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Special Subcommittee To Study Presidential Inability; Committee on the Judiciary. House of Representatives. United States.

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PRESIDENTIAL INABILITY

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HEARING

BEFORE THE

SPECIAL SUBCOMMITTEE ON

STUDY OF PRESIDENTIAL INABILITY

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

EIGHTY-FIFTH CONGRESS

FIRST SESSION

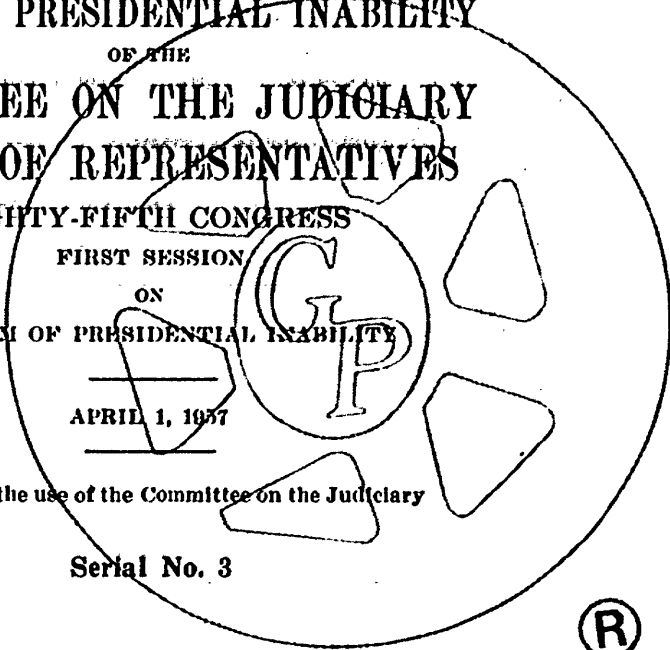
ON

PROBLEM OF PRESIDENTIAL INABILITY

APRIL 1, 1957

Printed for the use of the Committee on the Judiciary

Serial No. 3



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1957

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PRESIDENTIAL INABILITY

MONDAY, APRIL 1, 1937

UNITED STATES HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
SPECIAL SUBCOMMITTEE TO STUDY PRESIDENTIAL INABILITY,
Washington, D. C.

The subcommittee met, pursuant to call, at 10:07 a. m., in room 346 of the Old House Office Building, Hon. Emanuel Celler (chairman of the subcommittee) presiding.

Present: Representatives Emanuel Celler (chairman), Francis E. Walter, Jack Brooks, Kenneth B. Keating, and William M. McCulloch.

Also present: Representatives Feighan, Miller, Hyde, Robson, Cramer, Keenoy, and Moore, and William R. Foley, general counsel.

(The committee had under consideration the following resolutions and bill:)

[H. J. Res. 39, 85th Cong., 1st 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."

[H. J. Res. 20, 85th Cong., 1st 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.

[H. J. Res. 291, 85th Cong., 1st 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 a 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 for the unexpired portion of the then current term.

"Sec. 2. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 3. If the President does not so declare, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President.

"Sec. 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

"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."

[H. J. Res. 20, 85th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States 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 (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. 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.

"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."

[H. R. 6510, 85th Cong., 1st sess.]

A BILL To establish a commission to determine the inability of a President or one acting as President to discharge the powers and duties of the Office of President

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 1 of title 3 of the United States Code is amended as follows:

(1) Add, at the end of the analysis of such chapter, the following:

"21. Presidential Inability Commission."

(2) Add, immediately following the present text, the following new section:

"§ 21. Presidential Inability Commission

"(a) For the purpose of determining the inability of the President to discharge the powers and duties of the Office of President, within the meaning of section 19 of this title, there is hereby established a commission to be known as the Presidential Inability Commission (hereinafter called the "Commission").

"(b) The Commission shall be composed ex officio of ten members as follows:

"(1) The Vice President shall serve as Chairman of the Commission, but if by reason of death, resignation, removal from office, inability or failure to qualify, there is no Vice President, or if the Vice President shall be acting as President, the individual next in line of succession to the powers and duties of the Office of President, as determined by section 19 of this title, shall serve as such Chairman. The Chairman shall have no vote in the proceedings of the Commission.

"(2) The Chief Justice of the United States.

"(3) The senior Associate Justice of the Supreme Court of the United States.

"(4) The Speaker of the House of Representatives, but if such Speaker shall be the Chairman of the Commission, the leader in the House of Representatives of the political party having the greatest number of Members of the House of Representatives.

"(5) The leader in the House of Representatives of the political party having the second greatest number of Members of the House of Representatives.

"(6) The leader in the Senate of the political party having the greatest number of Members of the Senate.

"(7) The leader in the Senate of the political party having the second greatest number of Members of the Senate.

"(8) The Secretary of State.

"(9) The Secretary of the Treasury.

"(10) The Attorney General.

"(c) Seven members of the Commission shall constitute a quorum. The concurrence in writing of at least six members shall be required for any action to be taken, or any determination made, by the Commission.

"(d) Members of the Commission shall serve as such without compensation; but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

"(e) If, in the opinion of the President, he is unable to discharge the powers and duties of the Office of President, he shall so notify the Chairman of the Commission by written communication. Upon receipt of any such communication, or upon receipt of a communication from any three members of the Commission stating that they have sufficient cause to believe that the President is unable to perform the powers and duties of the Office of President, the Chairman shall convene the Commission without delay.

"(f) The Commission shall seek competent medical advice as to the condition of the President and his ability to discharge the powers and duties of his office. If, based upon such findings, the Commission shall determine that the President is unable to discharge the powers and duties of the Office of President, such powers and duties shall thereupon devolve upon the individual next in line of succession to the Presidency, as determined pursuant to section 19 of this title.

"(g) If, in the opinion of the President, he is able at any time to reassume the powers and duties of the Office of President, he shall so notify the Chairman of the Commission by written communication. Upon receipt of any such communication, the Chairman shall convene the Commission without delay and the Commission shall obtain competent medical advice as to the condition of the President and his ability to discharge the powers and duties of his Office. If, based upon such advice, the Commission shall determine that the disability has been removed, and that the President is able to reassume the powers and duties of the Office of President, it shall notify the President and the then acting President of its decision by written communication, and the President shall then reassume the powers and duties of the Office of President.

"(h) Whenever any individual is acting as President, or has acted as President, pursuant to the provisions of section 19 of this title, the word 'President,' as used in this section, shall be deemed to refer to that individual and the word 'Presidency,' as used in this section, shall be deemed to mean the powers and duties of the Office of President."

The CHAIRMAN. The committee will be in order.

We are pleased to have with us this morning the Attorney General. Mr. Attorney General, you may proceed.

STATEMENT OF HON. HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY HON. WILLIAM P. ROGERS, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. BROWNELL. Mr. Chairman, members of the committee, the problem of inability of a President to discharge the powers and duties of his office in case of illness or other unexpected emergency has been of serious concern to our Nation for many years. Recently both the executive and legislative branches of our Government have been giving intensive consideration to the clarification and improvement of our constitutional system relating to such inability.

At the direction of President Eisenhower, which was originally given some time ago, I believe in January 1956, I have been conducting a special study of this problem and am prepared this morning, in response to the invitation from this subcommittee, to present a plan approved by him. He has authorized me to say that, in his opinion, action to amend the Constitution is required to eliminate uncertainty and to provide for the orderly conduct of government in time of future crises due to a President's inability to act. I am also authorized to say for him that the plan which I will present this morning provides a workable and equitable solution which he recommends for favorable consideration by the Congress.

Before reading the text of the proposed constitutional amendment, I will describe its principal provisions.

A major provision of the plan is to make it abundantly clear that, in the event of a President's inability, the Vice President would serve only as Acting President, and only during the continuation of the Presidential inability, and the President would resume the exercise of the powers and duties of his office as soon as he was again able to act.

The plan makes provision for two types of situations which involve Presidential inability:

The first is: If a President should become unable to discharge the powers and duties of his office and so declare that in writing, then the Vice President would become Acting President for the period of inability. Whenever the President is again able to act, he could so declare and he would thereupon resume the powers and duties of his office.

It is my opinion that this provision, standing by itself, would probably take care of most cases of Presidential inability; but I realize a second type of situation might arise in the event—

The CHAIRMAN. Do you mind being interrupted, or do you prefer to conclude your statement first?

Mr. BROWNELL. I will suit your convenience on that, Mr. Chairman.

It might be well for me to go ahead and present my prepared statement, but whatever you want to do is perfectly all right.

The CHAIRMAN. In the case of President Garfield, I wonder whether he was in a position to state in writing whether he was disabled.

Mr. BROWNELL. As we will come to it a little later, there were times during that convalescent period when he wouldn't have been able to do that. But, as I say, there is a second type of situation which might arise in the event that a President is unable or unwilling to declare his inability, so that the plan provides for such case, and says that the Vice President, if he is satisfied of the President's inability, and upon approval in writing of the majority of the heads of the executive departments, who are members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President.

Now, this, you will note, is not for action by the Cabinet alone, but action by the Vice President upon approval, in writing, of the majority of the members of the Cabinet.

The CHAIRMAN. May I ask who initiates it there—the President or the Vice President?

Mr. BROWNELL. It could be either one. I will come to it a little later.

Whenever the President in this case again becomes able to discharge the powers and duties of his office, he may reassume them by declaring in writing that his inability has terminated; and if we want to go to the extreme, ultimate case, where a President might endeavor to act, although clearly unable to do so, I believe the present constitutional provisions for impeachment could be relied upon and appear to be adequate.

Now, just one other preliminary observation, and that is this: That this plan, even if it receives prompt and favorable consideration by the Congress, probably would not become effective during the second term of President Eisenhower because, as we all know after congressional approval, it has to be submitted to the various States for consideration and action.

The CHAIRMAN. Mr. Attorney General, doesn't this arise from the emergency of the President's illness?

Let's face facts. There is nothing personal about the matter, but I don't think the matter would have been presented so pointedly to the Nation, and I don't think the President likewise would have raised the question and we certainly might not have dealt with it, as we have, for a considerable period of time were it not for the double illness of the President and in order to cope with that emergency.

Now, if we are going to have a constitutional amendment, as you indicate, then we are not covering, shall I say, the present emergency because of the illness of the President, and why should we wait?

Mr. BROWNELL. Well, I will come to that in some detail as we go along. As a matter of fact, I have a whole section of this prepared statement in which I deal with that subject; but I would not agree that there is any present emergency, in any real sense----

Mr. KEATING. Mr. Chairman.

Mr. BROWNELL. That calls for action, and I would stress, rather, we must take the long-range viewpoint on this for the best interests of our country in future crises.

