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PRESIDENTIAL INABILITY

HEARINGS
BEFORE
SPECIAL SUBCOMMITTEE TO STUDY
PRESIDENTIAL INABILITY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
EIGHTY-FOURTH CONGRESS
SECOND SESSION
ON
PROBLEM OF PRESIDENTIAL
INABILITY

APRIL 11 AND 12, 1956

Printed for the use of the Committee on the Judiciary

Serial No. 20



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PRESIDENTIAL INABILITY

WEDNESDAY, APRIL 11, 1956

UNITED STATES HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE NO. 5,
Washington, D. C.

The subcommittee met, pursuant to call, at 10:11 a. m., in room 346, Old House Office Building, Hon. Emanuel Celler, chairman of the subcommittee, presiding.

Present: Representatives Emanuel Celler, Thomas J. Lane, Kenneth B. Keating, and William M. McCulloch.

Also present: William R. Foley, counsel.

The CHAIRMAN. The subcommittee will come to order. Our first witness today is the distinguished Senator who always enlightened us materially, Hon. John J. Sparkman, from Alabama.

Will you step forward, please, Senator.

But prior to presenting your views on this matter I should like to read a telegram received from our distinguished former President, Mr. Herbert Hoover. The wire reads as follows:

I greatly regret that a cold precludes my attending the committee's hearings; in a separate telegram I send you a further statement of my views which covers all I can contribute to this matter.

And the supplemented telegram is as follows:

The committee's questionnaire raised three major questions as to the President's "inability to discharge his powers and duties."

1. Once the question arises, who shall make the determination of inability?
2. Who shall initiate action for a successor in case of an inability?
3. Who shall act in any interim of such inability?

It seems to me this problem may fall into several situations. The President's "inability" may be partial but not exclude essential action. It may be temporary from which recovery may be expected. It may be more serious but for a considerable period there may be hope of recovery. It may be, or may become, so serious as to give no hope of recovery.

We have seldom in our national history had need of any such determination or action as to "inability." However the question is unprovided for in the Constitution and merits consideration by your committee.

On December 8, 1955, I replied to your request for my views as follows: "It is my understanding that under article II, section 1 of the Constitution, the Congress has the power to determine who shall take over the executive powers in case of the inability of the President to serve * * * In my view the determination of inability and its termination should rest with the Cabinet, and the executive powers should be executed by the Vice President during any such period."

My reasons for this view are as follows:

1. The Cabinet are in intimate contact with the President during any illness
2. They can appraise the national setting as to whether there is any emergency which requires any action beyond the President's abilities.

3 Ours is a government based on two political parties and is elected with responsibility to carry out definite policies and promises. If the determination of inability or the selection of anyone except the Vice President to act for the Presi-

dent were in the hands of the Congress, it could, in case of a congressional majority of the opposing party, result in nullification of the will of the people.

The question of inability of the Vice President at the same time as the President seems to me rather remote. In any event, the only assurance of continuity of the party in power would require a revision of the present law as to succession. The whole question would be solved by returning to the act of 1886 which established the succession within the Cabinet and adopting the above recommendations as to procedure.

HERBERT HOOVER.

The CHAIRMAN. The Chair would like, if you would indulge me for just a moment, Senator Sparkman, to make this preliminary statement.

The subject matter of the hearings which we initiate this morning, namely, "Presidential inability," presents one of the most difficult problems that has ever challenged a Congress. This problem is not a novel one since its origin is found in the Constitution, itself, and, moreover, on three occasions it has been a stark reality. But since the days of our Founding Fathers there has been no real concerted effort to resolve this problem. Such failure on the part of past Congresses may be attributed to the difficulty in reaching an adequate and satisfactory solution.

There is no denial that this problem is fraught with many difficult facets—legal, political, and constitutional. Nevertheless, I am certain that it is not insoluble. I am convinced that the past failures were caused mainly by a desire to obtain a solution that would cover every possible contingency that could be conceived. That was a mistake, for by attempting to cover all nothing was achieved.

In undertaking the study of this matter I have eliminated the theory that our only choice is either we do nothing or that we find the perfect solution to the most difficult case. I am convinced that there is an adequate solution and the very purpose of these hearings is to find it.

In preparation for these hearings we have sought and obtained the views of eminent authorities on this problem. Their suggestions have been converted into legislative drafts which we will now submit to the test of examination. Those proposals are varied, ranging from action by the Vice President to action by an independent agency.

The two cardinal questions which must be resolved are who raises the question of the President's disability and, then, who determines the disability. The solution to this entire problem lies in the answer to those questions.

In order to ease the approach to those answers I believe that we should first clarify the status of the Vice President. History teaches us that the past failure to so clarify his status has been a major obstacle in the path of solving this problem. It has endangered on two occasions the very foundation of our Government. Providence has been most generous to us in the past, but it ill behooves us to tempt fate in the future.

I am convinced that we have neglected this problem for too long a period. Moreover, in the light of the present day we cannot afford to continue this "head in the sand" attitude. The risk is too great and the penalty too severe. World problems and our position of international leadership do not permit even a short space of time during which this Nation should exist without a functioning Chief Executive.

In that regard our present Chief Executive, himself, recently advocated that the Congress with the advice of the Attorney General undertake a study of all the aspects of this problem. That is exactly what this committee is doing. We have sought the views of the Attorney General but, unfortunately, he has not completed his study so as to be able to present his views at this time. I am certain, however, that his counsel will be forthcoming in the future and will be of much value in assisting us in solving the questions with which we are faced.

I fully realize that the task which we have undertaken is a most difficult one but that should only be a challenge and not a deterrent. The preliminary study which has been made affords us a firm foundation on which to proceed. It has removed many of the irrelevant factors which only beclouded the main issues. It has settled several minor legal problems. Moreover, it has disclosed several points in which there is a great deal of unanimity. Finally, it has crystallized basic solutions to this problem and at the same time points out the concomitant dangers of each.

Some have said that if nothing else is accomplished we will have done well merely by our work to date. I am grateful for that view but do not intend to rest on such a laurel. A solution to this problem is feasible and can be enacted into law, even in this Congress.

Of course, in that statement I refer to this House committee print which is called *Presidential Inability, Committee on the Judiciary, House of Representatives*, dated January 31, 1956.

Now the staff has prepared a number of resolutions which are on the desks of the members as committee prints. They are only suggestions.

(Committee prints referred to, lettered A, B, C, D, and E are as follows:)

[Committee Print, March 17, 1956]

[H R. — A, 84th Cong., 2d sess.]

A BILL To provide for the discharge of the powers and duties of the President in case of the inability of the President

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) If the President of the United States shall determine that he is unable to discharge the powers and duties of his office, he shall notify the Congress of that fact in writing, and the powers and duties of the office shall immediately devolve upon the Vice President.

(b) If the President is, by reason of his inability, unable to notify the Congress of his inability, the President's Cabinet shall make the finding of inability and notify the Congress in writing of that finding, and the powers and duties of the President shall immediately devolve upon the Vice President.

(c) If the Congress is not in session at the time of the finding of inability, the notification shall be made to the President pro tempore of the Senate and to the Speaker of the House of Representatives, or to either of them, and the effect of the notification shall be the same as though the Congress were in session.

SEC. 2. When the Vice President is exercising the powers and duties of the President during the inability of the President, his title shall be Acting President, and he shall possess the full constitutional authority of the President.

SEC. 3. When the President determines that his inability has been terminated, and that he is capable of exercising the powers and duties of the office, he shall so notify the Congress in writing, and the powers and duties of the office shall immediately revert from the Vice President, serving as Acting President, to the President.

PRESIDENTIAL INABILITY

[Committee Print, March 17, 1956]

[H. J. Res — B, 84th Cong, 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

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

"SEC. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President

"SEC 3 The Congress may, by concurrent resolution approved by two-thirds of each House, suggest that the President is unable to discharge the powers and duties of his office. For the purpose of considering such a concurrent resolution, the Vice President may convene the Senate and the Speaker of the House of Representatives may convene the House of Representatives

"If the Congress suggests by a concurrent resolution that the President is unable to discharge the powers and duties of his office, the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, and Secretary of Health, Education, and Welfare shall determine by a two-thirds vote whether or not the President is able to discharge the powers and duties of his office. If they so determine that the President is unable to discharge such powers and duties, they shall devolve upon the Vice President.

"SEC. 4. If the powers and duties of the President devolve upon the Vice President pursuant to section 2 or 3 of this article, the exercise of such powers and duties shall be resumed by the President when the President notifies the Congress by written communication to the Speaker of the House of Representatives and the President pro tempore of the Senate

"SEC 5 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

[Committee Print, March 17, 1956]

[H. J. Res — C, 84th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States

"ARTICLE —

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

"SEC 2 If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.

"SEC. 3. The Congress may, by concurrent resolution approved by two-thirds of each House, suggest that the President is unable to discharge the powers and duties of his office. For the purposes of considering such a concurrent resolution,

the Vice President may convene the Senate and the Speaker of the House of Representatives may convene the House of Representatives.

"If the Congress suggests by concurrent resolution that the President is unable to discharge the powers and duties of his office, the Speaker of the House shall so notify the Chief Justice of the United States. Upon receipt of such notice, the Chief Justice shall establish a panel of not less than three or more than five members appointed by him from qualified medical specialists in civil life. Each member of such panel shall examine the President and submit individually his report to the Chief Justice, setting forth his findings as to the condition of the President and his conclusion on the question whether the President is suffering from an inability to discharge the powers and duties of his office. If all the members of the panel concur in the conclusion that the President is suffering from such inability, the Chief Justice shall so notify the Congress by written communication made to the Speaker of the House of Representatives and to the President pro tempore of the Senate. Upon receipt of such notification from the Chief Justice, the Speaker of the House and the President pro tempore of the Senate shall then notify the Vice President that the President is unable to discharge the powers and duties of his office and they shall devolve upon the Vice President.

"Sec. 4. If the powers and the duties of the President devolve upon the Vice President pursuant to section 2 of this article, the exercise of such powers and duties of the President shall be resumed when he notifies the Congress by written communication to the Speaker of the House and the President pro tempore of the Senate of his ability to resume the powers and duties of his office.

"If the powers and duties of the President devolve upon the Vice President pursuant to section 3 of this article, the exercise of such powers and duties shall not be resumed by the President until such panel has made a finding and report to the Chief Justice that the inability has terminated and that such a report has been communicated by the Chief Justice to the Congress by written communication made to the Speaker of the House of Representatives and the President pro tempore of the Senate.

"Sec. 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission "

[Committee Print, March 17, 1956]

[H. J. Res. — D, 84th Cong., 2d sess.]

JOINT RESOLUTION Relating to the inability of the President to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of the removal of the President from office, or of his death, or resignation, the Vice President shall become President.

Sec. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.

Sec. 3 Whenever the Vice President or the person next in the line of succession to the Presidency is satisfied that the President, or the person then discharging the powers and duties of said office, as the case may be, is unable to discharge said powers and duties, such person shall convene both Houses of the Congress and announce that the powers and duties of the office have devolved upon him.

Sec. 4. If the powers and duties of the President devolve upon any person pursuant to sections 2 and 3 of this resolution, the exercise of such powers and duties shall be resumed by the President upon the President's announcement of his ability and intention thereupon to resume

[Committee Print, March 17, 1956]

[H. J. Res. — E, 84th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States :

“ARTICLE —

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

“SEC. 2 If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.

“SEC 3. If the President is unable to make such an announcement, the Vice President shall announce that the President is unable to discharge the powers and duties of the President, and said powers and duties shall thereupon devolve upon the Vice President.

“SEC 4. If the powers and duties of the President devolve upon the Vice President pursuant to section 2 or 3 of this article, the exercise of such powers and duties shall be resumed by the President upon his announcement of his ability and intention thereupon to resume them.

“SEC 5. The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and the 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.

“SEC. 6 Clause 6 of section 1 of article II of the Constitution of the United States is hereby repealed

“SEC 7 This article shall not apply to any person holding the office of President when this article was proposed by the Congress.

“SEC 8 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.”

The CHAIRMAN. There are in addition two bills, H. J. Res. 442, introduced by Representative Frelinghuysen, and S. 2763, introduced by Senator Payne.

They will be made a part of the record too.
(H. J. Res. 442 and S. 2763 are as follows:)

[H. J. Res. 442, 84th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States :

“ARTICLE — .

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

“SEC. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve on the Vice President.

“SEC 3 The Congress may, by a concurrent resolution approved by two-thirds of each House, suggest that the President is unable to discharge the powers and duties of his office. For the purpose of considering such a concurrent resolution, the Vice President may convene the Senate and the Speaker of the House of Representatives may convene the House of Representatives

“If the Congress suggests that the President is unable to discharge the powers and duties of his office, the Supreme Court shall determine whether or not the President is able to discharge such powers and duties. If the Supreme Court

determines that the President is unable to discharge such powers and duties, they shall devolve on the Vice President.

"SEC. 4. If the powers and duties of the President devolve on the Vice President pursuant to section 2 or 3 of this article, the exercise of such powers and duties shall not be resumed by the President until the Supreme Court, on the request of the President, determines that the President is able to discharge the powers and duties of his office.

"SEC. 5. The Congress may by law implement the foregoing sections of this article.

"SEC. 6. 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.

"SEC. 7. Clause 6 of section 1 of article II of the Constitution of the United States is hereby repealed.

"SEC. 8. This article shall not apply to any person holding the office of President when this article was proposed by the Congress.

"SEC. 9. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

[S. 2763, 84th Cong., 2d sess.]

A BILL To amend title 3 of the United States Code to provide for the ascertainment of the physical inability of the President to perform the duties of his office, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the analysis of chapter 1 of title 3 of the United States Code (entitled "The President") is amended by inserting at the end thereof the following new item:

"21. Ascertainment of the physical inability of the President to discharge his duties."

(b) Such chapter is amended by inserting at the end thereof the following new section:

"§ 21. Ascertainment of the physical inability of the President to discharge his duties

"(a) In case of the physical inability of the President to discharge the powers and duties of the office of President, he shall so notify the Congress by written communication made to the Speaker of the House of Representatives and to the President pro tempore of the Senate. Upon the transmission of such communication, the powers and duties of such office shall devolve upon the Vice President, who shall discharge them until the President notifies the Congress, by written communication made to the Speaker of the House and to the President pro tempore of the Senate, of his ability to reassume the powers and duties of his office, or until a new President is inaugurated.

"(b) If, at the time of any notification to the Congress by the President of his physical inability to discharge the powers and duties of his office, there is no Vice President, such powers and duties shall devolve, for the duration of such physical inability, upon the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter.

"(c) In case of the death, resignation, removal from office, or physical inability of the Vice President while discharging the powers and duties of the office of the President, such powers and duties shall devolve upon the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter, until the President, or the Vice President in the case of his temporary inability to discharge the powers and duties of such office, notifies the Congress by written communication to the Speaker of the House and the President pro tempore of the Senate of his ability to reassume the powers and duties of such office, or until a new President is inaugurated.

"(d) If the Vice President has sufficient cause to believe that the President is suffering from a physical inability to discharge the powers and duties of his office and by reason thereof is unable to so notify the Congress pursuant to sub-

section (a), the Vice President shall so notify the Chief Justice of the United States. Upon receipt of any such notice, the Chief Justice shall establish a panel of not less than three or more than five members appointed by him from qualified medical specialists in civil life. Each member of such panel shall examine the President and shall submit individually his report to the Chief Justice, specifying his findings as to the physical condition of the President and his conclusion on the question whether the President is suffering from any physical inability to discharge the powers and duties of his office. If all members of such panel concur in the conclusion that the President is suffering from such physical inability, the Chief Justice shall so notify the Congress by written communication made to the Speaker of the House and to the President pro tempore of the Senate. Any such notification shall have the same effect as a notification transmitted by the President to the Congress under subsection (a).

"(e) If, at any time at which there is no Vice President, the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter, has sufficient cause to believe that the President is suffering from a physical inability to discharge the powers and duties of his office and by reason thereof is unable to so notify the Congress pursuant to subsection (a), such officer shall so notify the Chief Justice of the United States. Any such notification shall have the same effect as a notification transmitted to the Chief Justice by the Vice President under subsection (d)."

The CHAIRMAN. I am sorry to have detained you, Senator. We will be very glad to hear from you at this time.

STATEMENT BY HON. JOHN J. SPARKMAN, UNITED STATES
SENATOR FROM ALABAMA

Senator SPARKMAN. In the beginning Mr. Chairman, let me say that I have enjoyed very much listening to the statement by the able chairman, and also the telegrams sent by former President Herbert Hoover.

I think both of you have pointed to the problem and to need for doing something, and some possibilities for accomplishing it.

I want to commend the committee also for the very excellent job that has been done by the staff, as referred to by the chairman on the subject of Presidential inability.

Mr. Chairman, let me say that I running late for a speaking engagement that I have downtown. I would like to stay with you as long as I can, but I have a rather brief statement and I would like to read it. It is general in its nature. Then if I could be excused rather promptly. I would appreciate it in order to make this speaking engagement for which I am late already.

Mr. Chairman and members of this subcommittee, I am very pleased to have this opportunity of appearing before you this morning.

I look upon this problem of Presidential inability that you are considering as one of very great importance. I believe it is a problem of much greater magnitude than is generally recognized. It is quite understandable, as history indicates, that interest in the question is stimulated only when a President has suffered an illness. Undoubtedly, this inquiry into the matter was prompted by the recent heart attack of President Eisenhower. Or, may I say that the President undoubtedly began to think more seriously about this problem as a result of that.

It is paradoxical that the events which create enthusiasm for seeking a solution to the problem seem to be the same events which require a cautious approach. I feel certain that all agree the final result must be free from the influence of a particular incident. Because of the very complexity of the question and the remoteness which seems to

characterize it, I wish to commend those of you working toward a method for solving this situation. I earnestly believe the work begun by this subcommittee must be continued until the matter is resolved.

There seem to be countless situations in which the President would be unable to discharge the powers and duties of his office. In many of these, his inability would be so very apparent that any need for making a determination of the question would be eliminated. However, I think most situations would prove difficult to decide and require very careful study.

It is because of these very real areas of doubt that some process for conducting a formal inquiry should be available. As to the design of this process, I feel I can only make a few general suggestions.

I think it would be most unwise to try to enact a definition for inability. When I consider how vastly different are the demands of the Office of President today from what they were 150 years ago—even 50 years ago—I have serious doubts that any definition would have much permanent value.

With or without a statutory definition, the problem of judging whether the President is disabled would remain the primary question to be answered. Once the question is affirmatively determined, it seems quite clear that the Vice President is obligated by the Constitution to assume the powers and duties of the Office of President for the duration of the disability, not extending, of course, beyond the term to which elected.

Some question exists as to whether an election should be held to fill the Office of President upon the determination of his disability. I would rather not go into the matter of whether Congress should provide for such an interim election. It is a rather technical point. I believe it highly unlikely that the Congress would not seat the Vice President.

I have studied the replies to Chairman Celler's questionnaire with a great deal of interest. The people who have given their cooperation and assistance to this inquiry are to be very much commended. I see that a lot of careful thought has been made of this problem.

I see from the questionnaire that for purposes of the study the initiation of the question of inability has been separated from the determination of the issue itself. This seems like a very reasonable distinction. I believe that official sanction for initiating the question is very necessary. Those who act must act with authority—moral or legal—which is given proper recognition.

I agree with those who recommend a flexible method for beginning the inquiry. Initiation of the procedure for making the determination of the President's disability should not be limited to a single person or a single small group of people. This obligation should be sufficiently widespread to assure its immediate exercise once it is required.

A number of suggestions already made to the subcommittee seem to take this approach. I think the proposal of Harvard Law Professor Charles Fairman, that the Vice President, the Cabinet, and the Congress all be allowed to start the inquiry in addition to the President himself, is a good suggestion.

At this point, I want to emphasize the possibility that the President's inability might be of such a nature that he would make the

fact known himself. We must continue to rely upon the good faith of the President to take appropriate action in a matter such as his inability the same as he would with respect to any other function of his Office.

Regardless of how the question of inability is raised, I believe very strongly that the determination should be made in the most friendly atmosphere possible. The only means available today for relieving the President of his responsibilities of office is to impeach him. Impeachment, to most people, has a sinister meaning. In the minds of most people, the very mention of impeachment is associated with strong adverse feelings. It is not reasonable to decide the question of the President's inability by impeachment. The answer to such a question of the President's disability should be found in an atmosphere devoid of all possible partisanship.

The CHAIRMAN. Senator, you say that you wanted to emphasize the possibility that the President's inability might be of such a nature that he would make the fact known himself.

Suppose he is unable to. Suppose he is in a coma?

Senator SPARKMAN. I make it conditional. I say he might be. I say that whatever is decided upon must have a sufficient coverage and sufficient flexibility that it would take care of all of the various situations that might arise such as you pointed out in your statement and as former President Hoover points out so well in his statement.

The CHAIRMAN. Suppose the President, God forbid, would be captured in time of war. In this atomic age nobody knows what might happen.

Senator SPARKMAN. I touch on that later. Whatever is done should be broad enough to cover any such situation in which the country would be confronted with the inability of the Chief Executive to perform his duties, whatever might be the cause.

The task of making the determination would be at least a very complex one. The responsibility for making the decision would rest very heavily upon those selected for making it. Yet, despite these difficulties, it is a job which necessarily must be done. No single task of government could be more important than providing for the continued leadership.

I believe the method chosen for making the determination of Presidential inability should also be flexible. After the issue has been raised, I think the facts should be ascertained as quickly as possible. The locus for determination should be flexible enough to allow for any situation which might arise. And I have in mind where, Mr. Chairman, the possibility of an atomic attack on the Capital for instance where it would not be feasible to make the determination here but perhaps in some other part of the country which perhaps as you suggest by this question, in which a great part of the Government itself might very well be wiped out. I think whatever plan is arrived at must be flexible enough to cover a dire disaster such as that.

Mr. KEATING. Senator, I have had a bill up for quite a time with reference to atomic attack wiping out one-third of the Congress. I think it is very important to have some provision for succession.

I wonder whether we ought not to put our own house in order and provide for proper succession of ourselves before we take up the question of the President's inability.

Senator SPARKMAN. I think by all means we ought to, and when I think of it I rather shudder at your optimism in thinking of just one-third of the Congress being destroyed.

Mr. KEATING. At least one-third. One hundred and forty-five members.

Senator SPARKMAN. You mean if there are that many?

Mr. KEATING. Yes; if there are that many eliminated at one fell swoop.

Senator SPARKMAN. I might remark, rather facetiously, that I notice in the program for vacating the Capital that the Congress is to be left here.

Mr. KEATING. Yes; we are expendable.

Senator SPARKMAN. I have seen, and I am sure members of this committee have seen the time when one single well-placed bomb could virtually wipe out the Government.

I have seen both Houses of Congress, the Chief Executive and all of the Supreme Court and all of the Cabinet members together at one time.

Mr. KEATING. If those Puerto Ricans had used bombs instead of guns they could very easily have wiped out both Houses.

Senator SPARKMAN. I think all these matters ought to be considered, and it is high time that we were making some decision.

The final determination should be made by a group of persons. That group should not be so large as to be unwieldy. On the other hand, it should be large enough to permit a balanced and temperate consideration of the information presented to it. While a unanimous decision would be preferred, I think an extraordinary majority ruling should be allowed.

A number of proposals have been made as to the proper forum for making this determination. In a recent address, former Vice President Henry Wallace suggested a nine-man group composed of Cabinet members, Supreme Court Justices, and Members of Congress. There are others. I feel certain that a workable plan can be found for establishing such a group.

Professor Fairman has made a fine argument on behalf of an agency or commission made up of members of the Supreme Court. By naming the Justices to the Commission, the jurisdictional prohibition imposed on the Court would be overcome and their wisdom and dignity would be of service in judging the question of inability. As members of the Commission while on the Court, the respect accorded to the Justices would make them well-suited for giving the required decision.

The CHAIRMAN. Don't you think as to that, the separation of powers doctrine might preclude the Supreme Court and members of the Court from making such a decision?

Senator SPARKMAN. That might be a problem as far as a simple act of Congress is concerned. In order to do it it would require a constitutional amendment.

The CHAIRMAN. I think it would require a constitutional amendment.

Senator SPARKMAN. I think the chairman is right on that.

The CHAIRMAN. In view of that, who, may I ask?

Senator SPARKMAN. May I say this, of course there have been occasions in the past when members of the Supreme Court have taken other duties, as for instance in the famous Election Commission of

1876 which was presided over by the Chief Justice of the United States.

The CHAIRMAN. It created a great deal of controversy at the time.

Senator SPARKMAN. Yes. Of course the Pearl Harbor investigation was conducted by Justice Roberts and the Nuremberg trials were conducted by Justice Jackson, and there have been other cases. There have been other cases. I suppose that was really not out of character with the Court but there have been other times when Justices have been assigned as individual members of the Supreme Court, although I will say frankly it will be on much stronger ground should this be decided upon to do it by constitutional amendment.

Mr. KEATING. Members of the Court have been criticized for performing these duties outside of the areas of the Court.

Senator SPARKMAN. That is correct; and I think it is a matter that deserves very serious consideration.

Of course, this is not the only possible solution. Undoubtedly, other plans would have many of the same advantages. I think that whatever method is selected for making the decision it should be simple and readily understood by everyone. The plan should embody the general approval of all the people.

As I thought of the views I might express in my remarks to this subcommittee, I began to think of how vast is the complexity which shapes the world in which we live. There are countless situations which might arise to impair the continued functioning of our Government. An alarming situation is presented by the lack of a plan for reorganizing our National Government should a disaster strike. I believe that consideration should also be given to this possibility. The problem which it presents is just as real as the possible inability of the President.

The CHAIRMAN. Thank you very much, Senator.

Senator SPARKMAN. Thank you very much, Mr. Chairman and members of the committee.

The CHAIRMAN. We will place in the record a statement by Senator Frederick C. Payne, the Senator from Maine.

(Statement by Senator Payne is as follows:)

STATEMENT BY HON. FREDERICK G. PAYNE, A UNITED STATES SENATOR
FROM THE STATE OF MAINE

Mr. President, distinguished members of the committee, it is a real pleasure for me to be here today to discuss the problems associated with the present provisions of the Constitution with regard to just what happens when a President is not removed, has not resigned, and has not died, but is unable to perform the duties of his office. As you know from the study you have already given this subject, the problem is not a new one. In fact it has existed since the Constitution was adopted. While the question of just what was meant by "inability" was raised at the Constitutional Convention, it was given very little attention and no conclusions were reached. Until the assassination of President James Garfield the problem received practically no attention by anyone, and none by Congress.

During the period while President Garfield lay mortally wounded, quite a bit of attention was given to whether the Vice President should exercise the duties of the Presidency but it was finally decided, apparently contrary to fact, that President Garfield was not

constitutionally unable to bear the duties of the office. His death put an end to the real need for a solution to the problem and the matter lay dormant until President Woodrow Wilson's illness. Although Congress did at that time give the question some consideration it took no final action and in retrospect it appears that the White House had determined that the President was not disabled.

After Wilson's illness the matter again receded from public attention and congressional awareness and was not revived until last fall when President Eisenhower suffered a heart attack. Fortunately the President's illness did not prevent him from carrying on the duties of his office, but it did serve to focus attention once again on the need for establishing some definite procedure to be followed in the event of presidential inability.

Today it is patently obvious that executive leadership of the United States must be a continuing thing and that we cannot afford to have any possibility of a lapse. Any such lapse could well be disastrous, not only to the United States alone, but to the entire free world. Therefore, this Congress has a very grave responsibility to the Nation to resolve, once and for all, the doubt that surrounds this aspect of the succession clause of the Constitution.

President Eisenhower, at a press conference in January, firmly expressed his belief that steps should be taken now to clarify the procedures to be followed in the event of Presidential inability, and properly placed the responsibility to take such action on the Congress. The President made the following statement:

"Well when you are as closely confined to your bed as I was for some time, you think about lots of things, and this was one of the foremost in my mind.

"I do believe that there should be some agreement on the exact meaning of the Constitution, who has the authority to act.

"The Constitution seems to be clear the Congress cannot only make the laws of succession, but it can determine what is to be done, and it says, 'In the case of so-and-so and so-and-so,' but it does not say who is to determine the disability of the President. And we could well imagine a case where the President would be unable to determine his own disability.

"I think it is a subject that, in its broadest aspects, every phase of it should be carefully studied by the Congress, advised with the Attorney General, and any kind of advice they want from the executive department, and some kind of a resolution of doubt reached. I think it would be good for the country."

This committee has received many replies to its questionnaire which were compiled and printed as a committee print dated January 31, 1956. Since these replies from outstanding constitutional experts rather thoroughly cover many of the fundamental questions, such as the meaning of the succession clause, I will not attempt to review them here.

On the basis of my own study of the matter it seems to me that the arguments holding that the framers of the Constitution did not, in the event of Presidential inability, intend the Vice President to succeed to the title of President, but only to exercise the powers and duties is the most compelling, for many reasons. First, the whole

history of the Constitutional Convention points in this direction. Secondly, I believe that the rule followed by the courts to the effect that where words admit different meaning, the one consonant with the object in view is to be selected, is entirely reasonable and logical, and particularly applicable to the problem at hand. If we assume that the succession clause means that a Vice President succeeds to the title of President in the event of inability of the President it raises almost insurmountable problems. On the other hand, if we assume that the Vice President does not acquire the title, but only the powers and duties, the problem becomes relatively simple, and involves only spelling out adequate procedures by legislation.

What then does it really boil down to? In general terms it is a question of determining Presidential inability. This necessarily involves who should initiate proceedings, who should make the determination, how the determination should be made, and finally how such an inability is to be terminated. The first question, who should initiate proceedings, is probably the simplest one to answer.

Here we must recognize that inability can be of varying kinds. For instance there could be just plain physical inability. In this event the President, himself, should make the determination and notify the Congress. Such a notification should serve to automatically give the Vice President the responsibility to exercise the powers and duties of the President, but should not give him the title. On the other hand inability could be of such a nature that the President could not make the decision, such as paralysis, coma, or mental incapacitation. In this event someone else would have to initiate proceedings and to my mind there is only one logical person to do this. He is the Vice President. The courts have a well-established rule that in contingent grants of power, the one to whom the power is granted should determine when the emergency has arisen. The Vice President is charged by the Constitution to exercise the powers and duties of the President when the latter is unable to do so, and therefore it is the Vice President's responsibility to raise the question when he has good cause to believe the President is incapacitated.

It might be said that the Vice President should determine when inability exists, but experience has shown that this procedure cannot be relied on. In effect, it would require the Vice President to act at his peril and in the two instances when the occasion has arisen, the Vice President has refused to act. History, as well as considerations of human nature, require that the Vice President be given some degree of clear legal sanction and protection in the event of Presidential inability. In order to avoid the dangers of partisan accusations and the undesirable consequences of a possible struggle for power, it would appear that the Vice President should only raise the question and that the determination should be made by some other agency.

Now we come to the heart and the most troublesome part of the problem. Who should make the determination and how should it be made? Many proposals have been advanced on this subject, all of which have merit, and all of which appear to raise some rather serious problems. It would seem to come down to deciding which system would be the most feasible and at the same time involve the smallest degree of hazard. At this point it should be noted that the whole reason for needing any system at all is because of the recognized necessity for having continuing executive leadership. Therefore, any

system must be one that will permit reasonably expeditious determination, without sacrificing the ability to make a correct decision to considerations of speed. A system that is time-consuming would be too cumbersome and unwieldy and would not meet the requirements of the problem. It has been suggested that it is the responsibility of Congress to make the decision, but I believe that experience has shown that on such an important question Congress could never act with the required degree of promptitude. In all probability it would take Congress weeks or even months to reach such a decision, if indeed it could reach one at all. For largely the same reasons I believe that a select committee of Congress would prove unworkable.

With regard to Congress there is another important consideration which should be taken into account. Congress is the forum for partisan politics, and properly so. However, the determination of Presidential inability should be entirely free of political considerations, and should be solely a question of fact. Whether or not the President has the support of any groups or party should not play any part in the question of the inability of a President to perform his duties. To allow such a situation to arise would be to permit the party or parties which lost the presidential election to override the decision of the people. Therefore, I do not believe that Congress should in any way play an active part in determining Presidential inability.

It has been suggested that the decision of a President's possible incapacitation should be made by the Cabinet since it is the closest group to the President and in the best position to know. It is probably true that the Cabinet, due to its close personal contact with the President, would have access to information bearing directly on the question, but I believe that there are other considerations which would make it undesirable to have the Cabinet perform this important function. Obviously there is a great possibility that political considerations might influence the Cabinet, either individually, or collectively. Personal loyalty, while it is a very commendable trait, should not play a part in a decision of this nature, and of all the agencies of government the Cabinet would most strongly be influenced by personal loyalty. During the illness of President Garfield it was personal loyalty that restrained the Cabinet from declaring the President incapacitated. Wilson summarily dismissed a member of his Cabinet for disloyalty because he advocated such a decision. From this it would seem reasonable that any Cabinet decision, in all probability, would be influenced by factors which should not enter into a question of such importance.

We come then to a question of what agency of the Government is reasonably free of the influences that should be avoided. The obvious answer is the Supreme Court. A proposal has been made that the Court should make the decision on a petition for a writ of mandamus to order the Vice President to exercise the functions of the President. This proposal in itself involves serious constitutional questions which I will not go into since I feel there is another reason why it should be rejected. I have already pointed out that any system which would be time-consuming would be too cumbersome to meet the demands of the situation. It should go without saying that the judicial process is necessarily slow and it seems to me that it could not be expected to move with rapidity on such a weighty question as Presidential inability.

On the other hand, as I have indicated, the Court is the only branch of the Government that is removed from political influence and would not be affected by questions of loyalty. This was the factor that caused me to prepare and introduce S. 2763. While I am not irrevocably committed to the provisions of this bill, it seems to me that it meets the problems involved better than any of the other proposals that have been advanced so far. Briefly, the bill would provide that the President notify the Congress in writing of his inability, if able to do so, and such notification would automatically give the Vice President the responsibility of exercising the powers and duties of the President, but would not give him the title. When the President felt he was recovered he would resume his duties by notifying Congress. With regard to disability of a nature that prevented the President from notifying Congress, the bill provides that if the Vice President had good cause to believe that such an inability existed he would notify the Chief Justice. The Chief Justice would then appoint a panel of qualified, civilian, medical specialists who would examine the President. Each member would individually submit a report of his findings, stating the physical condition of the President, and his conclusion of whether the President was able to exercise the powers and duties of his office. If all the members of the panel agreed in the conclusion that the President was suffering an inability, the Chief Justice would notify the Congress in writing. Such notification would have the effect of placing the powers and duties, but not the title of President, on the Vice President.

The bill has been objected to principally on the basis that it enlarges the judicial functions of the Court. To my mind this objection is not well founded since the duty placed on the Chief Justice is strictly ministerial in character and is not essentially different from other duties imposed on the Chief Justice by statute. The question has also been raised as to how would the inability determined by the medical panel be terminated. It is my feeling that this should be accomplished simply by the President notifying the Congress in writing that he was resuming the responsibilities of his office. At first glance it might seem that this could well result in a struggle for power, but I believe that when carefully considered such would not be the case. A President would necessarily be hesitant to resume his office after being found incapacitated until he was sure of his condition, because he would not want to run the risk of the process being repeated. Secondly, the President is the President unless he vacates the office by death or resignation, or is removed by the Congress. The decision as to ability or inability is his and his alone, except in those situations which prevent him from making the decision.

In this statement I have not attempted to cover all of the many ramifications of the question of Presidential inability, but only to point up what appears to me to be the principal controlling considerations, and to test some of the proposals that have been made against those considerations. I am sure that as the committee continues its study of this matter it will continue to develop valuable information on all aspects of the problem. The arguments, pro and con, for any specific proposal or on any given interpretation will be multitudinous and weighty and the ultimate decision with which this committee will be faced will be a very difficult one. I want to take this oppor-

tunity to assure the committee of my lasting interest in this matter and to express my willingness to be of assistance in any way that I can.

Mr. Chairman, I deeply appreciate your invitation for me to present my thoughts on this matter. It is my hope that the committee will be able to arrive at a workable solution and will favorably report such a measure, so that it will be possible to finally resolve this important question.

The CHAIRMAN. My distinguished neighbor from New Jersey is here, Mr. Frelinghuysen, from whom we will hear next.

Mr. KEATING. Mr. Chairman, before Mr. Frelinghuysen proceeds, we have had some very constructive help from former President Hoover in our deliberations.

Do I understand that an invitation was extended also to former President Truman?

The CHAIRMAN. Yes, it was, and we have had a reply.

Mr. KEATING. Wasn't he notified of these hearings?

The CHAIRMAN. Yes.

Mr. KEATING. Did we have any reply to that?

The CHAIRMAN. Yes, he declined to appear.

Mr. KEATING. Do we have his letter?

The CHAIRMAN. Yes.

Mr. KEATING. Might I see it, please?

The CHAIRMAN. Would you get it please, Mr. Foley?

Mr. KEATING. I think it is unfortunate because I am sure he could make a valuable contribution to our deliberations, and I wonder if there could be any merit involved in the invitation being renewed over the signature of all the members of the committee?

The CHAIRMAN. I think that is a good suggestion. I should be glad to arrange for that.

Mr. McCULLOCH. May this be off the record, Mr. Chairman?

The CHAIRMAN. Yes. Off the record.

(Discussion off the record.)

The CHAIRMAN. Here is the communication received from Harry S. Truman, our former President, which is dated March 26, 1956. It is addressed to me, and he writes:

DEAR MANNIE

I certainly appreciated your letter of the 20th, very, very much and I wish I could be with you on April 11 and 12 but if you will be kind enough to excuse me I would rather not.

I am not only tied up for that date but, as I told you before, I am very much opposed to appearances before committees at this time.

Sometime in the not too far distant future I expect to be in Washington and I want to have a conversation with you on the whole situation.

Sincerely yours,

(Signed) HARRY S. TRUMAN

Mr. KEATING. Of course conversation would always be pleasant with former President Truman, I am sure, but the conversation with the former President and the chairman does not put anything in our record or would not help, really, the committee in its deliberations except as his views might be relayed by the chairman. I think it might be desirable that his letter be referred to and that all members of the committee renew the invitation to him to appear at a time which would fit in with his schedule, and to suit his convenience.

I make that motion.

The CHAIRMAN. If there is no objection, of course, it will be followed.

