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**PRESIDENTIAL INABILITY AND VACANCIES
IN THE OFFICE OF VICE PRESIDENT**

1620-6

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CONSTITUTIONAL AMENDMENTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-EIGHTH CONGRESS
SECOND SESSION
ON
**S.J. Res. 13, S.J. Res. 28, S.J. Res. 35, S.J. Res. 84,
S.J. Res. 138, S.J. Res. 139, S.J. Res. 140, S.J. Res. 143,
S.J. Res. 147**

RELATING TO THE PROBLEM OF PRESIDENTIAL INABILITY
AND FILLING OF VACANCIES IN THE OFFICE OF THE VICE
PRESIDENT

JANUARY 22, 23; FEBRUARY 24, 25, 28; MARCH 5, 1964

Printed for the use of the Committee on the Judiciary



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PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

WEDNESDAY, JANUARY 22, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh (presiding), Keating, and Fong.

Also present: Larry Conrad, counsel, and Clyde Flynn, minority counsel.

Senator BAYH. The subcommittee will please convene.

We are here this morning to consider the problems of Presidential succession and Presidential inability. Notice of these hearings has been duly published in the Congressional Record of January 16, 1964.

It is certainly no stretch of the imagination to say that the subjects that we are met to consider this morning are complex and significant questions. They deserve our urgent attention. There are no quick and easy solutions. But certainly the problems are not insoluble. These are not new problems, to be sure. They have been the subject of discussion from time to time since the adoption of our Constitution. But they have a ringing urgency today with the tragedy of our martyred President so fresh in our memory.

The first of our problems is that we have a void in the Vice Presidency today. It is an almost unbelievable fact of American history that on 16 different occasions totaling more than 38 years in time we have been without a Vice President.

In any one of those years something could have happened to the President. This would have required an officer other than the Vice President to act as President.

Eight times in our history a President has died in office and has been succeeded by the Vice President. Each time this has happened, it has been a severe shock to the Nation. But each time, our Government has withstood the test. We have had orderly transfer of Executive authority. We pray we may never be faced, however, with the supreme test—the loss of a President and Vice President within the same 4-year term of office. But we must prepare for such an eventuality. For whatever tragedy may befall our national leaders, the Nation must continue in stability, functioning to preserve a society in which freedom may prosper.

It seems clear that the best way to assure this is to make certain that the Nation always has a Vice President as well as a President. It is significant that every measure placed before this committee since

President Kennedy's assassination agrees on one vital point—that we shall have a Vice President.

Why have a Vice President? Hasn't this office been the object of sharp satire since the Constitutional Convention created it as an after-thought? Isn't this the job that has been described as a one-way ticket to political oblivion? Maybe so—once upon a time. But no more—not in 20th century America.

Today the Vice Presidency is a sought-after office. It is, in fact, a springboard to the Presidency. The Vice President is the President's chief ambassador. When President Johnson was Vice President, he traveled more than 75,000 miles aboard on missions for the Chief Executive, including top-level trips to Berlin and to Vietnam. Vice President Nixon spent more than twice as much time abroad as did President Eisenhower during the 8 years of their combined administration.

It was when he was on official missions that Mr. Nixon confronted surly youths in Latin America and met Mr. Khrushchev in the now famous kitchen debate.

The Vice President is today an integral part of Cabinet meetings. Modern-day Presidents seek the advice and counsel of their Vice Presidents. The Vice President is a statutory member of the National Security Council. He is Chairman of the President's Committee on Equal Employment Opportunity. He is Chairman of the National Aeronautics and Space Council.

There are few more significant issues today than the security of our Nation, the race for space, and the fight for equal rights. These are among the paramount issues of our age, and the Vice President, by virtue of his office, is in the thick of each of them. Last, but hardly least, the Vice President is the man who is always one heartbeat away from the most powerful office in the world.

There are those who would cloud the issue by criticism, not of the succession law today, but of the distinguished Speaker of the House of Representatives, who, under the present law, as we know, is next in line of succession to the Presidency.

As junior Senator from Indiana and as chairman of this subcommittee I would like to say that those who criticize the Speaker's ability to perform the powers of the Presidency should spend some time watching the actions of the Speaker in the House Chamber or, better yet, in the semiprivacy of the Speaker's room. There can be little doubt as to his capability.

Today the problem goes far deeper than the questions of age or personality of the Speaker. It involves the traditional separation of powers in our form of Government. It involves serious doubt about what would happen if the President were disabled. Would the Speaker, who has toiled for 40 years to reach his exalted position, give it all up to act as President for a few weeks if the President were temporarily disabled? If he did not, would we have a chief legislator also acting as Chief Executive? If the President were to die, couldn't the Speaker be of the opposing political party? What implications would that have for the continuity of Executive policy? Does the Speaker—any Speaker—have the constitutional right to assist the President as a Vice President does? Can the Speaker—any Speaker—possibly run the large and diverse House of Representatives and, simultaneously, prepare properly for the Presidency?

I submit that reason dictates that we take steps to assure that the Nation always have a Vice President. He would lift at least some of the awful burdens of responsibility from the shoulders of the President. His presence would provide for an orderly transfer of Executive authority in the event of the death of a President—a transfer that would win popular consent and inspire national confidence, which is important in any political system.

He would be there to substitute as President, as Hamilton suggested, when events required him to do so.

Our obligation to deal with the question of Presidential inability is crystal clear.

Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our Nation from the possibility of floundering in the sea of public confusion and uncertainty which oftentimes exists at times of national peril and tragedy.

The Constitution spells out in minute detail the procedures for removing a President from office. Yet there isn't a word, not a hint about what is meant by inability of a President. There is no clue as to the method of determining disability, who would make such a determination, what would happen once the determination is made, how the period of inability would be terminated or whether the President would then resume his office or simply lose his job.

History has been trying to tell us something, it seems to me, and it is high time that we listen.

President Garfield lay wounded 80 days before he died. His only official act in that time was the signing of an extradition paper. The Cabinet, without constitutional authority, ran the Government as best it could.

For nearly 2 years after President Wilson collapsed with a stroke, our Government was virtually run by Mrs. Wilson and the President's personal physician—two well-meaning persons devoted to the President, but hardly individuals with constitutional authority to direct our affairs of state.

Again, no one knew what to do when President Eisenhower suffered a heart attack. Later, the President and Vice President Nixon set a precedent with a mutual agreement on what to do in the event of the future inability of the President.

But such informal agreements are unsatisfactory as permanent solutions, and both Mr. Eisenhower and Mr. Nixon were among the first to say so. Such agreements depend on good will between the President and Vice President. They don't have the force of law. They could be subjected to serious constitutional challenge. They open the door for possible usurpation of power from the President. Yet they do not protect the Nation from a President whose disability might involve a mental illness.

These questions can be solved by amending the Constitution. Some say they could best be solved by statute. Frankly, I disagree. Many distinguished lawyers disagree. What most lawyers agree upon is that if there exists a reasonable constitutional doubt, the best method to eradicate any doubt is to amend the Constitution.

We have had three succession laws in our history. We may have many more unless we remove succession from the arena of political expediency and amend the Constitution to provide for a Vice Presi-

dent at all times. It might be remembered that our first succession law, passed in 1792, placed the President pro tempore of the Senate next in line after the Vice President. The recorded reason for this was to avoid placing the Secretary of State too far up in the line of succession. History shows us that Alexander Hamilton was fearful that Thomas Jefferson might possibly ascend to the office of President.

Finally, the time to act is not when a President is lying ill and there is no machinery to deal with the execution of Executive power. If we act in those circumstances, we may come up with an expedient—but ill-conceived—answer to these pressing problems.

It seems to me the time to act is now when we still find it hard to believe that President Kennedy is gone and when we have a President in robust health.

I have made two principal points thus far. I have said that we should provide a means to have a Vice President at all times, and I have said that we must provide machinery for that Vice President to act as President when and if the President is disabled.

I believe strongly that we can provide a Vice President for the Nation by the relatively simple means of having a President nominate an individual for Vice President, when the Vice Presidency is vacant. Then the Congress should act on the President's recommendation by electing or rejecting the nominee.

The President must have a voice in the selection of a Vice President. It would assure the selection of a man—or woman may I add—with whom the President could work harmoniously. It would assure a reasonable continuity of Executive policy, should the Vice President become President. And it is in keeping with tradition, whereby a party's presidential candidate generally has great influence and, at the very least, a veto concerning his vice presidential running mate.

Our traditional system of checks and balances would dictate that the people, through their elected representatives, have a voice in selecting a Vice President.

Under the Constitution, Congress could always call for a special election. In our history, Congress has chosen not to. This has been a wise decision. For a time of traumatic shock—such as a time when we lose a President unexpectedly—is hardly conducive to a well-reasoned selection by popular vote.

On the other hand, the Congress is a body entrusted with making fateful decisions at crucial times. It is the Congress that declares war on behalf of us all. The Congress may elect or remove Presidents in certain circumstances. Certainly, the Congress is the proper body—with its hand on the pulse of public opinion—to elect a Vice President upon the nomination of a President.

In the question of Presidential inability, we must take every precaution to safeguard the President from unwarranted usurpation of his power.

Thus, the President must have the primary right to declare his own disability, and the termination of his disability. But should the President not make known his disability, the Vice President, with the concurrence of a majority of the Cabinet, should have the authority to determine Presidential inability. In such a case, the Vice President would become acting President, just as he would if the President himself declared his own disability.

Again, the President should have the primary right to declare when his disability had terminated. If the Vice President and a majority of the Cabinet disagreed with the President, the continuing inability of the President would be determined by a two-thirds vote of the Members of each House of Congress.

The point of this is to safeguard the President—to give him every advantage in any action or contemplated action. But, at the same time, we want to provide checks and balances because our system of Government recognizes no person—even the President of the United States—as infallible.

A proposed constitutional amendment to accomplish these goals has been introduced by myself and Senators Pell, Randolph, Bible, Moss, and Burdick.

There are other suggestions, some of which have been presented by my learned colleagues here. Frankly, those of us who presented the previously suggested resolution disagreed with the suggestion for two Vice Presidents which has been proposed by my good friend from New York, and we are going to have the opportunity to study this and to discuss it fully.

Basically, we disagreed with the suggestion for two Vice Presidents because we have just reached the stage in our history when the Vice President has become a figure of political significance, and it seems to us to divide the Vice President's duties between two men would perhaps nullify this advancement. We want to be careful we do not nullify this advancement by spreading the duties too thin.

To have one Vice President whose duties would be confined to presiding over the Senate would be to invite men of small political stature and questionable qualifications to stand for one of the highest political offices in the land.

We disagreed with proposals to have the electoral college elect a Vice President upon the President's nomination. The electoral college is not chosen, as is Congress, to exercise any considered judgment or reasoning. Its members are chosen merely to carry out the will of the voters in their respective States. The electoral college is not representative, really, of their respective States. As far as exercising considered judgment is concerned, the electoral college is not equipped, nor should it be equipped, to conduct hearings on the qualifications of the nominee submitted by the President. It would be a cumbersome body to try to assemble quickly and to get to act quickly in emergencies. Much of the general public has no earthly idea who their State's electors are. In fact, this morning, we had a group of constituents in my office and I asked—it was a sizable group—if anyone in the room knew any one member of the electoral college from our State. Not surprisingly, there was not one who knew the members of the electoral college. They have no earthly idea who their State's electors are and would be understandably hesitant to allow any such unknown quantity to make an important decision like confirmation of a Vice President of the United States.

This does not reflect upon the individual qualifications of the electors but rather points up the fact they have just not been accepted by the public as a body to make a considered judgment.

It is apparent that I feel strongly on this subject. I do. It is a vital subject and I have devoted a great deal of time to it. I want this

panel to consider my proposals carefully, and I want it to consider the proposals that will be laid before us by several of our distinguished colleagues. The important thing is to find a reasonable solution acceptable to the Congress and the several States.

I am grateful to the number of writers and interested groups whose concern about this problem will aid this committee in its deliberations. I want to express particular gratitude to the American Bar Association, which assembled a special group of experts in the past 2 days to study this problem. I am hoping that many of the distinguished panelists will appear individually at subsequent hearings on this question.

I am referring to men who met with this committee of the bar association like the Honorable Herbert Brownell, former Attorney General of the United States; the Honorable Ross Malone, former Deputy Attorney General of the United States; Prof. Paul A. Freund of Harvard Law School; Walter E. Craig, president of the American Bar Association; and Lewis F. Powell, Jr., president-elect of the American Bar Association.

One member of this distinguished panel, Prof. James C. Kirby, Jr., of Vanderbilt University, chief counsel of this subcommittee, some time ago, will testify before this committee today. Others on the panel were John D. Feerick, former editor-in-chief of the *Fordham Law Review*; Jonathan C. Gibson of Chicago; Richard Hansen of the University of Nebraska; Dean Charles B. Nutting of George Washington University; Sylvester Smith, past president of the American Bar Association; Martin Taylor of New York City; and Edward Wright, chairman of the house of delegates of the American Bar Association.

I wish at this point to insert in the record, if there are no objections, the consensus report released yesterday by the American Bar Association's Conference on Presidential Inability and Succession.

If there are no objections, I would ask that this be submitted for the record.

(The report referred to follows:)

CONSENSUS ON PRESIDENTIAL INABILITY AND SUCCESSION, JANUARY 20 AND 21, 1964

The Conference on Presidential Inability and Succession was convened by the American Bar Association at the Mayflower Hotel, Washington, D.C., on January 20 and 21, 1964. The conferees were Walter E. Craig, president, American Bar Association; Herbert Brownell, president, Association of the Bar of the City of New York, and a former Attorney General of the United States; John D. Feerick, attorney, New York; Paul A. Freund, professor of law, Harvard University; Jonathan C. Gibson, chairman, Standing Committee on Jurisprudence and Law Reform, American Bar Association; Richard H. Hansen, attorney, Lincoln, Nebr.; James C. Kirby, Jr., associate professor of law, Vanderbilt University, and a former chief counsel to the Subcommittee on Constitutional Amendments, Senate Judiciary Committee; Ross L. Malone, past president of the American Bar Association, and a former Deputy Attorney General of the United States; Charles B. Nutting, dean of the National Law Center; Lewis F. Powell, Jr., president-elect, American Bar Association; Sylvester C. Smith, Jr., past president, American Bar Association; Martin Taylor, chairman, Committee on Federal Constitution, New York State Bar Association; and Edward L. Wright, chairman, house of delegates, American Bar Association.

The members of the conference reviewed as a group the following statement at the close of their discussions. Although there was general agreement on the statement, the members of the conference were not asked to affix their signatures; and it should not be assumed that every member necessarily subscribes to every recommendation included in the statement.

The conference considered the question of action to be taken in the event of inability of the President to perform the duties of his office. It was the consensus of the conference that :

1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

3. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

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

5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress.

The conference also considered the related question of Presidential succession. It was the consensus that :

1. The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

Senator BAYH. Let me, before proceeding to my colleagues, lay down one or two ground rules. The national interest in these problems indicates there are a great number of organizations and individuals who wish to be heard on the issues involved. It is the desire, I am certain, of my colleagues and certainly the chairman of the subcommittee to hear as many of these witnesses as is possible.

If it develops that it is impossible to hear all of them, they will be permitted to file with the committee written statements expressing their views which will appear as a part of the record.

Today we are pleased to have with us our colleagues in the Senate who are prepared to give their testimony in regard to one or another proposed resolution. The particular measures involved are Senate Joint Resolutions 13, 28, 84, 138, 139, 140, 143, and 147.

Without objection the text of these resolutions will be inserted in the record at this time.

(The resolutions referred to, S.J. Res. Nos. 13, 28, 84, 138, 139, 140, 143, and 147 follow:)

[S.J. Res. 13, 88th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution relating to the nomination and election of candidates for President and Vice President, and to succession to the office of President in the event of the death or inability of the President

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. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years and, together with the Vice President, chosen for the same term, be elected as provided in this Constitution.

"SEC. 2. The nominees of each political party for election as President shall be nominated in primary elections held in the several States as provided by this section. The places and manner of holding such primary elections shall be prescribed in each State by the legislature thereof. Congress shall determine the time of such primary elections, which shall be the same throughout the United States. The voters in such primary elections in each State shall have the qualifications requisite for electors of the most numerous branch of the legislature of such State. Any such voter shall be eligible to vote only in the primary of the political party of his registered affiliation. No person shall be a candidate for nomination except in the primary of the political party of his registered affiliation, and the name of each such candidate shall appear on the ballot of that party in all of the States. A political party shall be recognized as such for the purposes of any primary election held pursuant to this article if at any time within four years preceding such election the number of its registered members shall have exceeded 10 per centum of the total number of registered voters in the United States.

"Within fifteen days after any such primary, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall make separate lists of all persons for whom votes were cast as nominees for President and the number of votes for each, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Speaker of the House of Representatives, open all certificates, and the votes shall then be counted.

"Each political party in each State shall be entitled to a number of nominating votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress. Each person for whom votes were cast as nominee for President in any State shall be credited with such proportion of his party's nominating votes in such State as he receives of the total popular vote of his party therein for President. In making the computation fractional numbers less than one one-thousandth shall be disregarded unless a more detailed calculation would change the result of the election. The person having a majority of the nominating votes as nominee for President in the case of each party shall be the nominee of that party for President. If in any political party no person receives a majority of the nominating votes as nominee for President, then a second primary for that political party shall be held and the names of the two persons seeking the Presidential nomination of that party who have received the greatest number of nominating votes in the first primary shall appear on the second primary ballot, and the one person receiving the greater number of nominating votes in the second primary shall be the nominee of that political party for President.

"In the event of the death or resignation, prior to the election, of the nominee of any political party for President, the national committee of such party shall designate a successor, but in choosing such a successor the vote shall be taken by States, the delegation from each State having one vote. A quorum for such purpose shall consist of a delegate or delegates from two-thirds of the States, and a majority of all States shall be necessary to a choice.

"SEC. 3. The electoral college system of electing the President and Vice President of the United States is hereby abolished. The President and Vice President shall be elected by the people of the several States. The voters in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The places and manner of holding such election shall be prescribed in each State by the legislature thereof. Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year

in which the regular term of the President is to begin. Each State shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress.

"Within forty-five days after such election, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall make distinct lists of all persons for whom votes were cast for President and the number of votes for each, and the total vote of the electors of the State for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted. Each person for whom votes were cast for President in each State shall be credited with such proportion of the electoral votes thereof as he received of the total vote of the electors therein for President. In making the computations, fractional numbers less than one-thousandth shall be disregarded. The person having the greatest number of electoral votes for President shall be President, if such number be at least 40 per centum of the whole number of such electoral votes. If no person has at least 40 per centum of the whole number of electoral votes, then from the persons having the two highest numbers of electoral votes for President, the Senate and the House of Representatives sitting in joint session shall choose immediately, by ballot, the President. A majority of the votes of the combined authorized membership of the Senate and the House of Representatives shall be necessary for a choice.

"The Vice President shall be likewise elected, at the same time and in the same manner and subject to the same provisions, as the President, but no person constitutionally ineligible for the office of President shall be eligible to that of Vice President of the United States.

"The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a Vice President whenever the right of choice shall have devolved upon them.

"SEC. 4. Whenever the powers and duties of the office of President shall devolve upon the Vice President or upon one of the persons designated by the Congress to act as President in the absence of a Vice President, and the date of the next general election for Senators and Representatives in Congress to be held more than ninety days after such powers and duties shall have so devolved is at least two years prior to the date on which the next regular quadrennial election for President is to be held, a special election, shall be held in the several States for the purpose of choosing a President and Vice President. Such special election shall be held at the time of the next general election for Senators and Representatives in Congress, and, except as provided in this section, candidates for such special election shall be nominated and elected in the same manner as in the case of regular elections. The lists required by the first section of this article to be transmitted to the seat of the Government shall be transmitted within ten days after the election and shall be opened and the votes counted on the fifteenth day following such election. A President and Vice President elected at a special election held pursuant to this section shall take office on the fifth day following the day on which the result of such election shall have been determined and shall hold office until noon on the 20th day of January following the expiration of four years after the date on which they take office, and the terms of their successors shall then begin. Thereafter, except as provided in this section, the terms of the President and Vice President shall end at noon on the 20th day of January in each fourth year, and the terms of their successors shall then begin.

"SEC. 5. Paragraphs 1, 2, and 3 of section 1, article II, of the Constitution, and the twelfth article of amendment to the Constitution, and section 4 of the twentieth article of amendment to the Constitution, are hereby repealed.