That is the way I would like to have us look at it.

Mr. KEATING. Mr. Chairman.

The CHAIRMAN. I only stress the point that this question might not have come up at all were it not for the illness of the President.

While an emergency is not a pleasant thing to contemplate, we are—let's face the facts—presented with a degree—let's put it that way—of an emergency, and that is why I think I got actually interested in this matter.

Mr. KEATING. Mr. Chairman, I don't agree we are faced with any emergency and my interest in this question arose long before the illness of President Eisenhower. I didn't have any bill in, but I have been interested in this subject for years and I think we would make a great mistake if we tried to legislate here simply for any one President or any one situation. We must look at this objectively, as something which is going to stand for years and must stand the test of years.

I have made the suggestion—and I will be glad if the Attorney General could comment on it during the course of his testimony—that we proceed by a two-pronged attack on this problem.

Most students feel, I think, that a law is sufficient, but a great many students of the problem have indicated also that they thought a constitutional amendment is necessary; and the constitutional amendment is the procedure advocated by the Attorney General.

I see no objection—I am not sure there is precedent for it, but I see no objection—to our legislating and at the same time starting a constitutional amendment through the process, which would, as the Attorney General has said, take a good many years; but in suggesting that I do not in any way mean to imply that there is any reason for any hurry in this matter. I don't think that exists, and I don't think that this committee should legislate with that thought in mind.

The CHAIRMAN. Of course, this committee has been proceeding at a very leisurely pace on this matter. There has been no hurry. We have been wrestling with it since 1955. There has been no attempt to hurry it.

I want to say also, when I am speaking of the statute or the constitutional amendment, this is not just to cover the present situation, but it is for the future also.

I think that the present situation exacerbates this lack of specificity on the part of the founding fathers in reference to article II, section 1, clause 6.

I think we ought to jump into the breach and act, although not hastily, but act in a way that will meet the present conditions as well as future conditions.

I am not married to any particular plan, but I think we should act, and act expeditiously.

A constitutional amendment would take probably 2 to 4 years or, at best, probably 3 years. Some legislatures meet biannually, and the longer we wait, the longer we postpone the decision, and the less likelihood there will be any action.

I simply use this difficulty under which we are now laboring as a means to propel this thing to, shall I say, quicker fruition.

Mr. WALTER. I think it is a very unfortunate thing that the President's physical condition should be associated with this legislation.

This is not a new proposal. It has been suggested many years ago. Nobody ever went to the limit, but this is not a new proposal.

Mr. BROWNELL. I thank the Congressman for that statement because I believe it to be true, and I think this subcommittee deserves a great appreciation for the fact they are seriously considering this really as a part of realizing we live in an atomic age. The Government is making all sorts of plans for the orderly continuation of Government in the event of emergency. We have all of our relocation program and a number of other statutes that are being considered, and anyone who thoughtfully considers the realities of the atomic age must realize that the solution of this problem, of continuation of orderly government in the event a President is unable to act, is no longer to be considered as an exercise in theoretical constitutional law, but it is a practical problem of government which must be met, and without undue delay.

Now, with those preliminary remarks, Mr. Chairman, I would like to come to the text of the proposed joint resolution for amendment to the Constitution which I am presenting for your consideration today. I will read the exact language, if I may, and it is:

Resolved by the Senate and House of Representatives of the United States in Congress (two-thirds of each House concurring therein), That in lieu of so much of paragraph 6 of section 1 of article II of the Constitution of the United States as relates to the powers and duties of the Presidential office devolving on the Vice President in the 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 following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

“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

“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 for the unexpired portion of the then current term.

“SEC. 2.”—

and now we come to inability—

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

"SEC. 3. If the President does not so declare, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President.

"SEC. 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

"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."

The CHAIRMAN. In section 3 you have the question raised in the first instance by the Vice President, with the approval of the Cabinet. In other words, the Vice President raises the question, with the approval—

Mr. BROWNELL. Not necessarily, Mr. Chairman.

It might be better for me to go through with my description of my thoughts on the plan. I am sure it will answer these questions as we go along, if that is agreeable to you.

The CHAIRMAN. All right.

Mr. BROWNELL. First, I would note that this text would be substituted for part of paragraph 6 of section 1 of article II of the present Constitution, and I think in order to have our problem clearly in mind I had better read that paragraph 6, section 1 of article II in the present Constitution. The part that is underlined here in the text is the part that would be eliminated and the new text that I read would be substituted for it. The part that would be superseded 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, * * *

The balance of this present provision would stay in, and that reads:

* * * 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 office shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

Mr. WALTER. May I ask a question at that point?

Mr. BROWNELL. Yes.

Mr. WALTER. How would you enforce section 4?

Mr. BROWNELL. That would be by declaration in writing by the President.

Now, this morning—

Mr. KEATING. May I just raise a question about section 3?

Mr. BROWNELL. Yes, sir.

Mr. KEATING. The words "the President's Cabinet" are not found in other laws, I believe. I could be mistaken.

Mr. BROWNELL. There are a whole series of laws passed by the Congress establishing the heads of the executive departments, and we have taken this phrase verbatim from that series of laws.

There are 10 now, as you know, heads of executive departments who are members of the President's Cabinet.

Mr. KEATING. In other words does "head of an executive department" apply only to a department which is established as such by Congress?

Mr. BROWNELL. That is correct.

Mr. KEATING. In other words—

Mr. BROWNELL. Just here in the past few years you have established the Department of Health, Education, and Welfare, and that became the 10th executive department the head of which is a member of the President's Cabinet.

Mr. KEATING. Is a head of an executive department ever not in the President's Cabinet?

Could that happen?

Mr. BROWNELL. I suppose it could happen if the President desired to have it so, but there have been 165 years of history uniformly adopting the Cabinet as being the heads of the executive departments, who are recognized by the Congress as the heads of the executive departments.

Mr. KEATING. This seems to leave a measure of control in the President as to whether or not they are members of the Cabinet. Would it be objectionable to just say "heads of executive departments" without using that phrase "who are members of the President's Cabinet"?

Mr. BROWNELL. I don't believe you would want to do that. My offhand opinion would be that the President should have a certain flexibility there.

Mr. KEATING. My point is: Such an agency as, let's say, the Reconstruction Finance Corporation and some of the other alphabetical agencies are not executive departments.

Mr. BROWNELL. None of them is recognized by Congress as such, as heads of executive departments; no.

Mr. KEATING. I am a little hesitant about the use of the word in a constitutional amendment since it does not appear in other laws. That is why I am asking the questions.

Mr. BROWNELL. I think you have a good point there, and that certainly was our thought in putting in the phrase, which is so well recognized by the Congress over a period of years, that is, "heads of executive departments who are members of the President's Cabinet."

The CHAIRMAN. We now have 10, don't we?

Mr. BROWNELL. Ten; that is correct.

Now, this morning I would like to divide my statement into three parts:

First is a statement as to reasons why action in this matter is needed;

Second is a statement of reasons why a constitutional amendment rather than a statute is needed; and

Third is a statement of reasons why the proposed plan is preferable, seems preferable to us, to any other proposals that have been made up to date.

First why is action needed at all?

It is because there is now no agreement concerning the status and tenure of a Vice President during the inability of the President.

There are respected students of the Constitution who have contended that the Vice President would merely act as President for the duration of the inability, and there are other respected students of the Constitution who have argued that the Vice President would actually become President and replace the disabled President for the remainder of the term.

This demonstrates, in itself, the danger of having the right to exercise executive power beclouded by ambiguity and confusion, and I think a lesson from history would illustrate what I have to say.

It was soon after President William Henry Harrison died in 1841 that Senator William Allen of Ohio objected to the establishment of the precedent of the Vice President becoming President upon the death of the President because he could see that precedent would complicate the situation in the future when a President became disabled and, as he indicated, a study of the records of the constitutional convention shows that a Vice President was not intended to become President under the succession clause. The succession clause came about in this way, and I think historically it is interesting: When the original draft of the constitutional convention was sent to the Committee on Style, it contained two separate clauses dealing with Presidential succession. One provided that the Vice President should exercise those Presidential powers and duties and the other empowered the Congress to designate an officer to act as President in certain contingencies, and each of these two clauses was modified by a clause which would limit the tenure of the Acting President to the duration of the disability.

Then, as I say, it went to the Committee on Style which, of course, had no authority to alter substantive provisions, but merely to put them in clear and concise language, and what they did is what resulted in the ambiguity. They consolidated these two provisions into one and introduced the phraseology: "the same shall devolve on the Vice President."

The committee used this limiting clause "until the disability be removed" only once instead of twice, instead of using it to modify each of the preceding clauses separately, and they changed the semicolon to a comma so that the clause would be a part of a continuous sentence and modify each of the preceding clauses, and this brought about the ambiguity.

So, the records of the constitutional convention, it seems clear, vitiate the argument that the presidential office devolves on the Vice President, who thereby becomes President for the remainder of the term. But, regardless of the intent of the framers of the Constitution, remember that seven Vice Presidents have, upon the death of the President, been recognized as having become the *de jure* President and, as a result of these precedents established whenever a President has died, it seems to be assumed without question that the Vice President would become President and does not merely act as such when the President dies.

I believe that was Daniel Webster's view at the time of President Harrison's death—in other words, that Vice President John Tyler actually became President. This, of course—this precedent in the case of the death of the President—is what makes it easier to argue that a Vice President supersedes the President whenever he exercises the Presidential power, whether on inability or otherwise.

The CHAIRMAN. May I add a little bit of history there, too, to that idea and go further. When bills were sent to Tyler, they were noted as bills sent to the Acting President and, very angrily, we are told, he struck out the word "Acting" and insisted upon his being considered as President, and that word "Acting" was stricken out quite a number of times on the signing of a number of bills.

Mr. BROWNELL. When he struck that out with his pen, he caused a large part of the problem we are discussing this morning.

As we will note both in the Garfield and the Wilson cases, the Vice President was not asked to act as President largely because of the

fear that he would become President and would thereby oust for the remainder of the term the incapacitated incumbent. As a result, the full extent of the disability was carefully guarded in both of these cases because of personal loyalty to the disabled President—and, more important, the public interest could not help suffering from having no active President in both of those cases.

I would remind you President Garfield lingered on for 80 days after he was shot on July 2, and during this period he performed only one official act—the signing of an extradition paper. Although his mind was clear during the first days of his invalidism, he was unconscious and it was reported that he suffered from hallucinations during the last days of his illness; and he was physically unable to discharge the duties of his office during a substantial part of that 80-day period.