Mr. Foley, will you prepare a letter embodying those sentiments so that we might have former President Truman before us. I think he would respond.

Mr. KEATING. I am sure he would write a letter.

The CHAIRMAN. All right, we will be glad to hear from you now, Mr. Frelinghuysen.

STATEMENT OF REPRESENTATIVE PETER FRELINGHUYSEN, JR., UNITED STATES CONGRESSMAN FROM NEW JERSEY

Mr. FRELINGHUYSEN. Mr. Chairman and members of the committee, I appreciate the invitation extended by your distinguished subcommittee to present my views on this important problem. I am pleased to note the vigor with which your committee has approached its task. Your determination to clarify the constitutional provisions relating to Presidential inability, expressed so forcefully in the introduction to the committee's publication of January 31, 1956, is most encouraging. The selection of the ranking members of the full committee to serve on this special subcommittee is further evidence of your recognition of the gravity of the problem.

The problem is indeed a serious one. Until present ambiguities surrounding Presidential disability are clarified there is always the possibility that at some critical moment in history no one will be able to exercise the powers of the Presidency. A President could lie in a coma, unable to act and perhaps not even able to designate someone who could take over.

The Vice President clearly has constitutional authority to do so under specified circumstances. But he might fear the charge of "usurper" if he attempted to assume the President's powers and duties, when no clear-cut procedure for doing so has been established. In an administration which lacked a sense of unity and teamwork a stalemate could develop among various factions. The White House staff, the Cabinet, and the supporters of the Vice President might easily be at loggerheads. In an age when a nation's very survival may depend upon the right decisions being made at the right time, we cannot afford to continue to risk "muddling through."

The CHAIRMAN. Would you care to be interrupted as you go along?

Mr. FRELINGHUYSEN. By all means, Mr. Chairman. I have a fairly lengthy statement.

The CHAIRMAN. In other words, you don't mind being interrupted?

Mr. FRELINGHUYSEN. Not at all.

The CHAIRMAN. With reference to the statement you just made about the Vice President being fearful of being called a usurper, wasn't that the case during the illnesses of Garfield and Wilson where both Vice Presidents were so charged?

Mr. FRELINGHUYSEN. That might very well have been the case, especially in the case of Garfield. I discuss that later in my statement.

I think that was one of the reasons why there was no action in both those cases by the Vice President.

The CHAIRMAN. I think in the case of Marshall, who was Vice President, while he did not indicate in so many words, we can infer

from his action he was loath to take any action although Wilson was really hors de combat, if I may use that term, for over a year. The newspapers and periodicals demanded that he should declare himself as having had the office or rather that the duties and powers of Presidency devolved upon him, but he resisted because of the feeling of being charged as disloyal.

The Secretary of State Lansing almost insisted that Marshall take over.

Then Wilson himself said "I will not stand for any disloyalty," and said that in a most emphatic manner.

MR. FRELINGHOYSEN. I think as a practical matter the Vice President might very well be loath to take over the Presidency although he does have the constitutional power to do so.

Although inaction with respect to clarification of inability has been serious in the past, inaction must be regarded as intolerable now. New responsibilities of world leadership, the arrival of the atomic age, the increasing complexity of government—these factors and many more make it imperative that Congress respond to its clear obligation to supplement and clarify the constitutional provisions relating to Presidential disability. Failure to act could imperil the future freedom of our Nation and, as a consequence, that of the world.

Your committee is to be commended for its prompt action in considering the problem. For there is the danger that as time passes many people will dismiss the problem, as it has been dismissed before, on the grounds that since it has solved itself in the past, it will solve itself in the future. Such an attitude ignores the serious complications which resulted during the illnesses of Presidents Garfield and Wilson. It ignores, too, the quickened pace of society and the tensions of our times. It fails to perceive the responsibilities our Nation has assumed along with its position of world leadership.

The forthright manner with which President Eisenhower has publicly urged the Congress to study the question of Presidential inability undeniably has lent strong impetus to efforts to solve the problem. He has offered the cooperation of the office of the Attorney General and that of the entire executive department in order to facilitate congressional action. Clearly, his support and encouragement is important. It can do much to insure a favorable acceptance in the country at large of any proposed constitutional amendment which is submitted by the Congress to the States for ratification.

Probably never before has the outlook for improvement of the constitutional provisions surrounding Presidential disability been so bright. But that does not mean that action is assured. At other times in our history pleas for action brought only inconclusive results.

HISTORICAL BACKGROUND

Prior to the shooting of President Garfield virtually no attention was given to the problem of Presidential inability. Although Garfield's illness resulted in congressional discussion of the definition, duration, and means of establishing Presidential incapacity, the Succession Act of 1886 did little to remove the ambiguities of the situation. Instead it was concerned solely with determining the succession to the Presidency whenever the office was vacant due to death, resignation, or inability of both the President and Vice President.

This is the more remarkable since attempts to clarify the doubts surrounding the problem of inability received the strong support of Chester Arthur. He pleaded with Congress without success to eliminate the possibility that future Vice Presidents might have to experience the embarrassing situation which he had faced.

Although occasional requests for congressional action persisted through the years, it was not until the illness of President Woodrow Wilson that serious consideration was accorded bills designed to clarify inability. But despite the obvious gravity of the situation caused by the prolonged illness of President Wilson none of these bills emerged from committee.

Revival of interest in the matter of Presidential succession following the death of President Roosevelt led to renewal of demands that attention be given to inability. Resolutions introduced by Senator Theodore F. Green, of Rhode Island, in the 79th and succeeding Congresses urged the establishment of a joint committee to examine all the various problems relating to Presidential inability. Unfortunately no action was taken.

The CHAIRMAN. Well, I think no action should be taken on that resolution of Senator Green because it would oust this committee of its jurisdiction, and there is no need to do that.

That resolution not only embraced the matter of succession, inability, but also many other subjects relating to the Office of the Presidency and questions arising on those subjects have always been within the province of this committee.

I think we are proud of the fact that we have always tackled those problems courageously and, modesty notwithstanding, prompts me to say we have done it fairly well and efficiently, and I would not like to see this committee stand idly by and see itself deprived of its jurisdiction.

Mr. FRELINGHUYSEN. I do not mean to imply that the Judiciary Committee should be deprived of its authority. I think it is unfortunate that no action by any committee of Congress was taken after the death of President Roosevelt.

Much of the confusion which has existed throughout the years with respect to Presidential inability can be attributed to the interpretation which has been accorded a companion section of the Presidential succession clause of the Constitution.

Article II, section 1, clause 6, of the Constitution reads as follows:

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.

To date there have been seven cases of vacancy in the Presidency, all due to the death of the incumbent. On each of these occasions, following the example set by Vice President Tyler when he succeeded President Harrison, the Vice President took the Presidential oath and was recognized as President of the United States.

The CHAIRMAN. That raises a nice question whether Tyler should have taken the office of the Presidency of the United States. The Constitution says the Presidency shall be for a term of 4 years.

Mr. FRELINGHUYSEN. It raises a nice question, but I think the precedent is so firmly established that it is not likely to be shaken.

The CHAIRMAN. I think the fact that he said he was not acting as President caused a lot of difficulty.

Please proceed, Mr. Frelinghuysen.

Mr. FRELINGHUYSEN. The precedent built up in cases of death has through the years served as a deterrent to the exercise of the section dealing with inability. For many, including President Wilson, have reasoned that a Vice President might succeed to the Presidency in cases of inability just as he has come to be recognized as doing when the President dies.

Although the evidence plainly supports the view that a Vice President succeeds merely to the duties and powers of the President, rather than to the office itself, a contrary view has persisted through the years.

Examination of the records of the Constitutional Convention would seem to indicate that the framers intended that a successor to a President would not inherit the higher office. The antecedent to the words "the same" in the Constitution would appear to be "powers and duties of said office" rather than "said office." Each of the original plans presented before the Convention as well as the notes and report of the Committee of Detail used language synonymous with "powers and duties." The Committee of Style which made the changes which have resulted in confusion lacked authority to make substantial changes in the draft.

For these reasons President Tyler did not assume the Presidential title without his action producing discussion and dissent. Senator Allen of Ohio warned his colleagues that recognition of Tyler as President would lead to serious complications with respect to disability. Secretary of State Daniel Webster is said to have strengthened Allen's fears by stating that even though a President recovered from his disability during the term for which he was elected he could not displace the Vice President who had assumed the duties of his office. Webster's view was referred to at the time of the illness of President Wilson.

Despite the debate over Tyler's action at the time, the precedent he established has been regularly followed. It is not our primary task here to call into question the legitimacy of this practice. Clearly, it now is the accepted procedure. However, because scholars examining the records of the Constitutional Convention and the ratifying conventions, as well as the Federalist papers and the Constitution itself, continue to declare that Tyler's action was not consistent with the intent of the framers, it may be that formal recognition of this practice should be included in any constitutional amendment presently under consideration in connection with disability. House Joint Resolution 442 includes such a provision (sec. 1).

The CHAIRMAN. I think you are right in that regard for Congress itself has at times shortened the Presidency.

For example, during Washington's time they shortened it by 2 months, and when we changed the date of the inauguration we lengthened it, and then continued on for 4 years.

So the accepted practices you speak of are so imbedded in a sort of common law that we are inclined to accept them.

Mr. FRELINGHUYSEN. I am inclined to agree with you, Mr. Chairman.

GARFIELD AND WILSON

It may be well to consider for a moment the situations which arose during the incapacities of Presidents Garfield and Wilson, since they offer the most striking examples of Presidential inability.

President Garfield lived 80 days after he was shot, spending much of the time in a coma. During the entire period the only official act he performed was the signing of one extradition paper. The entire Cabinet agreed that it would be desirable for Vice President Arthur to act as President during the period of Garfield's illness, but the majority of them believed that once Arthur assumed the Presidential power Garfield lost his claim to it. They would not agree to assumption of this power by the Vice President without the knowledge and concurrence of the ailing President. Since the condition of the latter was so serious that no matters of importance could be discussed with him, no action was taken. The Government drifted along without effective leadership during this period. Fortunately no serious crises arose.

During this period of uncertainty there was much discussion of the meaning of constitutional "inability," but the experts could not agree. Although most persons believed that the Vice President should take the initiative in determining that the President was incapacitated, Mr. Arthur refused to do so in view of the divided opinion surrounding the matter and in view of the fact that he and Garfield were from divergent factions within the Republican Party.

Mr. KEATING. Did they have those factions in those days?

Mr. FRELINGHUYSEN. Oh, yes indeed, sir. They started factionalism quite some time ago.

Without a doubt the vagueness of the Constitution and the precedent set by Tyler in assuming the office of the Presidency upon Harrison's death did much to becloud the issues and prevented effective action.

The most dramatic case of Presidential disability in our history is that of President Wilson. The following details illustrate the seriousness of the situation. Nothing similar could be tolerated today.

For about 6 weeks President Wilson was unable to pass on legislation, and 28 acts of Congress became law because of his failure to act upon them within the 10-day limit. For nearly 8 months he did not attend a Cabinet meeting although, without his permission, Secretary of State Robert Lansing called 21 Cabinet meetings during that period.

Throughout the long period of his illness, President Wilson's condition was seldom appreciated by the public and even by members of his administration. An aura of mystery surrounded the President. For weeks at a time no one but his family and closest friends were permitted to see him. The Vice President and the Cabinet were not provided with adequate information regarding the state of his health. It was widely recognized that Mrs. Wilson and Dr. Grayson, the President's personal physician, were determining many issues of public policy and selecting carefully the matters which could be discussed with the President.

There was general recognition that the President's protracted illness had an adverse effect on the progress of the Versailles Treaty discussions in the Senate. There was a time when the Democratic

leader in that body thought it would be possible to achieve a compromise settlement with Republicans with respect to the treaty but at the time he was unable to see Wilson, and his fellow Democrats were unwilling to agree to a compromise on any other basis. The hand of the Executive was also sorely missed in discussions relating to a critical coal strike and other domestic matters.

The CHAIRMAN. You are referring to Senator Hitchcock. I think he did see him eventually.

Mr. FRELINGHUYSEN. Yes; but he was not able to discuss and arrive at a reasonable compromise which an active President could have acted upon.

In view of the President's condition Vice President Marshall was urged to assume some of the duties of the President. Like Arthur before him, however, he refused to act. It appears that the full Cabinet never did get around to asking Marshall to serve, but the matter was discussed. According to Tumulty, the President's secretary and friend, Secretary of State Lansing mentioned the matter to him.

In a statement which one writer on the subject has referred to as having personal loyalty rather than the welfare of the country as the frame of reference, Tumulty told Lansing:

You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him. He has been too kind, too loyal, and too wonderful to me to receive such treatment at my hands. And I am sure Dr. Grayson will never certify to his disability.

Those were strong words. If Dr. Grayson never would certify to his disability there was little likelihood that anyone would.

The Cabinet sessions called by Secretary Lansing during President Wilson's illness resulted in a request for his resignation. The first meeting was held about 2 weeks after the President was stricken. At that time there was genuine concern about the President's condition and there was some talk about the advisability of calling upon Marshall to assume the Presidency. Members of Congress were especially active in consulting with members of the Cabinet about this possibility. The New York Times reported later that the Cabinet meetings were held with the knowledge of the President and that members supposed that Wilson was kept fully informed regarding them. Dr. Grayson attended the sessions occasionally as did Mr. Tumulty.

Later President Wilson sharply reprimanded Lansing for calling the Cabinet sessions. He wrote the Secretary of State:

No one but the President has the right to summon the heads of the executive departments into conference and no one but the President and Congress has the right to ask their views or the views of any one of them on any public question.

Lansing replied that the action had been instituted because the Cabinet was "denied communication" with Wilson and it seemed wise to confer together informally on interdepartmental matters and matters which could not be postponed until Wilson's medical advisers would permit him to pass on them. The President did not accept this explanation and retorted that he found nothing in Lansing's reply which justified his assumption of Presidential authority. He pointed out that the Cabinet could take no action without him. At the same time he requested Lansing's resignation.

Like Tumulty, President Wilson appears to have held the view that succession of a Vice President had the effect of removing a disabled

President. This explained to some degree his attitude toward Secretary Lansing who, as mentioned earlier, had discussed the possibility of requesting Vice President Marshall to assume Presidential duties. In his book, Tumulty quotes Wilson as saying :

Tumulty, it is never the wrong time to spike disloyalty. When Lansing sought to oust me, I was upon my back I am on my feet now and I will not have disloyalty about me.

When Lansing's resignation was requested public sentiment clearly sided with the Secretary. The New York Times sharply criticized President Wilson for attacking Lansing on the Cabinet meeting question. Its editorial stated that if Lansing and his colleagues had proceeded on the theory that the Cabinet could do nothing without Wilson's presence, government would have been at a standstill and Congress might have felt it to be its duty to ascertain whether in respect to the President the condition described in article II, section 1, clause 6 of the Constitution as "inability to discharge the powers and duties of the said office" actually existed.

The Wilson story points up the need for definite action to clarify those sections of the Constitution relating to inability. The Nation was fortunate to have survived the President's illness as well as it did. But the Nation cannot afford to tempt fate again. It is imperative that we be prepared to meet a similar crisis swiftly and surely.

Wilson's illness dramatized many of the weaknesses of the "inability" clause. The same uncertainty which had been expressed in Garfield's time, concerning the right of a President to regain his office upon recovery from a disability, found expression again. The reluctance of a President and his advisers to chance a temporary transfer of power was evident. The devotion of the intimates of a President and their tendency to view actions of others in terms of the effect upon the President, rather than the impact upon the welfare of the Nation, is revealed. The hesitation of a Vice President to initiate action is once again clear. The power of a disabled President to prevent meetings of the Cabinet to discuss topics of interest to the Nation is also brought home to us. In all of the details of the crisis there is a lesson for our day.

It might be proper here to mention, in passing, more recent examples which should lead us to direct our efforts to a solution of the "inability" flaw existing in the Constitution.

In the latest instance the United States was indeed fortunate that President Eisenhower recovered so quickly from his illness, and that no crisis developed during that short period. Had conditions been different the results might have been far more serious.

Various writers have cited also the illness of President Roosevelt as lending support to the need for action with respect to this long neglected subject. There has been much discussion of the true state of President Roosevelt's health during the latter months of his life. Most observers agree that he had failed markedly. At the time of his death the war was about to end and postwar problems were beginning to appear. Had the cerebral hemorrhage which killed the President left him hovering between life and death for a long period, the consequences might have been grave.

Certainly our past experience with Presidential disability should provide sufficient warning to the American people of the dangers of inaction.

Mr. KEATING. Before you proceed, I want to say this has been a very interesting matter. I commend you for the research that you have done in preparing this.

Mr. FRELINGHUYSEN. Well, it is a subject which has been of great interest to me for some time now, and I thank you very much.

The CHAIRMAN. I want to compliment you also. It involved a great deal of erudition and study and work.

Mr. FRELINGHUYSEN. Thank you, Mr. Chairman.

Before I proceed to discuss the contents of House Joint Resolution 442, which I introduced on the first day of this session, I should like to comment in a general way on various suggestions which have been advanced in the search to find the best possible person or group to determine when disability exists.

THE VICE PRESIDENT

Should, first of all, the Vice President determine whether or not a President is disabled? He is under a constitutional mandate to assume the responsibilities of executive power under certain circumstances. He automatically takes office as Chief Executive upon the death or resignation of the President, or his removal from office. Perhaps he is the most obvious factfinding agent in such a case. Could he not logically be expected to take the initiative in questions involving the disability of a President?

No one will dispute the fact that the Vice President holds the most important elective office in our Government next to the President himself. The Vice President, furthermore, is the only other official elected by the people of the entire Nation. Those favoring the Vice President taking the initiative maintain that he is in at least as good a position as any other individual, or group, to make what might well be a difficult decision.

However, to argue that a Vice President himself should act, it seems to me, asks too much of human nature. A Vice President having such power might find himself in an extremely awkward position. If he makes the initial determination of inability, he opens himself up to the charge of being overly ambitious, if not a usurper. Such authority, unquestionably, could in fact lead to a usurpation of Presidential power by a Vice President.

The CHAIRMAN. I might interrupt you at that point and say that most of the opinions expressed in this field tend toward the conclusion that the duty of raising the question of inability and determining the question of inability should lie with the Vice President, quite in opposition to your expressed view, the theory being that he is the one who has to assume the constitutional authority to make the determination and raise the question, and that all these difficulties and charges, possibly charges that you advert to, would undoubtedly be leveled against him.

He has to override them and make the decision.

I just wanted to make that comment.

Mr. FRELINGHUYSEN. There is no question about it. As things stand now a Vice President should take the initiative in certain cases, and yet as a practical matter in the two main historical cases—those of Wilson and Garfield—the Vice President failed to act.

The CHAIRMAN. Not only that but there seems to be a trend that it is a duty to take action and that if he doesn't there would be a solidification of public opinion that would force him to, and if he still refuses, and if his ideas of loyalty, as have been mentioned in the cases of Arthur and Marshall, would tend to prevent him from doing it, why he would be subject to impeachment.

Mr. FRELINGHUYSEN. You suggest the Vice President has the duty to do it. But, it is not a duty that is enforceable by anyone, and public opinion may or may not be an effective way of forcing the Vice President to take the initiative.

As I suggest a little later on, impeachment isn't too good a method to point out the way of duty to a Vice President.

McCULLOCH. Don't we have the possibility also of immeasurable harm resulting to the country before public opinion could be felt, particularly if there is a desire to conceal from the public the true condition of a President if he was unable to carry out his duties?

Mr. FRELINGHUYSEN. In my opinion, I think that is a basic problem of placing that responsibility with one individual, especially the Vice President.

Mr. KEATING. Furthermore, as a practical matter, I cannot conceive of a Vice President being removed from office and being impeached for such a reason.

The CHAIRMAN. I meant that the general opinion was that he would be impeached if he didn't raise the question.

Mr. KEATING. The Senate would never find him guilty of charges if he put in the defense that it was a loyalty to his chief which caused him not to assume the duties and powers of office.

We all know the Members of Congress, whatever their political affiliation, admire loyalty to a chief and it just seems to me impossible to conceive of a condition where a Vice President who interposed such as a defense would ever be removed.

Mr. FRELINGHUYSEN. It seems to me that if the impeachment process were to be useful it could only be used if a Vice President were accused of usurpation.

Mr. KEATING. Actually the danger of usurpation is not as great as the danger of a Vice President bending over backward not to usurp powers in the case of an alleged inability of the President.

I would imagine the Vice President, if he erred at all in that regard, would be apt to err on the side of not assuming duties, rather than the other way.

Mr. FRELINGHUYSEN. As a practical matter I think that would be the case.

The CHAIRMAN. Of course, to avoid the question of the separation of powers, if the Vice President—if he has the duty to raise the question and if it were given to the members of the Supreme Court and the Congress and those who might be appointed by the Speaker of the House or the Vice President—any more than the separation of powers—and I don't think it could be done without a constitutional amendment.

Mr. FRELINGHUYSEN. I agree, very decidedly. In this case it seems to me there would not be a serious problem with respect to separation of powers so long as you did it, not by simple legislation, but through a constitutional amendment.

The former Members of Congress who exhibited particular interest in the problem of Presidential inability—Senators George F. Hoar of Massachusetts and Charles W. Jones of Florida are among those who have declared it would be dangerous to vest the power of determination in the Vice President.

The danger of usurpation, it has been claimed, could be guarded against by Congress' power of impeachment. The Constitution provides specifically for this possibility. The impeachment power, however, has been used very seldom, and is not an easy weapon to use against an unduly ambitious Vice President.

I might add, against a Vice President who was reluctant to take the initiative in these cases.

To date, of course, the problem has been the reluctance of Vice Presidents to act rather than excessive ambition on their part. If the danger of usurpation on the pretext of inability is slight, the danger that a Vice President will fail to assume the duties and powers of the Presidency in cases of real Presidential disability cannot be ignored. Recently former Vice Presidents Barkley and Wallace have been reported as saying they would not have attempted to make the crucial decision themselves had a situation arisen requiring such a determination.

Most Vice Presidents would have a natural reluctance to open themselves to the charge that by making a determination of inability they were merely seeking to advance their own political futures.

It must be remembered, too, that under the system for electing vice presidential nominees which has customarily been used by national nominating conventions there is no assurance that the person selected will enjoy a good working relationship with the nominee for President, or even be in sympathy with his views. Increasingly, of late, demands are heard that political parties select their vice presidential candidates on the basis of sympathy with the philosophy and policies of their presidential running mates. Traditionally, however, despite the fact that one-fourth of our Presidents have died in office and the Vice President has succeeded them, other factors have been foremost. These have included such considerations as the desirability of obtaining geographical balance on a ticket, the necessity for placating a party faction which failed to put over its choice for the presidential nomination, or the wish to grant some measure of solace to a man who sought the top spot on the ticket. Thus we have had such winning combinations as Garfield-Arthur, Wilson-Marshall, Lincoln-Johnson, Coolidge-Dawes, McKinley-T. Roosevelt, and F. Roosevelt-Garner, among others.

Although lack of accord between the Nation's top two officials might conceivably lead to an attempt by the one to succeed the other under circumstances of doubtful validity, it is more likely to increase the reluctance of the Vice President to assume the duties and powers of an incumbent President with whom he has not been closely identified when the need actually arises. Indeed, this factor is said to have been an important consideration in the decision of Vice President Arthur to refuse to accede to requests that he assume these obligations during the incapacity of President Garfield. For Arthur was a "stalwart" selected as a vice presidential candidate to pacify Roscoe

Conkling and his allies in the face of the selection of Garfield, a "half-breed," for the presidential nomination. He feared any action by him to assume the duties and powers of the Presidency during Garfield's incapacity would be misinterpreted as an attempt to seize power.

Earlier I mentioned that Congress' power to impeach has been cited as a deterrent to an overly ambitious Vice President. Yet existence of the power might also serve to make a Vice President excessively cautious. If he alone were to determine questions of Presidential inability he might, in effect, be gambling his political future upon the likelihood of impeachment proceedings. If such proceedings were initiated his future would rest on their outcome. It is likely that he would be equally as cautious as Vice Presidents Arthur and Marshall in the Garfield and Wilson cases, respectively. If such were the result, of course, the proposal would be no remedy for the problem. We should be back where we started. What we are seeking is a safe and effective means of having disability determined.

Furthermore, specific authorization for action by the Vice President would not resolve the conflict which is likely to result between the Vice President and the President's close associates in cases where the latter wish to hide or minimize a President's disability. Should such a conflict occur, a Vice President might well feel that to further his own political ends it might be wise for him to defer to the President's official family or lieutenants. This would be especially true if he felt that the President, upon recovery, might support the view of his own entourage as against the Vice President.

Another danger in giving the Vice President this authority, with the impeachment power as the only check on him, is that it would tend to put the Vice President in the position of being obliged to "lobby" in the Congress in order to insure himself of support for his determination of Presidential disability. Once again, this seems too much to ask of a Vice President. In the case of Presidential illness, a Vice President is expected by the public to act with dignity and sympathy. He must not appear to be seeking additional power. It will be recalled that Vice President Nixon won widespread praise last autumn for his awareness of the delicacy of his position.

The CHAIRMAN. Of course, there is another argument that might support your view. The Constitution gives certain designated powers to the Vice President, and there is no specific power in the Constitution giving him the power to resolve this problem or even appraise it.

Mr. FRELINGHUYSEN. That is the trouble. We have got an ambiguity there and at the very least we should clarify who should take the initiative.

The CHAIRMAN. In other words, in any event I don't think he could raise the question. That is my offhand opinion. I don't think he could raise the question unless Congress gave him the right to do it, unless there is some statute where that power would be imbedded, that power to raise the question.

Mr. FRELINGHUYSEN. At the same time it might be difficult to challenge his right to make a determination, even though it is not specifically spelled out.

The CHAIRMAN. As I said in my opening statement, we cannot have a perfect answer to this problem no matter what kind of a solution you propound, you will find some difficulty with it. There will be

no solution that will be perfect. You probably have gathered that from your research.

Mr. FRELINGHUYSEN. Certainly my own suggestion is not offered as a perfect answer to this problem.

THE CONGRESS

Has Congress the power to make provision for the disability of a President? I believe it has.

Article I, section 8 of the Constitution provides that the Congress shall have power—

to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Furthermore, since the Constitution specifically authorizes Congress to take action to name a successor if both the President and Vice President are not available—article II, section I, clause 6—it can be argued that Congress has equal authority to remedy the problem under discussion. On three separate occasions—in 1792, in 1886, and in the Presidential Succession Act of 1947—Congress has passed legislation dealing directly with Presidential succession.

The question here, it seems to me, is one of wisdom not of law. Is it wise to have Congress alone make the inability determination? I do not believe it is.

Congress is inevitably embroiled in partisan political disputes. These are frequently an essential part of its functioning processes under our political system. However, given the nature of Congress and the character of the inability question, I do not believe that Congress is the appropriate body to make the final decision. Were Congress to be given exclusive power to make the inability determination, I fear the decision might frequently be dependent upon the outcome of a political power struggle. The procedure could well prove disorderly. Stalemates could develop. Passions might easily be inflamed.

It should also be borne in mind that on numerous occasions Congress has been controlled by a political party or coalition hostile to the Executive. It is not difficult to envisage a politically hostile Congress employing the disability determining device to unseat—or perhaps merely to embarrass—a healthy and competent President.

It is true that this danger could be reduced by requiring a two-thirds vote of Congress in determining disability. Such a requirement is included as part of the procedure in my own proposal. However, House Joint Resolution 442 does not give Congress alone the power to make the determination. Other checks are provided which seem to me to reduce the dangers inherent in placing the power with Congress exclusively. Joint participation in the disability procedure by Congress and the Supreme Court will make it more likely that the final decision will be readily accepted by the Nation. This argument will be further developed later in my testimony.

The CHAIRMAN. Suppose we would provide that the Congress make the determination, Congress might say one thing and the Vice President would say "No; I am not going to accept the office."

In other words, the Executive might say something quite different than the Congress determines. What would you do then?

Mr. FRELINGHUYSEN. If the Vice President refuses to accept the office when the legitimate authority makes the determination that he should accept it—

The CHAIRMAN. Or suppose that the Congress declares the President has a disability and the President says, "No; I am able and I will not allow the powers and duties and emoluments of my office to go to the Vice President."

The Congress might be of a different party than the President.

Mr. KEATING. In the other body they could filibuster and keep any President from performing the duties of his office ad infinitum.

The CHAIRMAN. That is right. I could not possibly conceive of Congress raising or determining the question.

Mr. FRELINGHUYSEN. I agree with you heartily, Mr. Chairman.

THE CABINET

A number of observers have advanced the suggestion that the President's Cabinet might be best qualified to determine disability. Various proposals have provided that one or more members of the Cabinet be officially designated to pass on any question of a President's disability. Such solutions, in my opinion, are of doubtful merit.

Under ordinary circumstances most members of a Cabinet possess a strong devotion to, and sense of identification with, the President. To ask that they view questions relating to their President in an entirely objective manner is asking a great deal. If they are friendly to the President—and their primary loyalty is clearly to him rather than to the Vice President—they will be reluctant to make a decision displacing him even temporarily from the seat of power. Their very loyalty to their chief would insure, it is true, that any decision by them that Presidential disability existed would not be suspected as having arisen from animosity or a desire to obtain power for his substitute. But this same loyalty factor serves to deprive them of their value as a factfinding body.

By virtue of their devotion to the President many Cabinet members are not likely to be closely identified with the Vice President. It is not difficult to think of past administrations in which at least a majority of the Cabinet members would not welcome the transfer of power from the President to the Vice President. They might imagine themselves removed from office by the Acting President. In such an eventuality, incidentally, determination of when inability ceased might be affected.

At the very least they might recognize that their influence in the administration would be lessened. Whatever their thinking, it is not unreasonable to anticipate that they might attempt in various ways to play down pressure for a determination of inability. For example, the initiative of Secretary of State Lansing in calling the Wilson Cabinet together apparently reduced the likelihood that the constitutional issue would be pressed.

And if the Cabinet was not particularly devoted to the President an attempted but unsuccessful unseating of him might well lead to their summary dismissal. Even a Cabinet able to view the matter of disability apart from considerations of loyalty might, mindful of Wilson's treatment of Lansing, refuse to act if even a measure of doubt existed as to disability.

Further, if the Cabinet was divided into factions, as might easily be the case a stalemate might develop which could prevent any action from being taken on the disability problem.

It might be well at this point to examine certain recent proposals providing for Cabinet determination of inability.

In an article in the April 6, 1956, issue of the U. S. News & World Report Henry Wallace takes notice of the problem and suggests that the initiative should come from three members of the Cabinet: The Secretaries of State, Treasury, and Defense. If Congress is not in session and the country is not in a crisis, these three should permit the White House staff to carry on as it would were the President on vacation. But, if 2 of the 3 should decide that for some reason our security is in prospect of being threatened, they should call in to sit with them on an equal basis 6 other men: the senior member of the Supreme Court who belongs to the same party as the President, the senior member of the Court who belongs to the opposition party, the top man in the Senate of the same party as the President, other than the Vice President, the top member of the opposition party in the House, and 2 medical experts—the heads of the Bethesda Naval Hospital and Walter Reed Army Hospital.

Mr. KEATING. That would very successfully mix up the separation of powers practically completely.

Mr. FRELINGHUYSEN. It would, thoroughly. I agree.

The CHAIRMAN. That is what we call a mishmash.

Mr. FRELINGHUYSEN. If 6 of the 9 members conclude that it is necessary to have an Executive in full health at once, and that the President does not meet this standard, they should call upon the Vice President to assume the Presidential duties. He would not assume the Office unless all nine men agreed that the President was completely and permanently incapacitated.

One weakness of the proposal is that the initial determination is entirely centered in the Cabinet. For reasons expressed earlier, I do not think that wise.

Nor do I approve of the plan to select two members of the Supreme Court for the full determining body on the basis of their party affiliation. It is pretty generally agreed these days that partisanship should disappear upon appointment to the Court. It would seem to me to be a mistake to stress party membership. I happen to believe that the Supreme Court is the body best suited to make the final determination of disability, as I shall discuss later. However, my proposal is based upon the belief that the Court is far removed from partisan considerations and is most likely to arrive at an objective decision based on the best possible evidence available.

Under Mr. Wallace's proposal, 2 of the 9 members of the committee on disability determination would be medical men. I recognize the importance and necessity for medical guidance in arriving at the ultimate decision with respect to disability. However, I would not charge medical men with the responsibility for the decision.

Another advocate of Cabinet determination is the distinguished political scientist and scholar, Edward Corwin. In his most recent book, *The Presidency Today*, Professor Corwin urges the establishment of a new type of Cabinet consisting of legislative leaders plus department heads and even heads of independent commissions. He would

vest in this body the power to determine Presidential disability. Apart from the fact that there appears little likelihood at present that such a Cabinet will replace the present form of Cabinet in the near future, Professor Corwin's proposal would appear to be subject to the same criticisms as those which we have applied to proposals which would employ the present type of Cabinet for disability determination.

In considering the various proposals to vest the Cabinet with authority to determine disability it is well to keep in mind the fact that the Cabinet is not a constitutional branch of the Government. From this standpoint it should not, perhaps, be given the same status in your considerations as constitutionally established bodies.

For the reasons outlined above I believe that the responsibility for determining Presidential inability should be placed elsewhere than with the Cabinet.

MEDICAL EXPERTS

I believe as impartial a body as possible must be given the responsibility for determining inability. Some persons who agree with this general concept have suggested that the determination should be made by a committee of medical experts appointed by the Chief Justice.

This suggestion does, in part, meet the test of impartiality. However, the proposal does not appear to offer as much assurance in this regard as would a determination made by the full Court. Though it may be remote, there is always the possibility that a Chief Justice, were he so inclined, could appoint medical experts who would decide the question as he wished them to.

The full Court, under my proposal, would always be free to, and most likely would, hear testimony from medical experts. But some important testimony could be of a nonmedical character. For example, it might be valuable to hear testimony concerning a President's activities immediately prior to or during an illness. Such testimony would most likely come from the White House staff members and executive officials. In such cases a board made up of medical experts would not necessarily be competent to pass on such testimony. Nor would it be likely to be sufficiently aware of the multitude of factors which must necessarily enter into a proper decision in this matter. And it would be safer if the full Court, rather than the Chief Justice alone, were to judge such matters.

The CHAIRMAN. Would your proposal involve some definition by Congress as to what is inability?

Mr. FRELINGHUYSEN. Not in this amendment. It would not spell it out.

There is a section, section 5, which would enable us to implement the constitutional amendment.

The CHAIRMAN. Let us assume that your proposal becomes an amendment to the Constitution. Would you subsequently amend the constitutional provision by a definition by Congress as to what is inability?

Mr. FRELINGHUYSEN. It certainly would be a subject that might be considered.

The CHAIRMAN. Would the inability have to be permanent or temporary? Of course, in any event, if you do that, you would have the experts, who would undoubtedly quibble about it.

Mr. FRELINGHUYSEN. That is why I think it would be very undesirable to try to spell out any such thing in a constitutional amendment.

The CHAIRMAN. Must the disability be more than physical or mental, or must it be both, or can it be separate?

Mr. FRELINGHUYSEN. These are difficult questions. There are a lot of weighty problems facing this committee.

The CHAIRMAN. There may for example be disability which is due to enforced absence from the country.

For example, President Roosevelt went to Casa Blanca and President Truman went to Germany and President Eisenhower went to Geneva. Is that a disability?

Mr. FRELINGHUYSEN. There was certainly some question as to whether President Wilson was able.

The CHAIRMAN. That is temporary disability.

Mr. FRELINGHUYSEN. It would certainly seem so.

The CHAIRMAN. Suppose that the President should have, God forbid, an accident to his arm so that he could not sign a bill. Then what happens? You see what might happen?

Mr. FRELINGHUYSEN. I appreciate that, yes, Mr. Chairman.

ALTERNATIVE PROPOSAL

On the opening day of this session of Congress I introduced a joint resolution, House Joint Resolution 442. It would amend the Constitution to clarify the disability question. The proposed amendment contains the following provisions:

SECTION I

Section I provides that the Vice President shall become President in case of the removal of the President from office or of his death or resignation.

This provision in effect would give constitutional ratification to the precedent established by Vice President Tyler when President Harrison died in office. Tyler, contrary to the constitutional interpretation of many at the time, successfully established himself as President, rather than as acting President.

The CHAIRMAN. I take it in that case of resignation or death or removal that the Vice President would succeed to the office and become President.

Mr. FRELINGHUYSEN. That is right.

Mr. CHAIRMAN. And if it were the case of inability, temporary or permanent, the Vice President would only succeed to the duties and powers of the office.

Mr. FRELINGHUYSEN. That is right. Section II of my proposal covers that.

The CHAIRMAN. He would be the acting President.

Mr. FRELINGHUYSEN. The powers and duties, of course, would devolve on the Vice President, and not the office itself.

The CHAIRMAN. Would you call him an acting President then?

Mr. FRELINGHUYSEN. Well, so far as a case of temporary inability is concerned, I suppose he would be.

The CHAIRMAN. It is very important because Tyler, whenever a bill was presented to him for signature which came from the House or

the Senate and which had the words "Acting President" on it, before he would sign it, he always struck out the word "acting." He refused to consider himself "Acting" President.

MR. FRELINGHUYSEN. I think in the case of temporary inability the Vice President would be only Acting President. If he were not and if the President were to resume his responsibility, that would mean in effect that there were two Presidents at one time.

To avoid any possibility of conflict as to whether the President could resume his duties, perhaps it would be well to call the Vice President Acting President during that disability period.

THE CHAIRMAN. I think you are right because when the disability is removed, then, the President could resume his powers.

MR. FRELINGHUYSEN. That is right.

Continuing my testimony.

Since then, following Tyler's example, every Vice President who has taken over the powers and duties of the Presidency as the result of a President's death has been recognized as succeeding to the Presidential Office itself.

Since the Tyler precedent has become so firmly established it seems wise to remove any discrepancy between the accepted practice and the wording of the Constitution itself.

SECTION II

Section II states that "if the President announces he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President."

This provision is included in order to provide a simple method for determining Presidential disability. If a President finds that he is unable to carry on his duties, it seems proper that his own determination of inability should be sufficient.