"SEC. 6. This article shall take effect two years following its ratification.

"SEC. 7. 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 States within seven years from the date of its submission to the States by the Congress."

[S.J. Res. 28, 88th 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 only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President 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 that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the office as Acting President.

"SEC. 4. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

"SEC. 5. The Congress may by law provide for the case of the removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected. If at any time there is no Vice President, the powers and duties conferred by this article upon the Vice President shall devolve upon the officer eligible to act as President next in line of succession to the office of President, as provided by law."

[S.J. Res. 84, 88th 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 only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. If the President dies, resigns, or is removed from office, the Vice President shall become President for the remainder of the term to which the President was elected.

"SEC. 2. If the President becomes unable for any reason to discharge the powers and duties of his office, they shall devolve upon the Vice President, who shall then act as President until the disability of the President be removed, or the term of office of the President shall expire. Congress shall have the power to establish a procedure to determine the inability of the President to discharge the powers and duties of his office; but such procedure must be compatible with the maintenance of the three distinct departments of government, the legislative, the executive, and the judicial and the preservation of the checks and balances between the coordinate branches. Congress shall provide by law for the case of the removal, death, resignation, or inability of both the President and Vice President, declaring what officer shall then act as President; and such officer shall act accordingly, until the inability be removed, or the expiration of the term for which both officers had been elected.

"Sec. 3. Article II, section 1, paragraph 6 is hereby repealed."

[S.J. Res. 138, 88th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the selection of a new Vice President whenever there is a vacancy in the office of Vice President

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. Whenever the office of Vice President becomes vacant at any time, not later than thirty days before the expiration of the term for which the Vice President was elected, because of the death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall convene the Senate and the House of Representatives in joint session to elect a person to act as Vice President.

"SEC. 2. A quorum of each House of the Congress being present at such joint session, such person shall be chosen by majority vote of the Members of the Senate and of the House of Representatives present and voting, each such member having one vote. The selection under this article shall be made from persons who at the time of such joint session are heads of executive departments of the Government or Members of the Congress. The person so chosen shall vacate his office as the head of an executive department or as a Member of the Congress.

"SEC. 3. A person chosen under this article to act as Vice President shall act accordingly until the end of the term for which the Vice President or Vice-President-elect whom he succeeds was elected. While so acting he shall have in all respects the same status, powers, and duties as an elected Vice President.

"SEC. 4. Nothing contained in this article shall prevent the Congress from providing by law, consistently with the provisions of this article, for the designation of an officer who shall act as President at any time at which vacancies exist in the office of both President and Vice President.

"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 States within seven years from the date of its submission to the States by the Congress."

[S.J. Res. 189, 88th Cong., 1st sess.]

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

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

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

"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. Within a period of thirty days thereafter, the new President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority of those present and voting.

"SEC. 2. In case of the removal of the Vice President from office, or of his death or resignation, the President, within a period of thirty days thereafter, shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting.

"SEC. 3. 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. 4. If the President does not so declare, the Vice President, if satisfied that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties as Acting President.

"SEC. 5. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or as such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

"SEC. 6. (a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President, shall act as President: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, and such other heads of executive departments as may be established hereafter and in order of their establishment.

"(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this section.

"(3) To qualify under this section, an individual must have been appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, or inability of the President and Vice President, and must not be under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon him.

"(b) In case of the death, resignation, or removal of both the President and Vice President, his successor shall be President until the expiration of the then current presidential term. In case of the inability of the President and Vice President to discharge the powers and duties of the office of President, his successor, as designated in this section, shall be subject to the provisions of sections 3, 4, and 5 of this article as if he were a Vice President acting in case of disability of the President.

"(c) The taking of the oath of office by an individual specified in the list of paragraph (1) of subsection (a) shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

"(d) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

"SEC. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

[S.J. Res. 140, 88th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to create the offices of Executive Vice President and Legislative Vice President

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. The Office of Vice President is abolished. There shall be an Executive Vice President and a Legislative Vice President of the United States, each of whom shall hold office during the term of four years and shall be chosen in the manner and begin his term at the time provided with respect to the Vice President whose office is abolished by this section.

"SEC. 2. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Executive-Vice-President-elect shall become President. If at such time the President-elect and the Executive-Vice-President-elect both shall have died, the Legislative-Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Executive-Vice-President-elect shall act as President until a President shall have qualified. If neither a President nor an Executive Vice President shall have been chosen before the time fixed for the beginning of the term of a President, or if neither the President-elect nor the Executive-Vice-President-elect shall act as President until a President or an Executive-Vice-President shall have qualified then the Legislative-Vice-President-elect shall act as President until a President or an Executive Vice President shall have qualified. The Congress may by law provide for the case wherein no President-elect, Executive-Vice-President-elect, or Legislative-Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President, an Executive Vice President, or a Legislative Vice President shall have qualified.

"SEC. 3. In the case of the removal of the President from office, or of his death or resignation, the office of President shall devolve upon the Executive Vice President. In the case of the removal of the Executive Vice President from office, or of his death or resignation, or when he shall become President, the office of Executive Vice President shall devolve upon the Legislative Vice President. In the case of the inability of the President to discharge the powers and duties of his office, said powers and duties shall devolve upon the Executive Vice President as Acting President until said inability is removed. In the case of the inability of both the President and the Executive Vice President to discharge the powers and duties of the office of President, said powers and duties shall devolve upon the Legislative Vice President as Acting President until said inability of the President or of the Executive Vice President be removed. The Congress may by law provide for the case of the removal, death, resignation, or inability of the President, the Executive Vice President, and the Legislative Vice President, declaring what person shall then be President, or in the case of the inability of all of said officers to act as President, and such person shall be or act as President accordingly until the end of the term for which the President was elected, or in the case of any such inability until such inability shall be earlier removed. The Congress may prescribe by law the method whereby the commencement and termination of the inability of any such officer shall be determined.

"SEC. 4. The Legislative Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose a President pro tempore in the absence of the Legislative Vice President, or when he shall exercise the powers and duties of the office of President or Executive Vice President of the United States.

"SEC. 5. Except as otherwise provided by this article, all provisions of this Constitution relating to the office of Vice President abolished by section 1 of this article shall have application to or with respect to the office of Executive Vice President and to the office of Legislative Vice President.

"SEC. 6. This article shall apply to the selection of an Executive Vice President and a Legislative Vice President for each regular term of President which begins more than one year after the ratification of this article as an amendment to the Constitution, and shall take effect for all other purposes at the beginning of the term of President for which the first Executive Vice President and the first Legislative Vice President may be chosen under this article.

"SEC. 7. 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 States within seven years from the date of its submission to the States by the Congress."

[S.J. Res. 143, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to create the offices of Executive Vice President and Legislative Vice President

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. The Office of Vice President is abolished. There shall be an Executive Vice President and a Legislative Vice President of the United States, each of whom shall hold office during the term of four years and shall be chosen in the manner and begin his term at the time provided with respect to the Vice President whose office is abolished by this section.

"SEC. 2. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Executive-Vice-President-elect shall become President. If at such time the President-elect and the Executive-Vice-President-elect both shall have died, the Legislative-Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, the Executive-Vice-President-elect shall act as President until a President shall have qualified. If neither a President nor an Executive Vice President shall have been chosen before the time fixed for the beginning of the term of a President, or if neither the President-elect nor the Executive-Vice-President-elect shall have qualified, the Legislative-Vice-President-elect shall act as President until a President or an Executive Vice President shall have qualified. The Congress may by law provide for the case wherein no President-elect, Executive-Vice-President-elect, or Legislative-Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President, an Executive Vice President, or a Legislative Vice President shall have qualified.

"SEC. 3. 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 office of President, the same shall devolve upon the Executive Vice President. In case of the removal of the Executive Vice President from office, or of his death, resignation, or inability to discharge the powers and duties of the office of Executive Vice President, or when he shall discharge the powers and duties of President, the powers and duties of the office of Executive Vice President shall devolve upon the Legislative Vice President. The Congress may by law provide for the case of the removal, death, resignation, or inability of the President, the Executive Vice President, and the Legislative Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability of the President, the Executive Vice President, or the Legislative Vice President be removed, or a President shall be elected.

"SEC. 4. The Legislative Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose a President pro tempore in the absence of the Legislative Vice President, or when he shall discharge the powers and duties of the office of President or Executive Vice President of the United States.

"SEC. 5. Except as otherwise provided by this article, all provisions of this Constitution relating to the office of Vice President abolished by section 1 of this article shall have application to or with respect to the office of Executive Vice President and to or with respect to the office of Legislative Vice President.

"SEC. 6. This article shall apply to the selection of an Executive Vice President and a Legislative Vice President for each regular term of President which begins more than one year after the ratification of this article as an amendment to the Constitution, and shall take effect for all other purposes at the beginning of the term of President for which the first Executive Vice President and the first Legislative Vice President may be chosen under this article.

"SEC. 7. 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 States within seven years from the date of its submission to the States by the Congress."

[S.J. Res. 147, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the filling of vacancies in the office of Vice President, or in the offices of both President and Vice President

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. Within ten days after the date on which the office of Vice President becomes vacant because of the death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall convene the Senate and the House of Representatives in joint session to elect a successor to the office of Vice President.

"SEC. 2. Within ten days after the date on which the offices of President and Vice President both become vacant before the expiration of the term for which the President and Vice President were elected, the person discharging the powers and duties of President shall convene the Senate and the House of Representatives in joint session to elect a successor to the office of President and a successor to the office of Vice President.

"SEC. 3. A quorum of each House of Congress being present at a joint session convened under this article, a new Vice President, in the case of a vacancy in the office of Vice President, or a new President and a new Vice President, in the case of vacancies in the offices of both President and Vice President, shall be chosen by majority vote of the Members of both Houses present and voting.

"SEC. 4. A President or Vice President chosen under this article shall serve as such until the end of the term for which the President or Vice President whom he succeeds was elected.

"SEC. 5. The Congress may provide by law for the designation of a person who shall discharge the powers and duties of President at any time at which there is no President or Vice President chosen under article II of this Constitution, the twelfth or twentieth article of amendment to this Constitution, or this article of amendment. Any such person shall continue to discharge those powers and duties until a President or a Vice President is so chosen and has qualified.

"SEC. 6. 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 States within seven years from the date of its submission to the States by the Congress."

Senator BAYH. One other joint resolution——

Senator KEATING. Will the chairman yield? Did you include Senate Joint Resolution 35?

Senator BAYH. I wanted to ask my colleague from New York what his wishes were. I would like to have the text of this considered, but I did not want to circumvent the normal procedure which now finds this resolution before the full Judiciary Committee. Because I know of your interest I think we should consider it but technically it is not before us. What does my colleague wish?

Senator KEATING. I think technically you are right and as reported it is before the full committee. But the contents of it should be placed in the record.

Senator BAYH. Let us also include Senate Joint Resolution 35 as a part of the record and we will certainly consider this along with the others.

(The S.J. Res. 35 referred to follows:)

[S.J. Res. 35, 88th 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 only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“ARTICLE —

“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 inability 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 inability shall be earlier removed. The commencement and termination of any inability shall be determined by such method as Congress shall by law provide.”

Senator BAYH. Does my colleague from New York have objection if our good friend from North Carolina, since he has to go to a Rules Committee meeting, have the opportunity to make his statement first?

Senator KEATING. No; I have agreed that may be so.

Senator ERVIN. I am deeply appreciative to my friend from New York for his courtesy on this committee. He was scheduled to be ahead of me.

Senator BAYH. May I make one comment for those who might, and I am sure there are not many of those, fail to recognize Senator Ervin who is recognized as a distinguished jurist in his home State and a constitutional authority of some note in the U.S. Senate.

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator ERVIN. Thank you, Mr. Chairman.

Mr. Chairman, I congratulate the subcommittee on undertaking these important hearings. Presidential succession and Presidential

disability have long needed constitutional clarification, and I appreciate this opportunity to present my views on the subject.

The problem of Presidential succession has been the subject of three legislative enactments. Fortunately, it has never proven necessary to resort to the provisions of any of them.

Presidential inability, in many ways a thornier problem, has not been the subject of legislation, although twice in our country's history we have witnessed situations in which lack of provision for Presidential disability has led to indecision and confusion at a time when disorder could have had serious consequences. I refer, of course, to the disability of President Wilson in 1919 as the result of a stroke and the lingering death in 1881 of President Garfield at the hands of an assassin.

I wish to address my remarks today primarily to the question of succession as that is the subject of the resolution, Senate Joint Resolution 147, which I introduced January 20; it has been incorporated in the record by the chairman.

I want to emphasize that I think the problems relating to disability are serious ones, which deserve the thoughtful attention which this committee is giving to them.

It may well be that a provision relating to disability should be embodied in an amendment relating to succession; such a provision could grant Congress wide discretion in prescribing implementing legislation.

The Constitution itself provides that the Vice President shall succeed the President in the event of the latter's death or disability, and in the event that the President cannot "discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President."

Yet, even this language is not free from doubt. Controversy centers on the problem of ascertaining the proper antecedent to the word "same." Some claim that it refers to the Office of President, but others maintain that it refers only to the "Powers and Duties" of that office and so, the Vice President, under the Constitution, only becomes Acting President.

When Vice President Tyler succeeded President Harrison in 1841, he was designated President, not Acting President. And every Vice President to become President through succession has similarly been designated President. Yet there are some who still maintain that, constitutionally, the Vice President only serves as Acting President.

In fact, an article in the New York Times of December 10, 1963, imparts the information that a New Mexico lawyer is challenging President Johnson's assumption of the office on these grounds. I mention this fact only to show the uncertainty presented by the subject of Presidential succession.

Pursuant to its power to provide for the possibility that the Offices of the President and Vice President are vacant at the same time, Congress has passed three succession statutes.

The first, enacted in 1792, provided that the President pro tempore of the Senate was to act as President until a new President had been elected or until disability was removed. Following the President pro tempore in line of succession was the Speaker of the House. It is said that the line of succession was influenced by political considerations.

At the time Thomas Jefferson was Secretary of State, and many people felt that, as the ranking Cabinet member, he should be the first in line of succession. However, the Federalist Party, led by Hamilton, was in control of Congress. Hamilton, whose animosity for Jefferson is well known, had no desire to see the latter succeed to the Presidency.

In any case, the succession statute remained unchanged for 94 years when it was superseded by the Presidential Succession Act of January 19, 1886, which provided that members of the Cabinet, starting with the Secretary of State, would succeed to the Presidency. Justification for this answer to the problem of succession was based on the view that it was the best way to insure continuity in Government, since members of the Cabinet generally hold the same views as, and support the policies of the administration. Officers of the Congress, on the other hand, may not even be of the same party as was the disabled or deceased President.

I strongly agree that the laws of succession should provide for governmental continuity. Yet I believe that there are better ways to accomplish this than the Succession Act of 1886.

A new succession law, the one presently in operation, was enacted in 1947. Impetus for its passage was provided by President Truman who strongly disapproved of having Cabinet members first in the line of succession. He felt that it was undemocratic for a Vice President, who had succeeded to the Office of President himself, to be able to pick his successor.

In a letter to the then President pro tempore of the Senate, Senator Vandenberg, President Truman recommended that—

some other plan of succession be devised so that the Office of President would be filled by an officer who holds his position as a result of the expression of the will of the voters of this country.

President Truman preferred the Speaker of the House to the President pro tempore. It was his view that, since the Members of the House are elected every 2 years, the House is more generally in agreement with the political views of the administration than is the Senate, only one-third of whose Members are elected at the same time as the President and Vice President.

The succession law of 1947 adopted almost all of the recommendations of President Truman. It provides that the Speaker of the House, followed by the President pro tempore of the Senate shall follow the Vice President in line of succession to the Presidency. Following these are members of the Cabinet in stated order.

Although I think that the 1947 law governing the order of succession was a move in the right direction, it seems to me that Congress could devise a better system. The weakness of the present system is that for practical purposes it restricts the choice of a potential President to the Members of the House of Representatives and allows only House Members to participate in his election.

Moreover, a judgment as to who would make the best Speaker of the House of Representatives might differ from a judgment as to who would make the best Presidential successor.

I favor a system based on the premise that Congress should choose the best man for the office at the precise time when the need for selecting a successor arises. That time occurs when the Vice President succeeds

to the Presidency or when both the Offices of the Presidency and the Vice Presidency are vacant.

The resolution which I introduced on January 20 would provide that, within 10 days of the creation of a vacancy in the Office of the Vice Presidency, a joint session of Congress shall be convened for the purpose of selecting a new Vice President.

The votes of a majority of the Members of the Senate and of the House, each Member having one vote, shall be necessary to select the new Vice President. In the event both of our highest offices become vacant at once, Congress would select within 10 days both a President and a Vice President. In the interim period, the Presidency would temporarily be filled according to statute as enacted by Congress.

There are several reasons why I think this succession plan best meets the country's needs.

It satisfies our requirement, ably voiced by President Truman, that the potential President should be democratically selected. For under this system, he will be selected by the people's representatives.

Second, the need for continuity is met. There will always be a Vice President who can participate in the making of and be briefed on the policies of the existing administration.

Finally, the successor to the Presidency will be chosen at a time when attention can be focused on the qualities necessary to make a good President, not those necessary for some other office, and the Congress will be able to select from among all our great men, public and private, in making their choice.

Mr. Chairman, I would like to interpolate at this point these observations.

The resolution which I have introduced provides an amendment to deal with two different situations, one to deal with filling the Office of the Vice President when that Office is vacant, and the other to deal with the filling of the Offices of President and Vice President when the two Offices are simultaneously vacant. I think it has a decided advantage in that point.

It also would leave to Congress the power to enact a statute to provide who should exercise the powers of the Presidency and the Vice Presidency during the interim between the deaths of the President and Vice President and the selection of their successors.

It puts the election in the hands of the people, through their representatives, the Senators and the Members of the House. Each Senator and Representative shall have a vote. I think placing the greater voting power in the House is justified because all of the Representatives are elected every 2 years whereas only one-third of the Senators are.

I have only heard voiced two objections to this resolution: one is that it may result in having a President of one party or Vice President of one party succeeded by a man who happens to be a member of another party. Well, the present system, which some favor, of Cabinet succession, doesn't avoid that.

During the administration of President Roosevelt, who was a Democrat, there were two Republicans, namely Secretary Knox and Secretary Stimson, in his Cabinet, and while their views coincided with those of President Roosevelt on the subject of national defense, I have no reason to believe their views coincided with his on other subjects generally.

During the administration of President Eisenhower he had for a time a Democrat in his Cabinet in the person of the Secretary of Labor and at the present moment we have in the Cabinet, of a Democratic administration, two Republican Cabinet members, namely, Secretary McNamara and Secretary Dillon. So that is not too great an obstacle. Indeed, there is no assurance that any Cabinet member, regardless of party affiliations, would subscribe to all of the views or programs of his predecessor.

Of course, you can't have an ideal situation where death removes the Vice President or the President and Vice President both, but you have to deal with it. The Constitution itself permits us to have a divided Government elected by the people, with, for example, a Democratic Congress and a Republican President, as we had during most of the time of President Eisenhower's administration.

The only other objection I have heard voiced to this resolution is that putting the election in Congress violates in some way the doctrine of separation of powers. Well, the doctrine of separation of powers is modified in various aspects by the Constitution.

If no candidate for President gets a majority of the electoral votes, the power to elect a President devolves upon the House of Representatives where each State has a single vote, and the power to remove a President or a Vice President from office by impeachment for high crimes and misdemeanors resides in the Congress, and certainly some of the powers of Congress, the legislative powers, are given to the President in modified form in the conferral upon the President of a veto power.

So the whole system of checks and balances operates upon the basis of modification of absolute separation of governmental powers and it seems to me that this is not an objection of any great validity. And, as I say, this would put the election in the hands of the representatives of the people.

It would allow them to pick the best qualified man in the United States for the job, and it is far better than allowing the President, as President Truman said, to select his own successor through a Cabinet succession. It is far better than the present method because you might elect a Speaker or a President pro tempore of the Senate because of his qualifications to fill either of those two places and such a person would not necessarily have the capacity to be President. The best qualified person to be Speaker or the President pro tempore of the Senate is not necessarily the best qualified person to fill the office of President.

In saying this I do not discount the ability of either one of the present two occupants of those positions because I think either one of them is qualified to be President of the United States.