I don't think it could seriously be contended there was no important business during that time because history shows that officers were unable to perform their duties because the President was unable to commission them, and at that time there was a serious crisis in our foreign affairs. Yet, the department heads transacted only such routine business as could be transacted without the President's supervision, and it was claimed that important questions of public policy which could be decided only by the President were simply ignored.

Another important factor here is that public opinion was sharply divided about the manner in which the public business was being handled—a rather serious thing for a time of crisis.

Mr. KEATING. That is true today, too.

Mr. BROWNELL. I imagine that is right, Congressman.

The CHAIRMAN. It points up, too, in view of the times in which we live, the need for certain action to cover the situation today.

Mr. BROWNELL. Yes. That is—

The CHAIRMAN. During the time of Garfield we had that difficulty as you pointed out, and our records show even more difficulties, which are all the more reason for action now—

Mr. BROWNELL. I agree with that, Mr. Chairman.

The CHAIRMAN. And that we should not wait to have a constitutional amendment adopted.

Mr. BROWNELL. That was the point I was trying to make to Congressman Keating, of course. While it is true public opinion is always divided about how public business is transacted, in time of need and national crisis it is important to minimize that to the extent we can do so; and I believe we can do so by settling this problem now.

Mr. KEATING. In furtherance of what the Chairman has said—I feel strongly on this: That, while I have felt a law was sufficient and a constitutional amendment was not necessary, if I become convinced to the contrary, that the constitutional amendment is necessary, I don't think that this committee should simply pass a law, if the judgment of the committee is that a constitutional amendment is necessary, just because of speed. I think that is a secondary consideration, and I think—

Mr. BROWNELL. I am glad to hear you say that, and I hope to—

Mr. KEATING. We should put the emphasis upon doing the thing right at this time.

The CHAIRMAN. I think the reason why we would have to have a constitutional amendment, if at all, is because of the suggestions that have been made concerning inability of commissions or the Cabinet

or some such similar group to be constituted to raise the question of inability and to solve that situation.

There is an express admonition in the Constitution that in the event of the inability of the President the duties shall devolve upon the Vice President. He must take over. He has no choice in the matter. Therefore, there can be no interposition of any kind of agency or group or commission which would have the discretionary power to say whether he can or cannot take over because this is a solid, straight, uninhibited command to the Vice President to take over, and there can be no other agency.

So, if you are going to have any commission or any group determine that, you must have a constitutional amendment.

My point of view is: We don't need the constitutional amendment because we don't need the commission. I think the Congress has ample reserve powers by article I, section 8, which gives the Congress power to make all necessary and proper laws for carrying into execution all the powers under the Constitution. I think under that power Congress can act, and for that reason and for the other reasons I have indicated I think a simple law is all that is necessary.

Mr. KEATING. Mr. Chairman, my point is this: I know that you advocate allowing the Vice President to say when the President is disabled and to take over, and I have respect for your viewpoint in that regard, and I would much rather accept that than nothing at all, but the main thing is to do something, in my judgment. The method is a secondary matter.

I have felt a commission was the best method. The President and Attorney General have advocated members of the Cabinet. I do not necessarily agree.

I think it was Professor Corwin of Princeton who said: "If anyone intervenes, there must be a constitutional amendment."

I lean with you that any of these methods can be done by law, but my point is this: Whatever method we select as best, whether that is to be done by law or constitutional amendment, should not be a controlling factor. It should be a very minor factor.

If we decide to interpose the Cabinet as the best or have a commission as the best method, and that requires a constitutional amendment, we should not be deterred in that by the fact it is going to take 2 or 3 or 4 years to get it through.

Mr. BROWNELL. I agree.

Mr. KEATING. We should not lean toward a method which favors a law over a constitutional amendment unless we feel that is the best method.

Now, I am very much open-minded on the approach to the method. I, naturally, like the author of anything, think that my own suggestion might have more merit than someone else's, but I am very ready to yield on that to the necessity of action, and in that action we must decide this question not upon any specific situation, but with complete objectivity.

Mr. BROWNELL. I agree with that.

Mr. WALTER. Did the Attorney General, by any chance, see the committee report which this subcommittee issued on the 26th of March containing an analysis of the replies to the questionnaire which was sent to the authorities in this field?

Mr. BROWNELL. I saw last year's report. I haven't seen this.

Mr. WALTER. This is new, and I respectfully suggest that you examine B on page 63. You will find many of the authorities, including Professor Corwin, as Mr. Keating just mentioned, agreeing that legislation could meet this problem.

Mr. BROWNELL. Well, Congressman, in a moment, I am going to devote myself exclusively to that discussion, as to what method we should apply here, whether constitutional amendment or statute, and I have what I hope are some rather appealing arguments so far as we lawyers are concerned as to why we think the constitutional method is needed; but I think before we get into that, if I may, I would like to spend just a very few more minutes on stressing the need for action because, as we know, some people have taken the position that there is no need for action. They have taken the position: "Oh, we have struggled and got by in crises for 165 years. Why do anything about it?"

I think, in order to realize the importance of this question, it is necessary for me to spend just a few more minutes in describing these historical incidents so that there can be no question in the mind of any members of this subcommittee that action is needed, and then we will come to the question of method.

Mr. KEATING. We are living in a different world from 165 years ago.

Mr. BROWNELL. That is a fact.

The CHAIRMAN. May I just ask another question: I think you had indicated you would look up the question of whether or not we have ever had a situation where we offered a bill and a constitutional amendment covered the same subject at the same time. Did you have a chance to do that?

Mr. BROWNELL. Yes, and that is in my statement this morning.

The CHAIRMAN. You have?

Mr. BROWNELL. Yes.

To go on with the Garfield incident, you will remember after his illness had dragged on for 60 days his physicians thought he would recover, but his convalescence was expected to take another 60 days. So, the Cabinet considered the possibility of asking Vice President Arthur to act as President during Garfield's recuperation. All 7 Cabinet members agreed on the desirability of having him act as President, but 4 of the 7 thought that Arthur's exercise of Presidential power would actually make him President for the remainder of the term and thereby oust Garfield from office; and it was reported that the then Attorney General Wayne MacVeagh shared these views. So, the inevitable result, which always will happen, I believe, under the present system, was that the Cabinet decided that Garfield should not be advised to ask Arthur to act as President without first telling him of the possibility. Therefore, the whole matter was deferred because the physicians feared that the shock caused by such a discussion might result in the President's death. As you will recall, President Garfield died on September 20th, making it unnecessary to solve the problem in 1881, and the whole matter was dropped until President Wilson became ill in 1919.

Mr. KEATING. Mr. Attorney General, you omitted in your statement the mention of the New York Times and the New York Herald Tribune and the Boston Evening Transcript, and I notice representatives of those papers here and I am sure you want that included in your transcript.

Mr. BROWNELL. I do. I thank you for that.

That was overlooked in answering some of the questions.

Mr. McCULLOCH. Of course, I cannot let this occasion pass without reminding my good friend from New York that part of America lies west of the Alleghonies.

Mr. BROWNELL. As a Cornhusker, I will agree with you on that, Congressman.

Now, in furtherance of this first point that I am trying to make here—that action is necessary in this matter—let's take up the President Wilson incident.

There can be no doubt that President Wilson was actually unable to perform the duties of his office during at least some of the period after his collapse which started on September 25, 1919, and did not end until a year and a half later at the end of his term on March 4, 1921.

As evidence of this inability, it appears that during the special session of the 66th Congress 28 acts became law because of the President's failure to act on them within the requisite 10 days. The record shows he passed on only 1 of the 16 acts that were presented to him between October 28 and November 18.

The Senate Committee on Foreign Relations repeatedly tried to get the President to take some action or supply the committee with some information about the Shantung settlement, but the committee request went unanswered.

These facts are only part of the evidence that the President was disabled, in fact, during a part of this time and, more important, this inability occurred when the Senate was debating the Versailles Treaty.

The exact degree of the inability is uncertain, but I think it is quite clear he suffered from a stroke and his left side was paralyzed, and there is very good evidence that he was unconscious or at least only semiconscious during a part of this illness.

Whatever Wilson's condition, Vice President Marshall and the Cabinet were not fully advised concerning it, and the President's family and his White House staff and the Cabinet discharged public business in such manner and by such methods as they deemed appropriate.

History indicates, for example, that Mrs. Wilson and Dr. Cary T. Grayson, the President's physician, played an important part in the solution of many questions of public policy.

Students of this period seem to agree that official papers were given to Mrs. Wilson, who sometimes passed the papers on to the Secretary of the Treasury or to someone else in whom she had confidence.

Soon after Wilson's stroke the Cabinet joined with the White House staff to keep the Government operating. Secretary of State Lansing called 21 Cabinet meetings to transact executive business; but, as a matter of fact, these meetings were said to have been held for nearly 4 months before Wilson even heard of them.

Although Lansing's action doubtless had an effect on any congressional move that might have been made to establish the President's inability, you will remember that President Wilson accused Lansing of usurping Presidential power and forced him to resign.

One other footnote on the history of that time: Patrick Tumulty, Wilson's secretary, reported that Secretary of State Lansing had suggested that, in view of the President's inability, they should ask the Vice President to act as President, and he quotes himself as saying:

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.

Tumulty also reported that when Lansing resigned, Wilson said:

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.

Because of the belief that the Vice President would actually become President for the balance of the term and the President would be ousted, asking Marshall to act as President during Wilson's inability was viewed as disloyalty. The President's friends didn't seem to think that Marshall would remain Vice President and merely discharge the Presidential functions during the inability. So the result was what we would expect—that they looked at Marshall with antagonism and viewed him as a possible usurper instead of viewing him as a person who could lighten the disabled President's burden; and, instead of asking him to exercise the powers devolved upon him by the Constitution, they attempted to keep the Government operating in their own way in order to forestall any serious attempts to declare the President's inability.

Now, it seems to me a study of these two cases—the Garfield and the Wilson cases—shows there is a real need for a means of supplying an active President during times of Presidential inability, and it is the belief that the Vice President actually becomes President for the balance of the term when called upon as such which has nullified, for practical effect, the constitutional provision for the administration of government when the President is incapacitated.

The CHAIRMAN. I think on that we are all in accord, Mr. Attorney General.

Mr. McCULLOCH. Mr. Chairman, I would like to ask the Attorney General, if it is his studied judgment, section 4 of his proposal will nullify or neutralize all these feelings that are so eloquently set out here on the part of Cabinet members and friends and appointees of any President.

Mr. BROWNELL. That is the principal purpose of it; yes, sir.

Mr. McCULLOCH. That is your studied judgment—

Mr. BROWNELL. Yes, sir.

Mr. McCULLOCH. That the loyalty which is engendered by the consideration given by a President will be completely neutralized by section 4 of your proposal?

