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# Presidential Inability and Vice Presidential Vacany: With Questions and Answers

American Bar Association

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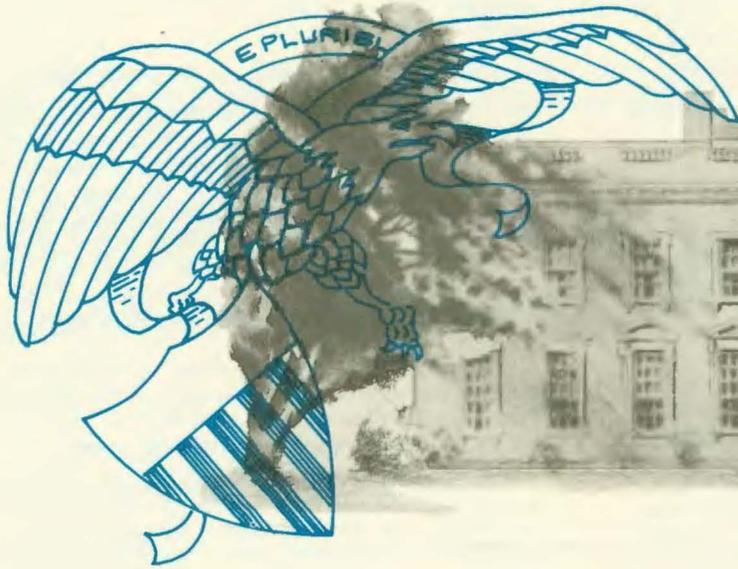
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A Discussion of the  
Proposed Constitutional  
Amendment on

Presidential Inability  
and  
Vice Presidential  
Vacancy

As Approved by  
the 89th Congress  
of the United States

— *With Questions and Answers* —

# A Constitutional Amendment is Needed

Throughout its history, the government of the United States has functioned with a major flaw in the Constitution that guides its actions. There is no clear provision for the temporary transfer of power to the Vice President in the event of the inability of the President to carry out his duties. The historical result of this flaw has been that no Vice President has been willing to act for a disabled President for fear of ousting the President permanently from office. An equally dangerous problem is that there are no procedures established to determine what constitutes a Presidential disability. A separate but related problem completely ignored by the Constitution is how to fill the office of the Vice President when a vacancy occurs.

## *The Tyler Precedent*

The first President to die in office was William Henry Harrison in 1841. Upon Harrison's death, John Tyler, the Vice President at the time, asserted his right to the title and office of President. He thereupon took the Presidential Oath, gave an inaugural address and served as President for the remainder of Harrison's term.

Tyler's action was not without opposition. Newspapers and politicians of the day denounced his assumption of the title of President, expressing their belief that he should only have exercised the "powers and duties" of the office as the "Acting President." Tyler was accepted as President by the Congress, however, and thereby established the "Tyler Precedent" which provides that a Vice President succeeds not only to the "powers and duties" but also to the "office" of President. This doctrine, while posing no problem in case of the death of a President, has caused great dispute concerning its effect in case of inability, since the Constitution does not distinguish between death or inability.

## *The Garfield and Wilson Disabilities*

Later historical events bringing the subject of Presidential inability to a test occurred during the administrations of Presidents Garfield and Wilson. These events were vivid examples of the confusion and danger caused by the "Tyler Precedent."

President Garfield lingered between life and death for eighty days after he was shot by a disgruntled office seeker. During this period, he performed only one official act, the signing of one extradition paper. There was a crisis in foreign affairs, yet only routine business was transacted.

After sixty days, the Cabinet unanimously agreed that it would be desirable for Vice President Chester Arthur to act as President. But there was sharp disagreement over whether the Vice President would actually become the President if he exercised the Presidential power, or whether he would only be "Acting President."

It was considered possible that had Arthur taken over, under the Tyler precedent, Garfield could not have resumed the powers and duties of his office. Therefore, the Vice President did not act, and Garfield's death finally solved the problem at the time.

President Wilson's serious illness of a much longer duration presented the country with very severe problems. Following his stroke in 1919, some twenty-eight bills became law because of the President's failure to act on them.