I want to thank the chairman and the Senator from New York for their very gracious act in permitting me to present my views at this time. It is necessary for me to do so in order that I go before the Rules Committee because of some matters that have to be acted on right away, and I thank you.

Senator BAYH. I would like to ask my colleague to yield. I would like to have in the record his thoughts because we have a great deal of common agreement: one, we agree that the present law is not adequate; two, we agree that the representatives of the people are the

best—this is the best form through which to make a decision, and you have limited your comparison to the present law in your proposal.

In order that we might have the benefit of your wisdom, Senator, what would be your objections to letting the President suggest to the Congress his selection and then let them either reject or elect the man he proposes, thus guaranteeing some continuity of party and administration?

Senator ERVIN. Well, I wouldn't have too serious objection to that except you have two problems involved there, and I think it would be unwise for us to solve one of them and leave the other unsolved. You have the problem of vacancy in the office of Vice President, and it is quite conceivable in this day of nuclear weapons and even in long-range rifles that you might have had a situation where both the Vice President and President died simultaneously or about the same time, and you would have two vacancies. I think we ought to deal with both of them on exactly the same basis, and the uniform way would be to allow the Congress to select either or both depending on which vacancies exist.

Senator BAYH. Then your resolution is designed to cope with the situation where we really have a dual tragedy? You feel the uniformity should be used in the event we just have one, but you have no serious objection to that?

Senator ERVIN. I wouldn't if you were just going to deal with the Vice Presidency alone. But I think as long as we are dealing with the Vice Presidency we ought to deal with both possible situations and it would be better to have a uniform rule than to have one rule in one case and another in another.

Senator BAYH. Thank you.

Senator ERVIN. I am sorry I can't stay to hear the presentation of the members of the committee and the witnesses, but I would certainly give them serious consideration because I hope that out of our divergence of views as to the proper mode that we can all finally agree on one method which will certainly solve these problems, and solve the problems of disability. This is a serious situation that might come about, and I certainly am grateful for the opportunity to present my views and I regret very much I do have to go to another committee meeting.

Senator BAYH. I would sincerely like to thank our colleague from North Carolina for taking the time. I know the session of the Rules Committee is important to him and to the committee which he chairs.

The Senator from New York, Senator Keating, has also expressed a considerable amount of interest and has done a great deal of study and deliberation in this area.

Senator Keating.

Senator KEATING. Thank you, Mr. Chairman.

STATEMENT OF HON. KENNETH B. KEATING, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KEATING. Thank you, Mr. Chairman.

This is in a way history repeating itself. Last June 11, this subcommittee began another set of hearings on Presidential inability.

It was presided over by the then chairman, the late Senator Estes Kefauver. In his opening statement, Senator Kefauver said:

We are very fortunate that this country now has a young, vigorous, and obviously healthy President. This will allow us to explore these problems in detail without any implication that the present holder of that office is not in good health.

The essence of statesmanship is to act in advance to eliminate situations of potential danger * * *.

Less than 6 months later, both Senator Estes Kefauver and President John F. Kennedy were dead. The "young, vigorous, and obviously healthy President" to whom Senator Kefauver had referred had been denied life by the still incredible concatenation of an incredible set of events: a parade, the right spot, an opportunity, a Marxist who also had marksmanship, possible lapses in security precautions, a host of factors coming together at a single time and place to work irretrievable change upon America's destiny.

As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land.

It is this possibility of temporary or permanent incapacity which would have plunged the country again into political crisis; the crisis of Presidential inability which from the adoption of the Constitution has loomed as the most serious single threat to the stability and continuity of the American Presidency as an institution.

In the light of my long association with him, with this committee and in other respects, I want to say that in the death of Estes Kefauver the country lost a brilliant public servant and statesman. His eloquent warning of last spring, unheeded, has now proved itself to have been right. Can America continue to trifle with danger to the institution of its highest public office by not translating Senator Kefauver's plea for action into a permanent constitutional solution? I think not.

The death of Estes Kefauver and John F. Kennedy provides a dual lesson for us. First, it is a grim reminder of the universality of tragedy, that no man, no matter his station, is immune from the accidents of fate that befall ordinary mortals.

Secondly, however, it cautions those who survive of the difficulty of clearly foreseeing the absolutely incredible. Human legislation partakes always of human fallibility. No act of lawmaking, no matter how carefully conceived and executed, can possibly safeguard against all the freak contingencies of our existence. The best we can hope to achieve is the best practical solution which will meet the needs of crises we can readily envision.

The limits of human foresight can perhaps explain why the Founding Fathers left the glaring omissions and silences on Presidential inability we perceive today in article II of the Constitution. Having had no operating experience, so to speak, under the novel institution of the Presidency which they were creating, it may well be that those wise statesmen counted upon the trial-and-error process of experience to galvanize their descendants into finally devising an adequate and lasting solution.

Today we cannot afford to ignore any longer this challenge to our political ingenuity.

The Constitution provides in article II that in case of the inability of the President "to discharge the powers and duties of the said office, the same shall devolve on the Vice President."

The so-called Tyler precedent—when Vice President Tyler upon the death of President Harrison assumed the office of President rather than merely its powers and duties as an Acting President—has, for practical purposes, laid to rest the constitutional ambiguity in cases other than inability. But as to inability the ambiguity and the lack of a consistent procedural precedent remain.

Under what circumstances is a President to be deemed unable to perform the powers and duties of his office? Who is to determine the existence or not of these circumstances in the first instance?

If the power of determination is to be lodged in the President himself, is he to have the last word? If not, who should have the last word? If a determination of inability is made by the proper persons, what course is the Vice President to follow? Is he to assume the office of President itself, or merely its powers and duties until such time as the President's inability is removed or a new President elected?

If the office of President itself, then is it right that the former President, even though recovered, should not be able to regain the office to which he was elected by the American people? If on the other hand, the Vice President is to temporarily assume only the powers and duties of the Presidency, but not the office itself, under what circumstances is the President entitled to regain the prerogatives of his office? Who shall determine the existence of such circumstances? These and other questions of the highest national import remain unanswered by the Constitution.

In 1958, this subcommittee conducted an exhaustive inquiry searching for possible solutions to these problems. President Eisenhower's then recent illnesses were fresh in the minds of all involved and many different proposals were put forward.

This subcommittee's hearings revealed widespread concern over the problem, but unfortunately as well, widespread disagreement over suggested remedies. As a result, no rectifying legislation was forthcoming. But also, in my judgment, the hearings served the useful purpose of winnowing the number of practicable inability proposals down to three, three which are now embodied in joint resolutions for constitutional amendments that are now before this subcommittee.

The first is essentially the system suggested by former Attorneys General Brownell and Rogers based on their experiences during the Eisenhower illnesses. It is embodied in Senate Joint Resolution 28 as a separate plan introduced by the late Senator Kefauver last year, but is also contained along with a plan for changing the line of Presidential succession which was introduced in December by the able chairman of this subcommittee, Senator Bayh.

The inability provisions of these measures specify a particular method for determining the beginning and the end of a period of Presidential inability. Since it is in the form of a proposed constitutional amendment and would be completely self-executing if adopted and ratified, it would require no further action by the Congress. Its shortcoming, in my judgment, is that as a constitutional amendment, it would not readily be subject to change except by the long drawn-out process of a further constitutional amendment.

If our experience as legislators has taught us anything, it is that it is most unwise to attempt to set up a rigid procedure to deal with a problem that cannot be quickly changed in the light of defects which only operational experience can reveal.

The second proposal, which is embodied in Senate Joint Resolution 35, has been generated by and is endorsed by the Bar Association of the city of New York, the New York State Bar Association, and the American Bar Association.

Senate Joint Resolution 35, sponsored by the late Senator Kefauver and myself, received the approval of the Department of Justice in connection with the hearings of last spring, has been reported by this subcommittee to our parent Judiciary Committee, and is now awaiting further action on the full committee's agenda, and the Attorney General has very recently reiterated his support of this resolution.

Very simply, Senate Joint Resolution 35 would do two things.

First, it would make clear that in cases of Presidential inability, only the powers and duties of the Presidency, rather than the office itself, shall devolve upon the Vice President as Acting President until the President has recovered from his condition of inability.

And secondly, it would leave to the Congress to prescribe a method by which the commencement and termination of any inability shall be determined—and this, under Senate Joint Resolution 35, Congress can do by ordinary legislation.

There are two major advantages that Senate Joint Resolution 35 has over Senate Joint Resolution 28, and both are extremely practical. It is highly unlikely that the particularized procedure spelled out in Senate Joint Resolution 28, a procedure which has its opponents among advocates of other formal procedural plans, could rally the widespread agreement it needs to be shepherded through the Houses of Congress with the required two-thirds concurrence in each, and then through the required three-fourths of the State legislatures.

Senate Joint Resolution 35, in contrast, leaves the entire matter to Congress, and would be more likely of ratification. And the fact that what Congress can do by ordinary legislation it can also change by ordinary legislation would insure the measure of quick flexibility needed to grapple with unforeseen defects revealed by the operation of any congressionally prescribed plan in actual practice.

The very able and distinguished Senator from Nebraska (Mr. Hruska) has introduced Senate Joint Resolution 84, which is a praiseworthy attempt to improve upon the basic framework of Senate Joint Resolution 35. It would add to Senate Joint Resolution 35, that any procedure to be prescribed by the Congress to deal with inability "must be compatible with the maintenance of the three distinct departments of Government, the legislative, the executive, and the judicial and the preservation of the checks and balances between the coordinate branches."

As I construe it, this addition is designed to safeguard against three possible abuses of congressional power:

(1) Using its power to prescribe inability procedures with respect to a particular Presidential incumbent as a pretext to oust him from his functions without resorting to established constitutional processes for impeachment;

(2) Injecting the Congress itself, or committees or Members thereof, into inability procedures in such a way as to impair the independence of the executive branch and the powers of the President; and

(3) Injecting the Federal judiciary into the process in such a way as to impair the independence of that branch of Government and perhaps preclude the impartial decision of the courts on concrete litigation involving Presidential inability.

In my judgment, the limitation sought to be added by Senator Hruska, though based on legitimate fears, is unnecessary. The principle of the separation of powers and the doctrine of checks and balances are thoroughly enconced in the original Constitution and pervade every action of our three branches of Government. Or, at least, every governmental action pays lipservice to these principles even when they are quite obviously violated.

The problem is that different people have different notions as to what these principles require or forbid when governmental power is exercised in a concrete case. But whether strict adherence or lipservice to these principles is the general rule, I seriously doubt that the addition of these stretchable concepts to Senate Joint Resolution 35 could improve upon the language of the original Constitution taken as a unified and organic whole.

On the other hand, I would be quite willing and believe it desirable that the full committee spell out in its report—if and when it comes to that—that the word “inability” in the proposed amendment, whatever the range of its possible meanings, does not in any event embrace the idea of incompetence, lack of judgment, laziness, or misconduct, or other possible grounds upon which impeachment for cause, rather than what might be called a medical discharge, so to speak, could be had under the impeachment provisions of the Constitution.

I think the average person, and certainly every scholar of the subject, does not use the word “inability” in this context in any other sense than physical or mental incapacity. To be sure, there are degrees of incapacity, but that would be a question to be resolved by whomever is authorized by the Congress to determine the existence or not of “inability.”

I am sure, however, that it can be made clear in an appropriate way that impeachment processes are not to be circumvented by any congressionally prescribed inability procedure, and if it is the consensus of the committee that Senate Joint Resolution 35 should be amended by adding the phrase suggested by Senator Hruska, I would have no objection to that course and could see no reason why that should not be done.

As for injecting Congress or the courts into the process of determining inability, no amount of cautionary language will serve as an adequate substitute for congressional and judicial restraint. I do not believe that anything can be added to the original Constitution as a firmer safeguard against possible abuse of congressional power in this regard.

I therefore urge the approval of Senate Joint Resolution 35 by the Judiciary Committee, and in turn by the Senate, as soon as possible. In my judgment, it is many times more imperative to act in the field of inability than in the distinct area of Presidential succession.

A Presidential succession law is now on the books; an inability provision is not. Let us not lose the opportunity to take action on inability by losing inability proposals in the scramble for changing the succession law.

Turning now to the problem of succession, let me emphasize my belief that it makes no sense to change the present law unless a new provision is hit on which is demonstrably better than the present law—and not just better for the next 10 months but better for as long as the American system of government survives, which, let us pray, means forever.

In 1947, I supported the repeal of the 1886 law which put the members of the Cabinet in the line of succession after the Vice President, and which made the Speaker of the House and the President pro tempore of the Senate the potential successors next to the Vice President.

At the present time, I still support the 1947 law with respect to its order of priorities. I oppose going back to the 1886 law for the same reason as I favored the 1947 law, and that is, that I believe the man next in line to the Vice President should have attained his Office by the elective rather than the appointive route.

But there is no doubt in my mind that the line of succession needs strengthening. It needs strengthening to meet the potential for danger that exists when a President has died, the Vice President has ascended to the Presidency, and the country is left without a Vice President; or when the Vice President himself has died or, like John C. Calhoun, has resigned from his office. It is no slight upon the Speaker of the House—any Speaker, not just the present incumbent—not to expect him to serve as a full-time presidential understudy and a full-time spectator of doings in the executive branch while at the same time he is required to perform the difficult legislative tasks of the Speakership.

Moreover, under the present system, the Speaker may not be of the President's own party. This country needs at all times a full-time Vice President, unburdened by the functions of other office, who as a member of the President's own party could be looked upon to carry out the basic policies of his administration if tragedy were to strike the Presidency again.

As a solution to the problem, I have proposed two constitutional amendments to create two Vice Presidents of the United States. One is Senate Joint Resolution 140, which also incorporates within it the provisions of Senate Joint Resolution 35 on Presidential inability, and the other is Senate Joint Resolution 143, which is identical except that it makes no change in the inability provisions of the original Constitution.

The basic measure I have sponsored would abolish the single Vice Presidential Office we have now and create two Vice Presidencies. Both Vice Presidents would be elected along with the President on a national ticket in the regular 4-year Presidential elections.

This would insure, first, that both men, and hence both of the immediate potential successors to the President, will be of the same political party, and secondly, to the extent that the Presidential candidates normally have a great deal of say in the selection of their running mates, that both will be acceptable to the President and com-

patible enough to enable them to work together with him when in office.

These are the other principal features of the plan for two Vice Presidents:

One is designated as the Executive Vice President, and would stand first in line to succeed to the Presidency in case of the death, removal, or resignation of the President. The other would be designated as the Legislative Vice President, and stand second in line of succession. No further changes in the line of succession would be contemplated. In other words, the present succession law of 1947 could stand as is, the only difference being that a second Vice President would be interposed in the line of succession between the First Vice President and the Speaker of the House.

The amendment I am proposing would place neither Vice President within a hidebound scheme of duties and responsibilities. The first or Executive Vice President would have no constitutional duties at all. He would be free, as the present single Vice President is, to take on any and all special assignments at the pleasure of the President. The main purpose is, of course, to retain the current practice, developed within the last decade or so, of bringing the immediate successor to the Presidency into the highest level of Executive policy circles in preparation for the eventuality we all pray will never occur.

The second or Legislative Vice President would succeed to the constitutional powers and duties now conferred upon our single Vice President; that is, he would be the presiding officer of the Senate, and would have the power to break a legislative deadlock on a tie vote in the Senate. In addition, much like the Executive Vice President under this proposal, and much like the single Vice President we have now, the Legislative Vice President would be free to take on additional assignments at the discretion of the President.

Senator BAYH. I have asked Senator Keating to assume the duties of the Chair while I join Senator Ervin in the Rules Committee.

Excuse the interruption, Senator. Please continue.

Senator KEATING. Since the relationship between the President and Vice President, and the degree to which the President will make use of the Vice President in performing basically executive-type duties, has always varied depending on the personalities of these two officers and a variety of political circumstances, it is my intention not to encumber either Vice President under this proposal with a rigid set of duties and responsibilities, save in the case of the Legislative Vice President, who would have, as now, the two constitutional functions of presiding over the Senate and casting a tie-breaking vote.

If, under this proposal, the President were to die, resign, or be removed from office, the office itself would devolve upon the Executive Vice President, and the office of Executive Vice President would devolve on the Legislative Vice President.

In the case of death, removal, or resignation of the Executive Vice President, his office would devolve upon the Legislative Vice President, and we would be in no worse a situation than the present one, in which there would be no Vice President endowed with the constitutional function of presiding over the Senate.

Critics of the plan for two Vice Presidents have focused their attack almost exclusively on one point. The argument is that traditionally

vice presidential nominations have been made to "balance the tickets" along lines of geography and political philosophy, that two vice presidential slots instead of one would merely aggravate rather than eliminate this tendency, and that, on the assumption that the second, or Legislative Vice President, would not have enough to do to stay in the limelight, it would be difficult to get capable men to accept the party nominations for this position.

My answer to this line of argument is simple and straightforward. Since the death of Franklin D. Roosevelt, the two major parties have, I believe, performed in a completely responsible fashion in selecting Vice Presidential candidates.

To be sure, geography and politics have played their part, and that is to be expected, but even so, it cannot be gainsaid that the nominees in recent years have been among the most illustrious and competent men of their respective parties.

With the deaths of Presidents Roosevelt and Kennedy fresh in the mind of everybody who was born before, say, 1940, I cannot believe that with two Vice Presidents the major parties would act any less responsibly.

The Legislative Vice President under my proposal would have no fewer constitutional duties than the present single Vice President, and would otherwise be as important as the President chose to make him. There is plenty of room for the President to delegate important tasks, especially to the only two other elected officials in the land who would be elected by all the people.

And I cannot perceive why any man devoted to a life of politics and service to our country would turn up his nose at the opportunity to be one of only three officials so elected. For instance, let me hazard the prediction that nearly every Senator or Representative and at least three-quarters of the State Governors would fall over each other in an open race for second or Legislative Vice President, in either party, if the opportunity were presented.

I have given other alternatives careful study and will comment only upon those which seek, as I do, to insure, insofar as feasible, that the country will rarely, if ever, be without a full-time Vice President.

I believe Senate Joint Resolution 138, which would permit the Congress in joint session to elect a new Vice President to fill a vacancy in the office is seriously defective in its potential for elevating to that office a man of the opposite party from the President. Also it provides for selection by a legislative body and that is certainly not by the people.

Senate Joint Resolution 139, is preferable as that would permit the President to nominate his potential successor and thus assure continuity of party and policy in the executive branch. In this, it is similar to the two Vice Presidents plan, the difference being one of timing in selecting the man to fill the vacancy in the Vice Presidency and the important difference that in one case, the President alone makes the selection and in the other, such a selection must be confirmed by the people.

However, I have little enthusiasm for the procedure of congressional confirmation outlined in Senate Joint Resolution 139. If, as is likely, the President has just assumed office as a former Vice President succeeding a deceased President, congressional confirmation is likely to be meaningless at best and divisive at worst.

Meaningless, if the country is in its usual mood of rallying behind the new President and giving him his way during more or less of a "honeymoon" period, in which case confirmation would be expected as a matter of rote. Or divisive, if the Presidential nomination of a potential successor is looked upon by his opposition as an opportunity to make real trouble from the start.

In either event, congressional confirmation represents only indirectly a measure of popular approval, and is no substitute, in my opinion, for direct election by the people at the regular quadrennial election, as I have proposed in the two Vice Presidents plan.

I want to express my appreciation to the chairman for the promptness with which he has scheduled these hearings on a vitally pressing constitutional problem, one that can affect the entire future, stability of our Government and social order. The subcommittee is performing a valuable public service, and I only hope that action will finally result. I end as I started by repeating the late Senator Kefauver's observation that "the essence of statesmanship is to act in advance to eliminate situations of potential danger." Let us act now.

This subcommittee will—Senator Monroney will be heard at 12 o'clock. This committee will now adjourn until 12.

Senator FONG. Mr. Chairman, I want to say—

Senator KEATING. Senator Fong.

Senator FONG. Mr. Chairman, I want to say that I have listened with attentive consideration this morning to the three very reasonable proposals made by the three members of the committee. They were well thought out. Although I have familiarized myself with other proposals and have studied them concerning this problem of Presidential succession and Presidential disability, I want to say that I still have a very open mind on this subject and having an open mind on this subject, I know I will be able to give to every statement that will be given here before this committee very attentive consideration. I have no statement to be made at this time, but I will reserve the opportunity of making a statement later.