Mr. BROWNELL. Taken in combination with the other sections, yes, sir.

It is this problem of providing for the exercise of Presidential power during periods of inability which would not be solved merely by providing a means by which the inability could be established, for unless the President and his Cabinet and his other friends and the public, I might add, are absolutely certain of the President's status after the termination of the inability, they will tend to oppose any attempt to declare the existence of the inability, because they would view that as a declaration which was equivalent to removing the President from office.

To answer Congressman McCulloch's question specifically, this problem, we believe, would be solved by sections 2, 3, and 4 of President Eisenhower's suggestion, which provide that the Presidential powers and duties shall be discharged by the Vice President as Acting

President and that the Vice President shall discharge the powers and duties of the office as Acting President, and the President could come back under section 4.

So, with this history to guide us and with the realization of new hazards, the continuity of government due to the atomic age, we must conclude—and I am delighted to hear the chairman say so, and I believe it must be the unanimous opinion of any lawyers who have studied this problem—that action is needed to solve this problem of Presidential inability.

Now it seems appropriate to turn to the important question of whether this can best be done by a constitutional amendment or by a statute.

There is no doubt that some students of the problem have argued that a statute or concurrent resolution which declares that the Vice President merely acts as President ad interim would be sufficient, but there is sharp division of opinion on the question as to whether such a statute would be constitutional.

What I am endeavoring to point out to you in this section of my argument is this: That we are not endeavoring to say who has the better of the argument; we are trying to eliminate the argument before it arises.

Now, to understand the basis for this division of opinion which arises—and it is a very serious one—I want to call attention to the different phraseology in the present Constitution of the first half and the second half of paragraph 6 of section 1 of article II, which we have quoted previously. This is the way the first half reads:

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.

Now, there is no express reference to any action by Congress.

Let's look at the second half. The second half reads this way:

* * * 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.

Note, as I say, that in that second half it is specified that Congress may act—and that, I think, is the basis for these arguments that are being made.

I don't ask you to agree with it or disagree with it, but I do want to show you that sincere students of the Constitution have disagreed as to this and I don't think we can stand for that kind of disagreement in time of crisis when we have a chance, as we do now, to eliminate that argument before the crisis arises.

The CHAIRMAN. It shows also, in the first instance, what action is limited to the Vice President and, in the second, limited to the Congress.

There is the clear indication in my mind that it was the Vice President who was to raise the question and the Vice President was to resolve the question.

Frankly, if Mr. Arthur and Mr. Marshall had taken action in those days, no question would have arisen today. They could have easily said under the first part of that section 1, article II, that they had the power to raise the question; they had the power to assume the duties,

and they did, and they were going to assume the duties. They would have been imminently sustained in that argument.

Mr. BROWNELL. I agree with you, Mr. Chairman, but the point I am trying to make is, while you and I may think one way, there are very eminent people, whom I will cite here in a moment, who think the other way, and as long as you have that stalemate and opinion you are not going to get any Vice President to take over; you are not going to get any Attorney General to advise the President that he should turn over the powers.

The CHAIRMAN. Oh, I agree with you on that.

Mr. BROWNELL. You are going to have critical conflict in public opinion at the time, and why should we risk that when we can now settle the matter before the crisis arises?

The CHAIRMAN. I couldn't agree with you more. History shows there was a reluctance on the part of Marshall and Arthur to take over. They were not usurpers. They were fearful that they might be called usurpers.

Mr. BROWNELL. That is what I meant to imply.

The CHAIRMAN. Therefore, it is not the danger of the usurpation of power. It is the danger—

Mr. BROWNELL. They won't act.

The CHAIRMAN. They won't use the power that the Constitution gives them.

If you agree with me that they had the right to do exactly what I indicated in those cases without a constitutional amendment, why do we need the constitutional amendment now?

Mr. BROWNELL. Because of the precedent that has been established in the long history and the long history that has flowed from it.

The CHAIRMAN. We can show, with the proper leadership and proper guidance of public opinion, that those actions, those precedents were wrong.

Those precedents don't necessarily bind us or bind the future Vice President who believe that Arthur and Marshall were wrong; but surely, if you admit they had the power to do that in those cases, in 1881 and 1919, they have a right to do it now without a constitutional amendment.

Mr. BROWNELL. Let me go on with my argument, if I may, Mr. Chairman, because I think I can show you there is very respectable argument the other way. I may not agree with it, but as long as that conflict exists I am sure you will not get the action you need in time of crisis because nobody wants to take a chance on it; and the question of settling that problem, as we lawyers know, cannot be settled, cannot even be started, until the crisis arises, so that you have that period of uncertainty there which is so unfortunate.

The CHAIRMAN. Wouldn't that reluctance that you agreed with me was present be dissipated if Congress would simply make the declaration that the Vice President shall, in the case of the disability, as a result of the question which he raised and resolved, step in and take over the duties?

Mr. BROWNELL. Not as I see it, Mr. Chairman.

The CHAIRMAN. The fact that Congress so stated would be encouragement for him to come to that conclusion.

I am sure public opinion would determine if he was wrong. There is always the power of impeachment in case he was wrong.

If he was intemperate and was not taking proper action—he would be very careful; I am sure he would—impeachment would curb any kind of excess, any kind of usurpation.

I think this resolution would be sufficient to do away with a reluctance to assume the power.

Mr. BROWNELL. I think your first point perhaps is right. It might give some encouragement, but it wouldn't settle the problem because we are not dealing with a question of statutory interpretation. Even if the statute is passed, you still have the question of its constitutionality and the same arguments would be made to that point as are being made now; and that is the reason nobody wants to make the move. They would stir up a lot of litigation right at the time of crisis.

Now, if we can settle this thing once and for all, by clear language in the Constitution, itself, then we will have surely solved the problem.

Mr. WALTER. I would be inclined to agree with you, Mr. Brownell.

Mr. BROWNELL. I would like to proceed with a case where the question of the validity of the statute would be raised.

Mr. WALTER. Who would raise that question?

Mr. BROWNELL. I have several citations of that, as we go along here.

Would you prefer to wait until it comes in the prepared statement?

Mr. WALTER. I agree with you. Unless we could visualize that, we shouldn't worry too much about it; but I foresee cases where it would arise.

Mr. BROWNELL. Now, let me give you the argument of the people on the side of the argument that the Vice President becomes President for the balance of the term.

A few weeks after Garfield's death a man named Charles W. Jones, of Florida, asserted in the 47th Congress that inability has the same effect as death, resignation, or removal. In all four cases he argued the office devolves on the Vice President, who thereby becomes President, and he argued that if Garfield had lived and Arthur had been forced to exercise Presidential power during the President's recuperation, Arthur would have displaced Garfield and would have served for the remainder of the term because, he said, once a Vice President is seated in the Presidential chair he has all the power that is given to the President by the Constitution and he cannot be displaced except by impeachment for high crimes and misdemeanors.

Senator Jones believed, in other words, that a constitutional amendment would be necessary if a Vice President were to serve only for the duration of the President's inability and, as the Constitution now stands, he argued, the Vice President must serve for the remainder of the term; and he offered three arguments in support of his position:

First, since the Constitution makes no distinction between a vacancy and inability, a Vice President would become President in case of inability, just as he would in case of the President's death;

Second, he argued that the vesting clause of article II excludes the possibility of having two Presidents at once—one acting and the other disabled; and

Third, he argued that the clause "until the disability be removed" limits only the tenure of an officer other than the President or the Vice President who acts as President by statutory designation, but it doesn't limit the tenure of the Vice President.

Let me cite you another example of an argument from a sound authority in favor of the position that, as the Constitution now

stands, the Vice President could not act merely for the duration of the inability, but would become President for the remainder of the term.

During Garfield's illness former Judge Abram J. Dittenhoeffer said:

I start with this conclusion: That whenever the Vice President gets lawfully into the Presidency the President gets lawfully out of it. There cannot be two lawful Presidents at the same time. Mark, no limit to time for which these powers and duties "shall devolve" is fixed. It is just as absolute and limitless as if the language of the Constitution were:

"In case of the removal of the President from office, or of his death, or resignation or inability to discharge the powers and duties of said office, the Vice President shall become President."

And when the President gets lawfully out there is no way in which he can get in again.

This line of argument which Dittenhoeffer used to substantiate this conclusion was much the same as that used by Senator Jones.

Another respected authority, Theodore W. Dwight, professor of constitutional law at Columbia, took the same position.

At the time President Wilson went over to the Versailles Conference, Hannis Taylor, who was another respected constitutional lawyer, argued this way:

And here the fact should be emphasized that neither the Constitution nor the Presidential Succession Act makes any provision for a President of the United States pro tempore. After the Vice President has been sworn in as President, he becomes such in the full sense of the term. No provision is made by law under which he can hand back the presidential office to his predecessor.

Now, I don't happen to agree with this line of argument that is offered by Messrs. Jones, Dittenhoeffer, Dwight, Taylor, and numbers of others. Although I think their arguments can be answered very effectively, I don't go into the merits of their arguments at this time because I want to make this point: That a number of respected constitutional authorities have argued that there can be no temporary devolution of presidential power on the Vice President during periods of presidential inability; and, whatever we may think of their arguments, I think that a statute would not protect the Nation adequately, for the doubts that have been raised have been raised too persistently.

As long as there is doubt, lingering doubt, concerning the constitutionality of the statute, as long as there is a question concerning the disabled President's constitutional status after his recovery, I do not believe any inability, as a practical matter, however severe it may be, would be recognized lest the recognition of that disability would oust the disabled President from office. Moreover, a presidential disability, severe and prolonged enough to warrant the devolution of presidential power on the Vice President, would create something of a crisis itself.

So, the Constitution should be clear and there should be no room for dispute about its meaning, for that is the very time when the country should be united and the very time when a Vice President should have general support.

We must remember that the constitutionality of such a statute just couldn't be tested until the inability arose, and it is the very uncertainty and confusion at that time that we are trying to avoid. That is another reason why a constitutional amendment is preferable to a statute, even if we limit it, as the chairman suggests, to merely a

declaration that the Vice President is to be Acting President and only during the period of inability.

Now, what if we go further than that, if it is proposed to go further, and declare that some person or some group of persons or a commission, other than the Vice President, should participate with him in the solution of this question or decision as to when the Vice President becomes Acting President?

For example, would we need a constitutional amendment, if my proposal is adopted, which would provide that when the President is disabled and fails to declare his inability, the Vice President plus a majority of the Cabinet should declare the existence of the inability?

I agree with the chairman. I don't think this section could constitutionally be embodied in a mere statute or concurrent resolution, nor could any plan that involves the creation of an inability commission or any plan that involves the determination of inability by the courts. Those would certainly have to be done by constitutional amendment, and I think it is important to go to history for a little instruction on this point.