Executive affairs were administered by Mrs. Wilson, Dr. Grayson and other members of the White House staff.

The cabinet met unofficially from time to time at the call of Secretary of State Lansing. When Wilson learned of the meetings, he forced Lansing to resign, believing that Lansing was plotting to oust him.

Several insisted that Vice President Thomas R. Marshall should act as President. Marshall, as Arthur before him, declined, fearing such a move might permanently deprive Wilson of the Presidency should he recover.

Without clear authority of law, it cannot be expected that future Vice Presidents will act differently if a President is disabled. Since President Eisenhower's illnesses, a memorandum of understanding has been in effect between the President and Vice President, outlining the Vice President's role in the event of Presidential inability. This memorandum, however, does not have the force of law, and is subject to the goodwill of the President.

## *A Vice President Is Needed at All Times*

Directly related to the problem of Presidential inability is that of a vacancy in the office of Vice President. That office has been vacant sixteen times in our Nation's history for a total period of thirty-eight years.

In past years, the office of Vice President was subject to more ridicule than respect. But such is not the case today. The Vice President is the possible successor to the Nation's highest office. He has many responsibilities. He is a member of the Cabinet and of the National Security Council. He is Chairman of the National Aeronautics and Space Council. He has become an important ambassador traveling thousands of miles on behalf of the President.

There is ample evidence that the United States needs a Vice President at all times.

## *Action in the 89th Congress*

In the past, these problems have been endlessly debated. The failure to reach satisfactory solutions has been due, not to lack of interest, but rather to an overabundance of proposals and a reluctance by their authors to admit the value of solutions other than their own.

Two recent events have stimulated a resurgent interest and concern in solving these problems. President Eisenhower suffered a heart attack in 1955 and was disabled on two other occasions during his two terms in office. The tragic assassination of President Kennedy in 1963 again suggested the awesome possibility that a President might linger indefinitely in a condition that would prevent him from leading the country.

The renewed concern stimulated by these events has resulted in a proposal that would settle, after 177 years, the two problems which have been called "our greatest national danger".

The proposal, in the form of a Constitutional amendment, has been approved by both Houses in the 89th Congress. It passed the Senate unanimously (72-0) and was overwhelmingly approved in the House of Representatives (368-29). If ratified by 38 states, the amendment would clarify the Constitutional ambiguity now existing; it would provide specific procedures to be followed in the event of Presidential inability and would also provide a method of filling the Vice Presidency when a vacancy occurs.

# Eighty-ninth Congress of the United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Monday, the fourth day of January,  
one thousand nine hundred and sixty-five*

## Joint Resolution

Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.

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

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.

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

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

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

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

# Questions and Answers

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## ***Why is a Constitutional Amendment necessary?***

Differing interpretations of the Constitutional provisions relating to Presidential inability have resulted in confusion and indecision during actual periods of Presidential inability. As a further result of the differing interpretations, no procedural legislation has ever been enacted by Congress. The only way to avoid the uncertainty which now exists is to clarify the Constitutional language. There is no Constitutional provision for filling a vacancy in the office of the Vice President. A Constitutional amendment is required to establish a procedure. The possibility of legal attack on the constitutionality of the government's action during periods of Presidential crisis will be removed by amending the Constitution.

## ***Why are the present Constitutional provisions concerning the authority of the Vice President in case of Presidential inability inadequate?***

John Tyler was the first Vice President to succeed to the Presidency upon the death of a President. His succession established the precedent that upon the death of the President the successor becomes President rather than "Acting President." Since the Constitutional language makes no distinction between procedures in case of death or inability, it follows, from the Tyler precedent, that a successor, in the event of inability, might also become President and not "Acting President."

It has been agreed generally that in case of the President's temporary disability, the Vice President should act only until the disability is removed and that he should not succeed permanently to the Presidency. The proposed amendment confirms the Tyler precedent in case of death, removal or resignation of the President but excludes cases of inability, which are treated separately.

