on a matter of this importance, which would add weight to any decision and encourage public acceptance of it, are greater than with another group, particularly a group having members of different political parties. Since it has come to be considered an integral part of the executive branch of government, its selection is consistent with the fundamental principle of separation of powers.

History indicates that the Cabinet would not decline to exercise this power if an occasion arose requiring it to do so. The Cabinet of President James Garfield was unanimous in deciding that the President was disabled but did not have the power to declare disability and hesitated to take any initiative because of the fear that the Vice-President would become President for the remainder of the term. During the Wilson inability, the Cabinet sought to ascertain whether the President was disabled, and it seems in retrospect that, if they had had the power to declare him disabled, they would have used it in a responsible manner. It seems clear that the Cabinet would use this power if, and only if, it were necessary.

If, however, future circumstances indicated that the Cabinet was not a workable body, Congress would have the power under the proposed amendment to entrust to another body the responsibility of determining, with the Vice-President, presidential inability.¹⁵⁶

155. *Id.* at 7672-73 (daily ed. April 13, 1965).

156. One of the points frequently made during the hearings and the congressional debates was that the President could discharge his Cabinet before it had a chance to declare him disabled, thus nullifying the prescribed method. See *id.* at 3198, 3201 (daily ed. Feb. 19, 1965) (remarks of Senator Hart); text accompanying note 116 *supra*; Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 28. This is certainly possible but, if a President were to act in such a manner, Congress could cope with the situation under

IV. CONCLUSION

Several times in our history, the Government has been paralyzed because the President was disabled. Similarly, if the President had died or become disabled on occasions when there was a vacancy in the Vice-Presidency, chaos and confusion would have been likely to result. The deficiencies in the Constitution which permitted the existence of these situations must be remedied. It is of critical importance to the Nation's security that a President's illness should not be allowed to halt the work of government, and that there should be available at all times a Vice-President of the United States.

The proposed twenty-fifth amendment, which would provide procedures both for determining a President's inability and for filling vacancies in the Vice-Presidency, is desperately needed. This has been demonstrated time and again in our history. Despite widespread recognition of the serious need for a method of determining presidential inability and, despite a long search for an acceptable method, none has ever been found which could command enough strength to be proposed by Congress, much less ratified by the state legislatures. Finally, a method commanding widespread support as an acceptable and workable procedure has been found and proposed by Congress. It is doubtful that a better proposal could be devised, considering the complexity of the problems involved and the great diversity of views. 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. It remains for the state legislatures to ratify it and to make it a permanent part of the

the proposed amendment by exercising its power to establish another body. Of course, this exercise, which would have to be by statute, would be subject to the President's veto. On balance, however, it seems clear that the advantages of having the Cabinet participate in an inability determination far exceed the disadvantages.

A Vice-President who has become Acting President would have the power to appoint and remove members of the Cabinet during his tenure as Acting President. If he used this power to stack the Cabinet in his favor, the President, if he had declared himself disabled, could regain his powers and duties immediately by a declaration of recovery. If he had been declared disabled by the Vice-President and Cabinet, he could declare himself able and, assuming he is challenged by the Vice-President and Cabinet within four days, get Congress to pass on the issue. Congress certainly would not look favorably on a Vice-President who had acted in an irresponsible manner. It should also be pointed out that Congress could eliminate the Cabinet as the body to participate in an inability determination. The legislative history of the "other body" provision clearly shows that, when Congress designates another body, that body replaces the Cabinet. See, e.g., 111 Cong. Rec. 7670 (daily ed. April 13, 1965) (remarks of Representative Celler); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 24-25, 93 (1965); Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 97-98. Congress could not replace the Vice-President. 111 Cong. Rec. 14830, 14835 (daily ed. June 30, 1965) (remarks of Senator Bayh). See also pp. 194-95 *supra*.

Constitution.¹⁵⁷ The nature of the subject dictates that this be done with all due speed.

APPENDIX A

(S.J. Res. 1 & H.R.J. Res. 1 as introduced in January, 1965 (same as S.J. Res. 139 as passed Senate in September, 1964))

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

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

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

Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall ["will" in S.J. Res. 1] immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

APPENDIX B

(S.J. Res. 1 as passed Senate on February 19, 1965)

Section 1. Same as above.

Sec. 2. Same as above.

Sec. 3. *Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is*

157. As of this writing, the proposed amendment has been ratified by Wisconsin, Nebraska, Oklahoma, Pennsylvania, Massachusetts, Arizona, Michigan, Kentucky, California, Indiana, Arkansas, New Jersey, and Delaware. The Colorado legislature refused to ratify the measure at a special session in July 1965 called to consider emergency flood legislation. Colorado is expected to ratify the measure at its next legislative session. Since a number of state legislatures will not be meeting in 1966, the proposed amendment is not likely to be ratified by the necessary thirty-eight state legislatures until early 1967. It is to be noted that the proposed amendment, as did the eighteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth, specifies a seven year time limit for ratification.

unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. *Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmit to the President 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.*

Sec. 5. *Whenever the President transmits to the President 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, with the written concurrence of a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits within seven days to the President 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 immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

APPENDIX C

(H.R.J. Res. 1 as passed House of Representatives on April 13, 1965)

Section 1. Same as above.

Sec. 2. Same as above.

Sec. 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 a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.*

Sec. 4. *Whenever the Vice President and a majority of the principal officers of the executive departments, or 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 the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two 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 ten days after the receipt of the written declara-

tion of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

* The italicized words represent the changes made in the basic proposal (appendix A) in the Senate (appendix B), and in the House of Representatives (appendix C).