At the time of President Garfield's illness in 1881, the great weight of opinion favored the interpretation that Vice President Arthur, and he alone, could determine that the President was disabled. At that time most students of the Constitution said that the Vice President was obligated to exercise the powers of the Presidency during Garfield's illness, just as much as he was obligated to preside over the Senate or perform any other constitutional duty, and that no enabling action by the courts or the Congress or the Cabinet was necessary.

Since the Vice President had the duty of acting as President, it was argued, in certain contingencies, his official discretion extends to the determination of whether such a contingency actually exists. In other words, they were applying the well-known rule of law that in contingent grants of power the one to whom the power is granted is to decide when the emergency has arisen.

The CHAIRMAN. Don't you agree with that statement?

Mr. BROWNELL. I do.

The CHAIRMAN. If that is the case, and the Constitution vests that power in the Vice President, he is the one to whom the power is granted, and, therefore, the Vice President must decide when the contingency arises.

Mr. BROWNELL. That is right; but I think it shouldn't depend on one man's opinion, even if he has a title back of his name. I think there should be a constitutional provision which would make it so clear that we couldn't have this kind of debate.

Mr. KEATING. Yes; but it also seems to me—I say this with the utmost respect—that the chairman is getting the cart before the horse, because it seems to me our committee's duty is first to determine the method by which we think this disability should be determined; then to decide, based upon that, whether a law or constitutional amendment is the desirable approach.

Now, there probably is merit to the argument—just leave it to the Vice President, which is more likely to give warrant to a law as against a constitutional amendment—but I don't think that should be an argument in that respect. I think we should first determine how we are going to do it—whether we are going to adopt this plan or some other plan—and then determine whether it should be by law or constitutional amendment.

The CHAIRMAN. I agree with you. I think we want to determine, first, whether it should be by law or constitutional amendment.

I have come to the conclusion, after a short deliberation, there is some law and precedence, after reading all the history, that all that is necessary is for the Vice President to act.

This very statement that the Attorney General read:

It is a well-established rule of law that in contingent grants of power the one to whom the power is granted is to decide when the emergency has arisen—

leads me to the inevitable conclusion that, since the grant of power is to the Vice President, he determines the contingency upon which he exercises the power.

Mr. McCULLOCH. Mr. Chairman, if I would follow that conclusion one step further, could I say that, in your opinion, there is no need for anything—the authority now exists, and it is only the problem of having the Vice President act when he should?

The CHAIRMAN. Legally, you are absolutely correct; but there are those doubts in the cases that we have had illustrated, the cases of Marshall and Arthur, to assume that power. Therefore, it is necessary to do away with that doubt and resort to congressional enactment which would remove the hesitancy.

Mr. McCULLOCH. Do you think the congressional enactment, of itself, would have much influence on the Vice President acting?

The CHAIRMAN. I think it would.

Mr. BROWNELL. That is where I disagree with the Chairman, because I think it is a constitutional problem rather than a statutory problem.

The disagreement here is the interpretation of the Constitution and, while you feel one way,—I happen to feel the same way on it—suppose the whole committee or the whole Congress should feel the same way—still it is a question of interpreting the Constitution, and there is very respected authority on the other side, and I believe it is that very disagreement which has caused the Vice President to hesitate to act, and that is why I favor—

Mr. WALTER. Is it disagreement as much as it is doubt?

Mr. BROWNELL. Doubt. I think that is more accurate. Yes, sir.

The CHAIRMAN. Read the next sentence, and I think that nails it down.

Mr. BROWNELL. I believe—and this is a personal opinion—that the Constitution now vests the power—

The CHAIRMAN. Read the one before that. You didn't read it.

Mr. BROWNELL. All right. As the Constitution now stands—

The CHAIRMAN. No. "Thus the Vice President is constituted"—

Mr. BROWNELL. Oh, yes. I have it now. I lost my place there for a minute.

Thus the Vice President is constituted the judge of the President's inability.

As the Constitution now stands, it mentions only the successor, and thus makes him the judge of the facts.

I believe the Constitution now vests the power of determining inability in the Vice President and that the Vice President could not constitutionally be divested of this power without a constitutional amendment.

That is the argument on my side only.

I would point out here—what I would like to do now is to show—that if the President's plan, which involves both the Vice President and the Cabinet participating in this decision, should be adopted, a constitutional amendment would have to be passed.

I call to your attention the fact that the Cabinet has always notified the Vice President when a President has died. I think it should also notify him in an analogous situation of the President's inability; but at the present time that is only custom that requires the Cabinet to notify the Vice President in case of the President's death, and the notification adds nothing to the Vice President's existing powers. In other words, the succession clause, as it now stands, is self-executing, and the Presidential powers devolve on the Vice President without this notification under the Constitution.

I think, as a practical matter, that a Vice President would not undertake the exercise of Presidential power during the period of Presidential inability without first consulting the Cabinet; but, under the Constitution, as I say, as it is now, he could do so.

Section 3 of the proposal I am making this morning would make it mandatory for the Vice President to consult the Cabinet and to secure the approval of a majority of that body. In this sense our proposal limits the authority which the Constitution now vests in the Vice President, and that is the reason I think it is quite clear, and I believe we would all agree that a constitutional amendment would be necessary to carry it into effect.

Mr. KEATING. Mr. Attorney General, before you proceed to No. 3, would you please turn back to your wording of the present Constitution, on page 4 of your statement?

Mr. BROWNELL. Yes.

Mr. KEATING. There is a reference to what Congress may by law provide for—

Mr. BROWNELL. Yes.

Mr. KEATING. And it says:

*** 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—

and so on.

Is it your interpretation of that constitutional provision that the extent to which Congress may by law provide for the inability has relation only to declaring who shall act in the line of succession and goes no further than that?

Mr. BROWNELL. That is correct.

Mr. KEATING. So that even though it says Congress may by law provide for the inability—

Mr. BROWNELL. That is when both the Vice President and the President are out.

Mr. KEATING. Oh, I see. That applies only in the case where they are both out?

Mr. BROWNELL. That is correct.

Mr. KEATING. All right.

Would you also, before you proceed to the advocacy of your specific proposal, comment at this time on the suggestion made that the Congress proceed not by a law, but by a constitutional amendment?

Mr. BROWNELL. I would be glad to comment on that now because it seems to me the more you consider the situation the more you

realize it is a constitutional debate that is involved here and that the statute would not settle the constitutional debate.

The authorities that we have discussed here this morning, very respectable on both sides, are talking about the interpretation of the present Constitution, and the question would merely be—suppose the statute were passed—whether the statute is constitutional under that same provision in the Constitution. So, you do not eliminate the debate by passing the statute. You still have this conflict of opinion, and the conflict of opinion, I think history shows us, is what has made the Vice President so hesitant to act, to the point where the Vice President just has not acted even though you had a serious crisis of a year and a half, as in the case of President Wilson's illness.

Mr. KEATING. Counsel of our committee has called my attention to the interesting fact that in the first 21 amendments to the Constitution they became effective in from 1 to 4 years. The 22d took 4 years. The first 21 took less than 4 years.

I think you have made a very convincing argument for a constitutional amendment.

Mr. WALTER. Actually, the average time is something less than 3 years. You have to remember the first 10 amendments were adopted at 1 time, but the average time is something less than 3 years.

Mr. BROWNELL. It would seem now, if it is agreeable with you, Mr. Chairman, we might discuss first why action is needed—I think we are in general agreement on that—and then discuss secondly why the constitutional amendment seems to be preferable to the statute, and I believe—I hope I am not overstating it when I say—there is general agreement on that; but let us get to the specific provisions of the plan which I would like to have you consider, and I speak here on behalf of President Eisenhower, who has endorsed this plan and asked the Congress to give it early and favorable consideration.

Section 1 of this plan merely confirms the present generally accepted interpretation of the Constitution—that in case of removal of the President from office, or his death or resignation, the Vice President shall become President for the unexpired portion of the then current term.

In other words, this specifically affirms the result that has been accepted by the Nation at least seven times in cases where the President has died. There is no controversy about that.

It seems wise to have it specifically stated in the Constitution rather than a matter of usage.

Now we come to the questions of Presidential inability. There are two kinds, you will remember, we are asking the subcommittee to consider.

Section 2 states that if a President voluntarily declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

This section authorizes the President to announce his own inability and allows him to do so, knowing that his powers and duties would be restored to him when he recovers.

The provision is also made that this announcement shall be in writing, for the obvious reason you don't want to have any dispute as to whether or not he did it, and the existence of a written document would serve that purpose.

The CHAIRMAN. Suppose he were a prisoner of war, out of the country, and he wouldn't be able to write?

Mr. BROWNELL. Then I think he would have to come under section 3; but I think it is important in our thinking to remember that most cases would undoubtedly be solved under this section 2. For example, where the President, if he is going into the hospital and knows he is going to be out in a few days, could make this written statement, that would take care of it, and he would know when his convalescence was complete he could come back into office, and that would give assurance not only to him, but to the public.

It would be an easy, sensible way of dealing with this problem.

Mr. FOLEY. Mr. Attorney General, what would be the depository for that statement?

Mr. BROWNELL. I assume under the existing practice, it would be the Office of the Secretary of State, where all such official documents are filed.

As a matter of fact, the only objection I have heard to this section No. 2 is that it might open the door to a President shirking his duties and responsibilities; but I think the obvious answer to that is any President who used this section to shirk his duties would be breaking his oath of office.

Mr. McCULLOCH. And, of course, that action would be contrary to all history.

Mr. BROWNELL. All history. There is not the slightest bit of evidence that would happen.

So I think we could pass over that rather captious objection and come now to section 3, which is designed at least to take care of the most unusual situation which might happen, and because it might happen, should be death with. This is the case where the President is unable or unwilling to declare his own inability.

In other words, this is the section that would be applicable in case the President were unconscious or, in the case of the point raised by the chairman a moment ago, captured by the enemy in time of war, something of that sort.

You can't describe all the various events that might constitute inability, but in these cases that we are talking about, the plan calls for the Vice President, with the approval of a majority of the President's Cabinet, to make the decision.

Before considering this provision, I think, however, we should look at some of the alternatives that have been proposed.

The CHAIRMAN. Mr. Attorney General, I think you are very wise in refraining from defining "inability."

Mr. BROWNELL. Thank you, sir.

I think a close study of the question would make it quite clear in a Constitution we shouldn't go into that much detail.

Mr. WALTER. I think the word is defined so well in all the courts that it would serve to meet any situation.

Mr. BROWNELL. Yes; I agree with that, Congressman.

Mr. KEATING. It is not a matter of law.