Senator KEATING. Thank you very much, Senator Fong.

If there is no objection the subcommittee will now stand adjourned until 12 o'clock when Senator Monroney will be heard.

(Whereupon, the subcommittee recessed, to reconvene at 12 o'clock noon.)

Senator BAYH. We will reconvene the committee, please.

We are very fortunate in our first day of hearings to have, as a witness, the distinguished senior Senator from Oklahoma, Senator Monroney, who was one of the original authors of the present succession law of 1947.

Senator, for a man who has spent in excess of a quarter of a century in the Congress of the United States it seems you are eminently well qualified to testify and give us the benefit of your thinking on this matter.

STATEMENT OF HON. A. S. MIKE MONRONEY, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator MONRONEY. Thank you very much, Mr. Chairman, for the opportunity to appear before this committee before I have to go back to my home State.

I feel that the task of this subcommittee is one of the most important that will be performed not only this year, but in the next several years. The orderly transition of executive power in a democracy is a critical point and must be done with dispatch, sureness, and steadiness, because at that time of change, the Nation is susceptible to great disruptions if the course of succession is not adequately spelled out beforehand.

In order not to burden the committee with long testimony, because I know they are very familiar with many of the reasons for this, I would like to put my entire statement in the record, and the bill that I am introducing today on the floor. Then, very briefly, I shall spell out some of the things that I think this bill will give us an opportunity to do that have not been suggested by legislation previously introduced.

Senator BAYH. Without objection those inclusions will be made in the record.

Senator MONRONEY. I thank you very much, Mr. Chairman.

Briefly, I provide in my bill that in order to help advise the Congress, help to center public opinion on the various courses and means of solving the line of succession and other problems, that a bipartisan Commission similar to the Hoover Commission be established to study the various problems associated with the line of succession, disability, and problems of the electoral college. The Commission would have 12 members, 4 appointed by the President, 4 appointed by the President pro tempore of the Senate, and 4 appointed by the Speaker of the House. Half of the members of the Commission would be private citizens and half would be from public life.

These men would study the various problems and then would report to this committee and its counterpart in the House, much the same as the Hoover Commission did on the reorganization of the executive branch. Then, of course, the Congress could work its will.

I feel that you need a long study period. With the prestige that such a high-level Commission studying this problem would achieve, the opinion of the Nation would be centered on the proper courses to take and what we should do to correct the defects in our system.

There have been so many examples in the past, as the chairman well knows, of dozens of bills that have been introduced on this subject which never passed the Congress. In 1963 there were 23 bills introduced.

From 1927 to 1962 there have been 194 resolutions introduced, 48 amendments to amend the Constitution with respect to the succession of the Presidency and determination of Presidential disability. So there is a vast interest in it, and I believe a Commission such as I suggest in my bill would help these committees to get a consensus of what is needed.

I believe the important and controlling factor in the line of succession is to have a certain line of succession specified before a tragedy hits, before the President is claimed by death or is the victim of assassination; to have this all spelled out so that the man in reserve, whether he be the Vice President or a second Vice President or whatever the Congress would decide, perhaps in a constitutional amendment, is known beforehand.

The bill that is being considered to have the President nominate a successor when there is no Vice President, and have that confirmed

by the House and the Senate, I feel subjects us to a sort of an election in the Congress, which I do not believe would be wise during a period where the country is in mourning over the loss of its Chief Executive.

If this is provided for ahead of time, the successor would be available, and well known because his name had gone before the electorate of the country. While we all are reasonable enough to know that the Vice Presidents generally are chosen by the candidate for President, at least the Vice Presidential nominee is subjected to a nationwide referendum, and it is the public that votes. If the President's choice is good he profits from his choice, as President Kennedy did from his choice of Senator Johnson to be his candidate for Vice President.

Now, to go to another question that I think is most important, and I do not believe has been covered by many of the bills; that is the necessity for an overall approach to the office of the Presidency. The line of succession is only one aspect. The disability of the President is one which the committee and the newspapers have discussed at length. But most of these problems, it is agreed, will require a constitutional amendment. If we are going to have a constitutional amendment, I think we should make it all embracing to correct the dangers and pitfalls that lie in many other parts of our system, and so, as the Commission would be studying the problems of succession, the problems of disability, I would like to call the attention of this committee to some other things that need studying by a Commission such as is proposed in my bill.

Since an amendment to the Constitution is of a permanent nature and cannot be changed readily as statutory law can be changed, great and careful study before their submission to the legislatures of the various States for ratification is very necessary.

I think we have just as much to worry about in disrupting the orderly transfer of power in situations that could occur before the election of a President.

This is where I would like to focus attention on one of the needs for this Commission. We all know that under our custom, our two great national parties will have conventions in July and August of this year. They will nominate a candidate for President and a candidate for Vice President.

As you well know these candidates of the two great major parties will campaign, perhaps by air, throughout the 50 States. They will be subject to jostling in crowds, riding in parades; they will be subject to more than normal hazards in transportation, and in the case of hatred or violent feeling could even be the victims of an assassination.

Have we given any thought to what happens if the nominee of party A for the Presidency, or the nominee of party B for the Presidency, is killed in an airplane accident or by disease, or becomes disabled or resigns, and no longer is available as the Presidential nominee to go before the people of the country in the general election on November 4th?

There is no process of law that specifies who will have the power to select the successor to a Presidential candidate who had been nominated by either of the parties. I think the law should spell out very carefully just how the Presidential nominee, if he should be claimed by death, would be replaced by the party so that you couldn't have a

star chamber meeting, you couldn't have a smoke-filled room, you couldn't have a handpicked supercommittee to make this choice. It would be difficult to reassemble a complete convention, particularly if the election were only 2 or 3 or 4 weeks away when this accident occurred that took the life of the President, or of the candidate for President. The situation could be somewhat equally bad if the Vice President should be claimed by death. Consequently, I think this is one thing that needs to be spelled out in some way to formalize the substitution of a candidate of a major party who has died during the course of the campaign.

Nothing provides for the Vice Presidential nominee to automatically step up to the Presidency, and this could be a very serious thing particularly if it happened within a short time before the election.

Of even greater danger, however, I think, is what could happen after the national election, and party A, we will say, has won the election, and the President has been elected to all intents and purposes by the people of this Nation.

You and I know that he hasn't been elected. The party has merely elected its slate of electoral college members. There is no way that we have to make definite and certain that this decision stands. The public thought it was voting for candidate A for a particular political party for the Presidency. If he should die, how will that victorious party choose who will be the President of the United States?

The same thing applies to the Vice Presidency. This could happen between the day of the national election and the day that the President is sworn in on January 20. Some formal legislative process should prevail, because the public would have to, under present law, trust to a group of almost unknowns who are put on the ticket as presidential electors, under the party emblem.

The public thinks they are casting a vote for their choice for the next President of the United States.

In fact, they are merely choosing a slate of electors. Under our present law these electors are not bound in any way to vote for the Presidential candidate of their party even if he is alive. If he is dead then we will have a chaotic condition. One State may go for one candidate, practically unknown, a favorite son, and one to another, and finally, you could get into such a desperate position that the election could go for naught; and, providing the candidate for President has died, it would be thrown into the House of Representatives for a vote where each State has only one vote.

So, I think we should make preparations for all the contingencies that could happen, particularly after the election of a President and before inauguration.

Other dangers occur in the electoral college, which I think needs very special attention by this Commission. If you have a number of independents running for the House of Representatives, and the division is close, or, if you should have three parties electing Members of the House of Representatives, they might not have time between January 3, when the Congress would convene under the law, and January 20, when the date of the President's term has expired, to organize and canvass the electoral votes.

Unless you can organize the House, and that means that a majority of the Members of the House have voted to elect a Speaker, you have

no means of canvassing the vote of the electoral college, because the Constitution requires that the House and the Senate canvass the vote of the electoral college. Under the Norris amendment, we no longer have a lameduck Congress organized during the session and lasting until March 4, which was the date under the old process that the President's term expired. The voting canvass could be conducted by the lameduck Congress which continued in office until March 4. Under existing law you could reach the expiration of the President's term on January 20, and have no way of formally being able to qualify a President, even though there had been no death or disability from the time that he had been nominated or elected. The country could find itself without a law under which the President could continue his term until his successor had been elected.

Another thing, in the electoral college that should be studied is a requirement that the electors cast their ballots for the candidates of the party under whose emblem the electors have been chosen.

The fact that electors can throw their votes away by voting for anyone they choose and not honor the pledge to vote for the candidates of their party needs to be studied in its entirety.

These are the reasons why I think we need a Presidential Commission. It would serve to focus public opinion on these many issues that could plague us. We have been very fortunate that we haven't had to face up to the crisis of having no successor beyond the Vice President, elected by the people.

We have had several lines of succession. The President pro tempore of the Senate was first in line of succession as you know.

Next came the Cabinet succession. Then because of objections to a purely appointive President, one who had not been elected, we went to the succession through the Speaker of the House, the President pro tempore of the Senate and then added to that, because of the atomic threat, the line of succession going beyond the Speaker and the President pro tempore through the Cabinet so we would always have someone who would be able in the event of a catastrophic attack to take over the reins of this Government.

I do appreciate your willingness to hear me out on this phase of these lesser known problems which, I think, should be looked at very carefully.

Thank you very much for your time and for your courtesy.

(The prepared statement of Senator Monroney and bill referred to follow:)

STATEMENT BY HON. A. S. MIKE MONRONEY, A U.S. SENATOR FROM THE
STATE OF OKLAHOMA

Mr. Chairman, the tragic death of President Kennedy has caused us once again to examine closely our existing procedure with respect to the succession to the Presidency. Much has been written in the press concerning the need for a change. Many bills have been introduced in the Congress since President Kennedy's death proposing new and different methods to govern the succession to this great office. Numerous proposals relating to both election and succession have been studied by previous Congresses.

The orderly and uninterrupted transition of the power of the Presidency is one of the strongest attributes of our system of government. But our system may not be as good as it could be. There are too many contingencies in which the orderly transition of Executive power could be disrupted. This could happen with just as disastrous consequences in the election of a President as in the succession to the Presidency upon the removal, death, resignation, or disability

of the President. Therefore, a study of the methods by which we elect a President and Vice President is just as urgently needed as a study of the problems of succession.

One of the deepest instincts in man is his need and respect for leadership. Men must have a leader; this Nation must have a leader; and the world must have a leader. When President Kennedy died, we and the world mourned for a great and good man, and we were afraid because a leader had fallen.

We are profoundly grateful to the men who created our stable system of government and to President Kennedy who so wisely chose his Vice President, because our Nation and the world now have a new and strong leader. But it might not have been so. The whims of fate are not always so kind.

We need only consider the difficulties we could have encountered had President Kennedy been seriously and permanently disabled. We need only remember the circumstances and uncertainty surrounding the death of President Garfield and the illness of President Wilson. And we need only witness the instability in India today as a result of the illness of its Prime Minister. But here again the problem of inability is only one facet of the problems surrounding the orderly transition of our Executive power—although it is certainly one of the most important problems crying for a solution.

On the occasion of this great national tragedy it is time to study our laws again. It is time to consider all the contingencies and circumstances under which the Office of the President might be vacant. It is time to try to construct a system of laws which will insure, as much as can be, the uninterrupted discharge of the powers of the Presidency—both upon election and succession.

The best minds in this Nation, both in public life and in private life, should be assigned to this task which is of such vital importance. No system of government is perfect. Not all of the contingencies surrounding the transition of power can be covered. But we must devise the best system we can, and we must provide for as many contingencies as possible. Perhaps our present system is as good as can be achieved, but we should study it again to make sure.

I shall not comment today on the specific proposals before the committee. They are all worthy of study. I appear, however, to give the committee my views of how this study should be conducted and by whom.

Mr. Chairman, I shall introduce this afternoon a bill to establish a Commission on Presidential Election and Succession. This Commission would make a comprehensive study of the present provisions of the Constitution and statutes of the United States governing the election of the President and the Vice President and the succession to the powers and duties of the office of the President of the United States. It would be the duty of the Commission to determine whether changes in the Constitution or statutes of the United States are necessary or desirable in order to (1) provide under all circumstances for the orderly and timely selection of a President and Vice President, and (2) insure the uninterrupted discharge of the powers and duties of the office of the President under all contingencies which might occur.

This Commission would be patterned after the Hoover Commission which made a comprehensive study of the executive branch of our Government. The Commission would be composed of 12 of the most eminent citizens in the country—6 from public life and 6 from private life. It would be bipartisan. The President, the Speaker of the House, and the President pro tempore of the Senate would each select four members of the Commission—two from private life and two from their respective branches of Government.

The Commission's study would include, but would not be limited to consideration of—

The death, resignation, or disability of the nominees for the office of the President and Vice President prior to an election;

The electoral college, its functioning and effectiveness in the choosing of a President and a Vice President and the obligation of the electors to cast their ballots for previously designated candidates for the office of President and Vice President;

The failure to choose a President or Vice President before the time fixed for the beginning of his term;

The death, resignation, or disability of a President-elect or Vice President-elect, or their failure to qualify before the time their term begins;

The removal, death, resignation, or disability of a President or Vice President.

One year after enactment of this bill the Commission would report its findings to the President and the Congress, together with any recommendations for

changes in provisions of the Constitution or statutes of the United States which it deemed to be necessary or desirable. If it considered our present laws adequate, it would so report.

I believe this Commission would perform a great public service. Its completely objective study and appraisal would either reassure us that our existing methods of election and succession are the best that man's ingenuity can devise or it would recommend to us what changes should be made to make our system as nearly perfect as it can be. This study must be made, and it should be made by the type of Commission proposed in this bill. The prestige of such a highly qualified Commission would add dignity and impetus to any changes in our present system deemed necessary or desirable by the Commission.

Without disparaging in any way the valuable work done by this committee in the past and the service it will perform in these hearings, I firmly believe that a Presidential Commission would provide the best means for obtaining prompt results in terms of enactment of changes in our Constitution and statutes relating to Presidential election and succession. The cold, careful, and totally non-partisan analysis of our laws relating to election and succession could best be achieved by this Commission composed of the most brilliant personages in our Nation—unharried by the press of multitudinous other problems and dedicated to the solution of a grave problem which has faced our Nation since its inception.

The hearings held by this committee and its recommendations would be invaluable to the Commission as would be all previous hearings and recommendations and studies made by private groups. But the Commission would be peculiarly equipped to consider all the proposals which have been made in the past and to develop other solutions. In my opinion the recommendations of such a Commission would have the best chance for adoption by the Congress and would be more likely to secure the approval of the people of this country on whose judgment the final decision will depend. This committee and the corresponding committee of the House would still conduct hearings and amend the final bill if they so decide. A brief review of Congress' record of accomplishment in this regard serves to illustrate my point. From 1927 through 1962 there were 194 resolutions introduced in Congress to amend the Constitution with respect to the electoral college, and 58 resolutions to amend the Constitution with respect to the succession to the Presidency and the determination of and action on Presidential disability. In 1963 there were 23 more resolutions on the electoral system and 18 more on Presidential inability and the succession.

This count of resolutions on the succession and inability to serve relates only to those calling for constitutional amendments. Since the Congress has the authority under the Constitution to determine the succession, there were many additional bills on this subject which did not call for constitutional amendments, and were, therefore, not included in this count.

In almost every Congress hearings have been held on changing the electoral college system, and sometimes bills have been reported, but none has ever been adopted.

Only since 1957 has serious attention been given to the problem of the succession to the Presidency in case of disability, and to the succession to the Vice Presidency, although a change in the line of succession was adopted in 1947.

I do not believe that another congressional study will prove any more fruitful than the studies made in the past and that is why I believe a Presidential Commission should be created.

The Republic has survived its recent crisis. But, unfortunately, history will repeat itself and we will again find ourselves faced with a similar crisis. We must make certain that we keep our laws and procedures as up to date as the contingencies and circumstances which could arise to take away from us once again the leader of this Nation.

A BILL To establish a Commission on Presidential Election and Succession, and for other purposes

That it is the purpose of this Act to provide for a comprehensive study of present provisions of the Constitution and statutes of the United States with respect to the election of the President and the Vice President of the United States and succession to the powers and duties of the office of President of the United States, for the purpose of determining whether changes in those provisions are necessary or desirable to (1) provide under all circumstances for the

orderly and timely selection of a President and a Vice President, and (2) to insure the uninterrupted discharge of such powers and the performance of such duties in all contingencies.

ESTABLISHMENT AND MEMBERSHIP OF THE COMMISSION

SEC. 2. (a) There is hereby established the Commission on Presidential Election and Succession (referred to hereinafter as the "Commission").

(b) The Commission shall be composed of twelve members as follows:

(1) Four members appointed by the President of the United States, two from the executive branch of the Government and two from private life;

(2) Four members appointed by the President pro tempore of the Senate, two from the Senate and two from private life; and

(3) Four members appointed by the Speaker of the House of Representatives, two from the House of Representatives and two from private life.

(c) Of each class of two members appointed under subsection (b), not more than one member shall be a member of each of the two major political parties. The Commission shall elect a Chairman and a Vice Chairman from among its members.

(d) Seven members of the Commission shall constitute a quorum, but a lesser number may conduct hearings. A vacancy in the Commission shall not affect its powers, but shall be filled in the same manner in which the original appointment was made.

(e) In the application of chapter 11 of title 18, United States Code, service of an individual as a member of the Commission, or as an attorney or expert employed by the Commission, shall be considered to be service as a special Government employee.

(f) The Commission shall cease to exist six months after the date of transmittal to the Congress of its final report pursuant to section 3 of this Act.

DUTIES OF THE COMMISSION

SEC. 3. (a) The Commission shall conduct a comprehensive study of existing provisions of the Constitution and statutes of the United States relating to the election of the President and the Vice President, and providing for succession to the office or powers and duties of President, to determine whether changes are necessary or desirable to (1) provide under all circumstances for the orderly and timely selection of a President and a Vice President, and (2) insure the uninterrupted discharge of the powers and duties of the office of President of the United States under all contingencies which may occur.

(b) Such study shall include, but shall not be limited to, a consideration of the following subjects and contingencies:

(1) the death, resignation, or disability of a nominated candidate for the office of President or Vice President before a President or Vice President is chosen for a term of office;

(2) the effectiveness and uniformity of application of existing provisions of the Constitution, and of laws of the States and of the United States, which govern the selection of electors to choose a President and a Vice President, including the functioning and effectiveness of the electoral college system of choosing a President and a Vice President and the obligation of the electors to cast their ballots for previously designated candidates for the offices of President and Vice President;

(3) the failure to choose a President or Vice President before the time fixed for the beginning of his term;

(4) the death, resignation, or disability of a President-elect or a Vice-President-elect, or the failure of a President-elect or a Vice-President-elect to qualify for office, before the time fixed for the beginning of his term; and

(5) the removal, death, resignation, or disability of a President or a Vice President.

(c) The Commission from time to time shall transmit to the President such reports relating to its duties as he may request, and may make such reports to the President as the Commission deems appropriate. Not later than one year after the date of enactment of this Act, the Commission shall transmit to the President and to the Congress its final report including a full and complete state-

ment of its findings of fact and its recommendations for any changes in provisions of the Constitution or statutes of the United States which the Commission may consider necessary or desirable.

HEARINGS AND INFORMATION

SEC. 4. (a) The Commission, or upon authorization by the Commission any subcommittee thereof, may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpoena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission or such subcommittee may deem advisable. Subpoenas may be issued under the signature of the Chairman or Vice Chairman, or any duly designated member, and may be served by any person designated by the Chairman, the Vice Chairman, or such member.

(b) In case of the contumacy of any person or the refusal of any person to obey a subpoena issued under subsection (a), the district court of the United States for any judicial district in which the inquiry of the Commission is conducted or in which such a person is found, resides, or transacts business shall have jurisdiction to issue to such a person, upon application made by the Attorney General of the United States, an order requiring such person to appear before the Commission or a subcommittee thereof and to produce evidence if so ordered, or to give testimony touching the matter under inquiry. Any failure to obey such order of the court may be punished by the court as a contempt thereof.

(c) Each department, agency, and instrumentality of the executive branch of the Government, and each independent agency of the United States, is authorized and directed to furnish to the Commission, upon request made by the Chairman or Vice Chairman, such information as the Commission deems necessary to carry out its functions under this Act.

APPROPRIATIONS, EXPENSES, AND PERSONNEL

SEC. 5. (a) There are hereby authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this Act.