But, some may ask, suppose a President were to pretend he was disabled in order to evade his constitutional responsibilities? I think former President Truman has suggested that that might be the case—that a President might pretend that he was not able to carry out his duties. In such a case, surely, he should not be expected to continue to exercise these powers and duties. The American people would not be likely to want a President to continue to employ them were he opposed to doing so. Furthermore, should a President feign inability merely as a means of shirking his duties while retaining title to his office, the Congress could always, should it so desire, institute impeachment proceedings.

MR. FOLEY. Going back to the point raised about the title, do you think in section II of the bill, you might use the title "Acting President" or "who shall be known as Acting President."

MR. FRELINGHUYSEN. That again is one of those difficulties which would not need to be formally incorporated in the amendment itself. It could be in supplementary legislation. If the committee feels it would clarify the Vice President's status, I think it should be put in. I don't think it is of any great importance whether it is included in the amendment.

THE CHAIRMAN. In your section II, you provide that the President shall make a finding of his ability; is that right?

Mr. FRELINGHUYSEN. That is right. That is the first step. If the President should announce it then the duties and powers would devolve upon the Vice President.

SECTIONS III AND IV

Sections III and IV cover the more difficult cases of presidential disability. Section III provides that the Congress, by a concurrent resolution approved by two-thirds of each House, may "suggest" that the President is unable to discharge the powers and duties of his office. For the purpose of considering such a resolution the Vice President may convene the Senate, and the Speaker the House of Representatives.

If the Congress makes such a suggestion of Presidential disability, section III continues, the Supreme Court "shall determine whether or not the President is able to discharge such powers and duties." If they so find, these powers and duties shall devolve upon the Vice President.

The CHAIRMAN. Suppose Congress is not in session at the time a catastrophe occurs and the President is in a coma?

Mr. FRELINGHUYSEN. I believe that section III would take care of such a situation. It provides that the Vice President may convene the Senate and the Speaker the House.

The CHAIRMAN. If this illness sets in the President might be unable to call a special session of Congress, then I take it we would have to wait until the regular session.

Mr. FRELINGHUYSEN. Section III should take care of such a contingency.

The CHAIRMAN. That is not in your proposal?

Mr. FRELINGHUYSEN. I believe section III takes care of this.

In view of the confusion which has existed in the past, it seems important to specify that a Vice President does not become President and thus cannot oust a disabled incumbent from his office. It should be made explicit that the remains as Vice President or perhaps Acting President, if there were preferable, and discharges the duties and powers of the Presidency only for the duration of the inability. I submit that if it were clear that such would be the case, the matter of inability might often be settled by the disabled person inviting his next ranking subordinate to act for him during the period of his incapacity, safe in the knowledge that he remained President. Certainly the President's advisers would be more likely, under such circumstances to look favorably upon the temporary changeover.

These sections contain the heart of the constitutional amendment. Their purpose is to provide an orderly procedure for determining disability which will be as free as possible from partisan political pressures.

It is of the utmost importance that the final determination of disability be received by the Nation as an objective finding not motivated by partisan consideration. Anything less than that might be disastrous to national unity and to effective leadership. The Supreme Court, in my judgment, is the body most removed from the stresses of partisanship and the one most likely to undertake an impartial consideration of the facts. And probably no other institution enjoys

the respect of the Nation to so great a degree. The prestige accorded the Court should aid in the public's acceptance of the transference of power involved in cases of Presidential disability.

The CHAIRMAN. May I ask this question? This is not quibbling. Only the President can exercise executive power; is that correct?

Mr. FRELINGHUYSEN. That is correct.

The CHAIRMAN. Can an Acting President exercise executive power under the Constitution?

Mr. FRELINGHUYSEN. Well, I should assume so. If what we are trying to do is to have continuation of the important executive powers, the executive power should certainly be transferred to an Acting President during the inability of the President. It certainly must be a transferrable power.

The CHAIRMAN. Wouldn't that have to be spelled out in the constitutional proposals that the Acting President could exercise executive powers because the Constitution as presently written would not give the Vice President who is Acting President any executive power, and the Constitution says executive power shall be exclusively vested in the President.

Mr. FRELINGHUYSEN. This does say the powers and duties of the President shall devolve. It might be well to add another sentence that it is the executive power you are talking about, but I should assume the intention would be clear.

One particular objection is frequently raised against the proposal to have the Supreme Court make the disability determination. It is argued that the Supreme Court has original jurisdiction over only a few specifically enumerated types of cases and that it could not, therefore, handle a question of this type. The answer, however, is clear. It is the Constitution which governs the Court's jurisdiction and a constitutional amendment obviously could give the Court the necessary authority to deal with cases of Presidential disability.

CHECKS AND BALANCES

By assigning this duty to the Court, it is true, we are asking it to undertake a new type of assignment. This would not in itself, however, appear to constitute a fatal objection to the proposal. A more valid criticism would arise if it could be shown that the procedure would upset the constitutional system of checks and balances. Such, however, is not the case. On the contrary, the proposed procedure itself incorporates all of the proper checks and balances.

It can be seen that this proposal embraces all three branches of Government. Where the President himself makes the determination of inability the Executive is, of course, involved. The Executive, through the Vice President, is also involved in calling the Senate into session to pass on a disability resolution. The Vice President is also presiding officer of the Senate, but it is reasonable, for our purposes, to classify him as at least partially a representative of the Executive.

Mr. KEATING. If the Supreme Court made the decision, would you require that their decision be unanimous?

Mr. FRELINGHUYSEN. I should think not. I should think it might be difficult to get unanimity in some cases. It is hard to visualize what the particular situation might be that you are considering, but

I should think that unanimity might be a very difficult thing to arrive at.

Mr. KEATING. Does your proposal provide for anything more than a majority decision of the Supreme Court?

Mr. FRELINGHUYSEN. No, my proposal does not spell out exactly how it shall arrive at its determination, but presumably a majority decision would be sufficient.

Mr. KEATING. A 5 to 4 decision, which we have seen in the Supreme Court frequently, would not be a satisfactory solution in the eyes of the American public.

Mr. FRELINGHUYSEN. It would not be as desirable in the case of the acceptance of the power if it were as close as that.

The CHAIRMAN. What about the reluctance of the Supreme Court to pass on political questions?

Mr. FRELINGHUYSEN. Well, if there is a specific amendment, that should take care of that.

Mr. FOLEY. Would it not be contrary to article III, the judicial power?

Mr. FRELINGHUYSEN. Perhaps so. At least you can wrestle further with the question. However, I should think an amendment would take precedence over an existing provision of the Constitution.

The CHAIRMAN. As I said before, there is no perfect answer to that. You have got to be realistic, I suppose.

Mr. FOLEY. Do you think it would be better to give the power to one man to convene either or both Houses where there might be different parties in the two Houses?

Mr. FRELINGHUYSEN. I don't know who the one man would be who could convene both Houses. Presumably the Vice President could. However, I have discussed the problems involved in giving exclusive power to him. It might be wise to avoid giving the one man that power and it might be safer to divide that responsibility. I would myself prefer not to have it lodged in one man.

Continuing. The legislative branch would enter the picture when a President was either unable or unwilling to declare his disability and when a resolution "suggesting" that the President was disabled was introduced in Congress.

If the Congress, by a two-thirds vote, passed such a resolution, it would then be up to the Supreme Court to make the determination of inability. This provision for a two-thirds vote has been inserted in order to minimize any likelihood that the device might be employed by Congress merely for the purpose of causing political embarrassment to a President who was actually in good health.

When called upon to make a determination of a President's ability to carry out the powers and duties of his office, the Supreme Court would hear all testimony bearing on the matter, including that of medical experts. It would then render its decision as to whether the President was unable to carry out the powers and duties of his office.

It can be seen that all three branches of the Government are involved in the procedure in one form or another. Before a final determination of inability, the appropriate agent in each branch must make its own determination. Before calling Congress into session both the Vice President and Speaker of the House must decide there is at least a doubt that the President is able to carry out his duties.

Even after the Congress has taken formal action, the Supreme Court must make its own determination before a final disability decision is made. Thus the system provides fully adequate checks to make certain that the procedure is not misused.

Some individuals who advocate that inability be determined by the Vice President or the Cabinet have argued that to place the responsibility in either the legislative or judicial branches would be to violate the concept of separation of powers. Several considerations lead me to conclude that such objections are not well taken.

As the distinguished chief justice of the New Jersey supreme court, Arthur Vanderbilt, has declared, the division of Government into three branches does not imply three watertight compartments. Our system of checks and balances clearly illustrates this point.

Further, it is important to note that the Congress already is involved in the selection of the President and Vice President under certain circumstances. The Constitution provides that in the event no candidate for President and Vice President receives a majority of the electoral college vote the election of these officials shall devolve upon the House of Representatives and the Senate, respectively.

It should not be forgotten, either, that the Congress is the representative assembly in the governmental structure.

SECTION IV

Section IV provides that if the powers and duties of the President devolve on the Vice President, pursuant to sections II and III, the exercise of these powers and duties shall not be resumed by the President until the Supreme Court, on the request of the President, "determines that the President is able to discharge the powers and duties of his office."

This section was included in order to provide an orderly means whereby a President, upon recovering from his disability, would be sure of a means of recovering his powers. In both the Garfield and Wilson cases there was fear that the President might not be able to regain his special powers, once he had relinquished them. This uncertainty undoubtedly had much to do with the reluctance of persons around those Presidents to permit a transfer of power to the Vice President. This provision is designed to remove such fears.

SECTION V

Section V provides that "the Congress may by law implement the foregoing sections of this article." The purpose here is to enable the Congress, should it see fit, to attempt further to define "inability," and to establish additional and more detailed procedures for determining inability. It was felt that detailed provisions should not be included in a constitutional amendment. At the same time it seemed wise to leave the door open for congressional action.

SECTION VI

Section VI retains the present provision of the Constitution which states: "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.⁵⁵

SECTION VII

Section VII repeals article II, section 1, clause 6, of the Constitution in order to substitute this amendment in its place.

SECTION VIII

Section VIII provides that the constitutional amendment would not apply to the person holding the Presidency when it went into effect. This provision was inserted in order to reduce the possibility that the merits of the proposal might be obscured by political considerations.

SECTION IX

Section IX includes the usual constitutional requirement that before becoming operative the amendment must be ratified by three-fourths of the States within 7 years of its passage.

CONCLUSION

Some persons, in their desire to achieve a quick solution to the disability problem, have opposed the idea of a constitutional amendment. They feel that it would take too long to secure its passage.

There is little doubt but that it would take at least 2 or 3 years before such an amendment could be passed, although the value of the support which a proposed amendment probably would receive from President Eisenhower might shorten this period. The question, however, is essentially whether the problem could be handled effectively by ordinary legislation. I do not believe it could. An effective solution to the problem requires the formality of a constitutional amendment. Halfway solutions are likely merely to perpetuate the difficulty.

I do not contend that the adoption of this proposal as a constitutional amendment will solve all the problems associated with Presidential disability. Nor do I think it wise to attempt to incorporate in a constitutional amendment solutions to all aspects of the problem. I do believe, however, that my proposal attempts to meet the basic issues which must be resolved. It makes the law of the land the custom by which a Vice President, who has assumed the powers and duties of the President as a result of the latter's death, has been recognized as succeeding to the Presidential office itself. It facilitates the devolution of the powers and duties of the office of the President upon the Vice President in case of disability, by making it clear that such powers and duties revert to the disabled President once he has recovered. It further protects the President by making it explicit that in cases of inability it is the powers and duties which devolve rather than the office itself. It clearly designates the agencies to be entrusted with deciding whether inability exists.

Whatever solution is deemed best able to remedy the inability flaw in our Constitution is, of course, the one which should be adopted. The important thing is that Congress continue to consider the problem until an effective remedy is found. Our Nation's very survival may

well depend upon our devising an answer to this critical problem.

Thank you very much, Mr. Chairman, for this opportunity.

The CHAIRMAN. We are very grateful to you for a very fine statement.

We have two additional witnesses, Dr. John Romani, research fellow from the Brookings Institute of Washington, D. C., and Mr. Sidney Hyman, from Washington, D. C.

Gentlemen, I can give you the alternative of making your statements now with only myself present, or you could come back tomorrow afternoon when more members will be present.

The reason why members have left is because the farm conference bill is being considered now and, of course, bells may ring any minute for quorum or a vote.

If you prefer not to be interrupted, and interruptions may be a long duration and it may be that I could not get back myself, I give you that choice to proceed now or to come back tomorrow afternoon.

Mr. ROMANI. My remarks are very brief since most of them have appeared in the committee print prior to this, and if at all possible I would like to complete them this morning because of prior commitments.

The CHAIRMAN. You may proceed. How about Mr. Hyman?

Mr. HYMAN. I have deadlines and it is very difficult for me to appear at the option of the committee.

The CHAIRMAN. Well, you may proceed then, Mr. Romani.

**STATEMENT BY DR. JOHN H. ROMANI, RESEARCH FELLOW,
BROOKINGS INSTITUTION, WASHINGTON, D. C.**

Dr. ROMANI. I would like to restrict my remarks this morning to some matters which I had not covered in my earlier statement and also to some which do appear in your committee print.

In considering the various suggested solutions to the problem of presidential inability now before this committee, it seems desirable to reiterate what appear to be certain basic constitutional principles regarding this matter. A first is, as the Constitution now stands, that the Vice President has both the right and obligation to assume the powers and duties of the President when the latter is unable to discharge those powers and duties.

The Vice President cannot escape this responsibility, nor, does it seem, may Congress circumscribe this right of his to act except by constitutional amendment. There are, perhaps, some students of the Constitution who may disagree, but many of those who replied to the questionnaire circulated last fall by this committee placed this principle as a first consideration in the working out of a solution.

A second matter is the status of the Vice President (or any other officer in line of succession) who assumes the powers and duties of the presidency for a temporary period. A proper reading of the Constitution leads me to believe that the Vice President only acts as President and is displaced when the President resumes his powers and duties. Constitutional precedent, however, has confused and complicated the issue. Following the death of William Henry Harrison in 1841, it was accepted that John Tyler succeeded to the presidency. He was

not—in his own mind, that of Congress, or of his staff—viewed as an "Acting President." The assumption of the Office by Tyler established a procedure which has been followed in later instances of presidential death. From this has developed the attitude that the Vice President cannot temporarily discharge the President's powers when the latter is unable to do so. The reasoning behind this argument and its impact on the problem of presidential inability may be summarized as follows:

1. The Constitution provides for only one President.
2. The Vice President becomes the President when he carries out presidential duties.
3. Since there cannot be two Presidents, assumption of the President's prerogatives by the Vice President is tantamount to removing the former from office.
4. The President, therefore, once the responsibilities are taken over by the Vice President, cannot resume those powers.
5. Thus, only in case of death, removal, or resignation can the Vice President act in a Presidential capacity.

The acceptance of this line of thinking by the Garfield and Wilson staffs was largely responsible for their resistance to any moves which would have permitted the Vice President to take over temporarily during the period of disability. It appears to have been the belief that such action would have prevented both Garfield and Wilson from resuming Presidential authority upon recovery. At the same time, both Chester Arthur and Thomas Marshall, the Vice Presidents concerned, apparently felt that their assumption of Presidential powers would have been a usurpation of authority. Despite pressures from many quarters, both men preferred to undertake no action. This precedent, consequently, has tended to erase what seems to have been the intended constitutional provision for succession in cases of temporary inability. It appears that no legislation establishing a procedure for meeting this problem can be effective until either the original intent of the framers is restored and made clear, or there is, at least, a clarification of the Vice President's status when he acts for the Chief Executive during the latter's inability.

Another matter is that the basic problem with which we are confronted concerns cases of Presidential inability when the President, by cause of disability, cannot act to meet the difficulties. There seems to be considerable agreement that the President—when forewarned or conscious of his disability—may make a declaration, following which the Vice President (or if no Vice President, the officer next in line of succession) assumes the powers and duties of the office. The acceptance of this approach reveals that what we are seeking, it seems, is a means to legitimize the Vice President's assumption of Presidential powers when the President is still alive. A statement by the President of his inability is authoritative, and one which would give political and other sanction to the Vice President's actions. In absence of such a declaration, there remains the question of how the Vice President's assumption of Presidential duties for a temporary period may be given political and legal sanction.

When the problem is viewed in these terms, the need for clarifying legislation becomes apparent and desirable. The form, however, is a matter of considerable debate as reflected in the proposals contained

in the replies to this committee's questionnaire. Of these various proposals, I favor the adoption of any of the following:

(1) The passage of a joint resolution declaring that—

(a) if the President announces that he is unable to discharge his functions, the Vice President shall act,

(b) if the Vice President or person next in line is satisfied that the President is unable to act, he shall then assume the powers, and

(c) the President shall resume his powers on declaration to that effect (H. J. Res. — B) ; or

(2) An inability statute incorporating the principles noted above, and in this relation I call attention to S. 2763, taking exception, however, to the provisions of section (d) calling for the Chief Justice to establish a panel of specialists to determine Presidential inability (note also H. R. — A) ; or

(3) the proposing of a constitutional amendment embodying 1a, 1b, and 1c above H. J. Res. — C).

The CHAIRMAN. That is, without a constitutional amendment.

Dr. ROMANI. Without a constitutional amendment.

The CHAIRMAN. You believe that a constitutional amendment is not necessary?

Dr. ROMANI. Following the general line of reasoning that I have stated, no; I would not think a constitutional amendment necessary.

My basic point is that I think some action is necessary to clarify this problem of the Vice President taking over and making sure that he is an "Acting President," and giving public and political sanction to this concept.

The CHAIRMAN. Don't you think that a practice whereby the Vice President takes over as Acting President and ceases to be Acting President upon the recovery of the President would be the simplest solution of this very vexatious problem despite the fact that the Vice President might be reluctant because of a loyalty to his Chief not to make such a decision?

Don't you think it is the duty of the Vice President to make such a decision and, if he doesn't, then public opinion will be aroused against him?

Dr. ROMANI. I agree with that. I feel that that is the simplest and most flexible way, and meets most of the contingencies under these circumstances.

The CHAIRMAN. In view of the complexity of this problem, and no matter what kind of a constitutional amendment we offer we would embrace a sea of troubles if we would have to get approval by two-thirds of both Houses and three-fourths of the States.

That would take a very long time.

We have a President now who has suffered a heart occlusion. God forbid, I hope there will never be any other occlusion suffered by the President, but do you think that the illness of the President has emphasized the need for us to provide a remedy and to do so fairly speedily?

Dr. ROMANI. I would agree with that and I would not recommend the adoption of any complicated procedure which would prevent immediate action in the case of any type of emergency because it seems to me that the central problem is providing a continuity in leadership

at all times. This is particularly true in times of crisis such as these where there is a great need for such continuity.

The CHAIRMAN. And you would have a fair continuity because the Vice President would be of the same party as the President.

If the country is to be ruled by other groups you might have the complication that these other groups might be dominated by persons of the opposite political party.

Dr. ROMANI. That is right. The only political officer who has been elected by the Nation at large, other than the President, is the Vice President, despite the formality of the electoral college procedures; and this type of decision should be made by a political officer.

My reasons for favoring these kinds of approaches are three in number. First, any solution must provide procedures that are flexible enough to meet most, if not all contingencies. Detailed, elaborate legislation would tend to lead in the other direction, and any attempt to define inability would tend to create almost as many difficulties as the ones we are now trying to meet.

Second, any solution devised should make possible a prompt assumption of Presidential powers when the President is disabled. Delay might be disastrous, for in crisis times as these, we do not know when the President must make immediate decisions. If he is disabled, we must insure that there is no lapse in the exercise of his constitutional powers. If we give sanction to the right of the Vice President, by a joint resolution, constitutional amendment, or declaratory statute, we will not have to await the impaneling of a board, the convening of Congress or any other such body to make this determination before he can act.

Third, the types of proposals which I have suggested do not circumscribe the constitutional right of the Vice President to make this decision, but, rather clarify and give support to this right. I believe that the enactment of this type of legislation will erase some of the doubts which we may have about the powers and obligations of the Vice Presidency. By such legislation, political and moral sanction would be given to the constitutional interpretation which I noted at the outset of my remarks.

Implicit in these recommendations is a rejection of proposals suggesting that the Supreme Court, a special inability Commission, or Congress, itself, either initiate or determine the question of Presidential inability. My reasoning here rests on—

(1) the belief that the Constitution clearly places this obligation and authority in the Vice President; and

(2) the belief that any of these procedures would not meet adequately the test of flexibility and speed of decision.

However, one may fairly raise the question—Why any legislative action if you believe that the Vice President, under our Constitution, already possesses the authority to act? In answer, it must be stated that failure of Vice Presidents to take any steps in the three cases of Presidential disability to date, and the reasons for this, tacit or otherwise, point out that some confusion and doubt still exist as to the powers of the Vice President.

The fact, too, that President Arthur, the 66th Congress, and this committee all have felt it necessary to consider the problem is still a further indication of this confusion. Beyond this is President Eisenhower's recent statement to the effect that he hoped that this Congress

would be able to clarify the situation. The type of legislative action which I have recommended, I believe, would meet this need—it is not mandatory in that it directs the Vice President to assume what is already his responsibility, but rather gives support to him in the carrying out of his responsibilities.

Before concluding these brief remarks, I feel that I should attempt to dispel some of the natural doubts which may be present as to the type of solution I recommend. Many people believe that it is most unwise to allow the potential successor to determine when his predecessor is unable to act. If, however, we remember that the Vice President in assuming these responsibilities only acts as President, part of the potential danger is removed. The Vice President, by the terms of this interpretation, does not displace the President, and ceases to function when the President himself decides to resume the powers and duties. To the objection that the President might be unable to act rationally, and that either he or the Vice President would dispute the other's right to exercise the powers, the answer is that this type of situation presents a justiciable issue which may be decided by the courts in the normal manner.

The CHAIRMAN. How could it be decided? Could you mandamus the Vice President or the President?

Dr. ROMANI. If the President said he was resuming the powers and duties of office and the Vice President disputed that, claiming that the President was still disabled, then there would be grounds for a case in law.

The CHAIRMAN. In other words, you would have to have a suit started; a lawsuit?

Dr. ROMANI. Yes, a lawsuit which could then be decided by the courts in a normal manner. It would be a justiciable issue and would not be political.

The CHAIRMAN. And if he would say there is no such law and he acted in accord with what he believed, and therefore might be arrested or someone might arise and question him, then the court would determine the question.

Dr. ROMANI. Yes. For example, the Vice President acting as President might sign the commission of a Government official after the President said he was resuming his powers and duties. The validity of the official's commission could be easily questioned by someone who questioned the Vice President's authority. This would be a bona fide case for the courts to settle.

I think it is possible, at the same time, to get speedy action as, for example, in the case of the seizure of the steel mills, and the matter could be decided very rapidly.

The CHAIRMAN. Don't you think that it would never get to that point because public opinion would solidify whether the President has suffered an inability?

Dr. ROMANI. Yes.

The CHAIRMAN. I was reading on page 27 of the committee print the views of Mr. Thomas K. Finletter who said:

I have suggested that the inability of the President should be established by public opinion and that the inability should not be held to exist except when the facts were so obvious that there would be a general recognition by the people that the President was incapable of performing his duties. There are, however, certain acts which by the Constitution or by congressional legislation must be

performed by the President, and if the President is disabled these acts cannot be performed, as was the fact for a while in the case of President Wilson.

I suppose that for a while such a situation might be tolerated but if it continued too long public opinion would develop rapidly. I should think, and would demand that "something be done." At this point it would seem to be the responsibility of the Vice President to move or not to move, depending upon the circumstances. Of course, if the President himself were capable of making the decision that he was not capable of carrying out his duties it would be appropriate for him to so state and to delegate, temporarily, his responsibilities to the Vice President. But under most circumstances of inability it is likely that the President would not be capable of this action, and the responsibility should then fall upon the Vice President. He is the officer designated by the Constitution to act in case the President cannot. I should not think that any other person or body should initiate the question or make the decision. The Congress, it seems to me, would be barred therefrom by the principle of the separation of powers. And I should think that if the Congress attempted to act and the Vice President disagreed with the action of the Congress the Vice President should prevail.

I think you agree with that; do you not?

Dr. ROMANI. Yes, I agree with that fully.

Also, we must accept the fact that no solution, however well drafted, can meet all the contingencies. The extreme case of a President losing his faculties, although in the realm of possibility, is a problem, it seems, that must be met in the terms of the situation in which it may arise.

More practically, perhaps, is the fear that the Vice President, because of our present selection processes, will be of a faction in the party hostile to the President, and therefore it would not be advisable to let the Vice President make a decision which has both administrative and political ramifications. Yet, if any special body created to make this decision decided not to make a finding of disability because of the political consequences, the gap in leadership might well be more disastrous than allowing the Vice President to take over. Also, since the assumption by the Vice President is only for a limited period of time, he will be restricted by this, and political condition.

Since I believe that the central objective of any legislation is to clarify and legitimize, in the minds of the public, the powers and obligations of the Vice President, I would be willing, as a second choice, to recommend the establishment of some procedure by which the facts of a President's inability be certified to the Vice President. The natural body here would be the notification by the Cabinet, or some other member of the President's staff, to the Vice President that the President is disabled. The decision as to what should be done, however, would rest with the Vice President.

In the final analysis, any solution drafted will be administered by men. As in all other cases, we must have a degree of faith in the men we select to administer our affairs. We cannot assume that these people will act in a vacuum. They will be able to avail themselves of whatever advice and counsel they need. We should also recognize that in the past three cases, the Vice Presidents have acted with considerable discretion.

In summary, there is a need to clarify the status of any officer assuming the powers and duties of the President when the latter is disabled, indicating that such officer only acts as the President. Second the decision as to whether or not a condition of inability exists rests with the President if he is able to act, and with the Vice President,

if not. The period of disability is terminated when the President announces his resumption of his duties.

The CHAIRMAN. Thank you very much. I am very much impressed with the statement. It is in accord with the views I have reached as a result of reading many of these opinions which we have gathered, and we are very appreciative of your contributions.

Dr. ROMANI. Thank you, Mr. Chairman.

The CHAIRMAN. We will now hear from Mr. Sidney Hyman.

Mr. HYMAN. I would rather present my statement now in part and skip over those things that have been developed in the colloquy between you and the various witnesses.

The CHAIRMAN. How long do you think it would take?

Mr. HYMAN. Would it be possible for me to come back? I happen to be working on an hour-to-hour schedule and it is very difficult for me to stay and wait until other witnesses finish. I would be happy to come back tomorrow provided I would not be spending the afternoon here.

The CHAIRMAN. We can put you on as the first witness in the morning.

Mr. HYMAN. It would be preferable.

The CHAIRMAN. How long do you think it would take?

Mr. HYMAN. In the morning?

The CHAIRMAN. Yes.

Mr. HYMAN. Not very long.

The CHAIRMAN. A half hour?

Mr. HYMAN. No, 15 or 20 minutes at most.

The CHAIRMAN. All right, suppose you be here promptly at 10 o'clock tomorrow morning and we will put you on as the first witness.

I am sorry I do have to inconvenience you, but we have this farm bill coming up.

Mr. HYMAN. We are both in the same circumstances, Mr. Chairman.

The CHAIRMAN. Thank you very much and we will see you tomorrow morning at 10 o'clock.

The committee stands adjourned until tomorrow morning at 10 o'clock in this same room.

(Thereupon, at 12:13 p. m., the hearing was recessed, to reconvene at 10 a. m., Thursday, April 12, 1956, in the same room.)

PRESIDENTIAL INABILITY

THURSDAY, APRIL 12, 1956

UNITED STATES HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE No. 5,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10 a. m., in room 346, Old House Office Building, Hon. Emanuel Celler, chairman of the subcommittee, presiding.

Present: Representatives Emanuel Celler (chairman of subcommittee), Thomas J. Lane, Kenneth B. Keating and William M. McCulloch.

Also present: Representative Peter Frelinghuysen and William R. Foley, counsel.

The CHAIRMAN. The subcommittee will come to order.

Mr. Hyman, we will be glad to hear from you.

STATEMENT BY SIDNEY HYMAN

MR. HYMAN. Every constitutional system must pay some price in weakness for the elements of strength it has. Not everything is soluble. Not everything can be controlled by law. Some things, as a matter of course, have to be lived with in the full knowledge that they embrace built-in risks of the gravest sort. Some things which are in need of solution, must be entrusted to the discretion of duly elected officials—whose constitutional morality must be taken on faith. For though it is true enough on doctrinal grounds, that our aim is to have a government of laws and not of men, experience supports Edmund Burke's observation, that "the laws reach but a very little. Constitute the government however you will, infinitely the greater part of it must depend on the uprightness and wisdom of the chief ministers of state."

This committee, with praiseworthy objectivity, is now at grips with a patent weakness in our constitutional system, namely, the uncertainty about the way a Vice President can succeed to the place of a disabled President without laying himself open to the charge of usurpation. Before anything else is said on this head, one must first decide which of two alternatives contain the greater or lesser risk to constitutional government.

The CHAIRMAN. You mean there is no perfect answer?

Mr. HYMAN. No.

The alternatives we face are these: Is it to live with a constitutional ambiguity on the question of disability as it has stood for the last 169 years, knowing at the same time that it might explode in a crisis form at some future date? Or is it to risk distorting a general picture of

constitutional strength and balance, in order to right one of its admittedly defective details?

If I rightly sense the current of thinking that runs through this committee, it has already decided between these alternative risks—and has decided in favor of the second one. That decision, I feel, is correct—though I held an opposite view in the interval immediately after President Eisenhower's heart attack. When it was widely thought that the end of his term would see him voluntarily stepping down from the Presidency, it seemed that as between risks, the lesser one was to do nothing about the question of disability and to gamble, instead, on the health of his duly elected successor in the Presidency. Or to turn the order around, it seemed that the greater risk was to introduce some sort of new mechanism into our constitutional system on the theory that it would end the fevered question of Presidential disability, but which might, in practice, lead to political deliriums far more menacing in their tendencies and effects.

On principle, it is, of course, both bad taste and bad practice to tailor a momentous constitutional question to the uncertain physical condition in which a specific President finds himself. Yet it would be foolish to ignore the probabilities General Eisenhower himself has defined for us, incident to his word that he was open to his party's nomination for another term. To state those probabilities in blunt terms, General Eisenhower may be elected for another 4 years, and the condition of his health in whose recovery we all rejoice, could, to our common sorrow, give way under the strain of his Presidential cares. Moreover, this could occur when national affairs were far less quiet than in the fall and winter of 1955 when he was prostrated by his heart attack. It could occur in the midst of a grave national emergency when no Presidential staff, however able and efficient, could lawfully make the crisis decisions that are reserved for a President alone, or, presumably, for a Vice President acting in the President's place as the Constitution provides.

Under emergency circumstances of this sort—and in commonsense terms, the question of Presidential disability acquires its real cutting edge only in time of a pressing crisis—the Vice President, on a plea of doubt about his constitutional rights in the matter, could chain his hands with a self-denying ordinance. Fearing the charge of usurpation, he could refuse to act for the disabled President, when in point of fact, the very survival of the Nation could depend on his so acting; and when the real charge to level against him would be his failure to so act at a time when the President had been felled.

The CHAIRMAN. Do you mean that the Vice President would be loathe to act under the constitutional command that the powers of the President devolve upon him?

Mr. HYMAN. I am saying he would be loathe to act unless the present ambiguity is cleared up, and I am saying furthermore, sir, that the real charge to level against a Vice President—

The CHAIRMAN. Why do you say it would tie his hands? What would be the evidences of that?

Mr. HYMAN. I said on a plea of doubt about his present constitutional rights in the matter. That is, who makes the finding of fact that the President is disabled so that the Vice President might succeed to the powers and duties of office in an orderly way.

The CHAIRMAN. At the present time the duty is not on him, to raise the question of disability or to resolve it, is it?

Mr. HYMAN. That is the key point. He does not know what his real duty is. My further point is one mentioned by Congressman Keating, that we overlooked one aspect of the disability question, namely, how do you get the Vice President to act, not whether he has the right to act.

Concerns of this sort—and they could crop up in any Presidency beyond Eisenhower's, should a President be felled and the Nation hit hard by an atomic attack—have changed my own thinking from one to the other side of the risk scale. It has changed from the side that would let the constitutional ambiguity about Presidential disability stand as it is, while gambling on the future; to the side that would clarify the grounds on which a Vice President can, under a color of legal or moral right, act for a disabled President.

As this committee knows, however, a number of men of high repute for their constitutional wisdom in both the House and the Senate, are still of the mind that it is either impossible or undesirable to propose any specific answer to the disability question as it now stands. Their position—it should be said—is altogether divorced from any narrow motive of partisan politics, and for that reason, is all the more commanding of attention. Indeed, the heart of their argument is the hurdle that must be scaled by any specific proposal this committee decides upon, if it is to muster majority strength in both Chambers. The heart of their argument, if I may presume to sketch it in beyond a previous allusion, is this:

The setting up of a new mechanism to determine the fact of Presidential disability, opens the way to the use of that same mechanism against the President when he is in excellent physical health, but in bad political health in one or another potent quarter. More specifically, it could become a concealed impeachment weapon to be used against the President on the pretext of his disability—a concealed weapon that might come into play when the open, constitutional weapon of an impeachment on the grounds of a President's misconduct, lacked the firepower to blast him from office. If the use of that concealed weapon won its aim, it would destroy a root principle that has done so much for the strength and stability of the American Government in the long historical haul. That principle is the duration of the President in office for a fixed term of years—an arrangement that permits him to conceive, execute, and prevail in sound policies that may be met at the outset by wild outcries, but whose solid merit comes to be seen when tempers cool, and calmer counsels gain ascendancy in the national mind. And the argument concludes: Even if the use of that concealed weapon failed in its ultimate objective, the bringing of it into action would split the Government, foster bitter dissensions, lower the dignity of the Presidency, weaken its authority, distract the public mind, and by this means, produce a toxic effect throughout our whole system of responsible power.

I believe that your committee is fully alive to both of the objections I've tried to sum up, and to the truth about the dangers which lie beneath them. I believe also, that the committee has before it a specific proposal which, on the one hand, does not run afoul of the objections; and on the other, suggests a working solution to the dis-

ability question. But if this is true of the specific proposal I have in mind—I shall come to it in due course—it is not true of any of the alternative plans I've seen in draft form, or have read about in the press.

Without exhausting the patience either of the committee members or of eminent scholars who are waiting their turn to testify, it would be impossible to consider in detail each feature of the plans alternative to the one, which in my view, at least, is preferable. Yet there are a number of common features to many of the alternative plans which allow of a brief and general treatment.

First, with all due respect to the position taken by Mr. Herbert Hoover, I would deny to a body like the Cabinet, much less a part of such body, a right of initiative or any role whatever in a disability proceedings. I would deny this to them on the ground that the Cabinet is not an elective body whose members can be tried individually in a polling booth. For the Cabinet, viewed in the general scheme of representative government, is not responsible directly to the people. It owes its place in the Government to the President's appointive power, and it is only as the President in his own person stands or falls in the judgment of the people, that Cabinet officers can be called to account by them for what they do.

Beyond this, the Cabinet has the form of a committee, however much it reaches its unity in the person of the President. As a committee, it can shift responsibility so dextrously from one member to another, as to make the onlooker dizzy, then bewildered, then indifferent, and at the deadly end of the chain, cynical about government as a whole. Yet a further ground for denying the Cabinet any roll on a disability proceedings arises in connection with two common circumstances. One is when the Cabinet is heart and soul with the President, but has strained relations with the Vice President. Under this state of affairs, it is unlikely that Cabinet members would step forward with information about a real disability. Rather, every inducement of loyalty and gratitude, not to mention self-interest, would work to the end of concealment. Under the second of the common circumstances, Cabinet members involved in a row with the President would be under the strongest temptations to settle their scores with him by declaring him mad. Even if the charge was not supported by such auxiliary governmental bodies as might be part of the disability proceedings, the fact that the highest officers of an administration had leveled such a charge against their Chief, would not only weaken his authority inside America—it would expose the whole Nation to the suspicions or ridicule of a not altogether loving world.

On similar grounds, except for its unassailable right to be informed, I would not have the Congress initiate or share directly in a disability proceedings, regardless of the number of additional organs of Government that were called into play before the final yes or no was arrived at. For though the Congress is an elective body, and thus is responsible to the people for what it does, it remains an amorphous committee in which blame for what is done often has a habit of wandering around like a displaced person looking for a place to settle.

Mr. KEATING. That is not bad. That is pretty good, as a matter of fact.

Mr. HYMAN. Thank you.

Mr. KEATING. I can use that. So can the chairman.

Mr. HYMAN. Moreover, as a committee, the Congress has a split personality. Part of it, the House, is formed on the basis of population. The other part, the Senate, is formed on the basis of the sovereign equality of the States. But whereas the whole House, if it was up to mischief in the case of a disability question could be reached by the people within 2 years at the most, only a third of the Senate could be so reached, while the remaining two-thirds could enjoy an immunity of between 4 and 6 years for the consequences of its actions.

In any case, there have been all too many instances in our history when one or both Houses of the Congress were under the control of a political party or faction bitterly hostile to the President. Why then endow such future Congresses with a new tool for tumult, when parties or factions can even now cut down a President by the route of the congressional investigating committees?

Finally, except as to the question of a President's recovery from a previous disability might arise in connection with a suit between two claimants to the Presidential station, I would most emphatically deny to the Supreme Court or to any portion of its membership any part whatever in a disability proceedings. Not that I suspect the motives of the Court. Far from it. Rather, because I revere the motives of the Court, because I revere its traditional self-restraint, I would not have the Court forced into a position where the subtleties that make for its unarmed but massive moral authority in our society, would be needlessly subjected to political disruption.

Where the Court is concerned, the question is not whether it would require a constitutional amendment to permit it to share in a disability proceedings. The question is whether it should be required by any means whatever to share such a burden. The Court, it should be remembered, has scrupulously tried to avoid any unnecessary decisions let alone any intrusion in our system of separate powers. Yet to require it to share in a disability proceedings would be to ask that it turn its back on its own history, and to acquire a new habit of deciding whether one whole arm of government, as it is embodied in the President of the moment, shall stand or fall. Secondly, it is also to be remembered that the Court has confined itself to the most narrow right of movement with respect to what it calls political questions. And even that narrow orbit of movement owes its existence far more to the tasks imposed on the Court by acts of Congress, and which it has discharged with the utmost reluctance, than to any voluntary assumptions of jurisdiction. Yet again, to have the Court share in a Presidential disability proceedings, would be to have it share in a political question with so great an explosive potential, as to imperil the whole of the Court's edifice. Finally, and this once again is due to its traditional habits of self-restraint, the Court has made it abundantly plain that it cannot sit in camera to hear and judge the merits of facts, such as those related to our foreign affairs, which must remain the special preserve of the Executive. Yet the one thing the Court has said it cannot and will not judge, forms the vital, pragmatic factor that is central to the whole question of Presidential disability.