Mr. BROWNELL. That is right.

Let's turn to a plan that would involve the courts. This alternative proposal, which we reject, arose during Garfield's illness. Theodore Dwight at that time said that the Presidential inability was a judicial question, and, therefore, should be determined in the courts.

Now, in the past the theory of justiciability, if you choose to call it that, has found support among some Members of Congress.

For example, on several occasions bills have been introduced to give the Supreme Court original jurisdiction to determine the President's inability; but, of course, we start with the proposition that a constitutional amendment would be necessary if this type of solution were to be adopted for these reasons, which I am sure will be clearly evident to the members of this committee:

First, the Supreme Court has already ruled that its original jurisdiction is limited to that set forth in the Constitution and cannot be enlarged by statute;

Second, no Federal court can inquire, on its own motion, into the action of the legislative or executive branches; and

Third, it is doubtful that the courts could be given statutory authority to find a President disabled in an action for mandamus, directing the Vice President to act as President, because the discretionary authority is involved.

Mr. FOLEY. Mr. Attorney General, at that point, are you acquainted with the recommendation of Professor Crosskey?

Mr. BROWNELL. Yes.

Mr. FOLEY. Where he suggested perhaps you or your office might initiate quo warranto proceedings?

Mr. BROWNELL. I used to have a good many arguments with Professor Crosskey when he and I were members of the Yale Law Review together, and I think I would continue that argument on this subject if I saw him again.

Now, then, to say that the courts do not now have equity jurisdiction to pass on a President's alleged inability does not mean that the courts might not pass on this question, and here now we come to Congressman Walter's inquiry. Once the Vice President has exercised Presidential power, it is possible, I think, that the issue might be properly raised in a case involving individual rights.

For example, one who is prosecuted under a law signed by an Acting President might question the validity of the law on the ground that the President was not actually disabled and that the purported law, therefore, was improperly signed.

To give you another example, a litigant might attack the legality of an executive action, alleging that the President was incapacitated at the time he took the action.

In such cases, it is conceivable that the courts might decide the question of whether or not a President is disabled.

I am inclined to think that, as the Constitution now stands, the courts would decide the Constitution submits this question to the Vice President's judgment alone, and that they were bound by his decision.

There would also be the question of whether the courts would look beyond the presumption of regularity of official action.

If this proposal submitted by me this morning were adopted, I believe the courts would accept the finding of the Vice President, and a majority of the Cabinet as final; nevertheless, I do think these examples indicate that the question might arise in the courts, and, as I said before, to say that the courts now don't have jurisdiction to pass on a President's alleged inability isn't to say they couldn't be given it by a constitutional amendment.

We considered that possibility, of developing a plan under which the President's inability would be determined by the courts, and we rejected it for these reasons - three reasons:

First, any court or judge who participated in making the original finding might subsequently be called upon to rule on the validity of that finding in a case involving actual parties litigant.

A second reason is that we believe that any procedure that is established should be flexible enough to meet all contingencies, and should allow the Vice President to assume Presidential powers promptly when a President is disabled - and it seemed to us especially important in time of national emergency, when the procedures of our courts, which are not up to date, as we know, are not readily adapted to meet these requirements of promptness and flexibility.

There was another reason why we rejected that.

Mr. KEATING. That is a masterpiece of understatement.

Mr. BROWNELL. So designed.

The other reason we rejected it is because we believe that the first declaration of inability is an executive matter and should be kept in the executive branch of the Government, and allowing the judicial branch or, I might say, even the legislative branch to make the initial finding would violate the doctrine of separate powers, which is so fundamental to our constitutional system, and allowing officials outside the executive branch to participate in the initial decision would be an encroachment on the Presidency itself.

We considered several other suggestions and rejected them on similar grounds.

Several suggestions, for instance, have been offered for the creation of a special commission which would be empowered to employ physicians and require the President to submit to physical and mental examinations, and declare the existence of an inability by a majority or two-thirds' vote of that commission.

We considered these, but we rejected them for a number of reasons I would like to state;

First, it seemed unwise to us to establish formal legal machinery for giving a President physical and mental examinations because this amounts to placing a President constantly on trial as to his health and this would give a hostile commission the power to harass him at all times. Even if the commission acted reasonably in the matter, which we might presume, there is the danger of irresponsible demands that the commission act and that alone would be demeaning to the President's office - certainly so far as world opinion was concerned - so that not only would provision for such physical and mental examinations be an affront to the President's personal dignity, but I think it would degrade the Presidential office itself.

Secondly, we rejected these plans because it seems ill-advised to establish a complicated procedure which would prevent immediate action in time of emergency. The great need is for continuity in the exercise of executive power of leadership in time of crisis, and investigations and hearings and findings and votes of a commission, I am afraid, could drag on for days, or even weeks, and result in a governmental crisis, during which no one would have the clear right to exercise presidential power. Moreover, we believe that such a hiatus, with newspaper accounts of conflicting testimony of physicians and others before the Commission, would serve to divide public opinion,

divide the country, create doubts abroad and might have serious effect.

So I believe that the procedures should be flexible, and they should be prompt, and that elaborate machinery and detailed procedures might have the opposite effect.

I come now to the point I believe -- and the plan that I present this morning on behalf of the President is -- that the Cabinet is the proper body to participate, along with the Vice President, in declaring a President's inability. The Cabinet, after all, is an executive body. It is the President's official family. A decision of this body along with the Vice President is likely to receive public acceptance -- at least certainly on the point of making it clear that if this group acted, there would be no question of the Vice President usurping power on the pretext of inability -- and, moreover, the Cabinet is right there on the job and in a position to know at once whether the President is able to act.

THE CHAIRMAN. We received a number of replies to our questionnaires. Of all the replies received, I think none of them involved the selection of a President's Cabinet as the determining agency, except that of former President Hoover, who made that suggestion, but he was the only one who offered that solution.

Are you expounding former President Hoover's rather than President Eisenhower's views?

MR. BROWNELL. I think President Hoover's plan, as I recall, was for the Cabinet alone, which I would like to emphasize that this plan does not propose, although there have been some press reports to the contrary.

This plan continues the decision in the Vice President, where I believe it should be. It only says that, in doing so, he would do what he ordinarily would do, I am sure, under the circumstances, but it makes it a requirement that he consult the Cabinet and obtain the approval in writing of the majority.

So, in other words, what I am presenting to you may not be the quantitative solution, according to the answers to your questionnaires, but I believe on quality it is the best.

I think a study of the Garfield and Wilson cases indicates that.

THE CHAIRMAN. I would just like to get your answer to this: Members of the Cabinet are appointed by the President, of course.

MR. BROWNELL. With the advice and consent of the Senate.

THE CHAIRMAN. Yes. But they are appointed by the President. They couldn't get the advice and consent of the Senate unless they were appointed by the President.

Don't they owe a loyalty, a personal loyalty, to the President?

MR. BROWNELL. Of course, everybody who has office takes his oath of office that he will faithfully perform the duties of his office under the Constitution, so that their greatest and highest loyalty is to the Constitution.

I think it is true that they are ordinarily personal friends of the President. They are certainly his official family, and inclined to be loyal to him, and that is an additional reason why we think it would be advisable to have them consulted because, after all, public opinion is going to decide whether or not this should be done, and the first thing anybody in this country is going to want to know is that the President's friends, at least, if he is unable to speak for himself, are

thoroughly convinced that this is a wise move; otherwise, you would have division and chaos in the country.

So, that is one reason we think that is an asset to this particular plan—that here would be a group speaking who would be considered, if you will, as friends of the President, and, after they have deliberated on it and thought it was the wise thing to do, from a public policy standpoint, it would have, I believe—the decision would have—great public acceptance which, of course, is essential to the success of the plan.

The CHAIRMAN. Their loyalty and personal feelings to the Chief might cause them to act the other way.

I think we had that made clearly manifest in the case of the Wilson Cabinet. They refused to come to any such—

Mr. BROWNELL. But the reason they did that, I believe, Mr. Chairman, was quite clearly because they were uncertain as to whether the President could come back into office at the end of his disability, and that is the reason this plan removes that obstacle and says right at the beginning, before the thing happens, the minute the President is able to act again, he comes back.

With that kind of situation, it seems quite clear to me there would be no bar to the Vice President or the Cabinet making this decision, and they could be clear in their conscience they were doing it only for the temporary period and that the will of the people that the President, if he is able to act, should act could be effectuated.

The CHAIRMAN. Human nature being what it is, first you have loyalty to the Chief, and secondly, which is very important, there may ensue loss of jobs—heads may be chopped off if the President comes back; they may no longer be members of the Cabinet—and I think that is an important factor to be considered.

Mr. BROWNELL. Assuming the Vice President acted arbitrarily, you would have several—

The CHAIRMAN. I have no reference, of course, to present members of the present Cabinet.

Mr. BROWNELL. No. No present personalities should be considered in connection with this whole question; but if that should happen, you would have the safeguard right in article V, that the President, if he was there, could act and come back by a written declaration, and you would have, of course, the ultimate protection of the impeachment procedure, which would be applicable in case the Acting President was acting arbitrarily.

The CHAIRMAN. That is where you cover it?

Mr. BROWNELL. Yes.

The CHAIRMAN. But if he doesn't recover, as in the case of Garfield, they would no longer be members of the Cabinet—and it is a nice assignment—

Mr. BROWNELL. At times.

The CHAIRMAN. And they would resolve any doubts they had in favor of their Chief, I would think. Let's be practical about it.

Mr. BROWNELL. On a temporary basis, I believe that would be a groundless fear, Mr. Chairman.

Mr. McCULLOCH. Mr. Chairman, I share some of your fears in this field, and I think that is one of the major decisions that this committee must first resolve.

I think the experience of Secretary Lansing is one that must give anyone pause, regardless of section 4.

Mr. BROWNELL. Then I evidently haven't gotten my point across, because my point is that history indicates, to me at least, quite clearly that the reason for this stalemate, for the failure to act, was because of the uncertainty as to whether the President could ever come back.

If I am correct in that, and we change the Constitution in the manner I propose, you would eliminate that obstacle entirely, and you would have them acting only for the duration of the inability.

Mr. KEATING. Mr. Attorney General, the chairman, with whom I must say last year I was rather inclined to be in agreement, would leave it entirely to the Vice President to make this determination. One reason for my reluctance to accept that is that I can see a danger there, because he provides for the President reassuming his Presidency, if he is able to do so, the danger of a chaotic condition by having the Vice President say the President was unable, and the next day the President saying, "I am able," and then the Vice President the next day saying he is unable, so that you would have a day-by-day President.