## ***May the President voluntarily declare his inability?***

Yes. In the event the President becomes incapacitated because of illness, or if for other reasons he will be unable to carry out his powers and duties, he may declare his inability and the Vice President will become "Acting President." When the President wants to resume his powers, he transmits a declaration of ability to the Congress and immediately resumes his office.

## ***May the President be declared disabled other than by his voluntary action?***

Yes. In the event the President is disabled but unable to so declare, as in the event of unconsciousness, or if he refuses to declare his inability, as in case of mental infirmity, the Vice President, with the concurrence of a majority of the Cabinet, may notify Congress of the President's inability. The Vice President immediately becomes "Acting President." Since the Cabinet members are the individuals closest to the President, they are best prepared to determine his condition. Such procedure leaves the primary decision in the Executive Department, thereby maintaining the doctrine of separation of powers.

## ***How does the President resume his powers and duties if he has been involuntarily declared disabled?***

If the President wants to resume his powers and duties after being removed involuntarily, he transmits to the Congress his declaration that no inability exists. If the declaration of the President is not contested by the Vice President and a majority of the Cabinet within four

days, the President resumes his powers and duties. If his declaration is contested by the Vice President and a majority of the Cabinet in writing within four days, the Congress will decide the question of inability. If more than one-third of the members of either House of Congress find the President able, he shall resume his powers and duties immediately. If two-thirds of the members of both Houses find the President is still disabled, the Vice President will continue to act.

## ***Why should we spell out procedures for determining inability in the Constitution?***

History has clearly shown the difficulty in getting agreement in Congress to legislate upon procedures for determining inability. The Constitutional amendment provides for an immediate self-implementing procedure which does not depend upon further Congressional or Presidential action. The procedure for determining inability leaves the responsibility, in the absence of further action by Congress, in the Executive Branch of the government. However, a single method will not be frozen into the Constitution and the amendment is flexible, giving Congress power to substitute another body for inability determinations if the need arises.

## ***Why should the office of the Vice President be filled at all times?***

The office of Vice President today has become a vital part of the Executive Branch of the government. It is essential in this atomic age that there always be a Presidential successor fully conversant with domestic and world affairs and prepared to step into the higher office at any time.

## ***How would the Vice Presidential office be filled?***

When a vacancy occurs in the office of Vice President, the President would nominate a new Vice President. Approval of the President's choice by both the Senate and the House of Representatives would be required. This is essentially the same practice that presently exists in political conventions where the Presidential nominee selects his running mate. It gives the President assurance that the Vice President will be a person in whom he has confidence and who shares his political views. By requiring Congressional approval, the elected representatives of the people play a vital role in filling the vacancy. This procedure provides a rapid, simple, workable means of selecting a new Vice President consistent with the basic framework of our government.

## ***Would the line of succession after the Vice President be affected?***

No. The statutory line of succession following the Vice President is not affected and Congress retains the power to change that line by legislation.

## ***Why not hold a general election for a new Vice President?***

While such a plan has some merit, it has two major defects. First, the delay, confusion and expense involved would be extensive and dangerous in time of crisis. Second, and perhaps more important, a Vice President of a different political party who was opposed to the President might be elected. A President is entitled to complete his term with a working partner of his own party.

These same defects apply equally to suggestions to use the Electoral College or the Congress to nominate and elect a new Vice President.

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**Lyndon B. Johnson**, *President of the United States*

"Our stability is, nonetheless, more superficial than sure. While we are prepared for the possibility of a President's death, we are all but defenseless against the probability of a President's incapacity by injury, illness, senility, or other affliction . . . if we act now, without undue delay, we shall have moved closer to achieving perfection of the great Constitutional document on which the strength and success of our system have rested for nearly two centuries."

**Dwight D. Eisenhower**, *former President of the United States*

". . . in each of these three instances, there was some gap that could have been significant—in which I was a disabled individual from the standpoint of carrying out the emergency duties pertaining to the office—I was fortunate that no crisis arose."