The CHAIRMAN. Isn't it true that when the members of the Court did participate in a matter of that sort, and I refer to the Electoral Commission, there was a great public outcry?

Mr. HYMAN. Yes, sir, and I think it was one of the worst chapters in the American constitutional history.

Mr. KEATING. I think it is very undesirable to have the members of the Court engage in any activities outside of the proper province of the Court.

Mr. HYMAN. I am in complete agreement with you, Congressman Keating. But as I was saying, there is a vital pragmatic factor that is central to the whole question of Presidential inability. It is whether the actual state of the Nation's affairs demand immediate yes or no action from an active President, or whether they permit a period of grace in which no finding of fact need be made about a President's disability, though the Presidency remains in suspension because of the President's actual disability. To demand that the Court take a case of disability in hand on notice of other officers of the Government, is to make the Court, in effect, a judge not of the law but of politics.

Standing to one side, yet indivisible with the substantive merit of any plan that may be put forward, is the vital question of the legalistic form in which the proposed solution to the question of Presidential disability, is encased. This committee, through the force of inescapable necessity, has had to risk the charge that it presumes to consider itself wiser, and therefore better equipped to untie the Gordian knot of a question that baffled the members of the Constitutional Convention.

The CHAIRMAN. We have that always when we have a constitutional amendment before us.

Mr. HYMAN. Yes, sir, and I continue.

The charge is unwarranted. But even so, some of its sting would be eased if the legalistic form containing the solution to the question of disability, at least tacitly acknowledged the possibility that the solution could contain some overlooked defects that would call for swift remedial action as knowledge improved.

What this means in specific terms, is first, an exploration of every avenue by which the spelling out of the procedures to be taken in the case of Presidential disability could take the form of a joint resolution. If for one or another reason, certain vital, and necessary grants of authority cannot be bottomed on this porous framework, then the committee might move on to consider how the spelling out could be accomplished by statute alone. A centering of attention on these first two possibilities seems advisable for it would permit the swift alteration or even the outright nullification of any part or whole of a plan that showed itself a multiplier of constitutional mischief.

Only as a last, desperate, back-against-the-wall resort, would it appear advisable for the committee even to consider the need for a constitutional amendment. The time element required to get such an amendment enacted, is the least of the reasons why the amending process should be resorted to only in extremis. The controlling reasons lie on two different grounds. One is the fact that a constitutional amendment, by its very nature, would rigidify any original error it contained. The other is, that every new comma and period added to the Constitution, not only has a habit of putting a new complexion on every other comma and period of whatever age. The new additions have a habit of providing a system of sanctions and

prohibitions for a sky-blue range of cases only faintly connected with the subject to which the amendment was originally addressed.

For all the foregoing reasons, of the printed draft measures now before your committee, the one that commends itself to me as the working basis for a solution to the question of disability is the draft of a joint resolution, No. J. 74590-D. It has the virtue of Doric simplicity—plus sufficient flexibility for maneuver, plus the fact that its provisions contemplate the need for swift action in an emergency. It may require some beefing up here and there, though the committee may have already considered the points I should like to raise in a moment, and for good reason, may also have decided that they should be left without formal statement.

Mr. KEATING. I just looked at it hurriedly. It also seems to have the merit of being a short one.

Mr. HYMAN. That is right. I am very much in favor of that, Congressman Keating.

But first I should like to add a passing comment about a point which the text of the resolution does not cover, which it was right in not covering, but which, nevertheless, was featured prominently in much of the public discussions at the time when the Nation was still reeling from the shock of General Eisenhower's heart attack. It was the question whether the Vice President, in the case of a Presidential disability, succeeded merely to the powers of the President or to the office and powers simultaneously.

With respect to this question, there was the opinion of Daniel Webster, voiced in the 1840's, that the powers and office of the Presidency were indivisible; that in succeeding to the one, the Vice President succeeded to both. It has been reported that a similar view, advanced in legal circles at the time of President Wilson's disability, deterred Vice President Marshall from acting in his place; and that this was again true in the recent case of Vice President Nixon's restraint at the time of President Eisenhower's disability. Whatever might be said of Webster's position in the 1840's, and whatever might be said about the history of what prevented two Vice Presidents in modern times from assuming the inactive Presidential crown, it seems to me that section 3 of the 20th amendment in the Constitution clearly separates the powers and office of the Presidency. In this section, the amendment provides that if a President shall not have been chosen before the time fixed for the beginning of his term or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified. None of this would have any meaning if the powers and office of the Presidency, on the Webster theory, were inseparable.

It has meaning only if the Vice President, acting as President until a duly elected President shall have been chosen or shall have qualified, exercised the powers but not the office of the President. To have spelled all this out in legislation when it was already in the Constitution would have been entirely superfluous. On this count alone, whoever drafted Joint Resolution J. 74590-D deserves praise for having read the Constitution as a whole, instead of taking his bearing from syndicated newspaper columns—not of New York Times ownership, may I add.

The CHAIRMAN. I want to state that the credit in that regard goes to Mr. Foley, our counsel, and Mrs. Dick, staff director.

Mr. HYMAN. They are the drafters?

The CHAIRMAN. The drawing up of the draft of that particular legislative item that you mentioned.

Mr. HYMAN. I should like to say that a further ground for commending the draftsmanship—

The CHAIRMAN. I think we ought to put in the record at this point that draft which was drawn up by Mr. Foley and Mrs. Dick. Will you read it, Mr. Foley?

Mr. FOLEY (reading) :

Joint resolution relating to the inability of the President to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of the removal of the President from office, or of his death, or resignation, the Vice President shall become President.

SEC. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.

SEC. 3. Whenever the Vice President or the person next in the line of succession to the Presidency is satisfied that the President, or the person then discharging the powers and duties of said office, as the case may be, is unable to discharge said powers and duties, such person shall convene both Houses of the Congress and announce that the powers and duties of the office have devolved upon him.

SEC. 4. If the powers and duties of the President devolve upon any person pursuant to sections 2 and 3 of this resolution, the exercise of such powers and duties shall be resumed by the President upon the President's announcement of his ability and intention thereupon to resume.

The CHAIRMAN. Proceed, Mr. Hyman.

Mr. HYMAN. A further ground for commending the draftsmanship of the joint resolution recalls the remark that the founders of our Government showed discretion in what they put into the Constitution, and genius in what they left out of it. In much the same vein, the drafters of the joint resolution showed genius in not venturing to define the term "inability" or how many degrees of it would have to prevail before the substantive provisions of the resolution would become operative. Had they acted otherwise, all that would have become operative would be a Babel of political and legal persons tossing bricks at each other that were meant for use in building a tower reaching to a constitutional heaven.

In its substantive content, the joint resolution says this in effect: First, that the President may declare his own disability if he is in a position to do so; and that upon doing so, his powers and duties shall devolve upon the Vice President. For what my opinion may be worth, let me say that I agree with this. The only question of detail I would raise is whether some consideration should be given to the possibility that the President, on his own recognizances, may declare a fictitious disability in order to avoid the burden of onerous or embarrassing decisions that would then fall automatically to the Vice President.

The CHAIRMAN. If the President would have the temerity to do any such thing he might be subject to impeachment.

Mr. HYMAN. I agree with you, sir, and that is why I say the danger of this happening, may on closer examination be either unreal or may have its own countervailing safeguards. In any case, I raise the problem as one that is worth considering.

In its further substantive provisions, the joint resolution says in effect that a President, on his own recognizances, may declare his disability to be at an end; that he intends to resume his powers and duties, and that his announcement to that dual effect should be conclusive. I agree with the main bent of this provision. The only question of detail I would raise is what happens if the President's version of his recovery is resisted by the Vice President to a point where the latter may refuse to relinquish the powers and duties of the Presidency that had been in his temporary custody.

Mr. FOLEY. Just a moment, Mr. Hyman, at that point, wouldn't it be possible if there was a dispute between the President and Vice President? Congress not being in session—he could summon the Congress in session and they would meet and recognize him as the President of the United States—would that give force to this matter?

Mr. HYMAN. I agree with that and I come to that a little later on.

The CHAIRMAN. In the draft that you mentioned, and in which I heartily approve and agree with you, as well as the staff counsel and Mrs. Dick, the provision that the Vice President shall have a right to summon Congress—I don't know whether or not the Vice President has such a right.

Mr. HYMAN. Presumably, Mr. Chairman, he will already have been acting as President.

The CHAIRMAN. Which comes first, the summoning of Congress?

Mr. HYMAN. Well, if everything has to be proved, nothing can be proved. He obviously has to act as President.

Mr. FOLEY. That is the first step. He, the Vice President, takes over the powers and duties of the office, and then under his constitutional power he summons Congress.

Mr. HYMAN. That is correct. If one were to be a purist about this, and I recognize the political necessity of drawing the Senate in as part of the body to which the Vice President would report, one might take the position that the House of Representatives should be the sole source to which he would have to appeal.

The CHAIRMAN. Thank you, and I take it upon myself to speak on behalf of the other Members of the House of Representatives.

Mr. HYMAN. It is not meant as flattery, Mr. Chairman, but I, for one, firmly feel that way.

Mr. FOLEY. If you would limit it to the House, you would run into the constitutional block.

Mr. HYMAN. You would not get it past the Senate.

The CHAIRMAN. That is right. It says he shall convene the Congress, consisting of two Houses.

Mr. HYMAN. I am throwing that out in case the Members of the Senate should read the record. I think the drafters of the resolution have been very generous to them.

The CHAIRMAN. Your answer to my question is that he is acting President, and then as such he summons Congress.

Mr. HYMAN. Yes, and if they do not like it, the House can start an impeachment proceedings right there.

Mr. McCULLOCH. Isn't that an added reason why the Senate is relatively important in this whole proceeding?

Mr. HYMAN. At the end of an impeachment proceeding.

Mr. McCULLOCH. Well, of course, but if there is a person who seeks to usurp the power of the Presidency, you must get at it quickly and you cannot get at it without the Senate of the United States.

Mr. HYMAN. That is correct, but I was thinking about the role of the House of Representatives plays under the terms of a direct constitutional grant in other matters affecting the Presidency. It has the sole right to elect a President in the event no one gets a majority of the electoral vote. It also has the sole right to initiate and vote an impeachment.

Mr. McCULLOCH. Oh, yes; I did not mean to minimize that part of your approach, but to make it complete, it is absolutely essential unless we have some utterly new procedure that the Senate be included and perform its responsible part in accordance with the existing provisions.

Mr. HYMAN. I admit the political force of your argument. Perhaps in suggesting a purist's approach, I was distracted by a desire to rectify what I think has always been a great wrong done to the House of Representatives. The Senate has come to speak of itself historically as the Upper Chamber and I don't understand on what basis they do. It is the coequal chamber.

The CHAIRMAN. Proceed, Mr. Hyman. We had agreed to give you 15 minutes, but this matter is such an interesting and illuminating statement that we agreed to give you more time.

Mr. HYMAN. Thank you, Mr. Chairman. I was speaking a moment ago about the problem of a Vice President's refusing to yield to a President who had recovered from his disability. One solution, of course, might lie in a suit brought by a private person who claimed he was injured because the Vice President exercised unlawful powers. The question of the President's recovery might then be decided as an incident to the suit.

Yet this does not cover the real ground for concern; namely, in the field, say, of foreign affairs, where no private person can put his finger on a specific personal injury, but where the Vice President, clinging overly long to Presidential powers might injure the national interest as a whole. Perhaps, as Mr. Foley said, the fact that the President had the vigor to press his demands against the Vice President would in itself be conclusive proof to the people, to his party, and above all to a Congress with the impeachment weapon at hand, that the President had recovered. This may, of course, be one of those areas where one must admit the possibility of trouble, yet count on a regular attendance at Sunday school to keep the trouble at bay. In any case, here, too, I raise a question that may commend itself to the attention of the committee.

The third and key provision of the joint resolution covers the case when the President is unable to discharge the powers and duties of his office; and presumably, is also unable to declare his disability. Under this circumstance, the text of the resolution would have the Vice President or the person next in the line of succession declare it, subject to this control: that having satisfied himself as to the Presidential disability, such person shall convene both Houses of the Congress and announce that the powers and duties of the Presidential office have devolved upon him.

On first sight and sound, this appears to be the most absurd of all proposals and invites vigorous attack on two grounds. First, the Vice

President or the person next to him in the line of succession are interested parties; and to make such a person the sole arbiter of his personal fortune and the President's as well seems to be constitutional lunacy. Further than this, to invest such a person with blank-check discretionary powers, approved in advance by the Congress, may tempt him to reach for the Presidency under the color of legal right, when the material facts of the case actually point to a naked usurpation of power.

The CHAIRMAN. I am one of those who feel that that question should be raised by the Vice President, and the Vice President in the event of the President not doing it should resolve the question. There have been statements made, not only in the published reports that we have, wherein we had gathered together the opinions of many publicists and statements made by this committee, that the Vice President would be reluctant because of his loyalty to the President to raise the question, much less resolve it.

What is your answer?

Mr. HYMAN. If there were some way you could get a formula within this resolution directing the Vice President to act.

The CHAIRMAN. Even if you had the direction, he still might be reluctant.

Mr. HYMAN. I think that the force of public opinion would exert itself in the case of a real national emergency—I don't think any Vice President, whether this provision is enacted in law, is going to act if there is no national emergency. I don't think he is going to stick his neck out. I think the problem is to give him a ground for action in time of national emergency.

The CHAIRMAN. You feel that public opinion would jell and solidify to such an extent that the Vice President could not refrain from acting if he was an honorable and decent man.

Mr. HYMAN. I think that is correct. I think, as I said in the opening paragraph of my statement, you have to run some risk.

The CHAIRMAN. We had this situation where public opinion seemed to require some action on the part of Vice President Marshall during the serious illness of President Wilson which was for over a year, and, yet, despite the almost insistence of the members of the President's Cabinet, Marshall refused to do that.

Mr. HYMAN. Yes, sir, because he did not have the underpinning of the kind of law you are now contemplating.

The CHAIRMAN. You think if there had been such a statute on the books he might have acted?

Mr. HYMAN. Perhaps so. It would depend on the gravity of the hour. He at least could have pointed to legal ground for acting.

Mr. McCULLOCH. Don't you think you have the added difficulty of the planned course of action of keeping from the public the true condition of the President under some conditions, and doesn't history conclusively show that people in high places on at least two occasions in our history deliberately prevented the public from getting all the facts concerning the physical and mental condition of a President.

Mr. HYMAN. I think that is correct, sir.

Mr. McCULLOCH. And public opinion cannot work its will unless it is completely informed, or it cannot work its will unless it is completely and accurately informed.

Mr. HYMAN. That is correct.

The CHAIRMAN. Don't you think that that situation could not endure too long? The public is bound to get the information, the real information.

Mr. HYMAN. I think so. I think it will become visible, for example in case of an enemy attack.

The CHAIRMAN. For example, if Congress passed 20 bills and the President did not sign them. Congress would get very suspicious if they became law without the President's signature.

The question would be why? There would be prying eyes. As a matter of fact, very little is secret in Washington. Go ahead, Mr. Hyman.

Mr. HYMAN. Is there any answer to the two lines for criticizing the grant of authority to the Vice President, as contemplated by the joint resolution?

I feel there is, though it may involve a bit of ancestor worship. Specifically, on the basis of deductions from circumstantial evidence, it can be shown, first, that the Constitutional Convention in its own day could not avoid giving at least a silent adherence to the precise arrangement now being suggested by the joint resolution. Consider in this connection what alternatives the Constitutional Convention had to choose from in 1787 when John Dickinson of Delaware raised his famous question about the extent of a President's disability, and who was to be the judge of it. In 1787, the Cabinet, as we know it, was not even in remote contemplation. The part played by the Supreme Court in the new Government was scarcely visible in silhouette. As for the Congress, the Convention had met among other reasons, to end the "tyranny of the legislature" by creating a new kind of executive strong enough to withstand it, but not so strong as to establish the tyranny of one man over an assembly of tyrants. Having already made an original grant of protective power to the Congress in the form of the impeachment process, there is no reason to feel that the delegates saw the merit of adding a further if covert system of impeachment which would float toward its objective on a wave of crocodile tears shed over the alleged fact that the President, poor fellow, was about to flop over the Great Divide. Finally, as for the creation of independent bodies, divided from, yet often cutting across the three-part system of government—this was the invention we hit upon in relatively recent years.

Eliminate as of 1787 the Cabinet, Court, Congress, and any independent body, and the sole remaining source in the Government who could conceivably determine and declare a President's inability (save for the President himself), was the Vice President. To this inferential conclusion, one can add two rules of constitutional construction habitually employed by the founders of our Government. The first rule was that when a grant of discretionary power was unavoidable, it was best centered in the highest available officer who is responsible to the people in his political character, to the court in his legal character, and to the Congress in both characters. Who, other than the President fits this description in a case of disability? Obviously it is the Vice President. The second and interlocking rule was, as the Federalist Papers put it, that in all things touching on Executive power, it was "far more safe that there should be a single object for the jealousy and watchfulness of the people," than that responsibility

for what was done should be diffused and lost by being centered in a "multiplicity of hands." Who, other than the President fits this description best in a case of disability? Once again the answer must be the Vice President—the sole officer except for the President who holds his institutional place as one man.

In connection with the broad question of Presidential disability, one side of it that is commonly overlooked, as Congressman Keating implied yesterday, is of a piece with a side that is also overlooked when people repeat Lord Acton's celebrated aphorism. It is certainly true, as Acton said, that all power tends to corrupt, and that absolute power tends to corrupt absolutely. But it is equally true—and this is what is commonly overlooked—it is equally true that the absence of power can corrupt every bit as thoroughly. So, too, with a Vice President in a disability case. Let it be admitted that the danger of his usurpation of Presidential power is real. But let it also be recognized that an opposite danger is every bit as real. It is that as "the single object for the jealousy and watchfulness of the people," he may be so scorched and shriveled from the concentrated attention given to all his moves once the word is out that a President may be ailing, that he may fail in time of emergency to fill a leadership vacuum created by a President's very real inability to execute the powers and duties of office.

Indeed, if as a supplement to the permissive right now granted a Vice President by the joint resolution—if as a supplement to that right, it was possible to devise a workable formula by which the Vice President could be ordered to act in time of emergency if the President was disabled, I would certainly urge the incorporation of that formula in the joint resolution. I would do it not from any bias toward Caesarism, but from an embrace of the principle of action set forth by Thomas Jefferson in his post-Presidential meditations. Those who accept great charges, he said, "have a duty to risk themselves on great occasions, when the safety of the Nation or some of its very high interests are at stake." The line of discrimination between cases, he went on to say, may be difficult; "but the good officer is bound to draw it as his peril, and throw himself on the justice of his country and the rectitude of his motives."

The character of American public opinion may prove a mercurial, unreasoning force when it is under the stimulus of a fictitious or trumped-up danger. But let the danger be real, and let the dimension of that real danger be made known, and American opinion, like the Constitution it sustains, shows a rather keen discriminating sense among the niceties of form that must bend or even be suspended if the instinct for national continuity and self-preservation, is to win its objects. Given the character of the American temper, it is inconceivable to me that any Vice President would risk his political neck if not his corporeal hide, by presuming to declare a President disabled who is either in good health, or whose disability, though real, coincides with a time of national or international calm. If the time should ever come when the contrary is the case—if a Vice President on any pretext could usurp the Presidency and get away with it—it would signal the fact of a collapse in the muscle tone of our con-

stitutional morality—a collapse that would render meaningless any work of constitutional draftsmanship inherited from an earlier and more disciplined era.

What gives the whole question of Presidential disability its real significance, I repeat for yet another time, is a disability that coincides with an hour of national or international emergency. In that sort of hour, it is inconceivable to me that a Vice President who found a seriously disabled President in the White House, who declared him to be such on the basis of proofs that would stand microscopic inspection, and who then proceeded to do what a President must do to save a country when it is in danger—it is inconceivable to me that the people, the parties, the Court and the Congress would assail him or deny him those marks of esteem to which he would be entitled.

To the extent that the draft resolution of which I have been speaking provides at least a moral if not a legal underpinning on which the Vice President in time of emergency can decide the fact of a Presidential disability, and then go on and serve in his place, I believe that the draft resolution should be viewed as the working text for the measure that may eventually be reported out of this committee and sped on through its legislative career in Congress.

The CHAIRMAN. What would you call the Vice President during the inability of the President? Would you call him the acting President?

Mr. HYMAN. Yes, sir, I should think so.

The CHAIRMAN. So that if the President proclaims his ability, he would have the powers restored to him?

Mr. HYMAN. Yes, sir.

The CHAIRMAN. I was very glad to hear you say that because of the lack of statutory authority of the Vice President, of Vice President Arthur and Vice President Marshall. Wasn't that also because the word used in the Constitution was "devolve"?

It is to be noted that the word "devolved" cast the Vice President in a completely passive role and if he had some direction then the role would not be passive. It would be a duty.

Mr. FOLEY. It says that if the President decides to take on the duties and powers, so then obviously he is never out of office.

Mr. HYMAN. The President?

Mr. FOLEY. Yes.

Mr. HYMAN. I do not see what the whole fuss is about who has the powers and duties and who has the office. The whole question has been settled by the 20th amendment. You don't have to define this at all. It has been settled for you.

The CHAIRMAN. Thank you very much, Mr. Hyman. I want to compliment you.

Mr. HYMAN. Thank you, sir.

The CHAIRMAN. Our next witness is Mr. Arthur Krock. Mr. Krock, will you step forward? I am sure it will be very comforting to have you with us. Mr. Krock. Mr. Krock is a very distinguished member of the fourth estate and we will hear you with great interest because you played a very important part in the past many years on the Washington scene.

If you will give your name to the stenographer.

STATEMENT BY ARTHUR KROCK, NEW YORK TIMES

Mr. KROCK. I am afraid, Mr. Chairman and gentlemen, there has to be a great deal of repetition in these depositions but I will try to cut mine down because some of it has been covered.

It seemed to me as a starter I should give the six proposals before your committee that were mailed to me and also as a preliminary say that there cannot be a perfect solution of something that has been unsolved all these years.

Of 6 proposals that have been introduced, 3 would deal with the problem of Presidential inability by statute, 3 by amending the Constitution. That is, of the ones I have seen.

One proposed amendment would authorize the Supreme Court, on the suggestion of two-thirds of Congress that the President was unable to perform his duties, to make a determination as to the facts. On the President's request the Supreme Court would then determine whether the inability had been removed.

The obvious objections to this are: (a) Such determinations are not judicial issues. (b) The Supreme Court has steadfastly refused to assume extrajudicial duties. (c) No provision is made whether these determinations shall be made by a majority or by some other expression by the Court.

A second proposed amendment would have the Cabinet make the determination on inability after two-thirds of Congress had suggested its existence. If the determination is "Yes" then the Vice President shall exercise the powers and duties of the presidential office until the President "notifies Congress in writing."

The objections to this are: (a) The Cabinet has no statutory existence or is not known to the Constitution. (b) The draft fails to say what the President's notice to Congress shall be. (c) The Cabinet, all its members being appointees of the President, is too close to the President to have this sole determination or to render that acceptable to the Congress and the people.

A third amendment would authorize the Vice President to make the determination of inability if the President is unable to do so.

The faults of this idea are applicable to the proposal that follows: This is a statutory method, proposed by Senator Payne, that would authorize the Vice President, if he has "sufficient cause to believe that the President is in a state of inability and is unable to notify Congress of that fact," to so advise the Chief Justice of the United States, who shall appoint a medical panel of 3 or 5 persons in private practice. Each, after examining the President, shall submit an individual report with a conclusion as to inability. If all concur that a state of inability exists, the Chief Justice shall so notify the Congress in writing; this shall have the same effect as a notice of inability from the President himself, and the duties and powers of the office shall devolve on the Vice President.

The objections to this are: (a) The choice of the Vice President to initiate a promotion for himself. (b) The imposition on the Supreme Court of the kind of extrajudicial function it has always rejected.

Another statutory method proposed is that the Cabinet shall make the finding of inability if the President is unable to do so; its notice to that effect to Congress shall automatically devolve the powers and

duties of the Presidency on the Vice President with the title of Acting President, such interregnum to terminate on a notice from the President to Congress in writing that he is able to resume.

The CHAIRMAN. Do you mind if we interrupt you?

Mr. KROCK. Not at all.

The CHAIRMAN. You have heard the colloquy between some of the members of the committee and Mr. Hyman who just preceded you?

Mr. KROCK. Yes.

The CHAIRMAN. What do you think about public opinion and the part it would play if there were a statutory direction so that the Vice President would not be loath, as were Vice President Marshall and Vice President Arthur, to act?

Mr. KROCK. I have tried to cover that later on; that the function by the Vice President would be very unwise.

The CHAIRMAN. Please proceed.

Mr. KROCK. Any act which in any way operates to remove a man who has been elected by the majority of the American people from office is a very serious step, and to turn that over to the man who is to succeed him is preposterous.

The objections to this role for the Cabinet alone, previously stated, apply with the same force to the second statutory proposal.

The third statutory method proposed is that, whenever the Vice President, or the person next in line of Presidential succession, "is satisfied" of the President's state of inability he shall "convene both Houses of Congress and announce that the powers and duties of the Presidency have devolved on him," this period to terminate on the President's "announcement" of the determination and ability to resume.

It is beyond credence that Congress, the courts, or the people would accept such an arrangement.

I have discussed the problem with qualified lawyers, judges, Members of Congress, and officials, and the composite of these conversations is as follows:

1. No precise solution, which would be acceptable to all concerned, is possible. This applies both to the drafts of a statute and of a constitutional amendment.

2. But some kind of modus operandi is possible. From this the Vice President and Supreme Court should be firmly omitted.

3. This modus operandi can and should be provided by an act of Congress, subject, of course, to the usual Presidential veto. This legislation might include the following provisions; the point there being that unless this is a completely agreed act it will never have popular backing, in my opinion.

A. A declaration of policy or purpose; namely, to prescribe, in advance of the contingency contemplated, a practical procedure for the orderly determination of the inability of the President to discharge the powers and duties of his office, and the proper devolvement of those duties on the Vice President, as provided in section 1 of article II of the Constitution.

B. There shall be created a special body of limited function known as the Inability Council, or some other appropriate name, which shall include members of the Cabinet (which the statute should define) or, as an alternative, the heads of Federal departments, the Speaker and

majority and minority leaders of the House of Representatives, and the President pro tempore, the majority leader and minority leader of the Senate.

C. On the written request of any two members of the Inability Council, provided they are not members of the same political party, filed with the Secretary of State, he (the Secretary of State) shall convene the Council by due and proper notice, to consider the desirability of instituting a formal determination of the inability of the President to discharge the powers and duties of his office. Upon an affirmative vote of a majority of the Council, the Surgeon General of the Public Health Service of the United States shall designate an advisory panel of five leaders of the medical profession, from the heads of the medical departments of voluntary hospitals in various sections of the United States. It will be the function of this advisory panel to examine the facts and report, by majority finding, on the inability of the President to discharge the powers and duties of the office, the panel having authority to call upon special consultants for advice. Such report shall be made public. On a majority finding of inability by the advisory panel, and not before, the Council shall vote on adoption of the finding, a majority controlling the decision. That is, if it is a heart attack, that type of consultant, or, if it is a stroke, that type of consultant.

The CHAIRMAN. Of course, that only covers the case of medical or a mental physical disability.

Mr. KROCK. Yes.

The CHAIRMAN. Suppose we have other disabilities where the President is restrained or kidnaped or a bomb might explode.

Mr. KROCK. Yes; that is a point to be covered.

The CHAIRMAN. I beg your pardon.

Mr. KROCK. As I say, there are going to be gaps in all these things. This is the most difficult I think that a congressional committee ever examined.

D. If this majority vote shall be in the affirmative, the powers and duties of the Presidency shall devolve on the Vice President until, on a reversal of the procedure, a suggestion by two members of the Inability Council (provided they are of different political parties) that the Presidential inability has been removed shall be adopted by a majority vote of the Council on the finding of a new panel of leaders of the medical profession, chosen as provided in C, above.

E. Each procedure, the affirmation and the reversal, shall be initiated and concluded within 30 days of its initiation.

F. Since the Constitution provides only that the President may give notice of his inability and of its termination his inclusion as one of those with the power to initiate both procedures is superfluous. But it would be desirable to include him if that is deemed within the purview of Congress.

G. Since the usual role of the Supreme Court is to abide by the will of Congress when expressed beyond peradventure, there is a slight probability that the Supreme Court would in any way disturb this modus operandi, except to perform its usual function of interpreting the statutory enactment of any questions of detailed construction that could be properly raised by a party with standing to sue.

H. No statutory approach is worth making without the full cooperation of the President. As a practical matter, no constitutional amendment could probably be adopted without this cooperation. But President Eisenhower has publicly offered his assistance, and the proposed legislation would be subject to the usual Presidential veto, if it were not acceptable to him.

I. That offer suggests an early conference as to methods between representatives of Congress and the Executive.

The CHAIRMAN. What do you mean by that "early conference"?

Mr. KROCK. Well, with this committee and I suppose with the President. I don't see why not.

The CHAIRMAN. I don't object to it.

Mr. KROCK. That is what I meant. The Attorney General, for example.

The CHAIRMAN. Do you feel we should get the President's views on this?

Mr. KROCK. I do indeed. He has encouraged that request. He said he would like to hear what Congress had to say.

The CHAIRMAN. Do you think we should invite the President down here or the Vice President?

Mr. KROCK. I would go to see the President if I were you.

The Vice President is not so high above the scene that he might not be asked.

The CHAIRMAN. We have already invited the Attorney General for his views.

Mr. KROCK. The point being that what I suggest as a stopgap statute with a certain lack of authority, it obviously would be fortified by a constitutional amendment. That would have a very binding effect, as stated in point J:

J. If a statute to the effect outlined above can be drafted to the satisfaction of Congress and the Executive, it would be desirable to supplement this with a constitutional amendment to the same effect.

The CHAIRMAN. You think we should first pass a statute?

Mr. KROCK. Yes.

The CHAIRMAN. And to solidify it we should put in the language containing that?

Mr. KROCK. Yes; authorizing Congress to legislate the substance of this statute.

What is proposed here is admittedly a complicated procedure. But the problem to which it is addressed is complicated also, and no simple procedure can be devised to meet it.

FURTHER DETAILS OF LEGISLATIVE PROPOSALS

CONSTITUTIONAL AMENDMENT

House Joint Resolution 442: If the President gives notice of inability, the powers and duties of the office shall devolve on the Vice President. But Congress by concurrent resolution, approved by two-thirds of each branch, may suggest inability. For the purpose of considering this resolution the Vice President and the Speaker "may" convene each branch, and if the resolution is approved the Supreme Court shall determine whether the suggestion has factual basis. If the determination is in the affirmative, the powers and duties of the

Presidency will devolve on the Vice President until the Supreme Court, at the President's request, determines that his inability has been removed. This would repeal clause 6 of section 1 of article II of the Constitution, and shall not apply to the White House incumbent at the time the amendment was proposed by Congress.

House Joint Resolution —: Amend the Constitution as in House Joint Resolution 442 except that on the suggestion of inability by two-thirds of Congress the Cabinet shall determine by two-thirds its validity in fact. If this determination is "yes" the powers and duties of the office shall be exercised by the Vice President until the President notifies the Congress in writing (but it doesn't say what this notice shall be).

House Joint Resolution — would amend the Constitution by leaving it to the Vice President to determine the President's inability if the President is unable to do so.

STATUTORY—AMENDMENT OF CHAPTER 1 OF TITLE 3 OF THE UNITED STATES CODE

S. 2763 (Payne): President shall notify Congress in writing. Powers and duties of the office will then devolve upon the Vice President until the President notifies Congress in writing of ability to resume his duties, or until a new President is inaugurated. If the Vice President has sufficient cause to believe that the President is in a state of inability that makes him unable to notify Congress, the Vice President shall so advise the Chief Justice of the United States, who shall appoint a panel of 3 (or 5) qualified medical specialists from private practice. Each, after examining the President, shall submit an individual report to the Chief Justice, giving a conclusion on the point of inability. If all concur in an affirmative report, the Chief Justice shall notify Congress in writing, which shall have the same effect as a similar notice from the President.

H. R. — provides that the Cabinet shall make the finding of inability when the President is unable to do so and transmit the finding to Congress, if in session, otherwise to the President pro tempore of the Senate and the Speaker, or to either, which notice will have the same effect as one to a Congress in session. The period of inability shall be terminated on notice from the President to Congress in writing. Meanwhile the Vice President shall perform the powers and duties of the office with the title of Acting President.

House Joint Resolution —: Whenever the Vice President or the person next in line to presidential succession "is satisfied" that the Presidential incumbent is in a state of inability, that person "shall convene both Houses of Congress and announce that the powers and duties of the Presidency have devolved on him." This interregnum shall terminate on the President's announcement of determination and ability to resume his duties.

The CHAIRMAN. We are very grateful to you for your contribution.

In essence, your proposal is that we set up an Inability Council?

Mr. KROCK. Yes.

The CHAIRMAN. Which Council shall authorize physicians, a certain number of physicians, to pass on the question of the physical or mental disability of the President.

Mr. KROCK. Yes, sir; but that goes back to the Council.

The CHAIRMAN. And the Council makes the determination?

Mr. KROCK. Yes.

The CHAIRMAN. The complexion of the Inability Commission or Council would be primarily members of the Presidential Cabinet?

Mr. KROCK. Yes.

The CHAIRMAN. There would be also the Speaker and the minority leader?

Mr. KROCK. Three from the House, the Speaker, the minority and the majority leaders, and three from the Senate. It neutralizes the political character and it also does not leave it in the hands of a body which is of course only a creature of the President, the Cabinet, which really does not exist in the Constitution.

Mr. FOLEY. What would you do in the case where a President actually felt he was disabled? Would you have him announce this to the Council?

Mr. KROCK. I am sorry, I did not hear you.

Mr. FOLEY. Suppose the President felt he was disabled. How would your plan work under that situation?

Mr. KROCK. I think that is already provided for in the Constitution itself. This procedure would not have to be initiated. This is to cover a situation when the President is unable or unwilling to announce his inability, which has happened, as you know.

The CHAIRMAN. You provide a special body that will include members of the Cabinet. You don't say how many.

Mr. KROCK. I think all members of the Cabinet.

The CHAIRMAN. Oh, the entire Cabinet?

Mr. KROCK. Yes.

The CHAIRMAN. You put it in the alternative or heads of Federal departments.

Mr. KROCK. Yes, because the Cabinet does not exist in the statutes or in the Constitution. So I thought it might be referred to as the heads of the Federal Departments which is the same thing.

The CHAIRMAN. Wouldn't the objection there—and I do not say I disagree or agree with your proposal—but I am trying to bring out these facts—

Mr. KROCK. Yes.

The CHAIRMAN. Wouldn't you feel that the same reluctance that exists in the case of the Vice President might also exist in the case of appointees of the President?

Mr. KROCK. I think it would and that is why I added the six Members of Congress.

The CHAIRMAN. You added two members?

Mr. KROCK. Six. The Speaker, the minority leader and majority leader and the President pro tempore of the Senate, and the majority and minority leaders of the Senate.

Mr. McCULLOCH. Any two of which may be members.

Mr. KROCK. All six. But no two could initiate an inability procedure unless they were members of opposite political parties.

The CHAIRMAN. Six Members of the Congress.

Mr. KROCK. And those from the Cabinet.

The CHAIRMAN. Wouldn't there again, leaving out Members of Congress, wouldn't there still be that same reluctance in the case where the Vice President would be directed to act?

Mr. KROCK. There would be reluctance but it seems to me you get the cross section there. You can always get the initiation, and, if the medical panel found the President in a state of inability, I cannot see any majority of the Cabinet taking an opposite position.

The CHAIRMAN. Of course the Cabinet, in the case of Wilson, were very reluctant.

Mr. KROCK. Indeed they were.

The CHAIRMAN. Do you think that reluctance would be neutralized by the Members of Congress on the Council?

Mr. KROCK. Definitely, and by the fact that any two of the congressional members could initiate this if the Cabinet did not do it, and that would instantly bring about the summoning of the medical panel.

The CHAIRMAN. The vote would be by a majority.

Mr. KROCK. Yes.

The CHAIRMAN. And the majority would be controlled by members of the Cabinet.

Mr. KROCK. Yes.

The CHAIRMAN. It would be controlled by those who have the potential reluctance.

Mr. KROCK. It certainly would, but I do not know any way around it. If you eliminate the Cabinet I think you have a disproportionate situation.

The CHAIRMAN. In addition to that, you have other appointees of the President who would be making this decision, among them being the Surgeon General.

Mr. KROCK. No, he is merely instructed. He has no power. He has no choice except to summon the medical panel. He is given no discretion whatsoever, except in the choice of the medical panel, but that can be provided in the statute.

The CHAIRMAN. It is possible for the Surgeon General, in the appointing of the doctors, to appoint politicians and not medicos.

Mr. KROCK. This puts the heads of the medical departments of voluntary hospitals in here, which is an important point.

The CHAIRMAN. I remember Dr. White seemed to act more as a politician than as a doctor recently.

Mr. KROCK. He would not be the only one in this case. There would be a panel of five.

The CHAIRMAN. All of them may do the same thing.

Mr. KROCK. I doubt that. Heads of voluntary hospitals with national reputations—it is pretty hard for me to see a panel that would follow one political line.

You have got to have faith in the medical profession if this plan were attempted. There could be safeguards about the choice of those members of the medical panel. I don't try to spell that out.

The CHAIRMAN. It is a very interesting proposal. We shall consider it very seriously.

Mr. McCULLOCH. Mr. Krock, if this plan were to be followed, do you think there would be another safeguard if immediately upon determination of the inability, and the Vice President assumed the duties of the President, that the Congress be convened so that there be the safeguard in that respect?

Mr. KROCK. I think that is very useful. Anything that would fortify public support of this extremely revolutionary act, which it is.

Mr. FOLEY. Do you think there would be any problem regarding the time element?

Mr. KROCK. I allowed for 30 days. That is from the initiation, both affirmative and reversing the action.