Now, to a lesser degree, it strikes me that danger is inherent in this proposal which leaves it to the Vice President and Cabinet. If the Vice President and the Cabinet decided to gang up on the President, they might say, "He is unable," and then the next day, under your proposal, he could say, "I am able to act," and unless he fired the members of the Cabinet, they would then the next day say he was unable.

That has been one reason why I have leaned toward the feeling that it would be better to have the Cabinet share in the decision, but not to have it absolutely conclusive, but to allow the other branches of the Government to have a voice in reaching that decision.

Would you comment on that?

Is that a fear which you don't think is serious--that there could be a chaotic situation resulting from this plan?

Mr. BROWNELL. I would be inclined to think it would be almost nonexistent, for this reason: That public opinion is going to decide this matter in the ultimate analysis.

No Vice President can make this decision unless he feels that the country is with him, Congress is with him, and that public opinion is with him. If he does so, he destroys himself forever. As a matter of fact, even if he makes a mistake in hindsight, he is destroyed forever.

So this decision is going to be very deliberately made, and it is going to be made with the advice of the President's official family, so that it will be a serious decision, and I would think the Vice President, realizing that the Constitution says--and he takes his oath of office to support the Constitution--he is only in there on an acting basis, for a temporary period, even after he got in, would act wisely and with due regard to that; otherwise, he would destroy himself in the field of public opinion and his whole life, official life, would certainly be jeopardized, if not destroyed.

That is a very powerful factor, perhaps the most powerful of all the factors that come into play here.

Mr. WALTER. Mr. Brownell, have you given any thought to the advisability of having the President, when he feels he is able to act again, submit his case to the Cabinet?

Mr. BROWNELL. We have, to answer your question directly, yes, given consideration to that. We had a discussion of that, and we felt

that the people of the country would not feel quite the same about the President coming back as they do about the President going out. They elected the President, after all. They want him in there. They are willing to trust him to make this decision. So as far as his coming back into office is concerned, we felt there should be no strings on it at all; that is what the people voted for, and that is what they want.

That only leaves the question, as I see it, of the extreme situation where a President, obviously unable to act, still determined to do so, and in a reckless situation of that kind, or one where he really was not able to make a rational decision, if the time of crisis was such that action was needed, you could bring in your impeachment proceeding, because-----

Mr. WALTER. There is the other case where the Acting President would conclude that he was going to remain-----

Mr. BROWNELL. Yes.

Mr. WALTER. And would refuse to accept the President's representation he is now able to carry on.

Mr. BROWNELL. Then that is another reason why you want the President alone to be able to make the declaration under section 4.

Mr. FEIGHAN. Mr. Chairman?

The CHAIRMAN. Yes.

Mr. FEIGHAN. Do you not feel that if the President declared his inability and subsequently felt he was able, he probably would be in very secluded circumstances? In that case, I wonder how this public opinion of which you speak would be permitted to function.

Mr. BROWNELL. Of course, this would all be a matter of public record, and perhaps the attention of the entire Nation would, of course, be focused on it, so that I don't think any aspect of it would be not in full public view, if I understand your question.

Mr. FEIGHAN. I am thinking of the, most likely, secluded situation in which the President would find himself.

Mr. BROWNELL. Yes.

Mr. FEIGHAN. There may be some minimum degree of hospitalization, perhaps.

Mr. BROWNELL. Just place it in the context of present-day life, where you have your television and your press conferences and all, so that it wouldn't be very long, if any mistake was made, before the people would find out about it and action would be forced. Now, someone asked me, Mr. Chairman-----

The CHAIRMAN. Mr. Attorney General, this committee has a bill which is going to be considered very shortly. So we will ask you to conclude as soon as possible.

Mr. BROWNELL. I could finish in 5 minutes, if you wish.

Someone asked me the question of how this would work, who would initiate the action, whether it would be the Vice President or the Cabinet. I would like to comment on that.

The Cabinet, under one set of circumstances, could notify the Vice President when a majority of that body believed that the President's inability was sufficient to warrant a devolution of the Presidential power on the Vice President.

There is an analogy there. The Cabinet has always notified the Vice President when a President has died, and section 3 would extend this custom in the case of inability.

On the other hand, the Vice President could make the decision to assume Presidential power, but the constitutional validity of his decision would depend upon the Cabinet's approving that decision.

So, it could be initiated either way.

There is also the possibility that under section 3, the Vice President could take the initiative without the Cabinet first inviting him to make the decision. Unlike the present provision of the Constitution, however, this plan, section 3, would require approval of a majority of the Cabinet before the Vice President could undertake the exercise of Presidential power.

Now, section 3 contains a safeguard against the Vice President's possible usurpation of power on a pretext of inability. A Vice President who undertakes the exercise, in other words, of this Presidential power, would be assured that his action could not be seriously branded as usurpation, because it would be approved in advance by a majority of the President's own appointees in the Cabinet.

In addition to the safeguard provided by section 3, as one of you brought out a moment ago, section 4 contains a second safeguard because it provides that whenever the President declares in writing that his inability is terminated, the President shall immediately resume the exercise of the powers and duties of his office.

So, I think section 4 provides a disabled President with a constitutional guaranty that the disabled President can regain the powers of his office without the concurrence of any other official or any other group; but more important than anything else is the point that I conclude with, which I mentioned a moment ago to Congressman Keating: More important than any of the written safeguards are those provided by our political processes, for ultimately the operation of any constitutional arrangement depends on public opinion, and upon the public's possessing a certain sense of constitutional morality.

In the absence of this sense of constitutional morality on the part of the citizenry, there can be, of course, no guaranty against the usurpation of power or any coup d'etat. In other words, no mechanical or procedural solution will provide a complete answer, if one assumes hypothetical cases in which most of the parties are rogues and in which no sense of constitutional propriety exists.

Section 5 is merely the mechanical provision for 7 years for ratification by the States.

I would conclude my remarks this morning both by thanking the chairman and the members of this subcommittee for their courteous attention, and expressing my firm belief that the plan presented to you has the essential ingredients to make any decision under it a just one, and generally acceptable to our people, for history and common-sense combine to tell us that this problem should be solved to protect our Nation in time of future crisis.

Mr. KEATING. Mr. Chairman, may I make this comment: I have, as the Attorney General knows, offered a legislative suggestion, which is now H. R. 6510, calling for a Presidential Inability Commission to make the determination of inability. I have been very much impressed with the arguments advanced by the Attorney General on behalf of himself and the President, and my mind is very open on the way we should approach this problem.

My one decision is that it should be approached. I feel the commission plan is the best approach still, but I would be very much

inclined to prefer, in the absence of any suggestion at all, the suggestion made by the Attorney General or, indeed, the suggestion made by the chairman or any other of a reasonable nature to solve this problem.

In order that the Attorney General's views of the President's proposal may be before us in tangible form, I should be happy to also offer in the House the proposal made now by the Attorney General.

Mr. BROWNELL. Thank you very much.

The CHAIRMAN. I think we will have committee prints embodying all proposals that have been suggested.

I want to say we are very grateful to you, Mr. Attorney General, and Mr. Rogers. Your presentation has been very enlightening and very helpful to this committee. It has been, I would say, on a very high plane, and it has been exceedingly constructive, and, I am sure, will help the members come to some conclusion.

I find in my study of the matter there is no perfect answer to this, that every answer has its imperfections, and what we must try to do is to reach the least objectionable solution.

Mr. KEATING. I want to add something else, Mr. Chairman.

The CHAIRMAN. Let me say first, before I forget it, I want to put in the record the statement of the committee on the Federal Constitution of the New York State Bar Association on this matter, and an editorial that appeared in the Washington Post this morning entitled "Displacing Ill Presidents."

(The matter referred to was ordered to be printed in the record, as follows:)

NEW YORK STATE BAR ASSOCIATION,
COMMITTEE ON FEDERAL CONSTITUTION,
March 29, 1957.

HON. EMANUEL CELLER,
*Committee on the Judiciary,
House of Representatives, Washington, D. C.*

DEAR MR. CELLER: As you know, the committee on the Federal Constitution of the New York State Bar Association has studied the question of Presidential inability for some months and has given consideration to the many suggestions made to the Judiciary Subcommittee on the subject.

As a result it is felt by this committee that a constitutional amendment is necessary, and that the amendment should provide in substance:

(a) That the commencement and termination of any inability should be determined by such method as Congress should by law provide; and

(b) In case of the inability of the President, that the Vice President should succeed only to the powers and duties of the office and not to the office itself.

It is clear that in its present form the fifth clause of section 1 of article II of the Constitution leaves open the matter of determination of what constitutes inability and fails to authorize anyone to deal either with the beginning or the end of the disability. This fact has been a matter of embarrassment to the Government in the past and could be a matter of national disaster in the future.

The question of what happens on the death of a President and whether the Vice President then succeeds to the office or succeeds only to the powers and duties of the office has been settled by historical tradition. As we all know the Vice President is sworn in as President upon the death of the latter. Presumably the same thing would happen in case of the resignation of the President or of his removal from office.

On the other hand, it is not clear whether in case of Presidential inability the Vice President would become President or would only be authorized to act as President as one succeeding to the powers and duties of the office. The words "the same" have never been construed in this connection and this fact adds to the confusion which is so apparent in the recent discussions on the subject.

It is extremely doubtful whether Congress has power to deal with the matter without a constitutional amendment and clearly the ambiguity of the present provisions cannot be cured by act of Congress alone.

Our committee concludes that a constitutional amendment is necessary for any final or authoritative solution of the problem and therefore recommends for your consideration that the fifth clause of section 1 of article II of the Constitution should be amended to read as follows:

"In Case of the Removal of the President from Office, or of his Death or Resignation, the said Office shall devolve on the Vice President. In Case of the Inability of the President to discharge the Powers and Duties of the said Office, the said Powers and Duties shall devolve on the Vice President, until the Disability be removed. 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 be President, or in Case of Inability act as President, and such Officer shall be or act as President accordingly, until a President shall be elected, or, in Case of Inability, until the Disability shall be earlier removed. The commencement and termination of any Inability shall be determined by such method as Congress shall by law provide."

If this amendment shall be adopted it would mean that in case of the death, resignation, or removal from office of the President, the Vice President would be sworn in as President. In case of the President's inability, however, the Vice President would only act as President, having his powers and duties, until the disability was removed. Congress would be called upon to enact legislation determining the method by which the commencement and termination of any inability should be determined.

In view of the amount of time that would necessarily pass before adoption of the amendment there would be plenty of time for your committee to consider what method should be adopted by Congress for this determination.

In case of the inability of both the President and Vice President, the change contained in the amendment proposed above is designed to make it plain that the officer who shall then act as President shall do so on a temporary basis until the disability is removed or a President elected.