(b) Each member of the Commission shall receive compensation at the rate of \$75 per diem for each day on which he is engaged in the performance of duties of the Commission, except that no such compensation shall be paid to any member of the Commission who is receiving compensation from the United States for service rendered in any other office or employment under the United States, or to any member who is receiving compensation from any State or local government for service rendered in any office or employment under such government.

(c) Each member of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by him in the performance of duties vested in the Commission.

(d) The Commission may appoint and fix the compensation of such employees as it deems advisable without regard to the provisions of the civil service laws and the Classification Act of 1949, as amended.

(e) The Commission may procure, without regard to the civil service laws and the Classification Act of 1949, as amended, temporary and intermittent services to the same extent as authorized for executive departments of the United States by section 15 of the Act of August 2, 1946 (60 Stat. 810), but at rates not to exceed \$50 per diem for individuals.

Senator BAYH. I certainly appreciate your coming, Senator Monroney. Would you yield to one or two questions?

Senator MONRONEY. I will be happy to answer any questions I can.

Senator BAYH. You and I have discussed this at some length and I know of your wish to solve this problem and I certainly concur that something needs to be done.

Your basic proposal about succession in this whole area is that we need a Commission to study it.

Do you share my feeling that this issue of Presidential succession and Presidential disability or inability is not one which normally

catches the imagination of the people or of the Members of Congress; that it is difficult to energize the public to realize the significance of this?

Senator MONRONEY. I agree with you completely, Mr. Chairman. There is no great interest as long as we have our President and Vice President alive and functioning. If we lose one—as you well know, there have been many times in the course of the history of our country where we have been only one heartbeat away from a purely appointive President or one chosen from a line not associated or connected with our presidential elections—we do get somewhat excited. But it is still not a very well-known subject, and that is the reason I think that to give emphasis, and dignity and consideration to the subject that such a high-level Commission should study this matter and then report to the committees, this committee and to its counterpart in the House, its findings. Then Congress would work its will on the recommendations of the Commission.

Senator BAYH. Senator, in light of your experience in our legislative bodies, is there a danger, because of the importance to act now, yet with time for deliberation, if we did establish a Commission that it would take considerable time to study this, and then both Houses of Congress would have to study it and by this time the public interest, as witnessed by those of us who serve in Congress, some who are not as dedicated to this proposition as you are, would be so lacking that we couldn't get anything passed.

Senator MONRONEY. This is true if legislation by the Congress were delayed beyond the election of a new President and Vice President next November. Even though the electoral college had not disposed of its job, a great deal of the fear would be gone.

We would feel that the line of succession was whole again. I feel that in such case, only a Commission such as I am proposing could generate the continuing interest in the problem. The bills that have been introduced in the Congress don't cover all the defects in our system. You can't very well focus on any particular method or pattern to follow in this matter of the line of succession or of determining the disability. I would like to see the whole package worked into one amendment. By submitting it as a constitutional amendment you would once and for all provide a line of succession and correct these other dangerous matters to which I have addressed myself

Senator BAYH. I certainly appreciate your interest. We will be calling on your judgment from time to time if you have no objection.

Senator MONRONEY. I appreciate the opportunity of being allowed to testify. I would say that if the Congress is disposed to pass legislation now, it could be superseded later by a constitutional amendment. If a constitutional amendment is passed, you can bring into being the more carefully studied out correction of the defects of the Constitution in this regard.

Senator BAYH. Because of the difficulty of maintaining public interest and consequently constitutional interest, do you feel we would run afoul of the thinking in the minds of many that once you have passed legislation you no longer have an emergency so let's not worry about a constitutional amendment, which would become, we feel, a permanent solution to this problem.

Senator MONRONEY. From a practical standpoint I would feel that it would be quite difficult to pass legislation between now and adjournment of the Congress changing the line of succession. I think you might pass emergency legislation regarding the disability or determining the disability of the President, but I would feel you would have a considerable body of opinion that would want to stay with the elective branch of the Government, the highest elective member next to the President and the Vice President, who is the Speaker of the House, and who was chosen by a body more nearly consistent with the electoral college membership than any other means. You would have a division between those who feel that way, and those who might feel in favor of a purely appointive President, such as going back to succession through the Cabinet.

One of the reasons I introduced a bill originally, which the Judiciary Committee of the House later modified some and passed after several months, was that it was dangerous for the President to have the right to name his successor, or as in the case that we have seen in history, if he was practically disabled, as a Vice President, to have the people around him able to influence him in the name of the Secretary of State or a Cabinet member who would succeed to the Presidency.

There is absolutely no control, except, the confirmation powers of the Senate over who might be placed in line for the Presidency by this appointive method.

Senator BAYH. Of course, in a time of crisis, I think these very powers of the Senate to which you refer would be very important powers because the Members of this body to which we belong would take this additional responsibility, even greater than is normally the case, would we not?

Senator MONRONEY. I understand the recommendation which has been made to allow the President to nominate or to propose a person to be in the line of succession would require the confirmation of both the House and the Senate, sitting jointly. I haven't seen the bill; is that correct?

Senator BAYH. The one proposal we have discussed earlier would require them to sit separately. There is a proposal requiring them to sit jointly. There is almost any kind of proposal you want to consider.

Senator MONRONEY. That is right. That is one of the reasons I suggested a commission to study all of these and help you and then report back to you so you could work your will on the final report of the high-level commission.

Senator BAYH. I certainly appreciate your coming, Senator Monroney, and we appreciate your testimony.

Senator MONRONEY. Thank you very much for your courtesy in hearing me this late. It has indeed been a pleasure to appear before you. I will leave this statement and the draft of the bill.

Senator BAYH. It will be included, as mentioned, in the record and we hope we can call on you again.

Senator MONRONEY. I think you have one of the most important tasks to perform of any committee in the Congress for this year.

Senator BAYH. Thank you.

Senator MONRONEY. Thank you, sir.

Senator BAYH. The committee feels very fortunate to have with us today Prof. James C. Kirby, Jr., who is an associate professor of

law at Vanderbilt University. Professor Kirby was a former chief counsel of this very subcommittee, a student of constitutional law as well as a professor of this subject, and is eminently qualified to convey his thoughts on the subject. I have asked Professor Kirby to join us this morning despite the fact he is not a member of the legislative branch. We had originally intended to confine testimony to Members of Congress on the first 2 days of hearings.

However, Professor Kirby was one of the members of the American Bar Association who have spent the last 48 hours of their time discussing and grinding out a consensus. Because he is in the city and is well versed on this subject, I have asked him to stay over and give us the benefit of his views.

Professor Kirby, the floor is yours, and we are complimented by you spending the time.

STATEMENT OF PROF. JAMES C. KIRBY, JR., ASSOCIATE PROFESSOR OF LAW, VANDERBILT UNIVERSITY

Mr. KIRBY. Thank you, Mr. Chairman, the privilege is certainly mine and I welcome the opportunity to return here and speak from this side of the table for a change. I approach it with the knowledge that it is a mixed sort of blessing in that now, although I have the opportunity to speak more than listen, I am also subjected to the possibility of having to come up with answers rather than questions as I did in the past.

I especially appreciate your accommodating me by allowing me to appear today while I am in the city as a result of the ABA conference which you mentioned.

I also know from my experience here that brief statements while not anticipated are appreciated from all professors, and I will attempt to make my statement brief.

I have submitted a prepared statement, from which I will depart slightly, and which takes as the basis of my statement the consensus of recommendations which was issued by the American Bar Association Conference on Presidential Inability and Succession which completed its deliberations yesterday.

I am completely in accord with that consensus. This does not mean that it is the result of my views or that I prevailed in the deliberations. It contains several things which I had not subscribed to before, and it is not the product of any single individual. It is a new proposal which resulted from the give and take and intensive deliberations carried on by these 12 persons.

Also, I emphasize that this is only the recommendation of this group. The house of delegates of the American Bar Association will consider them at a meeting next month. It may or may not adopt them, and they may or may not become the official position of the American Bar Association. You will know that soon, however.

The consensus contains two points on Presidential succession, and five on Presidential inability. Let me say that I agree with the chairman that these two problems are not separable. They should be dealt with together.

Presidential inability is really a branch of the problem of Presidential succession. Inability is merely one of four contingencies in

the Constitution, the others being death, resignation, or removal, on which there is a succession either to the Presidency or to the exercise of its powers and duties. We found in our deliberations in this conference that the solution to one problem is greatly colored by the solution to the other.

Each aids in solving the other, and while the attention of the country is on the general problem of Presidential succession it certainly would be most unfortunate if one unified solution to the entire problem could not be arrived at and submitted for ratification in a single constitutional amendment.

Now, on Presidential succession as such, the first point I would like to mention from the recommendations is that—

the Constitution should be amended to provide that in the event of death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired terms.

This is a noncontroversial provision which is included in most proposals on this subject to confirm the so-called Tyler precedent by which a Vice President succeeding in the event of one of these contingencies of a permanent nature, death, resignation, or removal takes over the office, merely confirming a practice which now has the force of constitutional law, although initially it was of doubtful validity, according to most scholars on the subject.

The second point deals with filling the office of Vice President when it is vacant. The consensus reads:

It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall become Vice President for the unexpired term.

This endorses the principle which is supported by the chairman, I believe, that the President should nominate and Congress should either by confirmation or election take the next step which breathes life into the new official in the new position.

The term "approval" was used rather than either "election" or "confirmation," leaving that question largely of form to be dealt with as a matter of draftsmanship.

I, personally, think there is much to be said for not treating this as merely a Presidential appointment subject to confirmation, but to have the President nominate and the joint assembly elect. It is not uncommon for nominations to be limited to one person, but the President also could have the option of nominating more than one, as the Democratic nominee, Mr. Stevenson, did at the Democratic Convention in 1956, and allow a choice rather than choose between two.

But if the official is elected, even though it be a formality in most instances, it would give him the status of an elected official which may carry considerable psychological weight in the eyes of the American people.

This would make a sweeping and needed change in our present constitutional framework on the Vice Presidency. It would assure that a vacancy in the office would be filled quickly by a person primarily acceptable to the President but also approved by the Congress. It respects the generally accepted prerogative of the President to choose his coworker, but also recognizes the right of the people to have a voice in his election through their elected representatives.

I think it is generally agreed that it would be desirable to always have a Vice President to carry out the duties of that office, to assist the President and to be in training for possible succession to the Presidency. The controversy will turn here on the method of his selection. President Truman and former Vice President Nixon have suggested that the electoral college be reconvened to elect a new Vice President in this situation.

In my opinion it would be a great mistake to revitalize and dignify the electoral college by using it for this purpose. As the late Senator Kefauver once described it:

The electoral college is a loaded pistol pointed at our system of government. Its continued existence is a game of Russian roulette.

Ho warned that—

Once its antiquated procedures trigger a loaded cylinder, it may be too late for the needed corrections.

Again, as Senator Keating pointed out earlier, he exercised the functions of a statement by attempting to anticipate problems in advance. But I know Senator Kefauver would be greatly disappointed by the recommendations that the electoral college be given a new and important function in our system because in the 87th Congress this subcommittee developed an extensive record which established the evils and dangers of this mechanism in our system of Federal elections. I refer to the hearings which were conducted in 1961 on the subject and a staff study which was published.

The college of electors should be abolished, not strengthened. It is not merely obsolete and cumbersome, it is positively dangerous. It risks miscarriages of the popular will in presidential elections because of the constitutional independence of the electors, to which Senator Monroney earlier referred, and because of other pitfalls in this antiquated procedure.

Recent examples of defecting electors and attempts to use unpledged electors to control election results are dramatic evidence of the weaknesses of this institution.

However, a joint assembly of Congress has the same theoretical and symbolic values for our present purpose without the dangers of the electoral college. It is a numerical counterpart of the electoral college in which each State has the same representation through its congressional delegation as it has electoral votes. It is deliberative. It is easily assembled. It is responsible to the people. In all three of those respects it is in contrast to the electoral college.

It may be suggested that we risk that a Congress controlled by the opposite political party might dictate to a President that he nominate a Vice President of the opposite party. Conceding the doubtful and remote possibility that a congressional majority might ever be so partisanly irresponsible and so disrespectful of our political traditions, it still could not, as a practical matter, impose its will on the President in this way. It could only reject presidential nominees by refusing to confirm or elect.

If it rejected a succession of nominees, it would soon be apparent to an outraged public that individual Members of this congressional majority party were obstructing efficient government by causing a continuation of the vacancy in the Vice Presidency. We could depend upon public opinion to correct this.

The conference made no further recommendations on succession, and I personally have none to advance.

The procedure for filling the vice presidential vacancy obviously will make a line of succession beyond that office much less important.

One problem which I think the committee might want to consider, and I raise it as something for consideration without advancing a proposal, is the possibility if you have a dual tragedy of both the President and Vice President dying or being removed from office early in a 4-year term. Presumably the Speaker or a member of the Cabinet, depending on the line of succession law, would ascend to the Presidency, and then he would nominate his Vice President who would be approved by Congress. You would have two top officials who were not elected to their offices and perhaps were never elected, to any elective office.

You might consider if this occurs during the first 2 years of a 4-year term, having the incumbents stand for election at the next general Federal election. It would be a time when all Members of the Congress and a third of the Senate would be running anyway.

One obvious problem is that elections occur in November, whereas terms expire in January, and you couldn't have an exact 2-year cutoff. You might have an 18 or 20 month cutoff and provide that if succession to both offices occurs in that period there would be a special election which need not be merely an election for 2 years. It could be an election for a full 4-year term. There is no requirement that we have mathematical continuity of successive 4-year terms for the Presidency.

Turning now to inability, I think the chairman has well stated the need for action in his opening statement and I won't dwell on that. The first proposition on which the ABA special conference agreed was that agreements between the President and Vice President or person next in line of succession provide a partial solution but not an acceptable permanent solution to the problem.

Obviously they are only partial in that they only deal with one segment of the problem, that is where the President and Vice President are in substantial agreement on the inability, or if the President is unable to even communicate such as if he is in the hands of the enemy, isolated by disaster, or something of that sort.

It doesn't deal with the ultimate difficult problem of the situation where the President's inability is a matter of dispute.

Also private memorandums and agreements can't have the force of law regardless of whether a statute or constitutional amendment is needed. They do not have the force of law and depend essentially on good faith for their enforcement.

As a corollary to that statement, the conference agreed next that:

An amendment to the Constitution of the United States is needed to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

There is some respectable authority, although certainly a minority, that Congress can by simple statute deal with the inability problem. But even if it might be ultimately held by the Supreme Court that the Constitution now gives Congress this authority, this is a judicial decision that we do not want. We don't want it even subject to uncertainty, and the litigation in which the Supreme Court had to decide

that question would surely be symptomatic of a great period of uncertainty in this country. Those who agree that Congress has power to legislate largely agree also that there should be an amendment to the Constitution because of the doubt and uncertainty in the area.

Then we come to the proposed terms of such an amendment.

The amendment should provide that in the event of the inability of the President, the powers and duties, not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

Contrary to succession in the event of death, resignation, or removal, here we have succession only to the powers and duties of the office, and an acting President. This is obviously to enable the Vice President to step back down and the President to resume his office if an inability is removed. This meets another need in an area where I think, there is little controversy as to the need for constitutional amendment.

There is no question that in the Garfield illness and in the Wilson illness, Vice Presidents hesitated to exercise the duties of the office of Presidency because of a fear that if it was done the President would never be able to resume the office. This will eliminate that uncertainty.

The next point begins:

The amendment should provide that the inability of the President may be established by declaration in writing of the President.

This is a step in most proposals. Where the President views himself as disabled from exercising the office and puts this in writing the Vice President should begin exercising the powers and duties of the office.

Then, an area of disagreement:

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

This would be where the President was unable to communicate, either because of a lack of capacity to communicate or lack of means of communication, or where the President suffered from an inability of which he was not aware or would not admit. This is the hard case.

Here the decision to take over executive power is kept within the President's own team, the Vice President, acting with the majority of the Cabinet. However, provision is also made for Congress, in its wisdom, if pitfalls develop that are not now foreseeable in the use of this procedure, to substitute some other body, perhaps an inability commission to make the inability determination.

Now, the objections which some have to giving Congress the power to provide a method of determining inability. Any congressional action would still be by law, and would be subject to the President's veto. It would require two-thirds to override a veto. This is sort of a matter where Congress traditionally defers to executive discretion in the manner in which executive problems should be handled. It is not likely that any law unacceptable to the President could ever be passed under that enabling authority.

So far, I have dealt with the commencement of inability which should be determined only by the Vice President and a majority of the Cabinet.

Suppose the President disagrees. We come now in the consensus to his power of appeal, so to speak.

First, the amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing.

This is expected to be used normally where the inability was of a temporary nature. The President has recovered; he states the fact in writing, and reenters the exercise of the office, but the consensus also provides:

In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide, shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected Members of each House of Congress.

In other words, if the President thought he was not disabled in the first instance or thought he had recovered, and the Vice President and the majority of the Cabinet disagreed, it would require two-thirds of the Congress to prevent him from resuming the office.

So, ultimately a President can be declared unable and prevented from exercising the office against his consent only if his Vice President, a majority of his Cabinet, and two-thirds of Congress concur. I think we can expect that sort of near unanimity from those sources only where the case is a clear one.

Now, some suggest that possibly this should be left out of the Constitution, that it should be left to the exigencies of the situation to prevent a disabled President from resuming Office. They say that if he declares the inability removed he should be able to resume period and that impeachment should be reserved for the difficult situation. We would undoubtedly be talking of mental illness, where a President suffering from an inability insisted on staying in office.

The difficult part of this is that impeachment constitutionally and conceptually is reserved for crimes and misdemeanors. If a person who is mentally ill, impeachment is neither appropriate nor culpable. This is a defense to criminal proceeding and accusations of criminal and misconduct generally.

Also impeachment effects a permanent removal. The President could not recapture his Office if the inability were removed because if impeachment had been used, as in the event of removal by death or resignation the Vice President would succeed to the Office itself. This procedure we propose would permit the President to recapture the Office if the inability is removed and competence is regained.

Most of this is familiar to the chairman, because much of it accords with recommendations which he supports. As a package, it is a new proposal which I submit, contains many of the advantages, but avoids the pitfalls of methods previously proposed.

Upon ratification, such an amendment will provide an immediate self-implementing procedure which does not depend on either congressional or presidential action. Thus it avoids the risk of a mere enabling amendment, such as Senate Joint Resolution 35, the one previously approved by the subcommittee, that Congress might for

some reason fail to enact legislation and leave us without a procedure for determining commencement and termination of inability.

Unlike other proposals, it requires no special appointment of a Commission by the President, thus avoiding the risk that a President could defeat the purpose of the amendment by failing to make appointments or by removing persons previously appointed.

Determination of inability in the hard cases is to be a Cabinet decision. This is essentially the proposal of Attorneys General Brownell and Rogers during the Eisenhower administration which has also been supported by the late Senator Kefauver and Chairman Bayh.

However, the flexibility of a general enabling amendment is retained and the rigidity of a procedure fixed permanently in the Constitution is avoided. Congress is given a reserved legislative power to provide a different body for inability determinations. If unforeseen difficulties arise and the Cabinet procedure becomes undesirable or unworkable, Congress may substitute any of the other procedures which have been suggested or perhaps a method not yet conceived. This is essentially a wedding of the proposal of a mere enabling amendment (now embodied in Senate Joint Resolution 35) and endorsed by the ABA, the New York State Bar Association, and the Bar Association of the City of New York) and the Brownell-Bayh proposal that the Constitution specify a procedure for determinations by the Cabinet.

Incidentally, each of those proposals at different times has been approved by the Subcommittee on Constitutional Amendments in the past.

It seems to be thought that when and if a procedure is specified the Cabinet is the best choice. It is also feared however that there are dangers in making this a rigid permanently fixed constitutional provision which Congress could not alter in the event of unforeseen pitfalls.

Of the resolutions before this Subcommittee Senate Joint Resolution 139, sponsored by Chairman Bayh and others, appears to be nearest to the consensus recommendations. Both provide for filling a vacancy in the Vice Presidency by Presidential nomination and congressional approval or election.

Both place the Cabinet method in the Constitution and both provide that only a majority of the Cabinet and two-thirds of the Congress can prevent a President from discharging his office because of inability. Senate Joint Resolution 139 has no clause conferring on Congress the power to alter by law the inability procedure. With this substantive change and some minor amendments of a technical nature, Senate Joint Resolution 139, in my opinion, is a desirable basis for the much needed constitutional solution to this problem.