Mr. LANE. You feel that members of the Cabinet should be a part of the Council? How about limiting it to the Speaker and the majority and minority leaders and the President pro tem and the minority and majority leaders?

Mr. KROCK. I think that is going too far into the executive prerogative. It is perfectly possible to select only 6 senior members of the Cabinet to be balanced by the other 6. You would get the Attorney General in on that selection.

The CHAIRMAN. These doctors would only act in an advisory capacity.

Mr. KROCK. That is all. They have no final determination.

The CHAIRMAN. Thank you very much, Mr. Krock.

Mr. KROCK. Thank you.

The CHAIRMAN. We will have as our next witness Prof. C. Herman Pritchett from the department of political science of the University of Chicago.

First of all, I want to ask Mr. Hyman, Mr. Krock, and Professor Pritchett if we want to call on you, and I say this also to subsequent witnesses, for any more advice and counsel, we should like to have that privilege.

Mr. KROCK. Yes, sir, if that remarkable thing should happen.

The CHAIRMAN. Please proceed, Professor Pritchett.

STATEMENT OF PROF. C. HERMAN PRITCHETT, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO

Professor PRITCHETT. I would like to save your time by not repeating any of the discussions which have gone on before. So, with your permission, if you could put my prepared statement in the record I would simply devote myself to commenting on points of difference or points of similarity in my proposal and those of the two preceding witnesses, if that is satisfactory.

The CHAIRMAN. That course will be followed.

(Prepared statement of Prof. C. Herman Pritchett is as follows:)

TESTIMONY OF C. HERMAN PRITCHETT, PROFESSOR OF POLITICAL SCIENCE AT THE UNIVERSITY OF CHICAGO

The problems posed by the vagueness of present constitutional provisions relating to succession to the Presidency, in the event of Presidential inability to discharge the powers and duties of his office, have defied every previous attempt at congressional resolution. The reasons for this lack of success can only be appreciated when the various possible courses of action are reviewed. It then becomes obvious that there are weighty objections to the method or substance of any possible plan for eliminating the uncertainties which now inhere in article II, section 1, clause 6 of the Constitution. Consequently it has never been possible to develop a consensus as to what should be done, and what could be a disastrous uncertainty in our constitutional machinery remains unremedied.

In these circumstances, it seems to me the part of wisdom not to insist on searching for a solution which would cover every conceivable contingency that might arise in connection with an inability situation. It is better to take action which would be only a partial solution than to insist on a complete blueprint and fail to achieve anything.

In this spirit, I suggest that there is one principle on which everyone is agreed; namely, that a President who is forced to give up his office by inability should be able to reclaim it when and if the inability passes away. There are many conceivable types of inability which, though serious and completely disabling in effect, would be temporary, and from which a President could completely recover. The Constitution specifically recognizes that a constitutional disability may be removed, and this is certainly the commonsense view of the situation.

However, many competent students of the Constitution have argued that, while the President would be able to reclaim his office from the other officers in the line of succession, who are covered by the language in the latter part of clause 6, he would not be able to reclaim his office from the Vice President. They contend that if the Vice President takes over because of the inability of the President, the President is thereby permanently ousted from his office and the Vice President becomes President for the remainder of the term.

We need not go into the refinements of the various constitutional supports for this position. Basically, the case rests on the fact that, by practice, the Vice President becomes President on the death of the President; he does not simply act as President. Since by clause 6 the Presidency devolves on the Vice President in event of the President's death, it is argued that it must also devolve on him in the event of the President's inability, since death, removal, resignation, and inability are all listed equally in the Constitution as circumstances causing the devolving process to occur.

Actually, of course, the language of clause 6 could just as readily support the view that on the death of the President, the Vice President does not succeed to the Presidency, but merely acts as President for the remainder of the term. However, the precedent established by John Tyler in announcing that he had become President after President Harrison's death in 1841, a precedent subsequently followed by the six other Vice Presidents who have succeeded to the office on the death of the President, cannot possibly be questioned. But since no Vice President has ever been called on to act because of the inability of the President, there is no precedent in this field. And if everyone is agreed that the Vice President should not become President where the President is not dead but merely disabled, then it should be possible to find some way of putting this understanding in binding legal form.

This matter is of the highest importance, because so long as there is uncertainty on this point, the inability clause is a dead letter in the Constitution. No President, so long as he is able to function at all, is going to admit that he is disabled if the effect of that admission is to oust him permanently from the Presidency. The official family of a disabled President would certainly go to extreme lengths to maintain the fiction that he was able to discharge his powers and duties, and the Vice President or any other officers who might be charged with determining whether the President was incapacitated could be expected to avoid, if at all possible, a finding which had this conclusive and permanent effect. We need not speculate on these points. This is the situation which actually occurred during the prolonged disability of Presidents Garfield and Wilson.

If it can be firmly established that a finding or declaration of inability accomplishes only a temporary removal of the President, and that he resumes the office when his inability is terminated, it is my contention that the greater part of the dangers associated with the inability dilemma will be ended. A disabled President, provided his disability has not destroyed his reason or his sense of responsibility, could then normally be expected to cooperate in making the Vice President a temporary, acting President for the period of the disability. Every effort consequently should be expended to enact a provision covering this point.

How can this limited goal be achieved? The most effective method would be a constitutional amendment. If there is real consensus, there should be no problem in securing adoption of the amendment within a relatively short time. The Constitution certainly ought not to be cluttered up with unnecessary or complex amendments, but the principles involved here can be stated simply, and are of basic importance. The amendment would of necessity have to deal with succession for all four of the constitutionally recognized causes, since the proposal is to treat succession in case of inability differently from the other three situations. A proposed draft of the amendment follows:

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

"SEC. 2. If the President is unable to discharge the powers and duties of the office, the powers and duties shall devolve on the Vice President, to be discharged by him until the President's disability is removed."

The first section, it will be noted, simply puts the present practice in written form. The two sections replace only the first portion of clause 6, leaving intact the latter provisions covering congressional power to provide for succession beyond the Vice President. If it is regarded as better form to replace the entire clause by the new amendment, then the following sections could be added (sec. 3 being identical with the language it would supersede):

"SEC. 3. 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.

"SEC. 4. Clause 6 of section 1 of article II of the Constitution of the United States is hereby repealed."

Let me repeat that, if we could thus establish that the Vice President does not permanently oust the President when he replaces him because of inability, we would have taken a step that probably would prevent the inability problem from ever causing serious trouble.

DEFINING INABILITY

Now I pass on to the remaining issues of the inability question. First, should a legislative definition of "inability" be adopted? I doubt the necessity or wisdom of such an attempt. There have been some efforts, which seem to me entirely misguided, to read limitations into the broad term which the Constitution uses. It has been argued that inability means only "mental incapacity."¹ This interpretation would prevent the country from having a President if he was mentally competent but for some other reason was unable to exercise his powers—for example, if he had been captured by the enemy in wartime. It seems obvious that inability must be interpreted broadly enough to guarantee that the Vice President will be able to act when an emergency requires action and the President is for whatever reason unable to act. The present language of clause 6 should need no elaboration to make this point clear. However, if there is a desire to make it clear beyond the shadow of a doubt, Congress might, as suggested by Ruth C. Silva, author of an invaluable study on Presidential Succession, pass a concurrent resolution declaring that inability covers any situation which restrains a President from the actual exercise of his powers at a time when the public interest requires the exercise of those powers. In this form it would be without legal effect, but would be a guide which might prove useful in a situation where inability might need to be determined. However, there is certainly no case for putting such a statement in the Constitution itself by way of amendment.

PROCEDURES FOR DETERMINING INABILITY

It is when we take up proposals for establishing procedures for raising or determining possible inability of the President that we encounter the most controversy. Again on the principle of searching for areas of possible consensus, I suggest there is general agreement that the President should be able to declare his own inability, and that he has constitutional authority to do so. Indeed, he is the one person who can make such a prejudicial finding without raising serious questions about undermining the constitutional position of the President.

Nevertheless, there have been those who have questioned the power of a President to declare his own inability. In 1881, during Garfield's period of inability, Senator William W. Eaton argued that the succession clause provided for no disability of which the President could be aware; that the inability must be one such as insanity, which was patent to everyone but the President.² For reasons indicated earlier, this notion of inability is clearly wrong, but in order to settle all possible doubts, Congress might adopt a statute or concurrent resolution stating its understanding that the President has such power, and providing a procedure for its use, by language such as the following:

"If the President of the United States shall determine that he is unable to discharge the powers and duties of his office, he shall notify the Congress of that fact in writing, and the powers and duties of the office shall immediately devolve upon the Vice President."

¹ These arguments are summarized in Ruth C. Silva, *Presidential Succession* (University of Michigan Press, 1951), p. 88.

² See Silva, *op cit.*, p. 89.

It is my contention that, if it has been established beyond dispute that a finding of disability does not oust the President from office permanently, the procedure whereby the President declares his own inability will be adequate to cover most situations that are likely to arise. However, it would not cover these conceivable situations: where the President was hopelessly irrational or unconscious; where he was held by an enemy power; or where he was obviously incapacitated by illness but rational and unwilling to admit his inability.

The first two of these situations, I think, call for no legislative action to meet. The inability of the President would be obvious, and the Vice President certainly has constitutional power to announce that inability and to take over the powers and duties of the office. There would be no possible reason for reluctance on the part of the Vice President to make such a finding, and there would be no basis for anyone else to attack his action. The form which his announcement might take would be unimportant, but perhaps it might best be in a message to Congress. Then Congress might choose to pass a concurrent resolution taking note of the Vice President's status as acting President, if it desired to give added legitimacy to the transfer of powers and duties.

The sole situation, then, in which difficulty might be encountered would be where a President was seriously incapacitated by illness, but still rational, and unwilling to admit his inability. Are the chances of this situation occurring sufficiently probable to justify writing into the Constitution some plan for handling it? I do not think so. Certainly the succession clause as it now stands, or as it would be revised by section 2 of the amendment already proposed, implies the power of the Vice President to act on the basis of his finding of inability, if an emergency arises where the President's incapacity is threatening to harm the national interest.

But, it is said, the Vice President might be reluctant to act to displace the President. It will be recalled that both Vice President Arthur and Vice President Marshall refused suggestions that they supersede the disabled Garfield and Wilson. There are two answers. One is that we are now, unlike 1881 or 1919, dealing with a situation where the Vice President's assumption of the office would be only temporary, a fact which should make it substantially easier for the Vice President to convince himself that action should be taken. Second, the Vice President ought to be reluctant to take over the Presidency. The inability of the President ought to be so clear, and the emergency so great, as to leave no room for doubt about the necessity of the action. Moreover, a Vice President ought not to act until he had canvassed the opinion of the Cabinet and had found there substantial support for his action, and until he had made some soundings among congressional leaders, and determined that Congress was ready to express approval of his action by adoption of a concurrent resolution or other appropriate means.

While I would thus regard a constitutional amendment on this aspect of the subject as unnecessary and unwise, there may be a case for legislative action covering procedural matters, and especially to make clear the method by which the President was to reclaim his office when and if the inability was removed. Again, my thought is that the claim of the President to his office must be safeguarded against possible partisan maneuvers. There is one constitutional method of removing the President from office—by impeachment, which is a difficult process. We must not open up an easier route by way of the inability provision, which could be misused for political purposes. Consequently I would suggest legislation providing a simple procedure whereby the President in his own discretion would announce the termination of his inability and the resumption of the powers and duties of his office. The suggested language on determining and terminating a state of inability could be added to the statutory language already proposed, so that the entire statute would read as follows:

"SEC. 1. If the President of the United States shall determine that he is unable to discharge the powers and duties of his office, he shall notify the Congress of that fact in writing, and the powers and duties of the office shall immediately devolve upon the Vice President.

"SEC. 2. If the President is suffering from a constitutional inability, and fails or is unable to notify the Congress of his inability, the Vice President, after having secured the advice of the President's Cabinet, shall make the finding of inability and notify the Congress in writing of that finding, and the powers and duties of the President shall immediately devolve upon the Vice President.

"SEC. 3. When the President determines that his inability has been terminated, and that he is capable of exercising the powers and duties of the office, he shall so notify the Congress in writing, and the powers and duties of the office shall

immediately revert from the Vice President, acting as President, to the President."

These proposals avoid any participation of the Supreme Court in the process of determining or terminating a state of inability. I think it would be a very great mistake to involve the Supreme Court in this matter in any way. The issue of physical incapacity is one which the Court has no special fitness to decide. If brought into the picture, it would be solely on the ground of its supposed nonpolitical status. Any possible advantage from this characteristic would be more than offset by the possible loss to the Court's prestige by being involved in a political decision. Moreover, participation by the Court in an inability finding would seem to disqualify it from deciding any legal controversy that might subsequently be brought to test the legitimacy of the succession. Finally, the Supreme Court could not be given any role in the determination of inability except by a constitutional amendment.

It would be unthinkable to give any special, politically irresponsible, ad hoc board, even of the greatest medical experts, the power to make a finding of inability which could oust the President temporarily from office. That power should be vested only in the hands of men with the highest executive responsibility in the Government—and those men are the President, the Vice President, and the President's Cabinet. The proposals made here place that responsibility squarely on them.

SUMMARY

To recapitulate, I propose that a constitutional amendment be adopted which will make it absolutely clear that when the powers and duties of the Presidency devolve on the Vice President because of the inability of the President, the Vice President merely acts temporarily as President until the inability is removed. I feel that assurance on this point will go far toward solving the entire problem.

Second, I suggest as a possible supplementary step, the adoption of legislation which will interpret the constitutional provisions on succession as meaning: (a) that the President can declare his own inability; (b) that in emergencies the Vice President can declare the inability of the President after consulting with the Cabinet; and (c) that the President can reclaim his powers after a period of inability by announcing the termination of his inability.

Professor PRITCHETT. I should like to say that my position is closer to that of Mr. Hyman than it is to that of Mr. Krock.

Of the proposals which have been submitted as committee prints I am more favorably impressed with the one which has the letter D.

On reflection I like it better than the plan which I originally presented to this committee which has been printed as A.

I would like to indicate however some differences in approach which seem to me to be desirable from the committee draft, the D draft.

First of all, I feel there is a problem about the establishment simply by congressional legislation of the principles which are in sections 1 and 2 of the D draft.

The first section provides that the Vice President shall become President in the event of the removal of the President from office, or by the death or resignation of the President.

That, of course, is simply declaratory of our constitutional practice which has been confirmed by the 7 Vice Presidents who have become Presidents.

I feel, however, that our practice is contrary to the original intention of the Constitution. So, while there is no particular objection against legislation which simply confirms our unwritten Constitution, I think that legalists might feel we were on sounder ground if we wrote such a provision into the Constitution.

Consequently, I would myself feel that a noncontroversial, easily adopted constitutional amendment could be put through which would

remove any possibility of a question about the power of Congress to legislate on this point.

I have consequently, on page 5 of my prepared statement, proposed what seems to me to be a simple noncontroversial constitutional amendment which first of all would secure the principle of section 1 of the committee draft.

Then the more important thing which this proposed constitutional amendment would do would be to establish beyond question of any doubt that the Vice President when he takes the powers and duties in the event of the inability of the President, is only an Acting President. I think everyone is agreed that that is what should be the case, and yet I think you are all aware of the fact that there has been constitutional doubt on this point. I think it is unquestionably true that this doubt was what fortified the refusal of the two Vice Presidents, Marshall and Arthur, to consider taking over the Presidency because they faced the real possibility that in doing so they were displacing the President from his office, and they were thereby becoming President. That should not happen in a case of inability.

This principle should be announced in the most persuasive fashion possible. This committee draft does so announce. I would feel better if it were put in a constitutional amendment.

Consequently, the second section of my proposal says:

If the President is unable to discharge the powers and duties of the office, the powers and duties shall devolve on the Vice President, to be discharged by him until the President's disability is removed.

I believe the proposal was made in Mr. Krock's statement that you legislate on a subject first and then pass a constitutional amendment to make assurance doubly sure. It seems to me that might be done here. If the committee is convinced of the soundness of this D draft they might go ahead and recommend it to Congress.

They might, at the same time, propose this simple constitutional amendment which would take, presumably, a couple of years to go through. I cannot see any possible objection to it.

The CHAIRMAN. Will you comment on the objection raised that the Vice President should initiate the question?

Professor PRITCHETT. This doesn't take a position on that point.

The CHAIRMAN. What is that?

Professor PRITCHETT. This constitutional amendment properly doesn't take a position on that point. This leaves the machinery entirely to legislation. It keeps the Constitution for the basic principle. That seems very important to me. Mr. Krock, if I understood him correctly, proposed that his plan be written into the Constitution. I would object to that very much. It seems to me that a complicated plan of that type has no place in the Constitution. We should keep the Constitution for certain basic plans and principles.

Mr. KROCK. Like the 20th amendment which takes about an hour to read?

Professor PRITCHETT. Yes, I would apply it to that case.

The CHAIRMAN. You did indicate that you had a preference for the committee draft that was mentioned which places the responsibility in the lap of the Vice President.

Professor PRITCHETT. Yes.

The CHAIRMAN. What is your comment in connection with the objections raised?

Professor PRITCHETT. I am coming to that, Mr. Chairman. I broke up the committee draft into two parts and I see no objection to the committee going ahead with this draft, but I would like to see actually these first two principles in the Constitution itself. I would like to reemphasize the fact that I think if we got these 2 principles, and it is really only 1 principle that is new of course, that in a situation of disability which is a temporary thing, the Vice President is only an Acting President—it seems to me that might very well make any further legislation unnecessary.

A great deal has been made about Vice President Marshall's refusal to take action. Would Marshall have refused to take action if he had known that he was to be simply an Acting President and would step down as soon as President Wilson recovered?

The CHAIRMAN. You may remember some of the Members of Congress insisting that Tyler, when he succeeded, on all the documents presented to him, they indicated him as Acting President, and he, with a flourish and considerable anger, struck out the word "acting" and said "I am President and not Acting President."

Professor PRITCHETT. Of course, Mr. Chairman, that is the source of our trouble as far as disability is concerned. I think it is fairly clear that the Vice President was intended to be an Acting President, but we have changed that in the case of death. Now, what is the case in the situation of a President who is still living? We have to separate the constitutional status of the Vice President after the death of the President from the constitutional status of the Vice President after the disability of the President.

Mr. KROCK. The point the professor makes about changing the whole detail in the constitutional amendment is not important because if the amendment confirms the powers of the Congress to describe the procedure, it only takes a few words. You don't have to put the details in but only that authority should be in the constitutional amendment.

Professor PRITCHETT. That would take care of the point I mentioned, certainly.

Then I go on to comment on the problem with respect to who initiates the question of inability. There have been various proposals made.

The Supreme Court has been suggested. I would associate myself with Mr. Hyman's extreme hesitation to see the Supreme Court involved in cases of that kind. I think it is completely out of the question to put the Supreme Court into it.

The second possibility is Congress in one form or another. Whether it meant Congressmen participating in an inability panel of this sort which Mr. Krock mentions, whether it is two-thirds of Congress raising a question of inability, I tend not to favor any such statutory statement of responsibility for determining disability on the part of Congress.

We have Congress as the last resort in case any of the other plans do not work out.

In cases where there is a clear disability and still nobody takes the initiative, then Congress would be able by its legislative power to raise the issue, but I do not see any reason to provide for that in advance.

I would eliminate the Supreme Court and the Congress from proposed legislation, and that leaves us two alternatives, the Vice President and the Cabinet.

Originally I had thought when I submitted my first proposal that the Cabinet was a superior body to have this power because the Vice President was so directly and personally involved.

On further reflection, I have come to conclude that the Vice President probably is already granted, by the Constitution, authority to make this determination and, consequently, I would propose simply spelling out the principle which would recognize the role of the Vice President and perhaps try to associate some restraints in connection with exercise of that power.

Consequently, I have a proposal which is a little more detailed than the committee print D and it may be less desirable for that reason. But this simply tried to spell out my thinking on what might be done to make the Vice President's responsibility greater.

My proposal, which I discuss at the top of page 11, states:

If the President is suffering from a constitutional inability, and fails or is unable to notify the Congress of his inability, the Vice President, after having secured the advice of the President's Cabinet, shall make the finding of inability and notify the Congress in writing of that finding, and the powers and duties of the President shall immediately devolve upon the Vice President.

Now that doesn't say, you note, that he has to get the consent of the Cabinet, but just that he has to advise with the Cabinet before he does it, with the notion that any responsible Vice President would certainly gain some guidance from such advice.

The CHAIRMAN. Do you feel that in such cases there would be no recourse on the part of the Vice President, as was the case in Vice Presidents Marshall's and Arthur's cases?

Professor PRITCHETT. That is right. This proposed legislation would make the situation different from any preceding situation inapplicable.

The CHAIRMAN. This statement by Mr. Finletter was very interesting when he stated that there would be a strong feeling on the part of the public for the Vice President to act, and you take advantage of that public feeling, that public consciousness that something had to be done.

Professor PRITCHETT. Yes. I feel that we can rely on that without going into further hypothetical situations which would clutter up statutes and perhaps disperse responsibility from the rather clear-cut situation in which this would leave it.

Mr. FOLEY. With regard to your proposed section 2, would you have the Vice President take over the powers and duties of the office before notifying the Congress or after notifying Congress?

Professor PRITCHETT. In my notion the finding of inability by the Vice President would be the jurisdictional action which makes him President.

Mr. FOLEY. I am wondering about the draftsmanship. I am thinking of the situation when the Congress is not in session and only the President can convene it.

Professor PRITCHETT. Yes.

Mr. FOLEY. I am wondering about the language in your section 2 where you say "notify the Congress in writing of that finding, and

the powers and duties of the President shall immediately devolve upon the Vice President."

Professor PRITCHETT. Yes; that is a good point. In my earlier draft, I provided that if Congress was not in session the notification went to the Speaker of the House and the President pro tempore of the Senate or either of them, and that would perhaps safeguard it.

Mr. FOLEY. One of the primary reasons for including the convening of the Congress is that it is to be the sounding board of public opinion, to minimize that reluctance.

Professor PRITCHETT. I think I would prefer your draft to mine on that point.

Mr. McCULLOCH. Doesn't that also give the ultimate safeguard to the Court, that when the Congress convenes that, if there be a usurpation as to who is exercising the duties, he may be impeached.

Mr. FOLEY. If he did convene the Congress, the President could himself come in and say "I am perfectly all right," and you then have another problem arising.

The CHAIRMAN. That would also cover that contingency I mentioned to Mr. Krock, namely, an enforced absence by the President from the country by some act of belligerence or bellicosity on the part of some hostile nation.

They might kidnap or surround the Capital and hold him prisoner.

Professor PRITCHETT. That is right. I think that there should be nothing which could get in the way of a decision on the part of the Vice President under such circumstances.

Mr. FOLEY. Don't you think Mr. Krock's proposal has a great weakness because of the time element?

Professor PRITCHETT. I beg your pardon.

Mr. FOLEY. Because of the time element. Decision might have to be made within 24 hours.

Mr. McCULLOCH. Mr. Krock speaks of the decision being made within 30 days.

Mr. FOLEY. That is the maximum time.

Mr. McCULLOCH. That provision does not cover these contingencies of modern travel. Suppose the President proceeds to a friendly nation in time of war and his plane falls or he is captured and is delayed, this proposal meets that issue squarely.

Professor PRITCHETT. To sum up, I would simply say that I regard the D draft as a very acceptable draft.

The suggestions I make in connection with it for your consideration are the possibility of drafting a constitutional amendment which could be introduced simultaneously and which would rest any possible doubts as the authority of Congress to legislate on the basic problem of the Vice President becoming President.

Secondly the suggestion, in accordance with the question that was raised of actually writing into the statute that the title of the Vice President when acting as President is Acting President might be worthwhile stating in statutory form.

Finally, the possibility of suggesting, as my proposal did, that the Vice President consult with the Cabinet before making a determination of disability.

Mr. FOLEY. Your real objective in suggesting the dual approach, I presume, is to use the statutory form for a stopgap until a constitutional amendment is adopted.

Professor PRITCHETT. That is right.

When the civil rights bill of 1866 was put into effect, it was suggested that there was no constitutional authority for it, and then the fourteenth amendment was initiated a couple of months later to make sure there was constitutional authority for that statute.

The CHAIRMAN. Thank you very much, Professor Pritchett. We find your statement very illuminating.

Our next witness is Prof. Arthur E. Sutherland of the Harvard Law School. Professor Sutherland, we appreciate your coming here.

STATEMENT BY PROF. ARTHUR E. SUTHERLAND, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.

Professor SUTHERLAND. It is a great privilege to be invited, Mr. Chairman. I have prepared a short and, I fear, inadequate statement, which I should be very glad to hand in if you permit, sir. As many other and wiser people have already addressed the committee, may I have permission merely to comment, without reference to this prepared statement, in a brief way about some of the points which have been raised this morning, or which have occurred to me?

The CHAIRMAN. I want to comment on your becoming modesty. Your statement, Professor Sutherland, will be made a part of the record.

(The statement of Prof. Arthur E. Sutherland is as follows:)

STATEMENT OF ARTHUR E. SUTHERLAND

The opinions of many students of constitutional procedures, and the other material on Presidential Inability printed in the publication of the House Committee on the Judiciary, set out so fully the considerations affecting this important question that new information from me seems most unlikely. Perhaps I can, however, sum up what seem to me the points on which there is substantial support in the collected material

THE IMPORTANCE OF THE QUESTION

President Eisenhower's words, quoted at pages 1 and 2 of the committee document, carry conviction. Since 1789 the United States has been most fortunate in being faced only twice with Presidential inability lasting for a considerable time, until the President's illness last fall. Then his fortunate course of recovery forestalled what might have been a serious third instance. The two preceding cases, those of President Garfield between July 2 and September 19, 1881, and of President Wilson in 1919-21, occurred under such circumstances that the country was able to continue the conduct of its affairs without critical difficulty.

However, no very unusual imagination is required to think of a situation in which a President of the United States might have the misfortune of mental illness. Few of us who have practised law have not had occasion to see the embarrassment arising when some person, stricken with mental illness, very naturally resents the suggestion, even when made by kind friends, that he is no longer able to carry out his ordinary duties. There is now no procedure to cope with such a situation in our public life. The possibility of such a misfortune, or of such disabilities as those of Presidents Garfield and Wilson, occurring in the present posture of world affairs, makes the present question one of obvious importance to the United States.

CONSTITUTIONAL AMENDMENT OR STATUTORY CHANGE?

The problem seems to me to involve a constitutional amendment. The Founding Fathers wisely wrote into our Constitution the doctrine of separation of powers, from which the country derives many benefits, but which somewhat

complicates provision for Presidential inability. If, as might be the case if we had a parliamentary government, the chairman of the senior committee of the House of Representatives for the time being were automatically the President of the United States, the House could change its committee chairman (and thus change the President of the United States) whenever the House saw fit. However, under the Constitution as it was well drafted, Congress can no more remove the President than the President can remove a Congressman. An exception, of course, is the provision for impeachment and removal from office of the President when he is convicted, in the manner prescribed by the Constitution, of "Treason, Bribery, or other high Crimes and Misdemeanors." The presence of these constitutional procedures for removal of the President in case of his guilt emphasize the absence of any provision for his temporary suspension or his permanent removal in case of illness.

THE DESIRABLE TYPE OF CONSTITUTIONAL AMENDMENT

The simplest amendment would authorize the Congress to legislate for the case of Presidential inability to perform his duties. However, selection of the President of the United States is so important and solemn a matter that the Constitution provides for it in considerable detail. To turn over provision for suspending or ending his duties to ordinary legislation would alter, in an important respect, the present distribution of governmental powers between the executive and the legislative branches. Fortunately for the United States there have been few examples of real bitterness between the Congress and the President: perhaps the most conspicuous case occurred during the administration of President Johnson. It seems better that, if some new constitutional provision is to be adopted concerning presidential inability, it should provide directly for some means of determining the existence of the disability, and of its termination when that occurs.

Objectives of a constitutional amendment on this subject should be clarity, so that it can function without arousing argument at the time of its use, and acceptability to the country generally, so that there may be widespread popular acceptance of the action taken when the disability occurs. It is important not only that the factual determination of the President's disability be correctly made, but also that the people of the United States be satisfied that this is the case.

WHAT SORT OF BODY SHOULD DETERMINE PRESIDENTIAL INABILITY?

Although the existence of political parties does not appear in the Constitution, their useful and practical operation in selecting and replacing the national administration and the members of the national legislature seems entirely obvious. Therefore, the temporary or permanent displacement of one man by another to perform the duties of the Presidency should take into account the fact that the electors of the country have for the time being entrusted the administration to candidates of a successful political party.

Accordingly there is much to be said for placing the power and responsibility here in question at least partly, and perhaps predominantly, in members of the party which is represented by the administration which the President heads. President Hoover has suggested the Cabinet as an appropriate body to perform this duty, and the natural loyalty of that body to its chief is a guaranty that removal or suspension will not occur lightly or unadvisedly. From time to time, however, objection has been made to the Cabinet as being too apt to leave in office a President actually unable to perform his duties. Perhaps a compromise would be desirable, a special body could be created by the amendment, to consist of the Chief Justice, the two Secretaries of State and Defense, and the leaders of the President's party in the Senate and House. Such a body would represent all three branches of the Government and would thus if unanimous gain wide popular support.

Naturally this Presidential Commission (as it might be called) would inform itself by medical or other expert opinion concerning the inability in question. Appropriate provision could be made for its call by the Chief Justice, or by any two members. The procedure for determining the end of inability could be the same as for determining its existence.

Professor SUTHERLAND. It has seemed to me to be a good idea to sum up the problems we are trying to solve here. The first of these that occurs to me is the problem of the definition of disability. I agree

that it is futile to attempt any such definition. Everything from hostile capture to mental disturbance is a possibility, and there is no practical way to define these many forms of inability in a few words.

Next it seems to me that two great objectives for this committee, in its very solemn duty here, are to eliminate disputes, and to obtain wide public approval of whatever is done, in the event of Presidential inability.

I remember a few months ago, Mr. Chairman, sitting up almost all night reading this novel *The Caine Mutiny*.

The CHAIRMAN. Did you finish it in one night?

Professor SUTHERLAND. I finished it about 2 o'clock in the morning. It is a bully novel.

The essence of it is that the captain of a destroyer had become mentally disturbed and his executive officer was in the terrible situation of seeing the ship lost, or of superseding his own senior, his commanding officer.

I do not in anywise say this lightly, nor intend to depreciate the solemnity of the problems that face this committee, but as a matter of fact your committee's deliberations have the same theme as the one in *The Caine Mutiny*.

The CHAIRMAN. It is an excellent analogy.

Professor SUTHERLAND. Two or three of the problems fretting me are, first, the one raised by Mr. Pritchett with respect to the embarrassing doubts which have arisen in the past as to the temporary or permanent superseding of the President. I think this committee is favorably considering some statement by statute or by constitutional amendment that only while the President is sick or otherwise unable to act the Vice President acts; and when the President becomes well or is otherwise restored, the Vice President steps down.

This, it seems to me, is very wise and admirable and eliminates embarrassment to the Vice President, such as arose in the case of Vice Presidents Arthur and Marshall.

Another uncertainty that was mentioned was the question of the 4-year term, whether it continues in case of Presidential inability or whether there should be a new election. I have no especial wisdom from heaven on this subject. It seems to me offhand that the 4-year term continues to its end without a special election. If the Vice President takes over, even during the permanent illness of the President, it seems to me we wait for another ordinary 4-year election.

The CHAIRMAN. We have on occasion changed the period, too. We have changed the 4-year term.

Professor SUTHERLAND. That is right.

The CHAIRMAN. In Washington's term we curtailed it by 2 months, and we passed a comparatively recent amendment and expanded the term of one President.

Professor SUTHERLAND. That is a very thoughtful suggestion, sir. It strikes me, however, that the people of the United States have elected a President and a Vice President for 4 years and it is well, if the President cannot function, to allow the Vice President to finish up the 4-year span. I say this with humility because I have no revealed wisdom on this subject.

But the real critical problem which transcends the others is the mechanism to decide on inability. This has been widely discussed and there has been some extraordinarily interesting comment this morning

on Joint Resolution — I) which you, Mr. Chairman, were kind enough to send me with other papers.

I find it very difficult to disagree with two people with as much learning as Dr. Hyman and Dr. Pritchett but I am struck by the remembrance of The Caine Mutiny. Those of us who have practiced law have, I think, all seen ourselves in situations where some old friend or client has been stricken with mental illness, and to that unfortunate person the most resented blow is the suggestion that he is unable to function. This is the ultimate insult to a man's intelligence: the suggestion that his intelligence is gone.

We have been protected by providence from this misfortune in the United States Presidency. We are all profoundly grateful for this; but such a disaster may come, and it seems to me this is one of the solemn things which may face this committee. I deplore the thought of a President, mentally ill, resenting his friends' suspicion of his own disability, facing an announcement of inability reluctantly made by a conscientious Vice President. I can imagine factions adhering to each of these two, the country disturbed by the statement of the President that he is fully able to function and by the statement of the Vice President that the President has so lost his mental capacity that he can no longer lead the Nation.

I have made a few notes for my own guidance on some of these drafts on D I made this note the other day: "Provides for competitive announcements by Vice President and President". What if the Vice President announces that the President has so failed that the Vice President must take over, and the President then announces the next day that he is in full command of his faculties, and that he will take over?

The views submitted by Mr. Krock have made a most weighty impression on me, sir. It seems to me that the judgment of a detached body will perhaps obtain the acceptance of people of the United States better than an announcement by the Vice President as D proposes. Such acceptance is the great object that we seek here.

There is another thing about asking the Vice President to assume the duty. Should we put this burden of self-promotion upon him? All of us are familiar with the realities of political life, and political life in the United States is a good thing despite its occasional recrimination. Nevertheless, is not a Vice President who acknowledges or announces his own succession one who crowns himself? Didn't Napoleon I do this at his coronation? Didn't he seize the crown and put it on his own head? The proposal of D may bring down on a Vice President already troubled and burdened with the performance of his duties under extraordinary and embarrassing circumstances the charge from his opponents that he has crowned himself. Imposing that duty would be unfair to him.

I was much impressed by Mr. Krock's recommendation of a larger body of some kind. How should that body be set up?

The Constitution provides only one way of removing a President, and that is by the impeachment procedure, and this of course is all colored by the criminal character that impeachment implies.

The CHAIRMAN. Criminal?

Professor SUTHERLAND. Yes—"high crimes and misdemeanors."

The CHAIRMAN. Is it really criminal?

PROFESSOR SUTHERLAND. Well, I suppose that a President who is impeached would spend the rest of his life under a considerable cloud. To be removed from office because of high crimes and misdemeanors would be a very disgraceful thing. The impeachment procedure involves a discredit to the President who was removed.

We can learn something from this about how to set up machinery for determining a President's entirely innocent disability.

The CHAIRMAN. When Johnson was impeached there was no idea of criminal responsibility involved, was there? It was purely political, wasn't it?

PROFESSOR SUTHERLAND. I think it was political, and the Johnson precedent has troubled me a good deal. I mentioned it in the little statement which I have handed in. The bitterness between the Congress and the President which arose in President Johnson's term was an unhappy thing for the United States. It would be a lamentable thing in a case like Johnson's to have someone saying that the President was insane. To put this power in the legislative branch is perhaps not the happiest solution.

I wonder if there is not another factor which should be considered. I am a great believer in party government, Mr. Chairman, and the President who is presiding over the United States has been elected, with a Vice President, as a representative of the party which prevailed in the election. The people have entrusted the administration of the country to some party for 4 years. I wonder therefore whether some modification of the plan suggested by former President Hoover, for decision by the Cabinet, would not be a good idea. The Cabinet, made up of people of the President's own political affiliation, would be reluctant to remove a President of their own faith, and such reluctance is probably a good thing. But perhaps some representation of the other two branches would be still better.

Therefore, in the little paper I handed in, I have suggested this sort of a body of five: First, the Chief Justice as a presiding officer. I say this with full realization of the undesirability of implicating the Supreme Court in the political process. But inasmuch as the Chief Justice is already constitutionally entrusted with presiding over a court for the trial of impeachment perhaps he is not wholly out of line as the chairman for this body.

Next I would suggest that there be two Cabinet officers; and I am fully aware that the Constitution does not recognize the Cabinet.

I would suggest the Secretary of State and the Secretary of Defense be the two Cabinet representatives.

Then it seems to me that the legislative branch should also be represented and with considerable doubt I offer this possible suggestion. If we should recognize the political complexion of the administration and look to its continuance for the remainder of the 4-year term, would it not be well to make the 2 remaining members the leaders of the President's party in the Senate and the House, thus making a body of 5 which is small enough to be convened readily, which may act promptly under the chairmanship of the Chief Justice, to determine inability, and to determine the restoration of ability when it occurs?

There are a number of minor things which I am sure the Congress can take care of.

Should not the Vice President, if he assumes the duty, have the allowances and the financial backing of the Presidency itself?

Should not the disabled President be allowed to continue with his allowances?

Should not he continue in his official residence?

Would it not be a cruel thing to oust a sick man from his house?

The CHAIRMAN. You have a council of 5 composed of the 5 whom you mentioned and the Chief Justice would preside?

Professor SUTHERLAND. Yes.

The CHAIRMAN. Two members of the Cabinet, and the Speaker of the House and the President pro tempore of the Senate?

Professor SUTHERLAND. Yes, providing they are of the party of the President. I would take the leader of the House and of the Senate of the President's party, to the end that the whole body may be of the President's own party, except the Chief Justice, of course.

The CHAIRMAN. The Chief Justice might have been appointed by a President of the opposite party.

Professor SUTHERLAND. Yes. This is so. The Chief Justice I put aside from this partisan matter.

The CHAIRMAN. So the four of them would always be of the same political profession as the President.

Professor SUTHERLAND. Yes.

The CHAIRMAN. Wouldn't there be the same reluctance that we mentioned this morning in the case of the Vice President?

Professor SUTHERLAND. This is so, and I think that reluctance is not a bad thing. We do not lightly want to remove the Chief Magistrate of the United States from office, but, on the other hand, I feel that officers occupying the high responsibility that they occupy are going to be so conscientious that if this is really a serious case they will act.

The CHAIRMAN. Wouldn't that be true also in the case of the Vice President? Wouldn't he be conscientious?

Professor SUTHERLAND. I am sure he would. I am thinking of sparing the Vice President.

The CHAIRMAN. But you wouldn't spare the Chief Justice?