**John W. McCormack**, *Speaker of the United States House of Representatives*

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

"We cannot legislate for every human consideration that might occur in the future. All we can do is the best that we can under the circumstances and . . . having in mind the fact that with all our strength we have weaknesses as human beings."

**Richard M. Nixon**, *former Vice President of the United States*

"Fifty years ago the country could afford to 'muddle along' until the disabled President got well or died. But today . . . there could be a critical period when 'no finger is on the trigger' because of the illness of the Chief Executive."

**Senator Birch Bayh**, *United States Senator from Indiana*

"Whatever tragedy may befall our national leaders, the Nation must continue in stability, functioning to preserve a society in which freedom may prosper. . . . The best way to assure this is to make certain that the Nation always has a Vice President as well as a President."

**Edith Bolling Wilson**, *(Mrs. Woodrow Wilson)*

"I studied every paper, sent from the different Secretaries or Senators . . . I, myself, never made a single decision regarding the disposition of public affairs. The only decision that was mine was what was important and what was not, and . . . when to present matters to my husband."

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*Washington Office*

**1705 DeSales Street, N.W. • Washington, D. C.**



*If*

*We*

*Had*

*No*

*President . . .*

## *Presidential Inability*

Throughout its history, the Government of the United States has functioned with a major flaw in the Constitution that guides its actions. There is no provision for the temporary transfer of power in the event of the inability of the President to carry out his duties. In the event of serious illness or mental incapacity there is no machinery by which the President can hand over his power — upon which our national survival depends — to the Vice President. The President retains at all times the powers of his office, no matter how physically or psychologically incompetent he may be.

By almost incredible good fortune, this lapse of Constitutional authority has not yet opened the door to national chaos. The two most notable and unquestioned cases of Presidents who were disabled while in office occurred during the administrations of President James A. Garfield and President Woodrow Wilson. President Garfield lay near death for nearly three months after an assassin's bullet lodged in his spine. President Wilson suffered a stroke in 1919 from which he never recovered. During the last 18 months of his administration, twenty-eight bills became law because he was unable to act on them and the machinery of government virtually stopped. These two cases dramatically pointed up the terrible danger of the constitutional loophole. The heart attacks suffered by former President Eisenhower and the assassination of the late President Kennedy again dramatized this terrible danger.

## *Vice Presidential Vacancy*

In addition to the problems of presidential inability, the Constitution fails to provide a means for filling the office of Vice President when a vacancy occurs. During our history, because of death or succession, the Vice Presidency has been vacant for a total of 38 years, nearly one-fourth of our history as a nation.

In the early years of the Union, the office of Vice President was often looked upon with ridicule. That, however, is no longer true, and today the Vice Presi-

dency is a vital part of the executive branch of government. There is nearly unanimous agreement that the office should be kept filled at all times.

## *The Proposed Solution*

In the past, the Congress has always stopped short of amending the Constitution even though the danger was recognized. Even the fear that the government might be thrown into chaos has not been sufficient to get legislators to agree upon a single acceptable solution.

But the pressure of the nuclear age finally tipped the scales in favor of providing for the orderly and prompt transfer of power in the case of Presidential inability and for establishing a means to fill a vacancy in the Vice Presidency. The 89th Congress has passed a proposed Constitutional amendment which has been submitted to the states for ratification. The key provisions of the proposed amendment are:

A disabled President could voluntarily vacate the powers and duties of his office, with the Vice President taking over as acting President. In this case, the President could resume his powers when he feels able.

If the President did not declare his disability, the Vice President and a majority of the Cabinet could declare him mentally or physically disabled, and the Vice President would become acting President.

In this case, the President could resume his powers by declaring that he is able unless the Vice President and a majority of the Cabinet declare him still disabled. If they did so, Congress would resolve the dispute. The President would return to office unless a two-thirds majority of each House upheld the Vice President and Cabinet.

If a vacancy occurs in the Vice Presidency, the President would nominate a man to fill it. A majority vote of each House of Congress would be required to confirm the appointment.

If three-fourths of the states—38 of them—ratify the proposal, an amendment will be added to the Constitution that will insure the orderly functioning of our nation's government.

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