Senator BAYH. Thank you very much, Professor Kirby. Do you mind if the Chair addresses a few questions to you to fully exploit your knowledge in this field?

Mr. KIRBY. Not at all, sir.

Senator BAYH. Reference has been made both by you and by earlier statements by colleagues of mine to Commissions. One suggestion which is commonly discussed is a Commission to determine Presidential inability, to determine when a President was unable to perform as well as to determine when he could resume his duties.

Some discussion has been had that such a Commission could become involved in determining succession situations.

Do you share my belief that one of the major criteria for any solution is that at time of crisis the people of this country must have confidence in whatever solution we do arrive at, and that for this reason a Commission, which is really some unknown quantity which would be subject to change down through the years as it is not used, will perhaps not inspire this confidence? And while you are answering this same confidence question, would you also consider whether the suggestion that the electoral college ratify a nominee to fill a vacancy in the Vice Presidency have the same difficulty? That is, perhaps this would not have the national confidence that is necessary to make a smooth transition in time of crisis?

Mr. KIRBY. I think unquestionably the difficulties of the electoral college have been demonstrated to people sufficiently that they would lack confidence in any further utilization of it. The proposal of a Study Commission is one frequently resorted to for problems of this type, frequently with considerable success.

But we deal in an area where public opinion is aroused now, and after a Commission studies for 6 months or a year and then comes back with something that still must be approved by Congress, I am afraid we might have lost a great deal of impetus which now supports reform in this area. I am afraid from past experience that if we get through another general election, and get a Vice President into office, with a President, that the impetus behind this demand for reform will almost just vanish.

The experience has been that while you are in an uncertain situation as the result of a crisis there is great concern. As soon as that apparent defect is gone interest vanishes. It is not a bread-and-butter subject, and the confidence in the solution in the people is best going to be arrived at while they are concerned about the problem.

Senator BAYH. Thank you.

One criticism that has been levied in previous testimony against the proposal in Senate Joint Resolution 139, as well as that contained in the consensus which you so adequately described to us, is the fact that this will necessitate a selection or an election in time of crisis.

Could you discuss your thoughts as to, one, the advisability of calling a special election of the Nation as a whole in time of crisis, and, two, if you object to this special election, if there would be sufficient difference in letting Congress make a decision in time of crisis. Would we be jeopardizing the Nation for Congress to deliberate on a subject such as this at a time when there is uncertainty?

Mr. KIRBY. Of course, the existence of that crisis is the reason action is needed and it is needed at the time of the crisis. We can't have it both ways, both avoid a crisis and avoid solving the crisis while it exists. Congress is at its best, when it acts in a time of crisis.

In a special election at a time of crisis or a time of emotional upheaval in the country is more questionable. The personnel proposal I mentioned a moment ago would not be a special election in the full sense of the term because there would be a general national election at the time anyway. A new Congress would be elected, and both political parties would be going to the country.

A third of the Senate would be elected, and most of the State houses.

Senator BAYH. I was referring specifically to one suggestion that was made to me and has not been introduced in the form of legislation. It was pointed out that from the physical standpoint a special election could be made operative in about 5 days. It is the chairman's opinion here that this is the type of decision we are trying to avoid. I was not referring to your suggestion.

Mr. KIRBY. I understand.

I hesitate to envision the sort of campaign we would have in 5 days, wouldn't you, Senator? It would be pretty frantic.

Senator BAYH. So do I. From what you mentioned a moment ago would it be fair to say that you feel that Congress can operate in periods of national crisis involving peace and war? And since under the Constitution Congress is required to make a decision determining this Nation's status in peace and war, that Congress is equally able to find a solution to a problem which confronts it because of the death of a President?

Mr. KIRBY. I think so, not only able but with the duty to do so.

Senator BAYH. I did not see any danger in letting Congress deliberate in time of crisis, when as you say, it has been at its best.

Would you care to let us have the benefit of your thinking concerning the proposals that have been made concerning two Vice Presidents?

Mr. KIRBY. Well, I am inclined to the view that the second Vice Presidency or Legislative Vice President probably would not command the efforts of our better public servants to seek election. As you pointed out, the Vice Presidency has just recently come into its own and I doubt if the second Vice President ever would.

The proposal would further proliferate our campaigns, too. We now have the effort for a balanced ticket, but with three men on the ticket, the efforts to balance it could almost become a mathematical quagmire. I am inclined against the proposal, Senator.

Senator BAYH. Senator Monroney pointed out two areas to which I had not, frankly, given too much consideration, I did not know whether the group which formulated the bar association consensus had either.

They may well bear consideration. Do we need revision of our laws or Constitution to provide for the eventuality of the death of a President-elect prior to his being sworn into the office, or do we need a change which would provide for the eventuality that a presidential candidate who is running for election is killed prior to his election?

Mr. KIRBY. Well, I think in the second eventuality where the nominees die before the general election, we can depend on the political party processes just as we now depend on them originally to produce nominees. Most parties have provisions in their bylaws adopted at the convention each year for replacements of the nominee by a quick reassembling of the convention or by the national committee or something of that sort.

The other problem involves the electors and could be reexamined at this time, but if it is something to generate much controversy, I believe it would be left better for a separate inquiry.

Certainly, we wouldn't want the electoral college problem, as much as it needs attention, to get involved with this problem, because you

invite more opposition and more delay each time you add a new substantive issue.

Senator BAYH. Because I agree with the wisdom of keeping at least the electoral college controversy out of this discussion, I will not ask you another question about the bar's position on the electoral college. We will take that up separately.

For the sake of clarification of the record, was the reference you made to the electoral college your statement or has the bar association taken a position on this?

Mr. KIRBY. No, the bar association to my knowledge has taken no position on abolishing electors, and let me reemphasize that I am not here as a representative of the bar association.

Senator BAYH. I understand that. Minority counsel was curious and I thought you wouldn't mind clarifying that.

Senator Ervin is concerned that in the event of a dual tragedy, losing both the President and the Vice President, that we need to have machinery different from that we have now to provide for the selection of successors. As you recall in Senator Ervin's proposal, Congress would make the determination, and he seemed not to be vigorously opposed to the consensus you proposed as far as selecting a Vice President or that contained in Senate Joint Resolution 139.

However, he felt we needed to cover both possibilities and wrap it up in one ball of wax at one time.

Do you share this feeling or do you feel we can first tackle the Vice Presidential vacancy and then hope we don't have both offices vacant at one time.

Mr. KIRBY. Well, I think you are tackling it. It is involved in your solution although it may not be the solution some would prefer. If both offices become vacant then the existing line of succession established by Congress would give us a President, and then he would nominate and Congress would elect a new Vice President to join him under this proposal. We would fill both offices.

The obvious disadvantage is that both could be nonelected officials, but we wrestle in an area here where there are no good solutions. The nature of the problem is such that any solution is going to be partially undesirable, and one must choose between conflicting considerations and accept the fact that any proposal is going to be subject to some disadvantage and criticism.

Senator BAYH. One question I have heard raised is that constitutional lawyers and scholars generally agree that the Constitution should be a broad framework and should not contain a great deal of detail or procedural matters.

In my opening statement I referred to the fact that this was not the case as far as impeachment procedures are concerned.

I wonder if you share the feeling of some who might oppose this bar association consensus or Senate Joint Resolution 139 because it is somewhat procedural in nature?

Mr. KIRBY. Well, I generally agree that the Constitution should have broad grants of power and statements of authority and rights, and that detail is better left to legislation.

However, in matters concerning the structure of Government, internal operations of Government, particularly the executive branch, the Constitution is already fairly detailed.

The difficulty with detail, is primarily that whenever you start detailing you limit and if you do this in a Constitution you tie yourself down to a fixed method which is changed only by further constitutional amendment.

The consensus recommendation avoids that by giving Congress this reserve power to legislate to alter this. It has the substantive advantage of a general enabling amendment but at the same time it gives us something that is immediately operative and is self-implementing in the event Congress does not act.

Senator BAYH. I appreciate very much your willingness to expose yourself to the cross-examination of this committee as well as to let us have the benefit of your thinking. I would like to thank you again, you personally and the other members of this American Bar Association group who compiled the consensus. We hope to hear from some of the others, too.

If there are no objections, unless you have——

Mr. KIRBY. I have nothing further.

Senator BAYH. Does minority counsel have any cross-examination?

The plan of the chairman of the committee is to hold another hearing sometime in February, the exact date of which has not been determined at this particular time. Sufficient notice will be given. We would like and plan at that time to call expert witnesses and we would like, frankly, to have the ex-Presidents, and Vice Presidents, as well as representatives of the American bar and of this consensus group.

Tomorrow's hearing will have other testimony from members of Congress, Senator Javits, Senator Moss, Senator Hruska, Senator Long, Senator Church.

If there is no objection, we will adjourn the committee until 10 o'clock tomorrow.

(Whereupon, at 1:10 p.m., the committee adjourned, to reconvene at 10 a.m., Thursday, January 23, 1964.)

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

THURSDAY, JANUARY 23, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Also present: Larry Conrad, counsel, and Clyde Flynn, minority counsel.

Senator BAYH. The second meeting of the Committee on Constitutional Amendments will please come to order. We are very fortunate in having with us this morning the distinguished senior Senator from New York, Senator Javits.

Senator, you have given a great deal of time and study to this important field we are discussing. We are happy to have you with us this morning.

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Thank you very much, Mr. Chairman.

If I may, I would like to make a very short statement and then sum it up very briefly.

Mr. Chairman, this subcommittee is in my judgment now engaged in one of the most significant debates in American political life, the debate which began with the first Congress and has resumed with each Presidential transition crisis in our history.

The present discussion, stirred by the tragedy and shock of President Kennedy's death last November, should not be simply another inconclusive debate of this bedrock problem of constitutional democracy; the split-second exigencies of this nuclear age do not permit the luxury of further incomplete solutions. For this reason especially, I congratulate the subcommittee and Chairman Bayh on the prompt scheduling of these hearings, and I urge the equally prompt consideration and reporting, for the first time, of a constitutional amendment dealing in a substantive and comprehensive way with both Presidential succession and Presidential disability, or inability, if that word is preferred.

As the chairman pointed out in his opening statement yesterday, all of the proposals currently pending before this subcommittee are premised on the built-in inadequacy of all three succession statutes which have been in effect in our Nation's history: that is, that under

those statutes there can be no full-time Vice President in situations such as the present, when the Vice President succeeds to the Presidency. Neither the President pro tempore of the Senate, who was next in line under the Succession Act of 1792, nor the Secretary of State under the act of 1886, nor the Speaker of the House of Representatives under the presently effective act of 1947, can properly be expected, no matter who is the individual involved, to handle the full-time responsibilities of the Vice Presidency as well as the incumbent's present office. In some cases, particularly with a Member of Congress, there may be constitutional objections about doing so, even if one could, because of the separation of powers doctrine.

The Vice Presidency has grown historically, especially in recent decades. It is no longer the ornamental office that it once was. Not only does the Vice President have specific responsibilities of his own as a member of the National Security Council and as Chairman of the President's Committee on Equal Employment Opportunity and of the National Aeronautics and Space Council, and, I might interject, as a worldwide traveler for American goodwill and for the American personality in many parts of the world, but he also must be kept abreast of the critically important knowledge and basis for decision which inhere in the Presidency. The President, who has the responsibility for pressing or withholding his hand from the atomic trigger must have a Vice President.

I think it is almost as simple as that.

So I would like to state first my complete agreement with the chairman, with whom I am in very substantial agreement in this whole matter, as I will point out in a minute, that we must have a full-time Vice President at all times and when the Office becomes vacant for any reason, a successor should be selected as quickly as possible.

My particular prescription is contained in Senate Joint Resolution 138, which calls for the election by the Congress in joint session of a person to act as Vice President until the next general election, where the Vice President moves up to the Presidency. This calls for a joint session of the Congress and a majority vote, in which the 100 Senators and the 435 Members of the other House would each have one vote. I have thus sought to place the initiative as close to the people as the exigencies of time in these circumstances will permit. Let us bear in mind that there will be an incumbent President at all times. We must have immediate transition. I don't think any one of these proposals contemplates anything but that there should be a President at all times.

A special popular election for Vice President would in my judgment be the ideal solution theoretically, but I do not think it is practically feasible in short enough time to provide the rapid continuity of both the Nation's highest offices which is so vitally necessary. The next most democratically based election is one conducted by the Congress, which can and does meet and act quickly in time of crisis. There is the recent example, notwithstanding last year's unproductive session, of rapid congressional action in the face of a threatened national railroad strike, and we have shown other ability to act quickly.

My resolution calls for an election of a Vice President, from among the Members of Congress and the President's Cabinet. These are the two groups relied upon in the three succession statutes we have had. I lay aside the constitutional question of whether Members of Con-

gress are "officers" within the meaning of that term in the present section of the Constitution dealing with succession, article II, section I, clause 6, because a proposal embodied in a constitutional amendment would end that discussion. But I think the basic policy expressed in the original constitutional requirement is a sound one, since it insures election of a person already placed in a high position of public trust. This is particularly important for public confidence in such cases, when the Congress will be expected to act quickly. A Member of Congress or of the Cabinet is known to the public, and therefore enables some public judgment to be expressed in connection with the action of the Congress.

Now, I propose, Mr. Chairman, to make a change in my resolution to bring it much closer to the views of the Chair, because I believe that the Chair has expressed and developed what I consider to be a relatively good prescription for this whole problem. It was my thought when I first presented my resolution that in electing a Vice President the Congress would undoubtedly give considerable weight to the views of the President, just as do the party conventions in the case of a nominee for Vice President. Since that time, however, I have become convinced that this is a feature of my proposal which should be formalized, so that it is clear that the views of the President will not be excluded from choice, which is important, of course, especially where the Congress is organized by the party of which the President is not a member. I am therefore amending my resolution, Senate Joint Resolution 138, to add to section 2 the additional requirement that the election by the Congress shall be made "by and with the advice and consent" of the President who has just taken office. This addition imports directly the phrase already used in article II, section 2, in connection with Senate approval of Presidential appointments to executive and judicial offices and brings with it several useful and customary practices. Just as under the existing procedure the President normally consults with the leadership in the Congress in advance of sending a nomination to the Senate for advice and consent, so the Congress would informally determine in advance the wishes of the President as to his second-in-command. Just as under existing procedure the President may renominate another individual in the event that the Senate fails to give its advice and consent to his first nominee, so the Congress would do the same if the President should fail to give his advice and consent to the nominee elected by the Congress.

I believe this proposal overcomes the major objections which have been voiced against the other current proposals. Unlike nomination by the President subject to the approval of the Congress, the principal initiative is left with the Congress and the element of popular election is retained to the maximum possible extent. Although in many cases the result might well be the same, I believe this is a difference of substance and not merely of form, because with the initiative placed with the President, the Congress would undoubtedly be reluctant in such a crisis to exercise more than the most perfunctory consent process. This would amount to no more than appointment by the President of his successor, the very reason on which President Truman based his request for the 1947 change in the then-existing succession law, under which the Secretary of State appointed by the President would have been the successor.

My resolution does not deal with the related problem of Presidential disability, but I would like to add a few words on that subject as well. In my view, formal legal authority must be given to the informal agreements which have been in force between the President and Vice President in the Eisenhower and Kennedy administrations and now between President Johnson and Speaker McCormack. Although in my own view this could be done by statute, I believe the substantial doubts which have been voiced on this score should be quieted by adding language on this subject to the proposed constitutional amendment on succession.

On this, I would like to adopt the Chair's suggestion, with one exception. That is an exception imported into the plan embodied in the resolution introduced by the chairman, by the American Bar Association conference on this subject. I congratulate the association and its conference on dealing with the subject in such a timely way. The one point which I think should be added, is their recommendation that the certification as to inability of the President should not be exclusively that of the Cabinet, but the possibility should be left to the Congress of establishing, if it chooses, some other body. I think that is a very sound suggestion. The word used is "or." The Congress may, as time goes on, decide to use some other technique, or it may not. If it does not, then the Cabinet will remain the technique used. If it does, it should be free to do so and should not be absolutely strapped to the fixed scheme, more suitable for a statute than a constitutional amendment, of Cabinet approval. With that one change, I would very definitely endorse the chairman's bill on the question of Presidential disability.

At the same time, I do not believe the amendment should simply give Congress the power to legislate on this whole subject without specifying any substantive solution. But I think the continuing debate on the various alternative procedures which have been suggested should be honored by authorizing the Congress to specify an alternative procedure to the one set out in the amendment—that is, Cabinet approval—if it so desires. Therefore, the American Bar Association conference proposal on this score seems to me both substantively sound and tactically wise.

To summarize my statement, I am in agreement with the chairman's bill with two exceptions: One, I believe that the origination of the vice presidential nominee, at least technically, should be in the Congress, but that the President should have authority to reject a nominee who is unsuitable to him. I think that that gets as far as we can away from the way in which a Cabinet officer is selected and gets as close as we can to a popular election without taking the time required to have one. This is my intention, if that is a principle which the subcommittee would find congenial, and that is the way in which I seek to carry it out.

The second point is that I again concur with the chairman in his constitutional amendment for disability of the President, but with the one exception that the Congress should be able to provide other means for the certification of disability than the Cabinet, if it chooses to do so by law.

Finally, Mr. Chairman, may I reiterate what I said when I began: Within the range of these ideas, I like this one best, and apparently,

the Chair and I are in rather close agreement on that, and there are others that may commend themselves to the committee. But, whatever prescription may be adopted, I hope the committee will be unflagging in reporting out a constitutional amendment, and I hope the chairman and his committee members will consider it a duty to keep after it until it gets done. I think the bigger danger than all others in this situation is, as has happened so many times before, that we run into a national crisis, we immediately think about what ought to be done, we set to work to do it, and then as memory dulls of the dangerous period through which we have passed, we drop it. Mr. Chairman, it is just too urgent today for that to happen. We may not be as lucky another time as we have been so far. The atomic age just cannot stand our being rudderless for any period of time on any constitutional questions or legal questions which human ingenuity can quiet in advance. So if there is one thing that I hope I impress upon the subcommittee, it is the need for action. Any action in this within the range presented to the committee is almost better than no action, which is the way the situation stands today. And I hope, too, that the committee members will feel a real duty, and I certainly will as one Senator, to keep after this until it gets done and not to let us all forget its urgency.

Thank you, Mr. Chairman.

Senator BAYH. I want to again thank the distinguished Senator from New York for his interest in this. I hope that not only will the members of the subcommittee who are unable to be here this morning read the record of this hearing concerning your desire for quick action, but I hope that in time we can carry and impress this same message upon all of our colleagues in the entire body of the Senate. It is certainly comforting to the chairman to know that the articulate and persistent voice of the Senator from New York is enlisted in this cause, which I agree is of great national interest.

I wanted to commend you particularly for one comment that you made. I compliment you for your entire statement, but we run into occasional constitutional scholars who say that you had better be careful what you do in a constitutional amendment because of what the Constitution already says. I concur with the Senator from New York that since this is a constitutional amendment, let us put the changes in it now as we see it should be today and correct what might have been less-than-perfect wording in the past.

We do have substantial agreement in our thinking on this, and I am very happy about this. It seems the only major disagreement we have, and really, this is like trying to determine which came first, the chicken or the egg, is whether the executive or the legislative body should initiate this action for appointing the Vice President. We both agree that there is a great need that this office be filled at all times and that this is of paramount importance.

Do you feel that the President or the Congress would be able to act more quickly, particularly in light of the last session? One of the reasons the Chair was interested in having the President initiate action is that he now has the power to appoint and then the Congress now has powers of election or confirmation. Perhaps at least we could get it initiated more quickly if it had to go through the normal process.

Senator JAVITS. I think that that advantage would be overcome either be opposition which could very well develop to the President's choice, in which case there would really be foot dragging, or by a rubberstamping on the part of the Congress. I think those two dangers are greater than the disadvantage of less celerity perhaps, in the first instance, in actually picking a personality upon whom to concentrate. And I point out that though a presidential candidate chooses his vice presidential nominee, nonetheless there is a great difference between an informal practice at conventions which can always be overturned, which is not law, but is practice, and the cementing of an idea into the Constitution. I do not think it is a good idea for the law to say that the President chooses his successor. I do not think that is sound, whatever may be the practice in party conventions. So I believe that in so solemn an act and having run into this so many times, where a Vice President succeeds a President, that we ought as much as possible to put this process somewhere between the practice of naming a Cabinet officer or a high Government official and a popular election, and I believe that you do that most closely in the plan that I have laid out, remembering always that there is a President in office all the time, so that some time spent in congressional action is not fatal, provided that we move on it.