Professor SUTHERLAND. The Chief Justice is detached in this matter. He holds his office for life and decides matters of national importance anyway.

We have seen examples of this in the last 10 years on a number of occasions.

The CHAIRMAN. You wouldn't want the Supreme Court to make the determination? You wouldn't want the Congress to make the determination, and you wouldn't want the Cabinet to make the determination, and yet you take parts of all three to make the determination.

Professor SUTHERLAND. Yes; this is true. I recognize the logical anomaly of the suggestion. It has this merit: that, because it does call for participation by all three branches it will perhaps tend to get the more popular support.

I originally thought of the Cabinet alone when I wrote a letter to you, Mr. Chairman, a short while ago.

The CHAIRMAN. That gives you an idea of our problem when even a professor of political science changes his mind.

Professor SUTHERLAND. I have been weaned away to Mr. Krock's point of view; to the thought that widespread acceptance is a highly desirable thing; and I feel that by taking all three branches we will achieve that.

The CHAIRMAN. We have with us a very distinguished Member from New Jersey who has made a very interesting contribution, Representative Frelinghuysen. I would like to invite you to ask any questions that you care to.

Mr. FRELINGHUYSEN. Thank you, Mr. Chairman. I did not mean to come here to ask questions, but, if I have the opportunity, I would like to ask some.

The CHAIRMAN. Yes.

Mr. FRELINGHUYSEN. Why do you think it is an advantage to try to obtain most, if not all, of your members on this panel members of the same party? I should think what you are trying to do is encourage public acceptance of a difficult job and that you would try to get as bipartisan a group as possible, and for that reason I wonder why you wouldn't think that the Supreme Court would be at least as good a body as the group which you are proposing.

Professor SUTHERLAND. This certainly has a great deal to be said for it.

On the other hand, if you put the whole Supreme Court in the matter you do get the whole Court as such involved in this high political enterprise.

The Chief Justice already, by the Constitution, has some connection with this general sort of activity. The Constitution does not get the whole Court into it. I agree on the matter of detachment.

Mr. FRELINGHUYSEN. Again I do not see anything wrong if we do it deliberately and include the Supreme Court in a matter of this importance. It is suggested that they would be more vulnerable to partisanship than members of the Cabinet.

What do you think of Mr. Krock's remark that the control of the advisory council would be in the President's Cabinet? Is that desirable to have partisan considerations likely to prevail? Wouldn't it lead to the same stalemate which prevails because of the Vice President and his problems in making the declaration of inability?

Professor SUTHERLAND. There are two thoughts that occur to me on that. One is that reluctance to displace the President is probably a good thing. We want this done soberly, reverently, discreetly, and in the fear of God.

Secondly, I am a great believer in party government and party responsibility. The people of the United States have entrusted the Government to party A or party B for 4 years. It is that party's duty, selected by the people, to administer the affairs of the country.

Should not that party's leaders judge that their party leader has become ill or wounded?

Mr. FRELINGHUYSEN. To assure an impartial decision, I should think you would want to encourage a bipartisan decision.

Professor SUTHERLAND. I recognize the problem, sir, and I am torn between desire for a sort of judicial detachment and the desire for party responsibility.

I think, as Mr. Krock has said, there is no ideal solution for this.

Mr. FRELINGHUYSEN. I think we all agree with that. Thank you, Mr. Chairman.

Mr. McCULLOCH. I am very pleased to have Mr. Sutherland say that he is a firm believer in party government, and I hope that political science departments of colleges and universities all over the United States are of the same opinion, because I am a strong believer in party government and party responsibility too.

Professor SUTHERLAND. I must confess that I am not a political scientist. I am a country lawyer from Mr. Keating's district who wandered into law school teaching in the sere and yellow leaf of my life.

The CHAIRMAN. That is another one of your distinctions—you come from the district of our distinguished Representative from New York.

Mr. KEATING. I want to say that I was called out of here to the Rules Committee and I did not have the benefit of the previous statement of Professor Sutherland.

I have learned over a period of many years to look to him for guidance and advice on many matters and never found him wanting. It is a great privilege today for me and for this committee I am sure to have him here to give us the benefit of his great experience and wide knowledge on subjects relating to government.

He is altogether too modest. I happen to know better.

Professor SUTHERLAND. Thank you.

The CHAIRMAN. We are very grateful to you, Professor. We may want to call on you again.

Professor SUTHERLAND. I shall be delighted to be called on again, Mr. Chairman. Thank you.

The CHAIRMAN. Our next witness is Prof. Joseph E. Kallenbach.

**STATEMENT BY PROF. JOSEPH E. KALLENBACH, DEPARTMENT OF
POLITICAL SCIENCE, UNIVERSITY OF MICHIGAN, ANN ARBOR,
MICH.**

Professor KALLENBACH. Mr. Chairman and members of the committee, I have here a prepared statement which I shall submit. I should like to run through this statement. It is rather short and at particular points I will interpolate some remarks in connection with other remarks that have already been presented.

In my response to the committee's questionnaire, I have already presented at some length my views on the problem of Presidential inability. At this time I shall outline briefly my views on the substance of the draft bills and resolutions which have been prepared as a basis for consideration of possible modes of congressional action.

It is my opinion that the Congress can act on this subject under authority already conferred by the provisions of article II and by the necessary and proper clause, and that it should proceed to do so. However, there is some uncertainty as to the extent of its authority to implement, by statute, the inability clause. There is also need for clarification of the position of the Vice President in the various circumstances under which he may assume the powers and duties of the presidential office. Consequently, I believe that it would also be advisable for Congress to initiate a constitutional amendment to resolve any doubts that might exist with reference to these aspects of presidential succession arrangements.

The CHAIRMAN. May I interrupt you a moment, Professor Kallenbach?

Professor KALLENBACH. Surely.

The CHAIRMAN. I notice the presence in the room of Attorney General Patterson, of the State of Mississippi, and we would be very glad to have you sit up here with us if you wish, sir.

Mr. PATERSON. Thank you very much, sir.

The CHAIRMAN. I am sorry, Professor. Will you please continue.

Professor KALLENBACH. It is my opinion that the congressional statute on this subject should follow substantially the language of paragraphs (a), (b), and (c) of S. 2763, introduced by Senator Payne. I will not take the time to read here these paragraphs of the bill, because they are already in the record. You have the bill before you.

I feel, however, that the substance of parts (d) and (e), as stated in that bill, should be altered essentially along the lines provided by section 3 of the unnumbered House joint resolution draft (designated B for purposes of identification). There are several objections to involving the Supreme Court or the Chief Justice in a matter of this kind, as S. 2763 proposes. I also question the advisability of placing so crucial a decision entirely in the hands of a body of medical experts, as suggested therein.

There is, first of all, a question whether Congress can impose such a responsibility upon the Chief Justice of the Supreme Court or any member thereof in view of the separation of powers principle. His would be a nonjudicial responsibility heavily freighted with political significance. The Chief Justice would have a wide latitude of choice in the naming of the panel of experts. He would become inextricably involved in the decision they would finally render and he would tend to be held responsible, in the public eye at least, for the decision they made.

Moreover, the panel of medical experts would be entrusted with making a kind of decision which would actually lie beyond their competence. They could be trusted, of course, to discover the facts relative to the actual physical or mental condition of the President; but a judgment on whether the condition found to exist is one which prevents the President from discharging the powers and duties of his office in the manner which the public interest requires goes beyond that. It involves a determination of the question whether his physical or mental condition is such that the public interest would be seriously affected if the exercise of Presidential powers and duties were to remain in the President's hands. Furthermore, there may be other conditions than physical ill health which give rise to the question of the President's inability. That has already been commented on.

The determination of this question should therefore be entrusted to persons who have familiarity with the nature of the powers, duties, and responsibilities of the Presidential office and with the consequences of their not being adequately discharged over a period of time. Those who are expected to make a determination of the matter should, of course, have the authority to consult professional medical opinion on the actual physical condition of the President, if the question of inability arises out of the President's illness or physical incapacity. Medical experts should be on tap, but not on top, in resolving the question.

I should favor placing the responsibility for making a determination on the question of the President's inability in the hands of those

most intimately connected with the functioning of the Presidential office, viz, the heads of the major administrative departments and the elected presiding officers of the two Houses of Congress. These officers are all placed in the line of Presidential succession by currently applicable Federal legislation; and they therefore already have a special responsibility for seeing that the constitutional and statutory arrangements relative to provision for the discharge of Presidential powers and duties are properly observed.

I should like to amend my prepared statement to include the President pro tem of the Senate and the Speaker of the House of Representatives, in the consultative body, as I suggested originally in my prior statement to the committee in response to the questionnaire. The reason for that is that they have an interest in this matter under the terms of the present Presidential succession law and they should be associated with the other officers who, under that act, likewise are in line for the succession.

The ultimate responsibility for action is placed by the Constitution and laws upon the officer next in line in the succession, normally the Vice President; and I doubt that the Congress can, by statute, definitively limit or control his exercise of discretion in the matter. However, by providing him, through legislation, with an official body to consult in making such a momentous decision, the Congress can set up an additional moral and political sanction to support the course of action he eventually follows.

The CHAIRMAN. What would you mean by moral and political sanction?

Professor KALLENBACH. Well, it would give support to the action that the Vice President takes or to his refusing to take action if his action is based upon advice given him by all the other officers in the line of succession.

The CHAIRMAN. That is, all these other officers in the line of succession would recommend that he step down?

Professor KALLENBACH. That is right.

The CHAIRMAN. Suppose he refuses?

Professor KALLENBACH. They would recommend that he step up or not step up, taking into account the circumstances.

The CHAIRMAN. Suppose he refuses?

Professor KALLENBACH. If he refuses I don't think that Congress, by statute, has any authority to compel him to act. The Constitution places that duty in his hands.

I suppose as an ultimate resort Congress might turn to the impeachment process, but that is a rather cumbersome and slow means of compelling an officer to perform his duty.

However, as a last resort, if the Vice President should fail to assume the powers and duties of the Presidency, in accordance with the advice given by this consultative body, Congress could remove him from the Vice Presidency and cause the duty of so acting to devolve upon the Speaker of the House.

As experience has shown, a Vice President might prove reluctant to take the initiative in presenting to his Cabinet associates the question whether he should assume the powers and duties of the Presidency.

The CHAIRMAN. You have heard Professor Pritchett and Professor Hyman.

Professor KALLENBACH. Yes.

The CHAIRMAN. They neutralized that statement by saying that if there had been, in the case of Vice President Marshall and Vice President Arthur, a direction by the Congress indicating that they had a duty to resolve the question, that they might thereby remove that reluctance.

Professor KALLENBACH. That is what I am leading up to.

The CHAIRMAN. By removing that reluctance there would be a feeling of solidification of public opinion.

Professor KALLENBACH. That is what I am leading up to, Mr. Chairman.

He and his Cabinet associates may well feel that their political loyalty to the President inhibits them from taking the first step which may lead to a temporary displacement of the head of their party and of the Government. I would favor, therefore, inclusion of provisions in the statute which would recognize the role of Congress as an initiating body. My conception of a proper phrasing for the statute on this point would be as follows:

(d) If the Vice President has sufficient cause to believe that the President is, for a specified reason or reasons, unable to discharge the powers and duties of his office and that the President is unable to so notify the Congress pursuant to subsection (a), the Vice President shall so notify the Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Labor, and Secretary of Health, Education, and Welfare (and I Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, would add by way of amendment to the language of sec. 3 of H. J. Res. — B). "the President pro tempore of the Senate and Speaker of the House," and request their opinion on whether he should assume the powers and duties of the office of President. If two-thirds of the officers so notified find and determine that the President is unable to discharge such powers and duties, they shall devolve upon the Vice President who shall discharge them until the President notifies the Congress, by written communication made to the Speaker of the House and to the President pro tempore of the Senate, of his ability to reassume the powers and duties of his office, or until a new President is inaugurated.

Mr. KEATING. Suppose he did that the next morning?

Professor KALLENBACH. The President?

Mr. KEATING. Yes.

Professor KALLENBACH. I would say it would have to be given effect. Congress can not provide by law for the suspension of the President, other than through the succession of the Vice President.

(e) The Congress may, by concurrent resolution approved by two-thirds of each House, suggest that there is sufficient cause to believe that the President is, for a specified reason or reasons, unable to discharge the powers and duties of his office, and request that the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, the President pro tempore of the Senate, and the Speaker of the House of Representatives, render their opinion on whether the Vice President should assume the powers and duties of the Presidential office. If two-thirds of the officers to whom the request is directed find and determine that the President is unable to discharge such powers and duties, they shall devolve upon the Vice President as provided in subsection (d).

Now, that sets up, as you see, an alternative method of putting this question before this special advisory body.

The CHAIRMAN. What about the doctrine of the separation of powers inherent in the Constitution?

Professor KALLENBACH. I took this language from the joint resolution language. We are proposing here that Congress suggest this

matter be considered and request the opinion of the advisory body upon it. Now, this mode of action would provide an opportunity for mobilizing public opinion in case the Vice President is reluctant to act, as he might very well be, and it would give the action taken by the body then the double sanction of their acting in the capacity of an advisory council, with the advice and consent of Congress.

I think in that way we would have an alternative way of forcing the officers entrusted with making a recommendation on this matter to consider making a recommendation even if the Vice President failed to request their advice and opinion.

For the purpose of considering such a resolution the President pro tempore of the Senate may convene the Senate and the Speaker of the House of Representatives may convene the House of Representatives.

That is a further safeguard in the event that Congress is not in session. Two of these officers, the two representing Congress, can set the wheels in motion to secure congressional initiation of action by the consultative body.

The CHAIRMAN. Do you think those officers have the constitutional power to convene the Congress?

PROFESSOR KALLENBACH. I think, if Congress were to pass a statute providing for the assembly of Congress in this sort of a contingency, that that statute would then be the one on which they would fall back.

Terms of adjournment have been in the past so worded that these two officers have been empowered to reassemble Congress; and as the terms of adjournment could always be phrased in terms of reference to this statute, then there would be a continuing power in these officers to reassemble Congress for this purpose. If you leave it to the Vice President alone to initiate action he is forced to declare himself, as the counsel was stating in his colloquy with Professor Pritchett at the outset. What this language provides is a procedure that will avoid relying entirely upon the initiative of the Vice President to set this advisory body machinery into motion.

(f) If at any time there is no Vice President, the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter, is hereby authorized to proceed and act in the same manner as the Vice President, as provided in this section.

(g) Any officer who shall, as provided in this section, assume the powers and duties of the office of President shall be entitled to receive a salary and allowances equivalent to that of the President for the duration of the period during which he shall exercise the powers and discharge the duties of the office of President. During the period he may exercise the powers and discharge the duties of the President, such officer shall retain the office by reason of which the duty of acting as President shall have devolved upon him; but he shall not exercise the powers and discharge the duties thereof. Any provisions of section 19 inconsistent herewith are hereby repealed.

Now, that clause, I might point out, gets at what I might point out as one of the weaknesses of the present Presidential Succession Act. It requires that any officer other than the Vice President who takes over the powers and duties of the President temporarily must resign the office by virtue of which he is placed in the line of succession.

I think that is unsound because the whole idea behind succession legislation is that by such legislation we provide for a temporary annexation of powers and duties of another office to an existing office. But the person who succeeds loses all right and title to exercise these additional duties if he gives up the office by virtue of which he is made a succeeding officer.

The language proposed would correct that flaw in the existing statute.

MR. KEATING. Suppose the President and the Vice President were both unable to act—then the Speaker of the House who is next in line—would have him still acting as Speaker of the House while he was acting as President.

PROFESSOR KALLENBACH. No. The proposed language states that he shall retain the office by reason of which the duty of acting as President shall have devolved upon him; but he shall not exercise the powers and discharge the duties thereof.

MR. KEATING. But you said in the present succession law—

PROFESSOR KALLENBACH. He would be required to resign as Speaker and as a Member of the House under the terms of the present act.

MR. KEATING. You agree with that?

PROFESSOR KALLENBACH. No. I disagree with that. I think he should retain his seat in the House and his position as Speaker, but he should not exercise the powers and duties of a Representative and of the Speaker.

MR. KEATING. I see.

PROFESSOR KALLENBACH. Otherwise you have the man who is presiding over the House of Representatives acting as President, which is an unwholesome joining of the powers of the two branches.

MR. KEATING. It might be a shock to the acting President.

PROFESSOR KALLENBACH. Yes, I should think so.

MR. KEATING. As well as the Members, but he would still retain his seat in the House and would retain the title of the Speaker of the House!

PROFESSOR KALLENBACH. Yes. There would have to be provided a position of temporary or acting Speaker in the House, but the House can do that by the mere adoption of a rule. Likewise, if the President pro tem in the Senate were to become acting President, there would have to be a provision made for a temporary President pro tem in the Senate.

I might add this just as an illuminating point here: If the succession should devolve upon the Speaker in the first half of the President's term, it would be necessary, as I understand the full implications of this language, for the Speaker while acting as President to be reelected to his seat in the House and to be reelected Speaker in order to continue on in the second half of the term.

Otherwise, you would have him in a very impossible situation of being acting President and not even having the office by virtue of which he is acting President.

MR. KEATING. So, if he took over the Presidency and was defeated for the second term during the Presidential term, then he would no longer be President of the United States.

PROFESSOR KALLENBACH. That is right, the new Speaker would become the Acting President.

MR. KEATING. In other words, 200,000 or 300,000 voters in a particular district would be determining who the next President might be?

PROFESSOR KALLENBACH. Yes, but I don't think that a Speaker runs very much chance of not being reelected, because he is a man who has a great deal of seniority and he has a great deal of seniority because he is from a sure district, he is always from a sure district.

MR. KEATING. That is a practical answer, I guess.

Professor KALLENBACH. But, if there was a political overturn in the House of Representatives, that would mean he would no longer be Speaker, and in that event there would be a new Speaker, from a different party.

Mr. KEATING. And the new Speaker, the man who took over, would be the Acting President?

Professor KALLENBACH. Yes.

Mr. KEATING. And, if the former Speaker was defeated, then he would not only not be in the House and not be the President, but it would then go to the President pro tempore of the Senate?

Professor KALLENBACH. Well, I believe the language of the present Presidential Succession Act always gives the first choice, so to speak, to the Speaker.

Mr. KEATING. In other words, it would be the Speaker whoever he was?

Professor KALLENBACH. That is right.

The constitutional amendment which Congress should submit on this question need not be a lengthy one nor should it alter existing provisions and usages any more than necessary to resolve existing uncertainties. Its provisions need not deal in detail with the procedure for determining Presidential inability, but should make clear the authority of Congress to legislate conclusively on the subject. It should also clarify the question of the status of the succeeding officer under the various circumstances which can arise. I suggest the following substantive language:

ARTICLE —

SECTION 1 If the President dies, resigns, or is removed from office, the Vice President shall become President for the remainder of the term to which the President was elected.

I suggest that there be included in the constitutional amendment a guide as to what inability is. This would be covered in the following section of the amendment:

SEC 2. If the President should, for any reason, become unable to discharge the powers and duties of his office in the manner which the public interest requires and necessitates * * *.

Mr. KEATING. That might be a difference of opinion. The chairman and I might have a difference of opinion about the manner in which the public interest requires.

Professor KALLENBACH. That is where the machinery for resolving this question comes into play. The consultative body would make that decision.

I will repeat that:

SEC. 2 If the President should, for any reason, become unable to discharge the powers and duties of his office in the manner which the public interest requires and necessitates, the powers and duties of the office shall devolve upon the Vice President, who shall then act as President until the disability be removed or his term of office shall expire. Congress may by law establish the procedure by which the inability of the President to discharge the powers and duties of his office shall be determined, and provide for the case of the 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.

That last phrase, of course, is already in the Constitution; but the specific grant of power to Congress to legislate conclusively on how

Presidential inability shall be determined is new. It would resolve any doubts on this point and permit the legislation enacted by Congress on this matter to be regarded as mandatory on the officers involved, including the President.

SEC 3. Article II, section 1, clause 6 is hereby repealed

You will note from this statement that my views are largely in line with those of Professor Pritchett, with the difference being that I would associate the President pro tem of the Senate and the Speaker of the House with the Cabinet as an advisory body which the Vice President might consult, as a guide to his action.

The substance of the constitutional amendment proposed I am sure is quite in line with his ideas.

The CHAIRMAN. Thank you very much, Professor Kallenbach. It was very kind of you to present your suggestions.

MR. KEATING. Mr. Chairman, the deeper I get into this the more difficult it seems to become. Every witness who appears seems to have a fairly plausible solution of this problem.

The CHAIRMAN. We have two professors who agreed this morning. Now we have two more witnesses, the first of them being Prof. William W. Crosskey of the law school of the University of Chicago and the second one being Prof. James Hart of the department of political science of the University of Virginia, from Charlottesville, Va.

I wonder if it would not be asking too much of them if we could adjourn now and return at 2 o'clock.

Is that agreeable, Messrs. Hart and Crosskey?

Professor HART. I was going on the assumption that this would end at 12 o'clock, and I have an engagement tonight.

Would I be able to catch a 3:59 train if I came back this afternoon?

The CHAIRMAN. Oh yes, we will call you first.

Is it all right with you, Professor Crosskey?

Professor CROSSKEY. Yes, sir.

The CHAIRMAN. You will have plenty of time to catch the train, Professor Hart.

We will recess at this time and reconvene at 2 o'clock this afternoon.

(Thereupon, at 12:20 p. m., the hearing was recessed to reconvene at 2:09 p. m.)

AFTERNOON SESSION

(Whereupon, at 2:09 p. m. the committee reconvened.)

The CHAIRMAN. Professor Hart, would you please start now? The members will come in gradually. You don't mind starting now, do you?

Professor HART. No, Mr. Chairman.

STATEMENT BY PROF. JAMES HART, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA.

Professor HART. Mr. Chairman, I can best express the present state of my thinking on this matter by reading my prepared statement. I apologize for not having gotten more copies to you. I am sorry.

Allow me to congratulate this committee, Mr. Chairman, for exploring Presidential inability. An important result has been to reveal

widespread agreement that article II, section 1, clause 6, of the Constitution means: (1) that the result of Presidential inability is that the powers and duties of the said office devolve upon the Vice President, so that he is authorized to exercise the office of President, (art. I, sec. 3, cl. 5), but without holding that office; (2) that the Vice President is to exercise that office only until the end of the term or until the disability be removed; and (3) that upon the removal of the disability, the President is to resume the exercise of his office and the powers and duties thereof, and the Vice President is to cease to exercise the same.

I submit, Mr. Chairman, that if Congress did nothing else, it should pass a joint resolution declaratory of these three interpretative conclusions. Such a resolution would doubtless be taken as authoritative, and would remove uncertainty on these points. Since it would be favorable to the authority and independence of the President, it would not violate the separation of powers.

The CHAIRMAN. You mean you would not have a bill but just a concurrent resolution?

Professor HART. I should say a joint resolution because it is declaratory of the Constitution.

The CHAIRMAN. That would be signed by the President, joint?

Professor HART. Yes, a declaration by Congress of its sense of what the Constitution means.

Of course, that would be taken care of if you adopted my plan or one of these other plans, but even if you did not pass anything to say who should decide, for you to say that these consequences should be such and such it would be a useful thing to do.

I will go back. Since it would be favorable to the authority and independence of the President, it would not violate the separation of powers. It would in this respect be analogous to what Chief Justice Taft called the "legislative decision of 1789," by which Congress recognized the President's implied power of removal. It might legitimately add that while discharging the powers and duties of the Presidency the Vice President should have the title of "Acting President of the United States of America."

There are other points upon which I should hope for pretty general agreement: (1) That the terms "inability" and "disability" are in this context synonymous; (2) that inability means inability from whatever cause, and hence includes everything from physical or mental inability to capture by a public enemy; (3) that therefore the scope of inability is the same as the scope of section 2 of the British Regency Act of 1937 as quoted by Mr. Fellman; (4) that absence from the country does not in itself constitute inability, and would not ordinarily do so in fact, but might conceivably produce consequences which constituted de facto inability; and (5) that while Congress should not undertake a definition of inability, the joint resolution proposed above should declare, to borrow Mr. Brown's words, that inability includes "all cases in which the President is in fact unable to exercise the powers and discharge the duties of his office."

It is agreed that the crucial problem is how it is to be determined that inability exists and that the disability has been removed. There at once appear, however, two sharply contrasting views. The one holds that these provisions are self-executing, and hence that it is the

right and duty of the Vice President to take over when he finds that inability exists, and of the President to resume when he finds that he is again able to do so. These matters having been settled by the Constitution, so the argument goes, Congress has no power to set up a mandatory method of making these findings, though it may provide a means by which the Vice President in the one case and the President in the other may be advised in the matter.

The other view is that Congress may provide by law for an authoritative method of determining inability or its removal as facts upon which, when found, the constitutionally prescribed results automatically follow. Congress has the express power to make all laws which shall be necessary and proper for carrying into execution not only its own enumerated powers but also all other powers vested by the Constitution in any officer of the United States. This gives a textual basis for its power to act in this situation, though what it may do when it so acts is limited by other constitutional principles, such as the separation of powers and the President's independent tenure.

It is one thing to argue that in the absence of a statute it is or may become the power and duty of the Vice President and President, respectively, to make the crucial findings of fact. It is quite another thing to deny that Congress may make mandatory an appropriate method of making such findings. For to claim that it is the absolute power and duty of these officers to make the pertinent findings is to read into the Constitution something which is not therein stated and which is kept from being a necessary inference by noting that the power of Congress comes within the terms of the "necessary and proper" clause.

Several assumptions seem proper at this stage: (1) That this is one of those cases where any arrangement which is suggested has its drawbacks; (2) that therefore there is a strong presumption against freezing any plan into the Constitution; (3) that it is in the public interest that there be now provided a definite method for determining presidential inability and its removal; (4) that Congress has within limits the power to provide such a method under the "necessary and proper" clause; and (5) that the problem is not solved unless the method adopted promises satisfactory results in all possible cases of factual inability.

The considerations which in principle should govern the choice of method have been admirably stated by Mr. Kallenbach:

Only a situation involving the greatest kind of emergency warrants the devolution of the constitutional powers and duties of this great office, temporarily or otherwise, upon a substitute for the elected President. On the other hand, the cessation, by default, for an extended period of time, of active functioning of the Presidency is intolerable to the Nation and to the world.

In carrying out these principles, however, we run into a dilemma. If we center our attention upon protecting the independence of the President, we end up with Mr. Pritchett's plan, which achieves that end completely but makes it possible that mental derangement of the President or even just his lack of objectivity in serving as judge in his own case will threaten disaster. By that I mean Mr. Pritchett's original plan and I also refer to Mr. Kallenbach's original plan.

Mr. Pritchett's original plan leaves room for instances in which the President is able to report his inability but unable to see that he is

unable to discharge his powers and duties, and in which he thinks and reports that he is able to resume but is not in fact able to do so. The plan might work in many instances, but those in which it would not work are the ones in which the public interest would be jeopardized.

Nor can this defect be remedied without giving up the essence of the plan. For the only alternative to having the Cabinet step in only when the President is "unconscious, or physically unable to sign" his notice of inability, is a provision in which the Cabinet rather than the President is at least sometimes the judge. And the only alternative to having the President determine in all cases that the disability has been removed is to have somebody else rather than the President the judge in at least some cases. To the extent that either of these alternatives is adopted, to that extent the feature which gives absolute protection to the independence of the President is abandoned.

If, on the other hand, we center our attention upon the need to insure that there shall always be someone able to discharge the powers and duties of the presidential office, and hence upon obtaining what Mr. Sutherland well calls a factually correct decision and one which will be accepted by all concerned as having been impartial and without partisan bias, we end up with a plan like the one I offered in my first memorandum, which bids fair to achieve these ends as well as it is humanly possible to do so, but leaves to other men, technically in all instances, the determination of the President's ability to carry on and to resume. We cannot take lightly Mr. Pritchett's opinion that no board should be given "final authority to make a decision which could remove a President from office." To "place in someone else's hands the responsibility for determining inability" would, as he says, "open up the possibility of declaring a President incapacitated against his will"; and his statement, that "this is an eventuality of such grave consequences that it should be avoided if at all possible," must give us pause.

If the committee in its wisdom sees fit to vest the power to decide in anybody except the President himself, I invite them to consider my plan. In his New York Times column of February 3, 1956, Mr. Arthur Krock did me the honor to say that this plan seemed "viable both legally and politically."

Although Mr. Krock, as we saw this morning, now has his own plan.

The feature of the plan which is, so far as I know, novel, is the method of selecting the persons who are to make the determinations of Presidential inability and of removal of that inability. They are to be chosen by the Supreme Court, under the provision of article II, section 2, clause 2, of the Constitution, which, after providing for appointments by the President by and with the advice and consent of the Senate, goes on to say: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Now this clause of the Constitution assumes the need for three alternate modes of making appointments, and empowers Congress to choose among them. These alternate modes apply to "inferior" officers; but the term "inferior" is not defined, and hence should be liberally construed. It does not mean minor or unimportant officers; the Director

of the Bureau of the Budget is an "inferior" officer, since he is appointed by the President alone. It presumably means "inferior" as contrasted with "superior," or subordinate to some other officer. The heads of departments are subordinate to the President, but they are officers in whom the appointment of "inferior" officers may be vested. What about officers who are not in any department? It is submitted that the Constitution may properly be taken to leave it to Congress to treat any particular officers as "inferior," at least within the limits of reason. It would not be unreasonable for it to treat as "inferior" officers commissioners whose only function would be to make occasional findings of fact in two sorts of situation, however important the consequences of such findings might be.

But what inferior officers may Congress authorize the courts of law to appoint? The Constitution says such inferior officers as they think proper. This leaves it entirely to the discretion of Congress. That discretion is not limited by the fact that the motive for giving it to Congress was doubtless to enable it to vest in the courts of law the appointment of their own officers. That motive is determined by extrinsic evidence, which is inadmissible to counteract the intrinsic evidence of the words themselves: "such inferior officers, as they think proper."

It is suggested that Congress may provide for removal of the Commissioners for cause on the analogy of *United States v. Perkins* (116 U. S. 483), on which see *Myers v. United States* (272 U. S. 52, 126-127, 159-162 (1926)).

It is this novel method of appointment that I call to your special attention; but I think two features of my original plan call for amendment. The first relates to the description of those from whom appointments are to be made, in connection with the proposed tenure for life. My suggestion was that the Commissioners should be appointed among those private citizens whose character and judgment shall have won for them the respect of the Nation, and that their terms should be for life, unless they be sooner removed by the appointing authority for inability or other cause. I have heard it said that commissioners who had nothing to do but make findings if and when a case of inability arose would be forgotten for years on end, and when such a case arose might be found to be invalids, or feeble-minded, or in their dotage.

Now this danger arises from the fact that as private citizens they might have retired from active life and become disabled in mind or body without even the Supreme Court's taking note of the fact. But the suggestion that they be appointed for a term of years does not fully meet the danger. I suggest, therefore, that appointments be made only from among those private citizens who are active in some full-time capacity, and that the terms of Commissioners be until retirement from full-time activity, or acceptance of public office, unless they be sooner removed for cause. This would exclude some suitable elder statesmen, but it would be necessary to insure that the Commissioners would be in the full tide of mental capacity.

The CHAIRMAN. How could they be removed in the event of dotage or feeble-mindedness or for any other cause?

Professor HART. Well, if they became dotty they would doubtless retire from full-time activity, if they were in some full-time job.

The CHAIRMAN. Suppose they refuse?

PROFESSOR HART. Well, let us say the man is the head of some company, if he became dotty he would no doubt be eased out of that company.

THE CHAIRMAN. But these men are not with companies. How could they be eased out if they are Commissioners for life?

PROFESSOR HART. Their tenure would cease if they accepted any public office other than this particular one.

THE CHAIRMAN. I am sorry, I did not hear that.

PROFESSOR HART. If they accepted another public office. They would be private citizens in all other respects than as Commissioners of Inability.

THE CHAIRMAN. Like a WOC, a person serving without compensation, or a dollar-a-year man?

I still do not see how a President in some subsequent year, could dispense with their services. Could he oust them?

PROFESSOR HART. Their tenure lasts until they themselves retire from their private activity in which they are engaged, until they accept some public office, or until they are removed by the Supreme Court, the appointing authority, for cause.

The President wouldn't have anything to do with their appointment because Congress will regulate the tenure of those inferior officers.

THE CHAIRMAN. Is there any precedent for anything like that?

PROFESSOR HART. The Perkins case. It is an old case in which Congress had provided that military and naval officers appointed in time of peace should be removed only by court-martial; and whether or not that applied to Presidential appointees, this officer was appointed by the Secretary of the Navy, and the Supreme Court held that was all right because Congress having vested the appointment in the Secretary could control the tenure and regulate his power of removal.

If it vested the appointment of the officers in the Supreme Court, it could also regulate the tenure of those officers.

THE CHAIRMAN. I meant in addition is there any precedent for the appointment of other than members of the Supreme Court? Is there any precedent for the appointment for life?

PROFESSOR HART. Oh, I see. Is there any precedent for appointing officers for life?

THE CHAIRMAN. Yes.

PROFESSOR HART. Well, I do not now say for life. The tenure is not defined any longer as for life. That is the change I am making, that they are not eligible for appointment unless they are persons engaged in some private full-time activity and when they retire from that private activity their tenure ceases.

THE CHAIRMAN. But they could conceivably and possibly be for life.

PROFESSOR HART. Yes, sir, it might work out for life if they were active, as long as they live and not removed for cause and stayed in active private life, it would be for life. I do not see any constitutional or other objection.

THE CHAIRMAN. There may not be any constitutional bars. But I wonder whether the Congress would accept an appointment which might be conceivably for life.

PROFESSOR HART. Well, the justification that I give for that is that this is a judicial function. I don't know whether Congress would do

it but that is in the spirit of making it not a political but a judicial thing.

The CHAIRMAN. All right, Professor. Please proceed.

Professor HART. Another feature of my plan should be changed. I provided for findings of inability, removal of the inability, and permanent disability. The purpose of having a finding of permanent disability was to enable the Vice President to gain the prestige of becoming President if and when the disability of the President became permanent beyond a reasonable doubt. The trouble is, however, that once the Vice President became President, the finding of permanent disability would be irreversible even if the disability should prove not to be permanent after all. The possibility that this might happen makes such a provision an unwarranted infringement of the independence of the President's tenure. Such a provision would also complicate a statute which should be so simple that it is readily understandable by the public.

The following is the draft of a joint resolution incorporating the essential features of my plan as revised and making use of certain language of section 2 of the Regency Act of 1937 which seems to meet the requirements of simplicity of statement and comprehensiveness of application:

JOINT RESOLUTION Relating to the inability of the President to discharge the powers and duties of his office

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That three (five) Commissioners to be known as the Commissioners on Presidential Inability shall be appointed by the Supreme Court of the United States from among those private citizens of the United States who are active in some full-time capacity and whose character and judgment shall have won for them the respect of the Nation. The term of each Commissioner shall last until his retirement from full-time activity or his acceptance of public office unless he be sooner removed by the Supreme Court for cause

SEC. 2. If the Commissioners on Presidential Inability or any two (three) or more of them, giving all reasonable weight to the opinion of the President, declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the President of the United States is by reason of infirmity of mind or body unable for the time being to discharge the powers and duties of his office or that they are satisfied by evidence that the President is unable to discharge those powers and duties because he is for some definite cause not available for their discharge, then, until it is declared in like manner that the disability has been removed because the President has so far recovered his health as to warrant the resumption of the discharge of his powers and duties or because he has become available for the discharge thereof, as the case may be, or until the term for which the President was elected expires, those powers and duties shall be discharged by the Vice President of the United States under the title of the Acting President of the United States of America.

Professor HART. Should the Pritchett or the Hart plan be adopted by Congress? And I concentrate on those two. It would never occur to me, in seeking a method for determining whether a man was able to discharge the powers and duties of his office, to leave it to the man himself. My first reaction to the Pritchett plan was that it is patently unsatisfactory. There is still only one thing which causes me to take it seriously. That is my unwillingness to be a party to the weakening of the Presidency. For I regard this office as the one great contribution to representative government since that of Simon de Montfort, and I consider its independence of tenure the one stabilizing factor in the flux of our pressure politics, the one fixed star in our political sky.

The issue is between a plan which fully safeguards Presidential independence at the risk of not insuring Presidential ability and a plan which gives maximal promise of insuring Presidential ability combined with minimal likelihood that the power of others to determine whether the President shall continue or resume the discharge of his powers and duties will be used politically or unwisely.

If it be permissible to let anybody but the President decide, then my plan tends to insure that action will be taken when necessary, but not otherwise, to declare Presidential inability, and that action will be taken when feasible, but not otherwise, to declare the disability removed—in short that the power of decision will neither be used to oust a President or to refuse to reinstate him for political motives nor be unused because of political inhibitions or political pressures when its use is clearly called for.

I respectfully suggest that my plan is to be preferred because the chance that it will undermine the Presidency is negligible, while the danger left by the loopholes of the Pritchett plan is real and potentially alarming.

It is of course a compliment to the Pritchett plan that I have singled it out for critical analysis.

The CHAIRMAN. Will Mr Pritchett consider that a compliment?

Professor HART. Well, because I am going to dismiss the others rather summarily, and I think it is a compliment to have you state rather fully your reasons for disagreement.

Other suggestions will, in conclusion, be dismissed rather summarily. Mr. Fellman well remarks that the Vice President is in "a delicate position" in this regard, and that the Cabinet is affected by "the natural tendency of a staff" to "cover up their Chief's inadequacy and to pretend that all goes well." Congress might not be in session and is obviously too unwieldy and too political to be entrusted with judicial or quasi-judicial findings of this sort. None of these methods would give assurance of the factual correctness and impartiality of the findings; and to vest the power in Congress would be inconsistent with the spirit of the separation of powers.

Even if the questions to be decided could be got before the courts in "cases" or "controversies" in the technical sense of article III of the Constitution, their decision should not be left to litigation, but should be made the direct and immediate duty of specific persons.

Nor should Supreme Court Justices or other judges of the United States be made Commissioners, quite aside from any constitutional doubts. If the judges were associated with political officials, the former might be smeared with the political brush and the latter would be unsuitable Commissioners. If all the Commissioners were judges, it would be easier for doubt to lodge in the public mind about their objectivity in themselves making the decisions than if they merely chose the Commissioners at a time when no decision was pending. Under my plan the Supreme Court would appoint outstanding men as Commissioners because it would know that the public could and would pass sound judgment upon their selections. My plan would thus make judicial decisions likely while running to a minimal extent any risk of involving the judges in politics.