It is believed that no amendment would be sufficient to meet the problem without providing for the determination of the question of commencement and termination of inability of the President or the Vice President, or without separating the provisions relating to inability from those relating to death, resignation, or removal, thus removing the ambiguity involved in the present language.

I sincerely hope that the foregoing will be of assistance to you and your committee in your consideration of this vital subject, and I am enclosing additional copies of this letter for the other members of the subcommittee, and am sending further copies to the committee's general counsel.

Respectfully and sincerely yours,

CORNELIUS W. WICKERSHAM, *Chairman.*

[From the Washington Post, April 1, 1957]

DISPLACING ILL. PRESIDENTS

Beverly Smith, Jr., Washington editor of the Saturday Evening Post, takes us to task in a letter published on this page today for casting doubt on the efficacy of his proposed Presidential Powers Commission. In his recent article in that magazine, Mr. Smith offered his plan under the title of "Smith's Two Cents Worth." But now he has substantially raised his price and urges its acceptance as a means of plucking the flower of national safety out of the nettle of danger.

We fail to see any such promise in the proposed Presidential Powers Commission. That body—somewhat similar to the Presidential Inability Commission in Representative Keating's bill—would be composed of three members of the Supreme Court, the Secretaries of State and Treasury, the majority and minority leaders of the Senate, and the Speaker and minority leader of the House. Any time it might find the President temporarily unable to discharge the powers and duties of his office it could install the Vice President as acting President. When and if the commission should find the President's disability removed, it could restore his powers to him.

In displacing the President the commission would have to act by a two-thirds vote. Would it also take two-thirds of the commission to restore the President to his office? If so, 4 of the 9 members, all of whom might be of the opposite political party, could prevent a recovered President from regaining the office to which the people had elected him.

Other grave questions must be asked about the proposed PPC. For instance, would the Chairman, who would be the Chief Justice, be the only person who

could call it in session in case of a presidential illness? Any Chief Justice would be most reluctant to intervene in the affairs of the President. Mr. Smith seems to assume that such a Commission would have relieved President Wilson of his duties and powers during his illness. We seriously doubt that Chief Justice White would have inflated such a course of action, and if a Commission had attempted to displace Wilson in the tense atmosphere of the fight over the League of Nations he would certainly have resisted with all his power. An appalling fight over the Presidency might have been the result.

In our opinion, the best prospect of relieving the Nation's plight in that situation would have been a clearly established rule that the Vice President could fill in temporarily without acceding to the presidential office. Mr. Smith may be right in assuming that Wilson would not have invited the Vice President to take over in any event, but there is even less probability that he would have bowed to a Commission's edict without a potentially perilous struggle.

The existence of such a Commission would be a constant source of irritation to any President. Every time a Democratic President might be temporarily ill or might have to undergo an operation, a Republican Speaker or leader in the Senate could badger the Chief Justice about summoning the Presidential Powers Commission. The Chief Justice would be accused of acting or failing to act out of partisan motives. One of the most serious objections to the whole scheme is that it would plunge the Supreme Court into political imbroglios.

In sum, the proposed PPC would raise more doubt and uncertainty than it would remove about national leadership in case of disability on the part of the President. For that reason it is dangerous. A much safer proposal on this subject is the one favored by President Eisenhower—which would permit the Vice President to act as a substitute for the President at the latter's request. We are glad to note that Mr. Smith also favors this plan even though he thinks it does not go far enough. Mr. Eisenhower's additional plan of having the Cabinet decide the disability issue when the President himself could not is provoking about as much controversy as the Commission idea has done.

Mr. KEATING. I might say, parenthetically, I understand that this committee of the New York State Bar Association doesn't agree with anybody on this problem, which is par for this course; but I do want to add this, Mr. Attorney General, and this is an encomium of the chairman; in light of this statement that this has been held on such a high level; I want to call your attention to the fact that this committee sat and heard a large volume of evidence on this subject last year, toward the end of the session, and the chairman agreed with those of us on our side, that it was an inappropriate and indelicate time to bring up that subject at that time, and any political advantage which he or his party might have derived from it was completely divorced from his mind, and we agreed together that we would take it up in a very serious way in this session.

I want to say I commend the chairman most highly for that attitude.

Mr. BROWNELL. I would like to add my appreciation to that.

Mr. WALTER. I think this indicates the quandry of the members of this subcommittee, because we have been wrestling with this thing since 1955, and I think all of us have the same views that we had when we initially undertook a solution.

Mr. BROWNELL. It is a hard problem, but this subcommittee can handle it, I am sure.

The CHAIRMAN. Have you seen this brochure the committee issued on the Presidential disability?

Mr. BROWNELL. We have. We just received one this morning, Mr. Chairman.

Mr. BROOKS. Mr. Chairman.

The CHAIRMAN. Yes.

Mr. BROOKS. Mr. Attorney General, on page 21 of your testimony you indicated that you believed that to allow the judicial or legis-

lative officers to make the initial determination would be violative of the Constitution, or would not be constitutional. Do you think that is true in light of your restatement on page 12 of the second part of paragraph 6, where it states very clearly in the Constitution that "the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President"?

Mr. BROWNELL. I have two comments on that. First, that point that you just mentioned, that is a case specifically where the Constitution says in case both the President and the Vice President are out, there can be a succession law by statute.

The question we are raising is on the first part of that section which does not mention Congress acting, but I do not intend to say the Constitution could not be amended to provide that type of situation where Congress or the judiciary might participate in this decision.

Of course, you could have a constitutional amendment, but my point there was rather to the policy involved.

We have always endeavored to maintain this strict separation of powers between the three branches, and this seems to be peculiarly an executive-branch decision.

Mr. BROOKS. Then you don't think it would actually be unconstitutional for congressional officers to participate in such a decision?

Mr. BROWNELL. I think the Constitution could be amended to provide that.

The CHAIRMAN. Are there any other questions?

Thank you, Mr. Attorney General.

(Whereupon, at 11:48 a. m., the hearing was adjourned, subject to call of the Chair.)

(The following was later submitted for the record:)

COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES.

On April 1, 1957, a statement on Presidential inability was presented to your subcommittee by the Attorney General. Shortly before that the committee on Federal Constitution of the New York State Bar Association presented to your subcommittee a suggested amendment dealing with that problem. It did not then have before it the recommendations of the Attorney General. However, it agrees with him that in removal, death and resignation the office devolves but that in the case of inability the duties and not the office devolve upon the Vice President, that such inability may be terminated, resulting in the President taking up his duties. It agrees that a constitutional amendment is the best solution. It is true that by usage in those cases where it was impossible for the President to return, the Vice President has taken the oath of office, although there is no specific constitutional sanction therefor. A constitutional amendment would forever remove doubt as to this. Such diverse views have been expressed on the question of whether Congress has the power to legislate on inability that it may be contemplated that if such power were exercised by virtue of an act of Congress without constitutional sanction it would be tested in the courts. For those reasons the committee has advocated constitutional amendment.

Our subcommittee on Presidential inability, of which I am the chairman, and Messrs. Ellhu Root, Jr., and Arthur H. Dean are the other members, have not met since the statement of the Attorney General so there has been time for informal discussions only. Hence this memorandum is submitted as an expression of my own views although in general concurred in by the others.

While the Attorney General advocates constitutional amendment, he does so on a completely different ground. His expressed view is that the Vice President could not be divested, without constitutional amendment, of the power of determination which he now has. The reason for divesting him of that power is that he should be given a more limited power to declare inability and then only with the consent of a majority of the cabinet who are executive officers. This memorandum is not primarily concerned with the policy of how to deal with the question

of inability but is submitted in the hope that it may offer some suggestions to those having responsibility as to the interpretation of the Constitution. It is submitted that the interpretation of the Vice President's power advocated by the Attorney General and his recommendation as to the Cabinet acting with the Vice President could not have been within the contemplation of the framers for the following reasons:

First, it would have been a simple matter to have said that the determination of inability should be made by the Vice President. The debates rather indicate that they avoided who was to raise and determine inability. Nor was it likely that the framers expected that the Vice President would act deterred either by fear of the accusation of usurpation or reluctance induced by loyalty. Also the exercise of such a power without explicit direction would have been made at his peril and might lead to an extraordinary situation in some cases, as for example, where the President declared himself able to perform or resume his duties.

Second, at the time the Constitution was adopted, the Vice President was the candidate who received the second largest number of votes. The supporters of the rival candidates held quite strongly divergent views which very soon crystallized into a party organization. It seems unlikely that it was in the purview of the draftsman that a recently defeated candidate for President, then serving as Vice President, should be given power under any circumstances to determine the ability of the successful candidate to perform his duties.

Of course, it could not have been within the purview of the framers that the Cabinet should have any responsibility in the matter as the Cabinet was not then created.

As against the view that this power has been held since 1787 it should be considered that (a) it has never been exercised, possibly for the reason that it was feared that the office would be vacated; (b) that it required congressional action to implement it; (c) that such implied power was not sufficiently recognized to justify reliance on it.

The Attorney General argues that the Vice President has always had this power. He does not deal with the troublesome question which would arise if a President and a Vice President disagreed on the right of determination. His argument is based on the premise that since the Vice President has the duty of acting in certain contingencies he is clothed with the duty to determine when that contingency exists. It does not, of course, so state in the Constitution but the Attorney General contends that it is a well established rule of law that a contingent power gives its grantee the right to determine when to exercise it. In support of this legal generalization four cases are cited. (See citation 26 to Attorney General's memorandum.)

There was sustained in the Aurora case in 1813 the President's right to proclaim termination of embargo, in the Martin case in 1927 to calling out the militia and in the Field case in 1881 and the Hampton case in 1928 the right to determine changing state of facts to vary tariff. Each of the above acts was done in pursuance of express authority given the President by Congress. This is an entirely different matter from saying that power may be implied where express direction is not given.

The logical conclusion in the interpretation of any constitutional language directing that something be done would be that someone was directed to do it. Unfortunately that does not appear to be so here unless Congress under its broad powers was expected to implement it. If by inference it was expected that anyone had the power without congressional implementation it is submitted that it would be more likely to be the President himself at least where he was able and willing. The view of the Attorney General is that it requires constitutional amendment to give the President this power and a constitutional amendment to divest the Vice President of a power which he always had and apparently the President never had. It is submitted that not for this reason but for clarification a constitutional amendment should be adopted to settle the question of succession to office where the President cannot resume his duties and of devolution of duties where he may be able to.

April 9, 1957.

MARTIN TAYLOR.

Copy for information of Attorney General; Cornelius W. Wickersham, Bar Association Committee Chairman; Arthur H. Dean, Esq.; Elihu Root, Jr., Esq.