So I feel that the plan which I have suggested is well deserving of the chairman's consideration. I know he will give it.

Senator BAYH. That goes without saying. We have discussed this, and we both share a deep concern that we get action. You mentioned the American Bar Association Conference, in which there were a dozen or so scholars and educators as well as past public officials sitting around a table, all with their own ideas. They were able to come up with a consensus, and it is my hope that we in Congress will. I would pose this one last question to the Senator so that we might have the benefit of his experience. It seems to me that almost all of our colleagues recognize the deep need for a solution to these problems and that all of them have been thinking about this and many have come up with different solutions.

Do you have any suggestions to give the Chair as to how we can best get a consensus? We are going to need two-thirds of our colleagues in the Senate as well as two-thirds of those in the House. If we could do as well as the bar association conference, we should be successful.

Senator JAVITS. I would say to the Senator that in this case, I think he might very well, after the subcommittee has matured its thinking, have some meetings of Senators of both parties in order to see if there can be a consensus formed before the subcommittee actually reports out its bill. I think the Senator will be much helped in that by the findings of the bar association conference, which I think is very distinguished, and their recommendations are entitled to great faith and credit on the part of Members of the Senate. But I believe that this is the kind of thing in which a considerable amount of advance development in order to arrive at a consensus could be very fruitful and very useful. We have meetings from time to time, I do and I am sure the chairman does, about a particular bill, where 8 or 10 or 15 Senators get together to talk it over before it is put in or when there is some question about amending it or supporting it. I see no reason

why the Chair, in a matter of this importance, where we want the least amount of divisiveness of opinion, could not undertake in an informal way, having once matured the subcommittee's thinking and the reasons for it, either to gain support for it or to find that it lacks support and then perhaps to reconsider what ought to be done in view of the consensus of views.

I think it can be done and I would strongly commend it to the Chair.

Senator BAYH. Thank you for this suggestion. I appreciate very much your taking the time and I will count on your continued interest, Senator.

Senator JAVITS. Thank you, Mr. Chairman.

Senator BAYH. The committee is very happy that it can be joined next by our distinguished colleague from Utah, Senator Moss. Senator, we are glad to have your thoughts, particularly since you are one of the parents of this particular piece of legislation. We are glad to welcome you and your testimony to this committee.

STATEMENT OF HON. FRANK E. MOSS, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Moss. Thank you, Mr. Chairman. I am very glad I could come here. This is a subject that is on the minds of us all, and we are trying to find a solution. I believe that the suggestion made by you in the bill that you have sponsored, which I have the honor of cosponsoring, offers what seems to me the best solution to the problem. I would like to present my statement and if there are questions, of course we will go into that.

Mr. Chairman and members of the subcommittee, it has been said that nothing is so powerful as an idea whose time has come. Similarly, nothing is so unquenchable as a need on which time has run out.

I feel that we have such a need in this country today, the need to remedy, and remedy at once, the weaknesses and uncertainties in our Presidential succession laws. It is a need which represents a carelessness and imprudence hard to believe in the most robust and stable government of laws in the history of the world.

We have been under the essentiality, almost from the time the ink dried on the Constitution, of drafting a Presidential succession law which recognizes all of the exigencies in a democratic form of government like ours, and which is at the same time practical and realistic. Although we have passed three such laws, we have left imponderables in all of them, and none of them has assured a swift and smooth transition of power in all eventualities from the President to his successor. Also, incredible as it may seem, we have never resolved a clear and unmistakable procedure for determining when a President is disabled, when the Vice President should take over, and who should decide when and if a President is able to resume the reins of office again.

It appears from all evidence at hand that the Founding Fathers added the office of the Vice Presidency almost as an afterthought. They made the Vice President first in line of succession to the Presidency, but handed on to the Congress the responsibility of determining what officer of the Government should serve as President in the case of the "removal, death, resignation or inability of both the

President and the Vice President." In another afterthought, they also decided the Congress should determine the succession should the office of the President and the Vice President become simultaneously vacant.

The first of the Presidential succession laws was passed in 1792 by the Second Congress. It provided that the President pro tempore of the Senate should serve in the case of the death or removal of both the President and Vice President, and further provided that if the President pro tempore were not available, then the Speaker of the House should serve until a new President could be elected. This all seems rather casual to us today, either one or the other of the congressional leaders could serve, it didn't seem to matter which. The Secretary of State was named next in line, and he was to become acting President until the Presidential electors could meet to choose a new President.

Although the Presidential succession continued to be a subject for discussion, the 1792 act prevailed for about a half a century without any widespread concern about its adequacy. We were fortunate in those first 60 years of our national life in the good health and good luck of our Presidents, and they all served out their terms. Then in 1850 we lost President Taylor, and in 1853 we lost Vice President King. These two deaths within the space of 3 years again focused our national thinking on the realities of the Presidential succession, and a number of bills were introduced, but no action taken.

Abraham Lincoln died in 1865 and in 1868 President Johnson was impeached and missed being convicted by only one vote. President Garfield was assassinated in 1881, and Vice President Hendricks passed away in 1885. In each instance new problems about the succession arose. But Congress was not in session most of the year then as it is now, and the question came up again and again as to how a successor would be chosen if one Congress had adjourned, and another had not been organized.

A new Presidential Succession Act was, therefore, passed in 1886 which placed the line of succession in the heads of the seven executive Departments of the Government, beginning with the Secretary of State. This act also repealed the electoral college system of choosing a new President, and gave the Congress the authority to meet and choose a new President under certain conditions.

This act remained in force until after the death of President Roosevelt, when President Truman, who saw many thorny problems in the act of 1886, sent a message to Congress recommending that the Speaker of the House be designated first in line of succession to be followed by the President pro tem of the Senate.

In a recent CBS documentary on the presidential succession President Truman stated that upon reflection he believed the major reasons he offered in 1945 for recommending the change is still valid—it is more in keeping with the democratic processes to fill a presidential vacancy with an elected official than with an appointed one. He chose the Speaker of the House as the first in line for two reasons: (1) The Speaker has been elected by the people to the House of Representatives, and by the representatives of the people to the speakership, and (2) the House, elected every 2 years, and always in a presidential year, is more likely to be in political agreement with

the President. Eventually President Truman's recommendations became law through the act of July 18, 1947.

This is the law under which we are now operating. This is the law I feel should be repealed. I favor replacing it with the provisions of Senate Joint Resolution 139, introduced by the distinguished Senator from Indiana, Mr. Bayh, and I am a sponsor. This resolution provides for filling the office of the Vice Presidency, when it becomes vacant from any cause, by nomination from the President and confirmation by the Congress.

It establishes specific and detailed methods by which a President can be declared disabled, the Vice President can assume and discharge the duties and powers of the Presidency, and can then return the powers to the President if and when disability of the latter passes. It would assure the stability we must have in a space-age world.

There are many reasons why I feel the provisions of Senate Joint Resolution 139 would be superior to those now in effect. I will not take time to discuss them all, but will concentrate on what I consider the two major ones.

First, it is foolhardy in these days of instant crisis to have a Presidential succession law which could place a member of the opposite political party in the White House, with perhaps only an hour or two in which to become acquainted with all of the details of an explosive situation and be required to act.

Second, it is equally foolhardy in this precarious world not to have a standard, wise method of determining when a President is, or is not, well enough mentally and physically to carry the terrible, all but overwhelming burdens of the Presidency, and when he is, or is not, able to take them back.

Let me discuss these two points in order.

There have been a number of times in our history when the executive department has been in the hands of one political party, and the Congress in the hands of another. For example, when President Arthur, a Republican, assumed power, the Democrats controlled the Senate, and when Cleveland, a Democrat, had no Vice President to succeed him, the Upper Chamber was organized by the Republicans.

The most striking example, however, is a much more recent one. In the 1956 election, the Republicans carried the White House with President Eisenhower, and the Democrats controlled both houses of the Congress, while the Republicans continued to hold the executive branch. Loss of the President and Vice President then would have brought the opposite political party to the White House.

Following the tragic assassination of President Kennedy, last year, the country witnessed a smooth, forceful, untroubled, takeover by a man of the same political convictions, and a man who furthermore had contributed to major policy decisions, and was thoroughly conversant with the plans and aspirations of the President from whose hands he took up the reins of Government. In the country's great hour of sorrow and shock, the one consoling thought was that in Lyndon Baines Johnson we had a man of the same political philosophy and dedication, a man thoroughly cognizant with the Kennedy policies, a man superbly trained for the job through 3 Vice Presidential years in which he participated in all major decisions, and through 30 years of

Government service before that time. It was, therefore, a grateful Nation which hailed the new President.

Consider what could have happened had the next man in line of succession been a man of opposite political persuasion. At best he would have had only secondhand information on Kennedy policies, and he could have been hostile to them. There would have been the turmoil of an immediate Cabinet shuffle, and changes in other appointive positions in the Government. We would have been taking the risk of a slowdown in Government business, and perhaps a breakdown which would have taken all of our capabilities to master. I do not believe that world order in the age of the atom, the supersonic flight, and instant communications can tolerate that sort of leadership strain in the most powerful country in the world.

And even had the man next in line for the Presidential succession after the Kennedy assassination been a man of similar political faith in the legislative body, the takeover could not have been as untroubled and smooth. A legislative officer, engrossed as he is in business on Capitol Hill, cannot know much about the business of the executive branch as does the Vice President who is constantly participating in it.

The procedure recommended in Senate Joint Resolution 139 of having the President recommend to the Congress within 30 days the name of a Vice President is about as sensible and foolproof a procedure as could be devised. It would assure that the Vice Presidency would never be vacant more than a few days, and that there would always be a man in full training for the Presidency.

Because the President would have the privilege of nominating him, he would be of the same political philosophy. The candidate for the Presidency chosen at a national political convention is expected to choose his Vice President: why shouldn't a man who assumes the terrible burdens of the Presidency, through the death or removal from office of a President, have the same privilege of choosing the man who will work most closely with him, who will represent him again and again in this country and around the world, and who might succeed him?

And what could be more in keeping with the democratic processes than to have the President's nominee for a Vice President confirmed by the Congress—men and women elected by the people as their representatives. The Congress is far more representative of the will and views of the people than is the electoral college, which has become an anachronism, noteworthy chiefly because it gives a State an opportunity to bestow an honor on some of its outstanding citizens.

And now, finally, just a few words about Presidential disability. We can no more afford a period of uncertainty when we do not have a President who is physically and mentally able to conduct the duties of his office than we can afford the period of uncertainty resulting from the takeover of the Presidency by a man of the opposite political party or philosophy.

It has been reassuring to Americans that recent Presidents and Vice Presidents have, through an exchange of letters, made their own agreement on disability—the Vice President to decide when the President could not serve, and to assume the duties of Acting President, and the President to decide when he could take those duties back.

This system could work perfectly, but it could be catastrophic. How many men of great brilliance and balance have lost those powers through illness, or through the unrelenting march of age, and not realize it? Or even through a bullet which wounds but does not kill? I need only ask the question.

The provisions of Senate Joint Resolution 139 leave nothing to chance. When a President felt he should relinquish his powers, the Vice President can assume them only with the consent of the majority of the heads of the executive departments. When a President wanted to take those powers back, again the same group would have to concur. If the President did not offer to relinquish his powers, and the Vice President felt he should, he could take over—but only with the consent of the majority of the executive heads. Surely a country's destiny would be in good hands when the majority of competent and able men make a decision on the competency of the man with whom they are serving and constantly are in touch.

Mr. Chairman, our present Presidential succession laws represent a risk to our country's welfare which we can no longer ignore. Every time we have lost either a President or a Vice President down through the years, the question of the succession has again been anxiously studied and discussed. Twice we have been moved to amend our original succession law, but in neither instance have we dealt forthrightly with all contingencies.

Perhaps we could have jugged along for a few weeks in the 1830's without a President, and without disastrous results. Perhaps we could have even withstood an abrupt change in political philosophy and policy in our Government in the less violent world of the 1880's. But we cannot do so today. We must replace our uncertain Presidential succession laws with machinery which will assure cohesion and stability under all circumstances. The work which the subcommittee is doing is equally important, if not more so than the work being done on the far more widely heralded issues—the tax bill and civil rights. We must devise an orderly and infallible Presidential succession act. Let us not lose the momentum provided by our late great tragedy—let us pass a realistic and crisis-proof Presidential succession law as another memorial to John Fitzgerald Kennedy.

Senator BAYH. I certainly want to thank our colleague, Senator Moss, for a very pertinent statement. I would like to chat briefly with you about that, if I may.

First, I would like to welcome to the subcommittee one of its distinguished members, the Senator from Hawaii.

Senator Fong, do you have any comment you would like to make or ask our colleague from Utah any questions?

Senator FONG. Yes. I would like to say, Mr. Chairman, this is a very well-reasoned and well-thought-out statement.

The arguments you have made are very persuasive and I congratulate you on this very fine statement, Senator.

Senator Moss. Thank you, Senator Fong.

Senator BAYH. Senator Moss, Senator Javits was here just before you and is in accord with our thinking on a great preponderance of the points. One major point of contention between us is that he feels that the Congress should initiate action on naming a Vice President and that the President then should, in his words, advise and consent.

Article II, section 2, gives the advise and consent authority to the Senate. Do you have any specific thoughts?

Senator Javits' philosophy and ours is that both the executive and the legislative bodies in a time of crisis should be called into play here for the very good reason that you gave. Do you have any thoughts specifically as to the initiation of this?

Senator Moss. Well, yes; I feel rather strongly that the Executive should initiate, should make the nomination in the first place. For one reason, it is traditional. That is the way we do it in appointing Cabinet members, appointing American ambassadors, appointing judges. The initiation always comes from the executive branch, with the legislative branch carrying on the function of advising and consenting. This is confined to the Senate, of course, but the legislative branch then passes its judgment.

As we all know, the tendency is to give great deference to the choice of the Executive and it is only in instances where the Congress feels there is some rather major reason, I think, that we turn down Executive nominations. I think it ought to be the same way here. If the President nominated the man to be the Vice President, the Congress, the entire Congress in this instance, would then consider his qualifications and I think the Congress naturally would give great deference to the choice of the Chief Executive. They would want to uphold his hand if he felt in all good conscience that that could be done. The chances are that he would nearly always be ratified. But there would be that check. These are the representatives of the people and if, after inquiring into it, they felt that there was any weakness or disability in this man, I am sure this person, this man or woman, would then ask the Congress, the Congress could then exercise its choice. If it denied the confirmation, the President could make another nomination.

I think it goes the other way around. If the Congress, which in the first place is a very diverse body made up of 435 men and women on the House side and 100 Senators, with that many different points of view, as we often see—suppose some way or another, it all came together and decided on a particular nominee for the Vice President and got the necessary votes and he was then chosen, in effect, subject to some kind of a veto power of the President.

This is a very awkward thing, it seems to me. The President then is under the pressure, as it were, to take the choice of the Congress and he would be inclined to do that. But yet this might not accord with what he would think could be a smooth-working team. Nevertheless, he might take it just so there would not be this friction.

If he turned it down, then you have precipitated a crisis among all of these Representatives up here and there would really be a boiling going on, it seems to me. Many would be incensed with the President. He turned down something that the Congress had all agreed upon. Rather than get this smooth, effectual transfer we are talking about, I think you might precipitate a greater internal crisis here, certainly greater than the risks on the other side of the coin, the other way. So I feel very strongly that the nomination ought to come from the Executive in the first place.

After all, the Vice President who is chosen to fill this vacancy, if this should become the law, is going to become immediately a close-

working partner with the President. Because the Constitution does not assign specific duties to the Vice President, other than to preside as the presiding officer of the Senate, what he does really depends on what the President assigns him to do. If a President has great confidence in his Vice President, he will give many, many important assignments, which was done by President Eisenhower to Vice President Nixon, by President Kennedy to Vice President Johnson. The Vice President was given foreign missions, foreign assignments, a place on the National Security Council, Chairman of the Equal Employment Opportunity Committee, and many, many executive jobs that required policymaking in the closest kind of cooperation and liaison to the President.

That is the reason that in my statement, I referred to the Vice Presidency as being a training ground for the Presidency. I think without specific statutory authorization for it, our recent Presidents have seen the necessity for this and have embarked upon this procedure, starting to train that Vice President right away, so that he would be cognizant with the policies of the current administration, be able to take over, as was done so superbly by President Johnson, and also to begin to lighten, a little bit at least, the great burdens of the Presidency. The Presidency of the United States has become so complex and carries such great weight, responsibility, that anything that can be done to enable the President to share his load a little ought to be done, and I think our President has been doing this, with the Vice President, in recent years.

Therefore, I think the President ought to be the one in the first place to say who he thinks is the best man in the country, man or woman in the country, to become the Vice President and to send his name and see if the Congress will agree with him, confirm him. If they agree with the President, then that individual would become the Vice President and would work in closest association and harmony with the President.

Senator BAYH. Could I ask you, as one of the sponsors of this bill, to comment on another situation? All of us who have expressed the keen interest in plugging what we believe is a loophole in our present constitutional provisions have been more or less associated with some others who have been unfairly critical of the present Speaker of the House. The chairman would like the record to be very clear on this. As I recall, I made reference to this yesterday and I would like to get the Senator from Utah's thoughts on this. It is not my intention at all to be critical of the Speaker of the House, but to point out, as the Senator from Utah did, that he now has a job that perhaps is only second to the President's and that he is not able to participate in the preparatory activities as understudy to the President that the Senator from Utah so adequately described.

Would you care to comment on this?

Senator MOSS. I would like to, and I realize the delicacy of discussing this, because it could be misinterpreted in some way as being a reflection on the man who, under our present law, would stand next in line. I certainly do not want any personal implications drawn from this. I have the greatest admiration and respect for the Speaker of the House, and what I say about the position would apply equally to any Speaker, not the one who is the present incum-

lent. It would be any Speaker of the House, whether it was the last Speaker that we had, who was recognized as a great legislative leader, or any succeeding Speaker—any of them. The Speaker of the House of Representatives is deeply involved in the legislative process. He has to be. To be elected the Speaker of the House, he has already stamped himself in that body as a leader who is able to work with the legislative process to the point that his colleagues now are willing to vote for him to be their leader and the Speaker. This is a complex and difficult job, requires all the energies, I am sure, of any man. It is one that would absorb his attention and every waking moment, really, that he has to do that.

While he is discharging this function as Speaker, he just can't possibly acquaint himself in detail with all of the myriad executive functions of the Presidency.

Look particularly in the foreign field, which is of course of over-reaching importance now, since the United States has become the acknowledged leader of the free world. We have commitments worldwide, not only military but economic and all over the globe. This is the function of the Chief Executive, the President.

Now, the Senate has a little more cognizance of this, because at least the treaties come before the Senate and at least the confirmation of Ambassadors comes before the Senate. Even so, the Senate does not have any close, intimate knowledge of it. The House is divorced from that at all. The House does not ratify treaties; the House does not confirm Ambassadors. Other than dealing with the appropriation process of providing funds in the foreign field, the House does not concern itself directly and intimately with foreign relations.

In this respect, the Speaker of the House would be handicapped. If there came a sudden change, for instance, and the Speaker of the House then had to step into the Presidency, the very first thing he might have to deal with would be a foreign crisis. In fact, that is the thing we think of first, as to whether there is some kind of a foreign crisis that might come up with our allies or with countries that are unfriendly. How in an hour's time or a day's time or a month's time is he going to be able to have his knowledge and attention focused on what may be a real crisis in our country?

Now, on that basis. I do not think the Speaker of the House, no matter who he is, how brilliant he is, where he was trained before, or anything else, could be nearly as well qualified to take that over as could a person who was a Vice President, who could be given this exposure in this period of training, were he nominated by the President and filled the Vice Presidency first.

Senator BAYH. Unfortunately, there are human limitations.

Senator FONG?

Senator FONG. From your statement, Senator, I assume you feel that the President pro tempore of the Senate would be in a better position than the Speaker of the House because of his familiarity with treaties and various other things in foreign affairs?

Senator MOSS. Yes, sir; I would think very slightly, but I would think still even the President pro tempore of the Senate is not adequately—

Senator FONG. You think the President pro tempore probably would be in a better position?