The CHAIRMAN. Thank you for your contribution, Professor Hart, and we appreciate your coming in.

I hope you are able to catch your train.

Professor HART. Thank you, sir.

The CHAIRMAN. We will now hear from Prof. William W. Crosskey of the Law School of the University of Chicago.

**STATEMENT BY PROF. WILLIAM W. CROSSKEY, THE LAW SCHOOL,
UNIVERSITY OF CHICAGO, CHICAGO, ILL.**

Professor CROSSKEY. There is little I can add to the memorandum I mailed you some three weeks or so ago.

I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability.

Briefly, my view is that a case involving either alleged inability upon the part of the President to discharge the powers and the duties of his office or a case involving alleged removal of such inability on his part is essentially a controversy about the title to a public authority or office; and that the remedy in such case is what was customary in essentially similar cases when the Constitution was drawn.

The remedy in such cases was traditional and had long been an action of quo warranto, one of the so-called extraordinary legal proceedings, of which there were about a half dozen—3 or 4, something like that. On this basis, I think the matter is fully covered in the Constitution.

The reason it seems generally to be believed that this subject was not covered in the Constitution, I believe, was that John Dickinson, of Delaware, on August 27, 1787, in the convention seconded a motion to postpone what later became the Presidential inability clause, and at that time asked the question who was to be the judge of the Presidential inability. His implication was that there was no provision on the subject. In this connection, I think the fact has been overlooked that the Constitution was not the same when Dickinson spoke as it later became.

Dickinson's question was asked early in the day of August 27. At the time he asked his question the judicial power of the United States was very limited. It extended to some of the cases within the party category now found in article III, but among those party categories to which it then extended, controversies to which the United States shall be a party were not included. Besides the party categories then included, there were cases in admiralty and maritime jurisdictions, which obviously would not cover the situation. Then there were cases of impeachment which were later transferred to the Senate; and finally there were cases arising under laws passed by the Legislature of the United States. That also would not cover this case.

But later in the day on August 27 many changes were made in the scope of the judicial power, and among the changes that were made were two that resulted in extending the power to all cases in law and equity arising under the Constitution of the United States. This answered Dickinson's difficulty.

The points involved in this view of the matter are all fully settled. Thus, it has been recognized that the phrase "in law and equity" in this clause of article III means law and equity, as understood under the common law, and the effect of the phrase was to vest the United States

courts with full legal and equitable powers for administering all customary legal or equitable remedies. The quo warranto proceedings were regarded as legal and not equitable proceedings.

Second, it has long been well settled and never questioned that a case "arises under the Constitution" when it involves the meaning or application of some provision of the document. Obviously there can be no question from that point of view that a case under the Presidential inability clause is a case arising under the Constitution.

It is true that, to come within the judicial power, a case has also to be what is called a justiciable case but any case customarily adjudicated in courts of justice when the Constitution was drawn is a justiciable case with this rule. I believe all lawyers would agree to that, and as already indicated, cases involving title to public office, or public authority, had long been adjudicated in courts of justice when the Constitution was drawn.

So, it seems to me every single test is met and the consequence follows that cases under the Presidential inability clause are "cases in law arising under the Constitution." This seems to me the central issue on which I differ with most of the people who have spoken here today. With many of the other things they have said I am in agreement.

I agree that the term "inability" in the Presidential inability clause ought to be taken generally. It seems to me absolutely necessary that it be so taken, because the duties of the President are too important to allow us to suppose there could be any hiatus in the readiness of some officer of government to discharge them. I think we simply have to take the inability provision that way and I think it would accordingly be a mistake for Congress to undertake any definition of the term.

The CHAIRMAN. What would you call a hiatus?

Professor CROSSKEY. A gap.

The CHAIRMAN. What would you call a gap?

Professor CROSSKEY. I would call it a gap if there is any situation where the President was unable to discharge his duties.

The CHAIRMAN. For how long?

Professor CROSSKEY. Well, that is a practical question that has to be dealt with on a practical basis. I do not suppose every time he gets a headache or something of that sort that he is out of the picture.

The CHAIRMAN. Well, let us take the recent case.

Professor CROSSKEY. I would think, myself, that that was a case that came within the provision. It extended over many weeks. Just how many weeks, I don't know. But certainly for many weeks after September 24, 1955.

The CHAIRMAN. I think it was around 6 weeks that he was in Denver.

You would say that some method should be devised whereby the office of Acting President should be—

Professor CROSSKEY. I do not believe I would say that, Mr. Chairman. What I would say is that there is no real occasion for devising any method but that because it seems to be a fairly widespread view that a Vice President can take over and discharge the Presidential duties only by ousting the President permanently from office, something ought to be done to dispel that view. If we disposed of that idea I don't think we should have the problem now as you stated it.

In other words, I think the Vice President was intended originally

to be an understudy to the President, a ready understudy, to take over at any time he was needed, and I think it was intended ordinarily to be informal and that this question of remedies as to who is to take over arises only when there is a controversy.

The CHAIRMAN. You mean when the President was suffering his heart occlusion and his inability to function, you believe that the Vice President could have taken over and signed a bill.

Professor CROSSKEY. I do not see why not.

The CHAIRMAN. What is that?

Professor CROSSKEY. I do not see why not. It seems to me that is what the Constitution provides. If the President cannot consider the bill I do not see how he can possibly sign it, and isn't it conceivable that during that time the need for signing a bill might be imperative?

I can see no reason why the provisions in the Constitution don't cover that. You have to remember this: to start with, the Vice President was the runner-up in the election. He was the man who had the second most numerous votes—how shall I put it—the second largest number of votes in the electoral college.

The CHAIRMAN. The Constitution placed him in the legislative branch in the event of a tie to break the tie with his vote.

Professor CROSSKEY. Yes, but in case he began to exercise the office of President, according to the Constitution, the Senate is to elect a President pro tem in his place.

The CHAIRMAN. Then you think the Constitution appropriately could be interpreted to mean that in the event of an extended illness of the President which would incapacitate him, that during that temporary period the Vice President could move in and act as and be the President and do everything the President would have done had he been well?

Professor CROSSKEY. I think so. Or, to use the language of the Constitution, he is to "exercise the office of President." That is the language it uses. It speaks of the necessity of electing a President pro tem when the Vice President shall exercise the office of President. They apparently thought of him as a substitute and nothing more. The practice of swearing in the Vice President as President in case of the death of the President—I think you might say this arose from historical accidents.

If a case of temporary inability of sufficiently extended duration had arisen first, I don't think we would have had that interpretation.

The CHAIRMAN. In the cases of extended disability, would you have the Vice President take the oath of office?

Professor CROSSKEY. The Constitution makes no provision for it. I understand John Tyler thought it was not necessary. I would be inclined to agree with him.

Certainly the Constitution says nothing about that.

Of course the Presidential oath varies a little, but I have never been able to convince myself that the duties of the President require the elaborate oath which is given, and I don't think it need be any more elaborate than that of a Representative when he takes his oath of office to support the Constitution. Supporting the Constitution seems to cover the whole subject.

The CHAIRMAN. The practice is that the Vice President usually takes the oath of the Senate.

Professor CROSSKEY. I did not have reference to that.

The CHAIRMAN. Go ahead.

Professor CROSSKEY. Well, taking the view I take of the matter, of course a good many of the things that have been suggested seem to me unconstitutional; for if this case, this type of case, is one of the cases at law arising under the Constitution which the Constitution speaks of in article III, and if that case is, as it is in article III, put within the judicial power of the United States which is to be vested in the National Courts, then it seems to me to be beyond Congress' authority to vest it in any such Commission or as has been described in various proposals here.

I am aware that the mandatory language of article III has not been followed in all cases with complete strictness. But the principle of the separation of powers seems to be accepted as a fundamental principle of our Government, and that was one of the things sought to be secured by this provision.

It would seem to me, therefore, that from a constitutional point of view the power ought to be left where it is.

The CHAIRMAN. Where is the power now?

Professor CROSSKEY. As far as I can make out the power is in the courts of justice in the United States.

The CHAIRMAN. How could they register their power?

Professor CROSSKEY. What do you mean by register?

The CHAIRMAN. You say the power is in the courts of justice?

Professor CROSSKEY. It is under the Constitution, and I assume that it is under the statutes. To tell you the truth, I have not examined the current statute with respect to that question, but I would be surprised if the statute doesn't cover it.

I know that in 1801 it was assumed in Congress that quo warranto was the proper remedy to test out the title of the "Midnight Judges" to their office.

So, that subject to the possibility that there might conceivably be some statutory problem at the present time, the power, so far as the Constitution is concerned, was given to the courts. And I can't but think that in giving it to the courts they gave it to the right people.

I don't understand the objection made to allowing the courts and particularly the Supreme Court to decide this question. The only difficulty that I see from that point of view is that it could not be put directly into the hands of the Supreme Court because of the decision in the case of *Marbury versus Madison*.

The CHAIRMAN. But is it a controversy?

Professor CROSSKEY. Sure it is a controversy.

The CHAIRMAN. Is it a controversy?

Professor CROSSKEY. It is a controversy as to who holds the title to the office, or authority, of the Presidency. If there is no such controversy, you haven't any problem.

If the President is willing to admit his inability and let the Vice President take over, where is there any problem?

It is only the case where the President holds on in the face of what is believed to be an inability to discharge his office that you have any problem.

The CHAIRMAN. You would call that a controversy?

Professor CROSSKEY. Yes, certainly.

The CHAIRMAN. I mean a controversy in a justiciable sense.

Professor CROSSKEY. Yes, sir, it is exactly the kind of case that is dealt with by *quo warranto*.

The CHAIRMAN. How would that be brought before the Supreme Court? That is important. Would it be by *mandamus* or what?

Professor CROSSKEY. No. By *quo warranto*. The customary way is for the Attorney General, the prosecuting public official, to file the writ or modernly to file an information in the nature of a *quo warranto*.

It can be done by these officials or it can be done by interested citizens if Congress so provides.

The Supreme Court has said that, in the absence of legislation otherwise by Congress, *quo warranto* can be brought about by the Government only.

The CHAIRMAN. Wouldn't the Supreme Court be likely to say that that is a political question?

Professor CROSSKEY. I don't think so, Mr. Celler. Politics in that connection usually means only this—and I think there are no actual cases of any other character—it means that the particular question has been confided by the Constitution to some other organ of the Government, commonly the Congress or the President.

There is the Coleman case, and I have got the reference here somewhere if you would like to have it. In that case Chief Justice Hughes makes the point very clearly that the Court will not decide a question that has been confided by the Constitution to one of the political arms of the Government, but the doctrine does not mean that the Court will not decide a case because it has political ramifications in the common ordinary sense.

The CHAIRMAN. Wouldn't this be a political arm of the Government? The Constitution says the Vice President shall succeed in some way.

Professor CROSSKEY. All right. It also says that the President shall exercise the Presidential duties. Now suppose the man who is elected President says "I shall exercise them," and the Vice President says "I shall exercise them," who decides that controversy?

The CHAIRMAN. That is the problem we are trying to wrestle with.

Professor CROSSKEY. That is right. But the power to decide that controversy is not given to the Vice President.

The CHAIRMAN. Let us assume, contrary to what you say, that the Supreme Court says it will not touch the case because it involves political considerations.

Let us assume such is the case, then where are we?

Professor CROSSKEY. You are left exactly where you are left whenever the Supreme Court steps out from under, and I am perfectly aware they can do that, as a matter of fact, whenever they want to, but I don't think the case is one of the kind that falls within the Court's doctrine of political questions.

The general position of the people who have spoken is that the Constitution does not confide the question to anybody. I think this is true, except as to the courts, and if this is the case, how can there be any room for the application of this doctrine of political questions?

The CHAIRMAN. The Supreme Court does some rather queer things in some of its rulings.

Professor CROSSKEY. I know they do. Nobody knows it any better than I do. But you have to take risks of this kind. Cases of Presidential inability will not be very numerous.

The CHAIRMAN. I hope not.

Professor CROSSKEY. If legislation went through and had the approval of Congress, and especially the President, it seems to me it would carry great weight.

I don't see why the Court should step out. They certainly have not the personal and political interest in these cases that the Cabinet has and it seems to me any way you look at the question that the best qualified group to deal with this sort of question is the Supreme Court.

Mr. FOLEY. The only trouble there is the question of timing. We would have to start it in the district court, naturally.

Professor CROSSKEY. I know. Well, I will tell you, one of my colleagues suggested this, and I will pass it on to you for what it is worth. He said, "Why couldn't they form a special circuit court of nine circuit justices and get around *Marbury v. Madison* that way?"

There is precedent for their sitting as circuit judges. Why can't they sit together as a circuit, a special circuit for this purpose?

Mr. FOLEY. Have the Supreme Court sit?

Professor CROSSKEY. Have the Supreme Court Justices sit.

I agree they might say that this was a way of beating the devil around the stump. If I were doing it I would be much more tempted to give them the opportunity to overrule this particular doctrine of the *Marbury* case. I don't think it has ever been applied to anybody's real benefit. It has been nothing but an embarrassment to Congress in the managing of intragovernmental litigation, and I think it would be better to amend the Constitution in this respect, or else give the Court the chance to overrule the doctrine in question.

I think we have to recognize that we are dealing with an exceptional case. Most of the time I suppose if the President is really disabled, he will admit it—well, I don't know if I should say that since we have certainly had cases where they wouldn't admit it.

Mr. FOLEY. You would agree that if there was a case to submit to the Supreme Court it would in this instance.

Professor CROSSKEY. There is another consideration too: you could put in expediting provisions.

Mr. FOLEY. Oh, yes.

Professor CROSSKEY. So that isn't really a fatal objection. You could do a good deal to alleviate that.

Of course the difficulty I have is in believing that these fellows in the Federal Convention had their attention directed to this thing and then behaved as they are generally supposed to have behaved. This happened on the 27th of August when the provision came up and there were four people who objected to it. One of them was John Dickinson who said there was no judge on this subject, and then they appointed a committee 4 days later, and they reported on the subject nothing at all, and one of the members of that committee was John Dickinson who made the objection.

The conclusion generally drawn is that nothing happened. That is true only if you leave out the actions taken later on the same day after Dickinson made his objection.

But I do not see how the proposition that this is a case at law arising under the Constitution of the United States can be gotten around. It seems to me to meet every test, and the tests are all well settled.

Mr. FOLEY. Your assumption is that when they were in committee they said we do not have to worry about this subject. We have got the courts here. Let it alone. We have the Constitution.

Professor CROSSKEY. Yes. Upon another view they look pretty foolish. Here they were, objecting to a thing and appointing a committee on the subject and nobody says anything.

The alternative view is that these changes later on took care of the objection of Dickinson.

Mr. FOLEY. The other view is that they deliberately let it alone because they were faced with exactly the situation that we were faced with today.

Professor CROSSKEY. Yes, I know.

The CHAIRMAN. Well, we appreciate your contributions, Professor Crosskey, and we are very much interested in what you said. Thank you again.

Professor CROSSKEY. Thank you, sir.

The CHAIRMAN. The Chair would like to read a wire received from Thomas E. Dewey who had been invited to give his views on this subject.

The wire reads:

Deeply regret absence from the country prevented my sooner answering your gracious invitation appear before subcommittee. Have not had opportunity to consider subject so do not believe I could make useful contribution at this time. Many thanks your consideration and repeated apologies failure to acknowledge. Kindest regards.

THOMAS E. DEWEY.

The record will be kept open for any statements that any interested person wishes to make.

Those who testified will have ample opportunity to correct their testimony or to add any additional matter.

Mr. FOLEY. There are four answers to the questionnaire which were recently received.

The CHAIRMAN. They will be included.

(The four answers to the questionnaire referred to above are as follows:)

MEMORANDUM IN ANSWER TO QUESTIONNAIRE ON PRESIDENTIAL INABILITY

THE COMMITTEE ON THE JUDICIARY,
House of Representatives, Washington, D. C.

GENTLEMEN: Let me say, at the outset, that I do not find the Constitution so obscure upon the points covered in your questionnaire as many commentators have seemed to find it. I think most of the apparent obscurities are attributable to ideas or practices that have come into currency since the Constitution was drawn, for which the instrument makes no provision, and which, it seems to me demonstrable, were not entertained or intended by the men who drew it. For the rest, I think there has been a failure to take into account the provisions of the Constitution as a whole.

I

I shall begin with your first question

"What was intended by the term "inability" as used in article 2, section 1, clause 6, of the Constitution? Shall a definition be enacted into law? If so, will you set forth a workable definition? Shall such a definition encompass physical and mental disability as well as the duration thereof?"

In my judgment, "Inability" is the blanket, catch-all term of this provision of the Constitution. "Death," "Resignation," and "Removal from office"—which last, by the terms of section 4 of article II, can occur only "on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"—are all terms that are definite and specific in coverage. The term "inability," on the other hand, is general: it covers every instance in which a President is unable, for any reason whatsoever, "to discharge the Powers and Duties of [his] Office"; or, I should suppose, any important part of them. Judging by comment I have seen, the notion is entertained by some that "Inability" refers only to "Inability" arising from Presidential illness, mental or physical. It is not so limited in the document. Suppose a war should occur, and the President, through some mishap, be captured by the enemy. Would that not be a case of Presidential "Inability to discharge the Powers and Duties of [his] Office"? Again, though the provision does not, perhaps, cover every trifling indisposition of a President, the character of the Presidential duties generally is such that no hiatus in the readiness of some officer to discharge them can possibly be tolerated. Cases of temporary "Inability," as well as permanent "Inability," must, therefore, have been intended to be covered, and the language of the Constitution is fully adequate to cover them.

These considerations seem to me sufficient to establish the generality of the "Presidential inability" provision of the Constitution, and the wisdom of its having been cast by the framers in these general terms. Accordingly, I do not think Congress should attempt to define Presidential "Inability," either in respect to its causes or in respect to its duration.

To define the conception would be to narrow this important provision of the Constitution. This would be unwise. It would also, as an act of Congress, be unconstitutional; for Congress has no power to alter this or any other provision of the Constitution, unless power to do so be given in specific terms, as, in this case, it clearly is not.

II

I pass next to the problem raised by your eighth and ninth questions. These questions are:

"VIII. In the event of a finding of temporary disability [of the President], does the Vice President succeed to the powers and duties of the Office [of President] or to the office itself?"

"IX. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the Office or to the Office itself?"

As I understand these questions, the problems to which they are addressed is whether, in the "events" they state, the Vice President is intended merely to act as President during the actual continuance of the President's disability or is, instead, intended to succeed to the Presidency, that is, to become permanently President of the United States during the remainder of the particular Presidential term concerned.

The relevant provision of the Constitution (which I shall refer to hereafter as the "Presidential inability" provision) reads as follows:

"In Case of 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."

Questions VIII and IX are based, I suppose upon the prima facie doubtful reference of the words "the Same" in the foregoing provision. The questions seem to me, however, to rely overmuch upon a distinction between an office and the powers and duties of which, for most legal purposes, it is certainly composed. I do not think the usage in the Constitution will support the distinction between these two that you seem to make. Moreover, whatever the true reference of the words "the Same" may be, there still will be the question, it seems to me, whether the "devolvement" of "the Office of President," or the "development" of "the Powers and Duties of the said Office," as the case may be, was intended to be merely temporary during the continuance of the Presidential "Inability" that the foregoing provision contemplates, or permanent during the remainder of the Presidential term concerned in the particular case.

If the latter is the meaning of the Constitution, that document certainly provides for some very odd results. It is odd, to begin with, to decree that a Presi-

dent must forfeit his office in cases of supervening "Inability," even temporary, although, in most such cases that I can imagine, his "Inability" will have been no fault of his. The exception prescribed to this rule by the Constitution—assuming that the rule itself is prescribed—is, however, odder still. The exception would include every case where the Vice President, either antecedently or simultaneously, also sustained an "Inability" to discharge the powers and duties of the Presidency. For, in every such case, the Constitution stipulates that the appointee of Congress under "the Law" shall merely "act as President," and only "until the Disability"—meaning that either of the President or of the Vice President—"be removed, or a President shall be elected." If, then, in such as case, "the [President's] Disability be removed"—at any rate, if it be removed before that of the Vice President—the President, in complete conformity with the Constitution, could once again take over the responsibilities of his office.

Now, such results as the foregoing are plainly discordant and irrational. Why should a President forfeit his office in one of the foregoing cases and not in the other? Indeed—as I have already suggested—why should he forfeit his office in either of these cases? No sensible answers to these questions can, I believe, be given. And this is not the end of the anomalies involved if it really is the meaning of the Constitution that the Vice President is to "succeed to the Presidency" in cases of Presidential "Inability." For, if this is the meaning of the Constitution, a Vice President, having "succeeded to the Presidency," has a securer tenure of that office than one who has been elected to it by the people. This results because, under the interpretation we are now assuming, a President would forfeit his office in case of his supervening "Inability"; but a Vice President, having "succeeded to the Presidency," would not forfeit the office in case he thereafter came upon a similar "Inability." This latter result follows, once more, because the Constitution stipulates that the appointee of Congress, in the latter case, shall merely "act as President," and only "until the Disability be removed, or a President shall be elected." And, again, I think, no satisfactory reason for this anomalous result can be given.

It is elementary law that an interpretation involving anomalies of the kind I have pointed out is not to be adopted, unless the language of the instrument under consideration compels it. In the case of the "Presidential inability" provision of the Constitution, there is no such compulsion. The provision does not say that the Vice President shall "become President," or "succeed to the Presidency," in cases of Presidential "Inability," or, for that matter, in any of the other cases—"Death," "Resignation," or "Removal" of the President—that the provision first puts. Yet it would have been easy and natural to say this if this was meant.

The implication of the word "then" in the second clause of the provision also seems important in trying to get at the intended meaning. For the implication of the word "then," taken with what is provided in the second clause, plainly is that, in the cases other than those to which the word "then" relates, it has already been provided who shall "act as President." In other words, the implication is that, in those cases—the cases first put in the provision—the Vice President is to "act as President": a result, it must certainly be conceded, that is much more in accord with the generally understood nature of a "vice" office than is true when it is assumed the Vice President, in the cases in question, is to "succeed to the Presidency."

Here it seems worth while to add that a "vice" officer, in the 18th century, was not apparently understood, any more than such an officer is today, to be one in the line of succession to a particular office. A "vice" officer was understood, instead, to be merely a ready substitute—an understudy to his particularly designated superior officer. Thus, in Samuel Johnson's Dictionary of the English Language (3d edition; London, 1765), the word "vice," in such connections, was defined as a Latin term, "used in composition for one, qui vicem gerit, who performs, in his stead, the office of a superiour." Substantially the same definition will be found in Webster's New International Dictionary today. Taking into account this ordinary meaning of the word "vice" in such connections, I find it hard to see why it is not the plain meaning of the initial clause of the "Presidential inability" provision that the Vice President is merely "to act as President" in the "Case" (or cases) that provision first puts. The Vice President, I think, was not, in any "Case," intended "to become President," or "succeed to the Presidency."

The correctness of this conclusion is well borne out by another, earlier provision of the Constitution: the provision, in section 3 or article I, for the Senate's

choosing their Presiding Officer in certain circumstances. This provision reads as follows:

"The Senate shall chuse * * * a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."

It will be observed that, in all the cases covered by this provision, the Vice President is still "the Vice President": he is not spoken of as "becoming President," or as "succeeding to that office," but, rather, as "exercising the office of President" as "Vice President." The implication of the words "pro tempore" is the same; and since the provision is apparently general with respect to all the cases in which the Senate shall choose their Presiding Officer, the inference once more seems warranted that the Vice President was not intended, in any case, to "become President," or "succeed to the Presidency": he was intended merely to "exercise the office" in cases of necessity; or—to use the language of the implication in the constitutional provision first quoted above—he was to "act as President" in such cases.

If we turn to the history of the framing of the Constitution by the Federal Convention, further corroboratory evidence can be found. The language that has apparently been the source of most of the doubts was, with the exception of a single clause not presently important, put into the Constitution on recommendation of the Convention's committee of style by its report of September 12. The committee's proposed language read as follows:

"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 the period for chusing another President arrive."¹

This provision was to replace two provisions previously approved by the Convention, which read in this wise:

"The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.

"* * * in case of his [i. e., the President's] removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen or until the inability of the President be removed."²

It will be observed from the foregoing that, by the antecedent decision of the Convention, the Vice President, according to the express terms of the passage I have italicized, was merely to "exercise [the] powers and duties [of the Presidency]" whilst any need to do so might continue; he was not, apparently, intended to "succeed to the Presidency," or "become President," in any case at all.

In considering the purport of the change proposed by the committee of style, it is important to remember that that committee had been appointed merely "to revise the style of and arrange the articles which had been agreed to by the House";³ that is, by the Convention. It is true the committee did, in a few instances, recommend changes of substance; but in an instance like the present, in which, as I have shown, no change of substance was really expressed, it is not to be assumed that such a change was intended. The committee simply thought it unnecessary to spell out that "the Vice President," in any case of need, should merely "exercise the powers and duties of the Presidency"—that is to say, merely "act as President"—because such was the nature of a "vice" office such as that which the Vice President was to have. Similarly, I suppose, they thought it unnecessary to spell out, in cases of Presidential "inability," that the Vice President was to "exercise the powers of the Presidency," merely "until the disability of the President [should] be removed," because, again, this was of the essence of his position as "Vice President." And, finally, they thought it unnecessary to provide that the Vice President should not in any case, "exercise the Presidential powers" beyond the time when "another President [should] be chosen," or "the period for chusing another president [should] arrive," because, by an earlier pro-

¹ Max Farrand, *The Records of the Federal Convention of 1787* (rev. ed. New Haven, 1937), II, 598-599. This work is hereafter cited simply as Farrand.

² Farrand, II, 573 and 575.

³ Farrand, II, 547 and 553.

vision of article II, the term of the Vice President was fixed as "the same" as that of the particular President with whom he might happen to have been elected, and a Vice President could not, of course, in any case "exercise the powers of the Presidency" as "Vice President" for any longer than he was to serve in the latter office. In all these respects, the appointee of Congress under "the law" was in a different situation, and that fact sufficiently accounts for the way the "Presidential-inability" provision was drawn.

Besides the foregoing evidence as to what the Convention meant to do—and, in my opinion, did do—there is still more evidence to the same effect in another piece of redrafting that was done by the committee of style. This was its redrafting of the provision we have already noted, relating to the right of the Senate to choose their Presiding Officer in certain cases.⁴ The provision, it will be remembered runs as follows:

"The Senate shall chuse * * * a President pro tempore, in the Absence of the Vice President, or when he shall *exercise the Office of President* of the United States."

This final draft was to replace part of another provision, "which had been agreed to by the [Convention],"⁵ that read as follows:

"The Vice President shall be ex officio, President of the Senate, except when they sit to try the Impeachment of the President, in which case the Chief Justice shall preside, and excepting also when he shall *exercise the powers and duties of President*, in which case, and in case of his absence, the Senate shall chuse a President pro tempore—"

There is not a shred of evidence that it was intended, either by the committee or by the Convention, to substitute something different in sense from this provision as it related to the subject in hand.⁶ To the men who did the final drafting of the Constitution, the phrases, "exercise the powers and duties of the President" and "exercise the Office of President"—which I have underlined in the foregoing provisions—must, then, have meant one and the same thing. And since I do not see how they could have thought of the Vice President as "exercis[ing] the Office of President," in the cases they had in mind, without also thinking of that "Office" as having "devolve[d] on the Vice President," in those cases, I think it probable they also meant to provide, in the "Presidential-inability" provision, that the "Office" in question should, in those cases, "devolve on the Vice President." But I do not think, for a moment, that they meant, by this, that the Vice President should, in any case, "succeed to the Presidency." The evidence is all the other way. The intention was—and the words used manifested the intention—that the Vice President should merely "act as President"—merely "exercise [that] Office"—temporarily in case of need. And this conclusion seems the proper one, whether the need in the particular case arises from the "inability" of a President, or from his "death," "resignation," or "removal from office." The Vice President was not, in any case, intended to "become President of the United States."

Whence, then, and how have the contrary notion and the practice of swearing in the Vice President as President, in cases requiring his exercise of the Presidential powers, arisen? They have arisen by a series of historical accidents, helped along, I suppose, by the natural desire of Vice Presidents, in such cases, to succeed to the more exalted and better paid office and, also, by certain adventitious circumstances connected with some of the cases that have arisen. The first case under the presidential inability clause did not arise until 54 years after the Constitution was drawn. That was the case of the sudden death of President William Henry Harrison within a month of his inauguration in 1841. There was, in that case, no such problem as that with which your present House committee is concerned. It was a clear case of permanent inability: the President was dead. The Vice President, John Tyler, was, as I understand,⁷ accordingly sworn in as President without much hesitation; and the practice thus was started which, though it was then and has since occasionally been questioned, has come generally to be accepted and has produced a good part of the prevailing confusion about this important matter.

The practice thus initiated in the Tyler case was confirmed by the next case that arose: that of the sudden death of President Zachary Taylor, after only

⁴ Farrand, II, 592

⁵ Loc cit., note 3, supra

⁶ Farrand, II

⁷ I have not myself looked into this Tyler precedent or the other similar precedents hereafter mentioned—I am depending upon what I have read about them by others.

a few days' illness, in July 1850. There was, once more, no such problem as that which your committee is considering; and in accord with the precedent already established the then Vice President, Millard Fillmore, was sworn in as President.

A third case confirming this practice occurred when President Abraham Lincoln was assassinated in 1865. Lincoln was shot on the evening of one day and died early in the morning of the next. There was, again, no such problem as your committee is considering; and the Vice President, Andrew Johnson, was sworn in as President. His status as President was afterwards questioned in connection with the proceedings for his impeachment and, in the same connection, eventually admitted, and the practice begun in the case of John Tyler in 1841 was once more confirmed.

These three initial cases, by the mere accidental circumstances of their character, combined to give a false slant to the general understanding of the constitutional provision on the subject, which is now usually called, misleadingly, the Presidential succession. Accordingly, when President James A. Garfield was shot, on July 2, 1881, and lay thereafter in a condition of "inability to discharge the duties of the Presidency" for more than 11 weeks, until September 19 of that year, the then Vice President, Chester A. Arthur, declined to take over the duties of the Presidency, as the Constitution requires, because, it is said, he did not wish to appear indecently anxious to oust the wounded President from his office. Similar considerations were apparently operative in what happened after President Woodrow Wilson was stricken in 1919, and, again, during the period of uncertain duration during which our present President, Dwight D. Eisenhower, was in a condition of "inability to discharge the Powers and Duties of [his] Office," after September 24, 1955.

The belief that has operated in these last three cases—that a Vice President can take over only by ousting a President permanently from his office—is a belief, as I have tried to show, that has no foundation in the Constitution and was certainly not entertained by the men who drew the document. The practice of swearing in Vice Presidents as Presidents upon the death of the Presidents with whom they were elected, which has occurred seven times in our history, is likewise without foundation in the Constitution. It is a practice that arose by historical accident 54 or more years after the document was drawn, was not contemplated by the framers, and was not provided for in the instrument they drew. Whether or not the practice is now to be regarded as constitutional by custom, it is clear that it ought not to be allowed to obscure and falsify what the Constitution actually provides, and was clearly intended to provide, in the cases in which your committee is primarily interested: the cases, that is, of temporary Presidential inability, or cases of Presidential inability that may, conceivably, turn out to be temporary.

In accordance with these views, I think the answer to your question VIII ought to be that, in any case of temporary Presidential inability, the Vice President is intended by the Constitution merely "to act as President" until the President's inability terminates; he is not intended "to succeed to the Presidency."

As for your ninth question, I confess I find it hard to conceive how, looking to the future, any Presidential inability can be found to be permanent, except in the case of death. You certainly cannot rely on the prognoses of the medical profession in such cases, since such prognoses often turn out to be wrong; and I do not see what else there would be to rely upon. However, assuming there can be such a case, I think the Vice President was intended, in such a case, to act as President until the end of the particular Presidential term concerned; that is, until the end of the term for which he himself has been elected Vice President.

III

In view of the answer I have suggested to your 9th question, I should, perhaps, comment next upon your 10th question, which reads as follows:

"In the event of a finding of permanent disability, does the language of the Constitution, namely 'or a President shall be elected,' demand the immediate election of a new President? If so, would the election be for a 4-year term or for the unexpired term of the disabled President?"

The words of the Constitution which you quote in this question do not, in my opinion, "demand the immediate election of a new President," either "for a 4-year term or for the unexpired term of the disabled President." Standing

by themselves, they are consistent with the possibility that the calling of one or the other of such elections may be the duty, or be within the discretion, of Congress; but they do not, of themselves, demand, or authorize, such action; and whether Congress has any such duty, or any such discretion, must therefore be determined by other provisions of the Constitution.

To begin with, then, it is clear that the words in question can have no possible application to any "finding of a permanent disability" on the part of the President only; for, in the Constitution, the words you quote have grammatical application only to the appointee of Congress under "the Law," in "the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President." In addition to this the Vice President, by the terms of the Constitution, is elected for a 4-year term in his own right. This right of the Vice President is impossible to reconcile with the possibility about which you ask. For the method of electing Presidents that is prescribed in the Constitution requires the simultaneous election of a Vice President "for the same term" as the President being elected. No such election as you suggest would therefore be possible without defeating the Vice President's express right to his 4-year term of office. In these circumstances, it is doubly clear that the words you quote can have no application to any "finding of a permanent disability" on the part of the President only.

There remains the question whether an irregular election of one or the other of the kinds you suggest was intended to be called, or possibly called, by Congress in cases in which both the President and Vice President might be permanently out of the picture. This question, also, must be decided by provisions of the Constitution other than the one you quote, since that provision is, again, not in itself determinative.

Another provision of the Constitution which, though it does not provide for an actual duty in the premises on the part of Congress, nevertheless seems to me to bear directly upon this matter is the provision in section 1 of article II, that "the Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The provision, it will be noted, is merely permissive and does not, in terms, purport to give power; yet the determination of the matters to which the provision relates—subject, of course, to any more particular provisions on the subject that the Constitution may contain—certainly seems to involve the power of calling—that is, of determining—when Presidential elections shall occur.

It seems significant, too, that the Convention cast in similar terms its resolution of "Opinion" that the old Continental Congress should, in effect, have power to call the first Presidential election. The resolution expressing this "Opinion" ran as follows:

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assemble should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution * * *."*

In the light of the accordant language of this resolve, I think the provision from the Constitution last quoted above was intended by the Convention to be a full permission to Congress—in spite of the control over the "Manner" of "appointing electors" antecedently given to the State legislatures⁹ to determine when presidential elections should occur. Except for possible implied interdictions arising from this appointment-of-electors clause, power in the premises would seem to have belonged to Congress anyhow, under the necessary-and-proper clause of section 8 of article I. For, with both President and Vice President dead or otherwise permanently out of the picture, it would certainly seem to be necessary and proper legislation for Congress to call a presidential (and vice presidential) election "for carrying into Execution the * * * Powers vested by th[e] Constitution in the" President and Vice President as "Officers of the Government of the United States." The express power of Congress to designate under "the Law" an "Officer of the United States" to "act as President" until an election shall occur is in no way inconsistent with this conclusion.

There is not much in the known history of the Federal Convention that sheds light on this particular matter, but there is a little. This little appears mainly

* Farrand, II, 665

⁹ Constitution, art II sec 1

in James Madison's notes for September 7 Edmund Randolph had just proposed to add the following to the provisions that had been proposed by a grand committee of August 31 for "constituting the Executive":

"The Legislature [i. e., Congress] may declare by law what officer of the United States—shall act as President in the case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly until the time of electing a President shall arrive"

Madison's notes go on as follows

"Mr Madison observed that this, as worded, would prevent a supply of the vacancy by an intermediate election of the President, and moved to substitute—'until such disability be removed, or a President shall be elected—' Mr. Governr. Morris 2ded. the motion which was agreed to.

"It seemed to be an objection to the provision with some, that according to the process established for chusing the Executive, there would be difficulty in effecting it at other than the fixed periods; with others, that the Legislature was restrained in the temporary appointments to 'officers' of the U. S.: they wished it to be at liberty to appoint others than such.

"On the motion of Mr. Randolph as amended, it passed in the affirmative"¹⁰

It appears from the foregoing that the Convention, after the subject was brought to their attention, rejected language precluding irregular presidential elections and adopted, instead, the language now in the document, which, it had been pointed out, would not have such preclusive effect. This action implies a belief that Congress would have power in the premises if the subject was not in some way excluded from their authority. Such a belief was in accord, as I have already suggested, with other actual provisions of the Constitution as the document was eventually proposed to the country. It was likewise in accord with the Constitution as it was proposed to be drawn when these proceedings occurred.

A conceivable objection to the Convention's action of September 7 was, however, that it left open the argument that Congress, by merely omitting to fix a time for a Presidential election, could keep its appointee under "the Law" "act[ing] as President" indefinitely. Probably it was this consideration that led the Committee of Style, on September 12, to suggest a return to the words, "or the period for chusing another president arrive."¹¹ The Convention voted to the contrary, however, on September 15¹² Apparently, then, it was thought important not to preclude the possibility of irregular presidential elections. This argues an intention on the part of the Convention to provide for them, but, as the Constitution shows, an intention to provide for them, not as a duty, but merely within the discretion of Congress. That body's obligation to abide by the elaborately stipulated ordinary mode of electing Presidents was probably thought to be writ sufficiently large in the other provisions on the subject in the document

To conclude upon the present point, I think the answers to your 10th question ought to be (1) that Congress has no power to call an irregular presidential election in cases of the permanent disablement of the President only; the constitutional rights of the Vice President preclude it. (2) that Congress does have power to call irregular Presidential elections in all cases of the permanent "inability" (assuming such a case can properly be found), "death," "resignation," or "removal" of both President and Vice President, but is under no absolute duty to do so; (3) that, if Congress does call such an election, the 4-year term provisions seem logically to apply to such elections, but that perhaps the calling of an election "for the unexpired term of the disabled President [or Vice President]" might be held to be within the discretion of Congress. I see no way of answering this last question with any certainty.

IV

I come now to the question of how Presidential inability—and, for that matter, Vice Presidential inability—is to be determined under the Constitution, in any case in which these officers, respectively, or together, do not agree to, or concur in, the fact in question. You do not really ask this question. Instead, it seems to be assumed, in your question II-VII, that no provision was made upon this subject in the Constitution. I think this is a mistake. It is of course true that no provision was made upon the subject specifically, either in the Presidential-

¹⁰ Farrand, II, 535

¹¹ Farrand, II, 599

¹² Farrand, II, 626.

inability provision of section 1 of article II or at any other point in the document. But the subject was nonetheless fully covered in general terms, along with other subjects deemed by the Convention to be similar. The subject, it seems to me certain, was not overlooked, as is commonly assumed to have been the case.

The high improbability of the view that the subject was overlooked will be apparent from a brief review of certain facts connected with the Federal Convention's framing of the Presidential-inability provision. We need not go back any further than August 27, when the Convention finally got around to the provisions on the subject in the report of its Committee of Detail. Various objections to the committee's provisions were then made, and Hugh Williamson, of North Carolina, finally moved that the provision "relating to a provisional successor to the President be postponed." John Dickinson, of Delaware, "2ded, the postponement, remarking that it was too vague." "What is the extent of the term 'disability,'" he asked, "& who is to be the judge of it?" The postponement, Madison records, was agreed to "new con:"³³ Four days later, on August 31, this particular postponed provision, together with various others that had "been postponed [at other times], and such parts of [prior committee] Reports as ha[d] not been acted on," was referred to a grand committee of one member from each State, for consideration and recommendation. North Carolina was represented on this committee by Hugh Williamson, who had moved the postponement of the Presidential-inability provision 4 days before, and Delaware was represented by John Dickinson, who had then seconded Williamson's motion and complained because the Constitution, as it then was envisaged in the report of the Committee of Detail, made no provision as to "who [was] to be Judge of [Presidential 'disability']"³⁴ Four days after its appointment, this committee reported on the subject of constituting the Executive. The mode of electing that officer was proposed to be changed, but the Presidential-inability provision that the Committee of Detail had suggested was recommended without material alteration in the respects in which we are here interested; that is, it was still to be provided, "in case of [the President's] removal [from office], death, absence, resignation or inability to discharge the powers or duties of his office," that he was to be superseded in those "powers or duties," "until another President [should] be chosen, or until the inability of the President [should] be removed." And the committee made no recommendation at all as to "who [should] be the judge of [the President's inability]."³⁵

The foregoing are the facts that seem to me to preclude, as a logical probability, any conclusion that the problem of determining "Presidential inability" was simply overlooked by the Federal Convention; that, as one commentator has suggested, "comparatively little thought was given to the matter." After all, the committee of August 31 was appointed to give thought to the matter; the man who had raised the objection was a member of the committee; and the committee began its deliberations only 4 days after his objection was raised. What actually happened may readily be perceived, I think, if we review the state in which the Constitution was, in certain important respects, at the time Dickinson's objection was made; and if we then, in addition, note certain changes in it, in these particulars, which were made a little later on the same day.

The provisions I have in mind are the judiciary provisions of the document. Early on August 27, when Dickinson made his objection, the national judicial power had not the scope it afterward was given. The power of the national courts then comprehended only (1) a part of the cases now within the "party" categories found in article III, among which part "Controversies to which the United States s[ould] be a Party" were not included; (2) cases of impeachment, later transferred to the Senate; (3) "cases of admiralty and maritime jurisdiction"; and (4) "cases arising under laws passed by the Legislature of the United States."³⁶ That was all; and in these actual circumstances in which

³³ Farrand, II, 427. The postponed provision read as follows: "In case of his [the President's] removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed." *Ibid.*, 186.

³⁴ Farrand, II, 473 and 481.

³⁵ Farrand, II, 493-495 and 497-499. The "Presidential inability" provision recommended by the committee read as follows: "* * * in case of his [the President's] removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed." Cf. note 13 supra. The committee substituted "inability" for "disability." In the end, the Convention, unable, apparently, to choose between them, used both "Inability" and "Disability" in the Constitution. They apparently were used synonymously.

³⁶ Farrand, II, 186.

Dickinson had spoken, his objection that there was no provision as to "who [was] to be the judge of [Presidential disability]" was incontestably correct.

A little later, however, on the same day, various important changes were made in the judiciary provisions that altered all this. In Madison's scanty notes on these important changes, there is, it is true, nothing to indicate that Dickinson's objection and the alterations in question were related as cause and effects, that is, there is nothing, except the juxtaposition of these events in time: except the circumstance that Dickinson's objection came first, and the changes afterward; and except the fact that certain of the changes did cure Dickinson's objection. These circumstances that appear, however, seem sufficient to ground a pretty solid inference that the changes in question were, in fact, brought about, in part, by Dickinson's objection, though it is not to be doubted that other unrecorded causative considerations were operative, also.

The categories of the national judicial power in article III of the Constitution involve, it is generally recognized, a great amount of overlapping. In the case of the subject of present interest, no less than four of the changes made on August 27 had some curative relevance to Dickinson's objection. For present purposes, it seems, however, to be enough to note merely 2 of these relevant changes; for these 2, taken together, are easily shown to have been completely curative of Dickinson's objection, and the other alterations in no way contradict this result.¹⁷

The particular changes in which we are interested were moved by William Samuel Johnson, of Connecticut; and their adoption resulted in an extension of the national judicial power to "all Cases in Law and Equity, arising under th[e] Constitution [of the United States]";¹⁸ as the third article of the document now provides. The words "in Law and Equity," in this article, have always been understood to invest the national courts, in the cases covered, with full equitable and legal powers; that is, with authority to administer, in such cases, all the remedies usual and customary both in courts of law and in courts of equity. "Cases * * * arising under the Constitution," it is also well settled, means cases involving the meaning or application of some provision of the document. Such "Cases," to be covered, have, it is true, to be what are generally called "justiciable cases"; but any "case" of a kind customarily adjudicated by courts of justice when the Constitution was drawn would fall incontestably into that category.

When the Constitution was drawn, one of the ancient remedies in courts of law, as distinct from courts of equity, was the remedy of quo warranto. Originally administered upon the issuance of the common-law writ of quo warranto, this practice had been superseded by the time the Constitution was drawn, and the practice then was to administer the remedy upon presentation by the public prosecutor, either upon his own initiative or upon the relation of an interested citizen, or citizens, of what was called "an information in the nature of a quo warranto." The initiation of the remedy in which we are interested had thus become, by 1787, criminal in form; but the remedy, at least by that time, partook no further of this character. The purpose of the remedy (though it had some other uses) is described by James L. High, the principal American commentator on the subject, as that "of correcting the usurpation, mis-user, or non-user, of a public office."¹⁹ The judgment, in a successful proceeding, was simply one of ouster from the public functions constituting the particular office; there was no penalty; and the proceedings had none of the usual incidents of criminal proceedings. The burden of showing title to the office, or authority, in dispute was, for example, on the respondent; the government—or the relator—had only to answer the case the respondent made.²⁰

The plain effect of the "Presidential inability" provision in the Constitution is, in all cases of Presidential "inability," to vest the Presidential powers and du-

¹⁷ The other two changes having curative relevance to Dickinson's objection were (1) the addition of "controversies to which the United States shall be a party," and (2) the striking out of the limiting words "passed by the Legislature" from the category of "cases arising under laws passed by the Legislature of the United States." Farrand, 430 and 431.

¹⁸ Farrand, II, 428 and 430.

¹⁹ High, *Extraordinary Legal Remedies* (2d ed.; Chicago, 1884), 458. He also says (p. 491): "In this country * * * the jurisdiction has been most frequently exercised for the purpose of determining disputed questions of title to public office, and for deciding upon the proper person entitled to hold the office and exercise its functions."

²⁰ *Ibid.*, 497. High adds: "The principle has been carried even further, and it has been held that it is incumbent upon the respondent to show, not only his title, but also the continued existence of every qualification necessary to the enjoyment of the office, and that it is not sufficient for him to state the qualifications necessary to the appointment, and rely on the presumption of their continuance."

ties, or the Presidential office—it does not, for our present purpose, really matter which—in the Vice President and, likewise, to vest these powers and duties, or this office, in the President again, in such a case, if, and when, the President's "disability be removed." In addition, the provision, with relevant legislation by Congress, has the effect, in all cases of "inability, both of the President and Vice President," of vesting the Presidential powers and duties, or the office which these constitute, in the appointee of Congress under "the law" and, further, of vesting these powers and duties, or this office, in the President, or Vice President, again, in such a case, if, and when, "the disability [of either of these officers] be removed." To a lawyer versed in the law that was customary in America when the Constitution was drawn, every one of the foregoing "cases" would have appeared to be, without question, "a case in law," as distinct from equity; and a "case in law," moreover, properly remediable by proceedings in quo warranto. And because every one of these "cases" would have been seen at once to involve necessarily the meaning and application of the "Presidential-inability" provision of the Constitution, they would also have been recognized to be "cases, in law * * *, arising under the Constitution," within the meaning of the first category of "cases" in the judiciary article of the document.

The principle of the separation of powers, it may be well here to add, would in no way affect the propriety of this conclusion. The remedy of quo warranto has been used in various of our States where this principle obtains, with respect to the office of governor.²¹ As High points out, the remedy of quo warranto "does [not] command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed."²² High adds that "it is doubtless due to the comparatively short tenure of offices in this country, as well as the method of popular elections which forms the distinctive feature of the American system, that the jurisdiction [in quo warranto] is more frequently invoked for the determination of disputed questions of title to public offices, in this country, than for all other causes combined."²³

The committee will observe that the conclusion I am suggesting makes the Constitution a good deal more a sensible document, as it relates to this matter, than it otherwise appears to be. In addition to this, the behavior of the Federal Convention in the premises; the behavior of the committee it appointed to consider the point; and the behavior of John Dickinson, the member of the committee who had raised the point; all become sensible and easily comprehensible under the view I am suggesting. For, if the changes made on the motion of Johnson, of Connecticut, a little later in the day, on August 27, did actually cure the deficiency Dickinson had pointed out, there was no reason at all why Dickinson, or the committee, or the Federal Convention should have given any further thought to the subject; but if the changes in question had no such effect—if, as is commonly assumed, nothing relevant was done between the time of Dickinson's objection and the appointment of the committee of August 31—then the behavior of the committee, the behavior of Dickinson, and the behavior of the Convention, all become puzzling, incredible, negligent, and unprofessional (where lawyers were involved) in a high degree. In view of the nature of these alternatives, as well as the other considerations earlier pointed out, the conclusion seems to me a very certain one: "Cases" of Presidential or of Vice Presidential "inability," as well as "cases" of "the removal [there]of," were intended to be decided in the national courts, in proceedings in the nature of quo warranto, as "cases in law" involving the title to a public office, or function, "arising under th[e] Constitution [of the United States]"

V

There remain, of the questions listed in your questionnaire, those relating to the powers of Congress in the premises; those relating to the limitations, if any, upon Congress, powers; and those relating to the kind of legislation—or, conceivably, to the kind of change in the Constitution—which the situation that has developed seems to require.

²¹ *Ibid.*, 502

²² *Ibid.*, 471.

²³ *Ibid.*, 475.

Whatever powers Congress has it has under its express power "to make all laws which shall be necessary and proper for carrying into execution the * * * Powers vested by th[e] Constitution in * * * any * * * officers * * * of [the United States]." The effect of the "Presidential-inability" provision is, in certain circumstances, to "vest" the powers of the Presidency, in the Vice President or the appointee of Congress under "the law," and, in certain others, to re-"vest" those powers in the President or the Vice President, as the particular case may be. In each of these cases, the "necessary-and-proper" clause vests Congress with full and express power to make laws to carry this provision into effect. Apart from limitations growing out of other relevant provisions of the document, this is a power to do whatever seems wise and expedient in the premises.

If I am right, however, that the Constitution provides for the adjudicating of "cases" under the "Presidential-inability" clause in the national courts, Congress cannot constitutionally put this function into any other organ of government. The language of the categories of "the judicial power" in article III is mandatory; it was intentionally made so with the purpose, among others, of separating the function of judging, from the functions of legislation and execution. The mandatory character of these provisions of article III has never, I am fully aware, been completely observed. Nevertheless, the principle of the separation of powers is regarded as fundamental in our Government, and I do not see how Congress could take the cases in question away from the national courts without violating this acknowledged principle.

Apart, however, from this question of constitutional obligation, I do not see why Congress should wish to do this. The framers of the Constitution, in putting these cases into the hands of the courts, put them, it seems to me, into the fittest hands there were for deciding them. This will be apparent from a consideration of some of the alternative suggestions for the deciding of these cases, that have recently been put forward.

I have seen suggestions, for example, that the President ought to be allowed to decide on his own "inability"; that, after all, he is the best judge of it. I have also seen suggestions that the Vice President decide; or that these two officers together decide. These suggestions simply do not meet the necessities of the situation. For there is no problem, except (1) where a President—or Vice President—holds onto the powers of the Presidency—from whatever motives—in the face of a publicly known, or suspected, "inability," partial or total, to "discharge" them, or (2) where a Vice President or appointee of Congress under "the law" holds onto the Presidential powers—again, from whatever motives—in the face of Presidential or Vice Presidential recovery from "inability." The real necessities of all these cases arise from the public interest that exists, of having a speedy determination, as objective as possible, of the question of "inability," or "ability," that such cases respectively involve, or are suspected to involve by the public—and, I might add, under present conditions, by the public, not only here but abroad. That these necessities are not met by suggestions, that the President decide, that the Vice President decide, or that both these officers together decide, seems perfectly obvious.

Another suggestion that has been made is that the President's Cabinet decide on his inability. This, in effect, is a suggestion that we continue what we have very largely had in the three clear cases of Presidential inability that have thus far arisen; for there can be no question that Cabinet officers have had a very large part in deciding, in these cases, what was to be done. Are Cabinet officers fit for such a decision? It seems to me very clear they are not. Cabinet officers are political appointees, men still in the thick of competitive politics; their tenure of their offices may very well be directly affected by what is decided about a President's inability; or they may conceive that it will be affected indirectly, in consequence of the effect which such a decision may have upon their party's chances of success at the next election. That such considerations have entered into the decisions made in the cases that have arisen seems to me clear beyond any doubt. I do not criticize these officers because their judgment has been swayed by such considerations: they are only human, and nothing else is to be expected. But the fact remains that Cabinet officers are very ill-circumstanced to render an objective decision. Entirely apart from the unconstitutionality of the suggestion, I think Cabinet officers are manifestly unfit, as interested parties, to decide on the inability of the President under whom they hold office.

There have also been suggestions that Congress decide on the President's "inability." Yet, if the majorities in Congress are of the same party as the administration in power, the same kind of considerations, though not all of them,

nor with quite the same intensity, will operate in Congress as operate upon the President's Cabinet. And if the majorities in Congress are of the opposite party, you will tend to get an opposite decision for reasons, however, that will tend to be basically similar. Congress ought undoubtedly to provide a function for its Members in this matter, as I shall try later to show; but their proper function, it seems to me, is not that of actual decision upon the questions of Presidential, or Vice Presidential, inability, or its removal.

Another suggestion that has been advanced is that some sort of "independent" governmental agency, or "commission," be set up, preferably of a permanent nature, for the sole purpose of passing on questions of Presidential inability when, and if—during the entire life, or entire service, of the projected commissioners—any such question shall happen to arise. Some of the persons advancing this idea have further suggested that the commission ought to be made up of medical men. Apparently it is assumed that the question of Presidential inability under the Constitution is purely a medical question. It is not. Even in cases where a President's health is involved, there are other questions: how much his health is likely to impair the performance of the executive functions, and whether the impairment to be expected will be of such a magnitude and such importance as to warrant a judgment of inability, as a practical governmental matter under the Constitution. I cannot see that medical men have any competence at all for the decision of such a question. Medical men have an appropriate function in this business; but it is the function of expert witnesses where medical questions are involved, and nothing more.

But even if the proposed "independent" body were not made up of medical men, I fail to see how it could possibly be made up in a way that would entitle it to a rational preference over the courts. If made up of men in government, its members would have to be sufficiently prominent so their decision would have weight. If they were members of the executive departments or Congress, you would run into the same objections I have already considered. If they were judges, they might as well hear the cases in their courts. And if the "independent" body were made up of nonparticipants in Government, it seems to me its members would be likely to lack the experience and ability requisite to a sound decision. Perhaps this danger could be met; but it would at least be present.

The courts, on the other hand, seem to me to be recommended in preference to all other possible agencies by at least two considerations. First, there is their experience: they are used to deciding complicated questions of mixed fact and law such as the cases under discussion would be likely to present, and they are accustomed, also, to evaluating testimony by interested witnesses such as would be certain to appear in Presidential inability cases. In addition to their experience, they have the artificial characteristics that the Federal Convention so solicitously gave them. I do not conceive, to be sure, that, in consequence of these, our courts are immunized completely against the sort of considerations I have mentioned as likely to sway the executive departments and Congress. No American, I suppose, is completely immune to these. But the judges are—or, at least, they ought to consider themselves to be—and I think they do in general consider themselves to be, permanently out of competitive politics; and their offices and salaries are secured to them, however presidential elections may turn out. These facts insure that we are, at least, more likely to get objective decisions from the courts in these Presidential-inability cases than we are to get such decisions from any other agency of similar competence and experience. Accordingly, I should not think that Congress ought to take these cases away from the courts even if I thought that body possessed of constitutional power to do so.

Does this mean that Congress ought not to legislate in the premises at all? By no means. Congressional legislation, in my judgment, is very desirable for two distinct purposes.

The first purpose which, it seems to me, Congress ought to aim at is a clarification of the general understanding of the Constitution as it relates to this whole matter. Any legislation by Congress ought, therefore, to make clear that the remedy in cases under the Presidential-inability clause shall be by proceedings in the nature of quo warranto, in the national courts; that such cases are "cases, in law, arising under the Constitution." These things could easily be made clear by the phrasing of the legislation. The legislation ought also to indicate the opinion of Congress—and of the President, if he signed the law (as presumably he would)—that the right of the Vice President, in inability cases, is merely to "act as President" temporarily "until [the President's] disability be removed."

This could be done by giving an absolute right to initiate proceedings, as a relator, not only to the Vice President in cases of Presidential inability, but to the President in cases where his "disability [is later] removed." If legislation involving such features were adopted, I believe it would completely allay the doubts and uncertainties that have grown up in regard to these matters under the Constitution.

A second object which I think Congress ought to have in any legislation it passes is that of molding the remedy of quo warranto, in the light of our experience in the three cases of Presidential inability that have arisen, so as to assure that, in such cases, in the future, the intended remedy will be used when the public interest demands it. There are not many cases in the Supreme Court's reports, that deal with the subject of quo warranto as applied to officers of the United States. There are, however, a few such cases; and these indicate a settled doctrine, on the part of the Court, that, in the absence of explicit legislation to the contrary by Congress, the remedy in quo warranto, as against national officers, is available only to the Government.²⁴ "Only to the Government" means, of course, only to the Attorney-General, on his own motion; and that, in turn, would mean, as a practical matter, that the remedy would be "available only to the administration," unless Congress should otherwise expressly provide. To legislate in a manner that would leave the matter in such a state would amount to giving the right to initiate proceedings to the President's Cabinet, and such an arrangement would be open to all the objections to which, as I have shown, the vesting of the function of actual decision in the Cabinet would be open.

Nor do I think the situation would be materially mended by providing merely for an absolute relator's right in the Vice President in cases of Presidential inability. Partisan considerations would still be likely to enter very largely into decisions as to whether the right should be exercised. It seems to me there is but one way this difficulty can be surmounted. This would be harnessing the force of partisanship in the public interest. This could be accomplished by giving absolute relators' rights to initiate proceedings in Presidential-inability cases, along with a right to their own separate counsel, to the opposition party in Congress. To assure such a right to the opposition, the right ought to be given to a minority in Congress. How large the minority should be, I shall not undertake to say; but it ought not to be so large as to carry with it a probability of the opposition's losing its right to an usually large administration majority in either House of Congress. And, on the other hand, the minority required ought to be large enough to insure that any action taken will be responsible action, representing a fairly widespread point of view. If such a provision were made, I believe it would restore the confidence of the public that, in any Presidential-inability cases in the future, the problems involved were being decided as objectively as possible in the public interest. Americans would have less worry, lest, in these perilous times, the country drift into a crisis with the executive arm of the Government in a weakened and disorderly condition.

I suppose nearly everyone would agree that it would be appropriate and expedient to put cases under the Presidential-inability clause within the original jurisdiction of the Supreme Court of the United States. Unfortunately, the Court's original jurisdiction as provided in the Constitution would not cover such cases; and though there is no actual prohibition against adding to this jurisdiction to be found in the Constitution, either implied or explicit, the Court held at an early day that such additions were forbidden.²⁵ The doctrine has never accomplished anything but embarrassment for Congress in providing expeditiously for intragovernmental litigation, such the Presidential-inability cases would be. Yet the doctrine has never been overruled. Perhaps, the Court would be willing to overrule it if given the opportunity. Otherwise, if it be desired to put Presidential-inability cases within the original jurisdiction of the Court, it will be necessary to amend the Constitution. It would be sufficient to say: "The Constitution shall not hereafter be construed to forbid Congress from adding to the original jurisdiction of the Supreme Court of the United States as that is provided in the Constitution." Such an amendment, I suppose, would be readily ratified.

²⁴ See *Wallace v. Anderson*, 5 Wheat 291 (1820) *Territory v. Lockwood*, 3 Wall 236 (1865) *Newman v. U. S. ex rel. Frizzell*, 238 U. S. 537 (1915); *Johnson v. Manhattan Ry. Co.*, 280 U. S. 479, 502 (1933).

²⁵ *Marbury v. Madison*, 1 Cr. 137 (1803). I have analyzed this particular doctrine of the *Marbury* case elsewhere. See Crosskey, *Politics and the Constitution*, 1040-2 (Chicago, 1953).

There remains one further point I have noticed, in some comments I have read, vague intimations that the courts could not hear presidential-inability cases because they would be political in character. That such cases would have political ramifications cannot be denied; but such ramifications are present in almost all the constitutional cases decided by the courts. If such ramifications were sufficient to defeat the courts' jurisdiction, they would decide very few constitutional cases. The doctrine of political questions in the Supreme Court's decisions has a very different and much narrower application. It is invoked only where the very question to be decided in a case has been confided by the Constitution to one of the political arms of the Government.²⁶ There would be no room for the application of this doctrine in presidential-inability cases. The general view is that the Constitution failed to confide the presidential-inability issue to anyone at all. As I have already indicated, I think this wrong; but it is at least true that the Constitution confided the issue to no one, except the courts.

I think I have now covered all the points raised by your list of 11 questions and the various subdivisions thereof, even though I have not commented upon all of them specifically. I trust that what I have had to say may be of some assistance to you in your deliberations.

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MY DEAR CONGRESSMAN: Thank you for your inquiry concerning the delicate and vexing problem of presidential inability arising from the inconclusive language of the Constitution. I will reply in general terms, as you suggest may be done, rather than follow the questionnaire, item by item.

At the outset I wish to indicate that although the ultimate question that faces the Committee on the Judiciary remains unanswered, developments over the past 3½ decades have served to minimize, somewhat, the severity of the problem. Today, an acceptable solution to this problem is possible without the Nation having to face a serious constitutional crisis. The fact that steps have been taken by the Congress and the President since 1920 that have tended to institutionalize the office of the Chief Executive, in comparison with the situation as it existed before that date, provides in part the basis for this view.

No President is able, personally and directly, to take care that the laws be faithfully executed. Delegations of authority to executive subordinates to act in the name of the President and without his immediate supervision started early in the Nation's history and have grown in succeeding decades. As presidential responsibilities have increased, so have delegations of authority. A recognition of this development is widespread today, but that should not lead one to overlook its constitutional significance. What is especially meaningful in the context of your survey is the fact that the Congress and the President, in cooperation, have integrated and strengthened the executive branch of the Government, and the Chief Executive's position within it, for the purpose of enabling it to function effectively, efficiently, and coherently. In the face of steadily mounting burdens, authority has been identified and lines of responsibility clarified and sharpened. Due to this development, proper attention today can be, and is, given to most of the affairs of state, regardless of what problem may be occupying the attention of the President.

The adoption of the Budget and Accounting Act of 1921 inaugurated a chain of developments of constitutional significance. The drafting of the budget, with the incidental control connected therewith, centered authority in the Chief Executive to a degree unknown for nearly a century.

Following this, certain logical next steps were taken. The initiation of the budget passed to the direct control of the President by the transfer of the Bureau from the Treasury to the Executive office. Under the stimulus provided by the Report of the President's Committee on Administrative Management (1937) and that of the first Hoover Commission (1949), significant new grants of authority have been made to Presidents to identify and integrate executive responsibility.

²⁶ See, for example, *Coleman v. Miller*, 307 U. S. 433 (1939).

Such great statutes as the Employment Act and the National Security Act, as amended, have taken strides in the same direction. Evidence of changes of an almost revolutionary character in the organization and operation of the office of the President is found in the active existence of top-level Cabinet committees, such as the National Security Council with its Operations Coordinating Board, and such other agencies as the Council of Economic Advisers, the Joint Chiefs of Staff, the Office of Defense Mobilization, and, of course, the Bureau of the Budget.

These developments have meant the vesting of authority to act for the President in executive officers responsible to the President. This has in no way injured the constitutional powers of either the President or the Congress. On the contrary, it has enabled the President to direct the great executive machine without becoming personally lost in executive detail. That is, this development has enabled the President to serve as a sort of chief of staff supervising and directing the work of a giant army of public officials through a small number of key officers directly responsible to him. It is in this sense that the Presidency has lost much of its formerly personalized character. This development has reached such a point that the substitution of a Vice President for a President, at least for a temporary period, would be unlikely to cause an administrative upheaval or a basic shift in policy.

These changes have freed the President from the necessity of making a mass of uncorrelated decisions. At the same time they have made more certain, than was the case earlier, that the mass of decisions that must be made will be made in accord with general policies agreeable to the President. The result of these developments has been an actual lightening of the burdens imposed on the President at the very time that the Nations—and consequently, the President's—responsibilities have increased. In terms of your survey it is important to note that the real burden of the Presidency is not the actual number of hours that he must put in at his desk, but rather the character and immensity of the decisions he has to make. It is possible that the full significance of these developments may not have been visualized by the Nation as a whole. But regardless of that, the fact remains that through them, the Congress has recognized and met a considerable portion of its responsibilities under clause 6 of article II, section 1, of the Constitution, even though it has hardly done so in a way anticipated by the framers. Thus, it has made provision for a portion of the "inability" that modern government has made necessary, even though it has not provided for the total and continuing (temporary or not) inability of a President to act. The Congress may well make further delegations of the Presidential authority before meeting the final necessary step. And the taking of that final step, which is the basis of your inquiry, may be much easier than was that preliminary step, the adoption of the Budget and Accounting Act 35 years ago.

The effective operation of the executive branch of the Government during the recent illness of President Eisenhower stands as a monument to the wise planning of Congresses and Presidents during the 20th century. One would not like to contemplate what might have been the case had there been no equipped and operating Bureau of the Budget, no National Security Council, no Joint Chiefs of Staff, no modern White House staff while the President was confined in the hospital in Denver. The coordinating of the great administrative operations of the Government through Cabinet committees, the Executive Office, and the President's White House staff resulted in the crisis becoming more a personal one rather than a great political-administrative one. Had there been an authorization for still further delegation of Presidential power to the President's principal sub-ordinators, the situation might have involved even less political concern.

The need that your committee faces is based on the single fact that a small number of important constitutional and symbolic functions of government, such as direct legislative and appointive powers, can rarely, if ever, be delegated. In planning for the exercise of such powers during the period of a President's inability to "discharge the powers and duties" of his office, I would suggest that your committee, on the completion of your survey of facts and opinions, follow one of two courses of action. On the one hand, you might propose the creation of a Commission of Inquiry on the Presidency, the members of which would be selected by the President, the Speaker of the House of Representatives, and the President pro tempore of the Senate. This body would review the material you have developed and make recommendations to Congress for appropriate action. Due to its character, such an agency would have the advantage of receiving an unusual amount of attention. This might give con-

siderable impact to its recommendations. On the other hand, it might be equally satisfactory for your committee to initiate the proposed changes and seek the concurrence of the Senate and the President. In either case, I would suggest as a solution of the substantive problem the adoption of a joint resolution which would authorize the Congress to act at any time by concurrent resolution (1) to declare the existence of a Presidential inability to discharge Presidential powers and duties, and (2) to declare the prospective duration of the disability. The resolution would follow the language of article II, section I, clause 6 and devolve the constitutional functions of the President on the officer next in line of succession. The joint resolution would similarly provide for the adoption of a further concurrent resolution which would declare the disability at an end or, in an appropriate case, extend the effective period of the earlier resolution. It is suggested here that the rules of the two Houses of the Congress be amended to provide that such a concurrent resolution could be introduced in the appropriate House by either the Speaker or the President pro tempore, and by none other. If further caution seemed necessary, the rules of the two Houses might be modified to require that action on a motion to recognize the existence of a Presidential inability would require an affirmative vote of a majority of the entire membership of each House, and that the vote of each Member should be recorded in open meeting.

Such a power might be abused. But while that is true with all power, and while the fear of abuse is always present, such a fear has not been decisive in preventing the Nation from taking forward steps. Most students of American government would refuse to believe that the Congress would abuse this power any more than it has abused its power of impeachment. Furthermore, the test of any abuse of power is the test of history, not that of the moment.

The joint resolution upon which such a power would be founded would be in itself a quasi-constitutional act. Whether or not it acquired the force of constitutional authority would depend on the way in which power granted by it was exercised and the consequent acceptance by the Nation of such an exercise of power.

Were this, or a roughly similar proposal, adopted, the principal questions set forth in your inquiry would be resolved. For example, it would be unnecessary under this plan to spell out the meaning of the term "nability" with precision. It is to be expected that an adequate definition of the term would grow out of statesmenlike actions of the Congress. Were the word given a narrowly conceived meaning in any single enactment, that meaning might well resolve the problems of the past while failing to meet the unpredictable ones of the future.

The final question as to whether a Vice President succeeds to the office of the President or merely to the duties of that office is one of no great moment, despite considerable opinion to the contrary. Where a President has died in office, custom and the forthright actions of Vice Presidents have resolved the problem with complete satisfaction. In the resolution of this question as posed by your inquiry, the Congress would be advised to use the language of article II, section I, clause 6 of the Constitution and permit experience to supply the meaning.

In conclusion, may I repeat: Joint actions by Congresses and Presidents have gone far toward meeting the problem posed by your letter and questionnaire. In taking the final step that clearly needs to be taken, the political branches of the Government should not lose sight of the fact that America has been successful in meeting nice constitutional uncertainties by permitting them to be resolved by the wisdom of experience rather than by the wisdom of one particular moment.

Very truly yours,

CHARLES AIKIN,
Professor of Political Science.

P. S.—Items that might be included in the biographical sketch you requested are the following:

Degrees: Bachelor of Arts, Bachelor of Laws, Doctor of Philosophy.

Member, Ohio bar

Research assistant, California Constitutional Commission, 1930.

District price officer, OPA, 1942-45.

Assistant to the Honorable Dean Acheson; Vice Chairman, Commission on the Organization of the Executive Branch of the Government, 1948-49

Specialist with Department of State, occupied Germany, summer, 1950.

Publications: National Labor Relations Board Cases, 1939, and articles, notes, and reviews in political science and legal periodicals.

Present position: Professor of political science and associate dean of the College of Letters and Science, University of California, Berkeley, Calif.

CHARLES AIKIN.

UNIVERSITY OF NOTRE DAME,
Notre Dame, Ind., February 21, 1956.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR MR. CELLER: Please accept the following answers to your questionnaire concerning Presidential inability.

I. The term "inability" as used in article 2, section 1, clause 6, of the Constitution was intended in all likelihood to mean a condition of time, place, or circumstance whereby the President became unable to discharge the duties laid upon him by the terms of the Constitution. A clarifying definition should be enacted into law. The law should provide that "inability" also includes both mental and physical disability and that "inability" also includes circumstances under which the President is captured, imprisoned, or similarly impeded in the discharge of his constitutional functions. A period of time would not have to be specified in the definition. Brief periods of inability would appear to come within the rule of *de minimis*.

II In the case of serious illness of the President, the President himself might properly raise the question of his own inability and request the Vice President to act as President until the President recovers from his illness. In case of mental incapacity of the President, it would appear to be the duty of the Vice President to raise the question of the President's inability. In the case of capture or imprisonment of the President it is also clear that it would be the duty of the Vice President to raise the question of the President's inability.

III In the case of serious illness of the President, the President himself should make the determination of inability. Under the Constitution the President remains President until his term expires or until within the term he resigns, dies, or is removed in the manner specified in the Constitution. He may choose not to resign but to turn over the functions of his office to the Vice President for such period as he deems proper because of his own inability. As long as a properly qualified President claims to be President during the term for which he was chosen, he remains President unless impeached and convicted. There can be only one President at a time. Legislation should be enacted to make clear that the Vice President when acting as President while the President is alive is not President but Acting President. Such legislation would probably clear up the chief difficulty under the present state of affairs. Presidents have refused to acknowledge obvious inability in the past because of the mistaken notion that the Vice President would become President upon the determination of inability of the President.

In cases of insanity of the President, long periods of coma, capture, or other condition known to the entire people of the United States as constituting "inability" it seems clear that the Vice President should determine that there is inability of the President. In the normal course of events his judgment would be confirmed by public opinion as expressed by the Congress.

IV There would appear to be ample authority under the Constitution for Congress to enact legislation of the character indicated above. However, serious constitutional doubts would arise if legislation were to provide for the determination of inability by an ad hoc body or permanent commission. Such legislation would affect the very foundation of our constitutional structure. But constitutional or not it would appear to be undesirable.

V If some body or commission is to be provided for I see no good reason for not having it both to initiate the question and to determine it, but, as I have already said, I do not favor having a special body or commission for such purposes.

VI When the President determines his own inability he should not have to state the nature or extent of disability. When the Vice President determines that there is inability, the fact in the usual case would be a matter of public knowledge, but it would appear advisable for him to declare in a public manner to be specified by law what the nature of the disability appears to be.

VII. The President in most cases should himself determine when the disability ceases to exist. If, however, he is in the power of enemies of the United States

at the time he purports to make such a determination, the statute should provide that such purported determination is not to be considered his act or determination since made under duress.

VIII. In the event of a finding of temporary disability or any disability, the Vice President succeeds to the powers and duties of the office and not to the office itself. Such would appear to be the clear meaning of the Constitution, but in view of historic doubts about the matter, legislation should explicitly so provide.

IX. In the event of finding of permanent disability, the Vice President succeeds to the powers and duties of the office and not to the office itself. The Constitution provides for the removal of the President but not on grounds of "inability."

X. I do not believe that in the event of a finding of permanent disability the Constitution demands the immediate election of a new President, but if it does, the election should be for the unexpired term of the disabled President.

XI. Clarifying legislation of the nature indicated above seems to be clearly within the constitutional authority of Congress. The establishment of special bodies for the determination of inability and for the removal of the President would seem to require a constitutional amendment.

Sincerely yours,

ROGER P. PETERS, *Professor of Law.*

P. S.—I was born in Brooklyn, N. Y., February 6, 1905. B. A., University of Texas, LL. B., New York University. Admitted to practice in New York, Supreme Court of the United States. Attorney, Internal Review, Washington, D. C. Professor of law, University of Notre Dame. Articles and book reviews in legal periodicals.

WASHINGTON UNIVERSITY,
DEPARTMENT OF POLITICAL SCIENCE,
St. Louis, Mo., February 21, 1956.

HON. EMANUEL CLELBER,
House of Representatives,
Washington, D. C.

DEAR REPRESENTATIVE CLELBER. While it is probably reasonable to assume that in your deliberations you and the other members of your committee have considered every phase of the involved problem of devising a procedure for use in the case of the disability of the President of the United States, may I nevertheless (even at the risk of being repetitious), list a few points that have not appeared in the newspaper reports that I have seen?

1. It seems to be agreed by all that the wording of any provision relating to "inability" should be general enough to cover the unavailability of the President for the performance of his duties whatever the cause involved might be—mental or physical illness, airplane crash in some inaccessible place, kidnaping, wartime capture, etc.

2. There are obvious objections to a plan under which Congress would be authorized to rule on inability, although all of them stem from an unfortunate lack of confidence in the capacity of Congress to act objectively, justly, and promptly.

3. There are some objections also to the authorization of the Cabinet to judge of the inability of the President. The most serious is that a mentally ailing President could exercise his power of removal and so defeat the whole plan. Furthermore, there have been cabinets (President Lincoln's, for instance), which few would regard as the best repository for such a power.

4. A better plan would seem to be the creation of a special Board or Commission of 5 or 7 members appointed by the Supreme Court for long and possibly staggered terms—but not for life or even good behavior. The board or commission would need authority to employ specialists and experts. The members should be removable by the Court.

5. As a safeguard against any arbitrary or corrupt action by the Cabinet or Board or Commission, authority might be given either to Congress or to the Supreme Court to take action on the petition of the President (1) to declare null and void an order declaring a state of inability or (2) to terminate the period of inability. Certainly it would seem undesirable to vest arbitrary and unreviewable authority in so vital a matter in a small Board.

6. The Constitution seems to require that the Vice President assume the duties of the President when a state of inability is declared. That appears also to be the logical arrangement.

7. But in more than 30 years of our history there has been no Vice President, due to the Vice President's death, resignation, or succession to the Presidency. The Constitution makes no provision in such a case for a new Vice President, although it does, of course, give Congress power to determine the line of succession to the Presidency or to the duties of the Presidency in case no Vice President is available.

By the succession law now in force the Speaker of the House is first in line. He presumably would have to resign his seat in the House even to assume the duties of the President for a temporary duration of the President's inability. Certainly it would be unreasonable to require such a sacrifice of the Speaker.

In any law enacted to deal with the "inability" problem, provision has to be made for a special new line of succession to the duties of the President in the case of the temporary inability of the President when the office of Vice President is vacant. The existing law on the Presidential succession might be copied with the Speaker of the House and the President pro tempore of the Senate omitted—although these two would still head the list in the line of succession to the permanent office of President.

Respectfully yours,

ARNOLD J. LIEN.

The CHAIRMAN. That will terminate these hearings unless former President Truman, in answer to a communication which we are addressing to him in pursuance of a resolution adopted yesterday, will want to appear before the committee.

The hearings will now stand adjourned sine die.

(Whereupon, at 3:04 p. m. the hearing was adjourned sine die.)

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