Senator Moss. Slightly; yes, sir.

Senator FONG. Even if this resolution goes through, it does not prohibit the choice of the President pro tempore or the Speaker as a vice presidential candidate by the President?

Senator Moss. That is a very good point, sir, and I am glad you pointed to that. It may very well be that the President, in deciding to nominate for the Vice President, might say, "The Speaker of the House is my nominee." Then if the House all concurred, then he would come out of his speakership and start his training, so to speak, and then, in a period of time, he might become the best person in the country.

Senator BAYLI. This would be much different from the present succession law, where the Speaker, in order to be Acting President in the event of a Presidential disability, would have to give up his job as Speaker and perhaps would also have to resign from Congress. This is not a reasonable request to make of one of the Nation's most powerful legislative leaders.

Senator Moss. I agree. Usually, the man that becomes the Speaker of the House has devoted a good part of his life to working in the House of Representatives. As Mr. Sam used to say when he was the Speaker, his whole life was the House. To call on a man like that, for instance, to resign his position in the House and take an acting job as the Executive and the vacancy would be filled after his resignation, I think, would be most undesirable. I think the man, like Speaker McCormack or Speaker Rayburn, might well resist it. They would like to stay on the job, which is of tremendous importance.

I hope that nothing I have said would indicate that I do not think the Speakership of the House is an important position. I would place it as one of the most important positions in this whole Government of ours.

We have been talking about possible disruption in the change, besides being confronted, perhaps, with some foreign problems immediately, you would have a reorganization required in the House at once. There would have to be an election of another Speaker, which might be clear and might be smooth. On the other hand, it might develop into a considerable contest. You might have a little turmoil and shifting until things settle down again, as it were, in the organization of the House, right at this critical time of change.

Senator FONG. You think, Senator, that the man chosen by the President would be of the same political faith, and therefore might have a very close working partnership, whereas under the present law, you could have a man of the opposite party, which would be working directly opposed to the President, which could be very, very damaging to the country.

Senator Moss. Besides the great shock of the takeover, should this man who came in be of the opposite political party, automatically, the members of his Cabinet would tender their resignations.

He might plead with them to stay on, but he would be expected to change some posts, which would mean a changeover at the very worst time, when we can ill afford to have changes going on in the structure of our Government. He ought to be of the same political party so he could carry right on with the structure that exists, at least for a reasonable period of time.

Senator FONG. One more question. On the question of Presidential disability, your proposal is to leave it up to the Vice President, with the more or less approval and consent of the Cabinet officers?

Senator MOSS. That is right.

Senator FONG. Don't you think there would be a reluctance on the part of the people near the President to declare the President incompetent? How do you react to the suggestion that a Commission be appointed by the President, set up for such a purpose?

Senator MOSS. Well, I would not object to that. I think that is also a reasonable way to do it. It might even have things to recommend that over the Cabinet. But what I felt is that no Cabinet would ever act in whim or caprice or vindictiveness, I would think, against the Chief Executive from whom they held appointment. They would have to feel genuinely that there was a disability, that this could not come out of some kind of political crossfire or anything of the sort. There would be a genuine disability.

On the other hand, I would think that the caliber of men that we choose as our Cabinet officers, and who have all been confirmed before they take that position, are men who are wholeheartedly devoted to the welfare of our country and are realists enough that when there was what really was a disability, to give their assent to the Vice President's taking over.

Now they are appointed by the President and beholden primarily to the President, but they are also working in association with the Vice President during all this time. They meet together in Cabinet meetings and so on.

So there is an acquaintance and a relationship and an evaluation. I think they would be quite a competent body.

However, as I say, I am not wedded to this over the other idea of a commission.

Senator BAYH. May I make one observation? I think that the three of us here would all agree, and all of our colleagues in the Senate would agree, that removing the President even temporarily from the responsibility of performing his duties is a very serious matter. I, for one, am inclined to believe that if there are any checks and balances, which there surely should be, they should be weighted in favor of the President. Only in cases where the President is definitely disabled and unable to perform his duties should anyone move in as Acting President. I think we have to be careful to avoid the possibility of a coup d'etat. As decisionmakers the Cabinet and the Congress, as you pointed out, are very well accepted by the people. They are bodies of some substance. A commission, though it might be comprised of experts, it also might have individuals who would be unknown to the public at large and could well cause the public at large to have some doubt. As you very accurately pointed out, in a time of crisis, we do not want any doubts in the public mind.

Excuse me for interposing my thoughts here.

Senator MOSS. I appreciate that addition. Certainly one of the things that we are striving for most is stability and certainty. We do not want anything that promotes any kind of instability or uncertainty. The Cabinet sitting in judgment does provide stability. Everyone would realize that that Cabinet would never give its consent as long as in the minds of those men there was any belief that that President could carry on.

Senator BAYH. Thank you very, very much, Senator Moss, for this very articulate discussion.

Senator Moss. I have enjoyed the discussion.

Senator FONG. This discussion will help us tremendously make up our minds on the bill that will be reported out from this committee.

Senator Moss. Thank you.

Senator BAYH. We are very fortunate in having our distinguished colleague from Missouri who is with us to make a statement.

Senator Long, we are happy to have you here and we are also happy to note that you have given the matter considerable study and are cosponsoring one of the resolutions before this committee, Senate Joint Resolution 139.

STATEMENT OF HON. EDWARD V. LONG, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator LONG. Mr. Chairman, members of this committee, I appreciate the opportunity to be here on this joint resolution and I am happy to be a cosponsor.

The tragic events in Dallas dramatized once again for us the pressing need to overhaul that part of our constitutional system which deals with Presidential succession and disability.

How many such dramatizations we need, or just how dramatic they must be before we act, no one knows. The need will never be more clearly spotlighted than it is today and, God willing, we will plug the gaps in our Constitution without any more tragic object lessons.

For any who might doubt the necessity for constitutional reform, only two of many most grave possibilities need be pointed out: Suppose the bullet which killed President Kennedy had strayed an inch or two and left him alive but disabled either for a long period of time or permanently; or suppose that Vice President Johnson had been killed or wounded at the same time.

The time for reform is now and the chairman of this subcommittee—you, Senator Bayh—should be most highly commended for your prompt action in calling hearings on the several solutions which have been introduced.

There are four ways in which the office of President—and, for that matter, the office of Vice President—can be left vacant: By death, by resignation, by removal, or by disability. The first three of these result in permanent vacancies which logically call for a permanent replacement; the fourth results in a vacancy which may or may not be permanent and which logically calls for a temporary replacement.

Historically, we have spoken of and treated vacancies caused by death, resignation, or removal as problems of "succession." Generally, we have separated these problems from those of "inability." In my view, this has been a false and misleading demarcation.

What we have are four different means by which the Presidency or Vice Presidency are left vacant. We should work out a single, whole, logical system to provide for prompt and effective replacement in case of a vacancy; regardless of the cause of vacancy. In other words, "succession" and "inability" are so intertwined as to be inseparable.

Naturally, the question arises: Why is a constitutional amendment necessary? Why can't Congress simply legislate on the subject?

There are at least two good answers.

First, under the Constitution as it now stands, only part of the complex problem can be handled by legislation.

More important, the dual problems of succession and inability are of such importance and magnitude that they should be placed in the Constitution even if conceivably they could be handled by legislation. They are precisely the type of problems which should be carefully worked out and enshrined in our basic charter of government. In simple terms, they are constitutional problems and should receive constitutional answers.

An analysis of Senate Joint Resolution 139, of which I am proud to be a sponsor, shows that it does propose a complete answer and a constitutional answer to the dual problems of succession and inability.

Sections 1 and 2 provide a system for the replacement of a President or Vice President who has died, resigned, or been removed from office. If the President dies, resigns, or is removed, the Vice President immediately becomes President—not Acting President—and nominates a new Vice President within 30 days. The new Vice President takes office upon confirmation by both Houses of Congress.

In case the Vice President dies, resigns, or is removed, the President nominates his successor who must be confirmed by Congress.

Under this system, there should never be more than a temporary vacancy in the office of Vice President and virtually never a vacancy in the office of President.

The system of nomination and confirmation of a new Vice President is believed to work as little change as possible in our present system of choosing Vice Presidents, wherein the candidate for President has the practical power of choosing his running mate. Confirmation by the Congress, under the proposed system for replacement of Vice Presidents, is a check and balance similar to those presently in our Constitution.

Under the proposed system, and short of an atomic attack or similar disaster, there should rarely—if ever—be an occasion to resort to succession below the level of Vice President.

However, to cover all contingencies, we have provided in section 6 that there should be "Cabinet succession" in a case where there is neither a President nor Vice President alive and qualified to serve. First in line would be the Secretary of State.

Sections, 3, 4, and 5 of the proposed article of amendment deal with the problem of inability.

In all cases of inability, the Vice President becomes Acting President, not President. This clarification would eliminate the doubt which kept the Vice President from assuming the powers and duties of the office of President in cases of Presidential inability in the past—notably in the cases of Presidents Garfield and Wilson. In each case, the Vice President hesitated because neither he nor his associates knew whether the sick President could get his office back if and when he recovered. This doubt is dispelled in this present Senate Joint Resolution 139.

I might point out, Mr. Chairman, that the committee of the American Bar Association in dealing with this particular problem—I believe this is perhaps the only change of any importance they suggested in this present resolution—that this action of determining whether the President was incapacitated at that time should be made with the concurrence of the Cabinet or such other body as the Congress, by law, would determine. But that may be something desirable that we would want in this. But that is practically the only change that the American Bar Association committee recommends.

We have also dealt with the problem of the mechanics of deciding upon and declaring disability, as well as the mechanics of how the President gets his office back upon recovery from his disability. We have carefully guarded against any possible usurpation of the office of the Presidency by an ambitious and unscrupulous Vice President.

All in all, I believe that we have come up with a workable and complete system. It can probably be improved in some of its details. Maybe there is an equally good or better proposal before the Senate.

The main point is, however, that we must get on with our task and settle upon one, good, workable system and place it in our Constitution without delay.

We should not trust to luck any further.

Senator BAYH. Thank you very much, Senator Long. As a distinguished member of the Judiciary Committee, it is of particular significance to have your testimony.

I ask my colleague from Hawaii if he has any questions.

Senator FONG. I have no questions, Mr. Chairman, except to congratulate the Senator for a very fine statement.

Senator LONG. Thank you, Mr. Chairman. I am happy to be here with my colleagues.

Senator BAYH. We look forward to working with you.

The committee is fortunate at this time to have another distinguished member of the Judiciary Committee, a man who has given a great deal of previous consideration to this subject, has studied it and has offered resolutions. One of the resolutions which he now offers is before this committee.

I know he is a man whose testimony will be of great value to the subcommittee in its deliberations and whose direct participation will be of value to the Judiciary Committee in its study of this important piece of legislation.

Senator Hruska.

STATEMENT OF HON. ROMAN L. HRUSKA, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator HRUSKA. Thank you, Mr. Chairman, and Senator Fong.

The chairman of this committee should be congratulated for arranging this series of hearings. I know that some momentum has already been gathered for speedy consideration, with due deliberation, of course, to come out with a report, to the Senate itself, on this very important subject.

These hearings and that type of conduct will be in response to a high degree of interest that is shared not only by all Members of Congress but by all thoughtful citizens in America.

I am confident that this subcommittee will pursue its schedule in such a way that such a report will be effectuated at the earliest possible time.

It is an especially propitious time, Mr. Chairman, because areas of agreement in this field are the greatest that I have ever witnessed in the several years that we, as a Congress, have been considering several bills, most of which contained all the elements that we find in the several bills which are before us now. The necessity for constitutional amendment, for example, now, that is pretty well agreed upon. The necessity for having a Vice President at all times is pretty well agreed upon. And also the revision of the succession law, is receiving favorable consideration.

One indication of the high degree of interest in this subject is the activities of the American Bar Association. In his statement yesterday, the chairman of this subcommittee named those who are serving on the committee. It was the pleasure of several of the members of the Judiciary Committee to have visited with the American Bar. They were kind enough also to invite participation in their deliberations and I was pleased to see that Senator Bayh was there. I also responded briefly to make some contribution in my way. The American Bar Association is to be commended for its interest in this subject at the present time.

Now, in general, I want to say, Mr. Chairman, that I subscribe to the sentiment of that American Bar Association committee as reported by Mr. Kirby in his release. I understand that it will be subject, however, to the usual procedures of the American Bar Association. It will be referred to a committee and there will be a recommendation to the House of Delegates, which is the fashion in which that association speaks officially on any subject that it undertakes. In general, I want to say that I do subscribe to the sentiment as expressed in the Kirby release, although I do not know whether he spoke as an individual or as an official representative of either the association or of the committee.

Senator BAYH. He said he was speaking as an individual and could not speak for the American Bar Association.

Senator HRUSKA. Still I feel that it is sufficiently definite for the purposes of my discussion to make the point that I would like to make.

Let me make this clear first, Mr. Chairman. I would like to limit my discussion to only one aspect of the many bills which are before us. That has to do with the determination of the commencement of Presidential inability and to its termination.

At this stage, I feel that we enter into an area which will have some potential danger to one of the most important of our constitutional fundamentals. That is the doctrine of the separation of powers. It would be my idea, Mr. Chairman, to limit the power to make decisions as to the commencement and termination of Presidential disability to the executive branch of the Government. It could be by the Cabinet or such other body within the executive branch as the Congress by law may provide.

Senate Joint Resolution 84, which was introduced by myself, and the Senator from Arkansas, Mr. McClellan, enunciates the principle of that decisionmaking power to the executive branch of the Government to the exclusion of the judicial branch and of the legislative branch.

Now, I am not sensitive as to the words contained in Resolution 84. I am not wedded to them. The words used there are words of art. They refer to the separation of powers and, of course, that is a tremendous concept.

But the resolution does, at least, enunciate this principle, and it is upon this principle, geared down and zeroed into this particular decisionmaking power, that I would like to speak now.

There are two principal points we ought to bear in mind when we consider the inability of a President: how do we decide that he is disabled or recovered and what happens in the interim. One point is this:

The President has been elected by the people, all of the people; in the initial instance by a majority of the voters, but in the acquiescence of the Nation to his choice, he is the President of all the people and all the people have a right—not only a desire expressed in orderly fashion in the polls but a right—that he serve the full term to which he was elected, except if there is some very grave disability visited upon him, nervous, mental, or physical. Now, to assure his continued service throughout his term, the decision should be made within the executive department. I will detail the reasons later why I believe that to be true.

Now, the second point is this, that the doctrine of the separation of powers should not be violated. No one of the three branches should be put in a dominant position over any one of the other branches. This is not only an academic statement, something we read in history books and in political science treatises, it is a very real and a very necessary and a constantly operating concept in our everyday governmental affairs.

Now, what are the major factors in determining disability or determining recovery? I would like to suggest these. I do not know that I will describe them very adequately, but these are the things which it seems to me are principal elements that would go into that decision.

First of all, to decide whether a President is able or unable to do his duties is a factual question. It is not a policy question. The policy was determined when the President was elected. The state of his health, is a factual question. Therefore, it should be decided by a body in a way that will rule out all extraneous factors.

Second, a factor of time enters into this decision. With the very fast tempo of all national and international affairs it is necessary when one leader falters that another should be there to assume the duties that may require action in a very decisive way.

So time is the second element.

The third element is that whoever makes this decision with reference to inability or recovery should have a high degree of reliable and readily available information on the subject.

The fourth point is that every fair intendment for continuation of the President or for his restoration to full Presidential powers should be accorded to the President. This is best assured, it seems to me, if we keep the body making the decision within the executive branch of the Government.

Now, where can these four factors best be accommodated? In the Supreme Court? I think we can rule the Supreme Court out, principally, because this type of responsibility is nonjudicial in character.

The letter of Chief Justice Earl Warren to our colleague, the Senator from New York, Kenneth Keating, written about a year ago and which is reported, in part at least, in the Senate hearings held last June is quite determinative of that. I shall not belabor the point that the Supreme Court is not the place where this decision should be made.

That would leave the decision to be made either by the legislative branch, or in the executive branch.

In the legislative branch, it would be the Congress itself I presume. In the executive branch, I would suggest that every consideration be given to the Cabinet acting in that capacity as the decisionmaker, or it could be—another body that would be constituted and created by the Congress, but still one which would remain within the executive branch.

Now, then, with the permission of the committee, I should like to take these four points I made and detail some of the reasons why it is only through a Cabinet or a Commission within the executive branch that they can be satisfied.

First, as to the factfinding nature of the assignment, politics should be kept out of it. Let me submit with all due respect to both Houses of the Congress that we are a political body. We live on politics, we get here by politics, we hope to stay here by good politics. We are a political body.

Now, personal prejudice, political bias, the possibility of political advantage can enter into congressional decisions, and I think one would have to be very naive, indeed, if he would think it wise. Always, there is a considerable segment in Congress which differs with the President, either on policy or on personality, sometimes on both. And this should be kept out of the consideration of whether the President is unable to do his duties or that he has recovered to a point where he can perform them.

I want to reemphasize this is not to the derogation of the Congress at all, that they are political. Will the Members of Congress, if we are to make the decision, be able to listen to the detail and to the real meaning of medical reports? Will we listen to the folks and the sentiment back home as to whether one should be restored to the Office of President?

However we eliminate a great many of these extraneous factors, when we assign this task to the Cabinet or a Commission.

Time is also important. Congress may not be in session when a disability occurs. True, it can be called within 48 or 96 hours, but it takes it a little while to get into momentum. All of us know that. And even if it is in session, we have our prescribed procedure for determining facts upon which we shall pronounce judgment. All of us know that this is a cumbersome process. It should not be interminable, but it is a deliberate process. So time would not be served by having Congress in the picture.

It would be living in a dream world indeed to suppose that 535 men and women would, out of hand, accept the report or the recommendation of even a Cabinet, because there have been only a few times when we have acted unanimously. We then proceed, hours on end, sometimes days on end, to enlighten each other and to enlighten the American public.

Well, this all has its place. Would we be filled with patriotism to a point that we would as Members of Congress thrust all these things to one side and say, "Let's go in here and let's do a job. Let's do the most notable and the finest and most statesmanlike job we can"?

I do not believe the millennium is going to arrive within the lifetime of any of those in this room. It would not take a great deal of imagination to envision a situation where in all good conscience and sincerity, some Member of Congress or a group of Members would say, "Let us delve into this thing very carefully, and particularly the proposal to restore the President to his rightful duties as the Chief Executive."

That brings me to my third point, the availability of reliable information. Now, the Cabinet particularly would have available to it the background to evaluate the President's condition. Not only could they sit around a table not any larger than the one at which I am sitting here and listen to the doctor, but that physician would speak without reserve and without reservation of any kind. Not only that they are in a position from day to day to observe how the President normally acts and how he normally reacts and conducts himself. And if they had the privilege of seeing him when he is considered disabled or recovered, they would have something upon which to proceed that would be more reliable, as well as available, than information submitted to the Congress.

Now, the fourth point I would raise is this, that any action on this decision of inability or recovery should be in sympathetic and friendly hands. It should be that way. Looking back at the Cabinets that have been appointed since 1789, I am confident that we have had, as Cabinet officers, men who are possessed of great patriotism in the first place, of a sincere desire to serve their country well, and that they would not be a body which would sacrifice the safety and the security of a nation by allowing a man to continue in office who notably and clearly is not capable of discharging those duties.

On the other hand, they would not restore to the office a President who has not recovered. Nor would they be prone to keep him out of the office if he were at all able.

Now, this is very important, because unless the decision to restore the man to his full powers and duties were in the background, and unless they are friendly to the President, there would be a great reluctance on the part of the President to say, "Well, I am unable now, let the Vice President undertake, as Acting President, my duties."

If he thought he had to battle with the hostile Congress, for example, a Congress, of another party, a Congress with whom he has become embroiled, as we have noticed in the last 20 years, the President might be reluctant. Some of our Congresses have been led by some very strong leaders and this understandably might deter the President.

Those are the four points which I alluded to in the opening part of my statement. Now, overriding them all is this dominant principle which has served this country well and which is operating since the inception of our form of government. This is the doctrine of separation of powers. No branch should have a dominant position over any other branch. I submit most seriously that to vest in the Congress the decisionmaking power of whether an inability exists is to

put the Congress in a dominant position over the President. Now, again, I want to say Senate Resolution 84 tries to express this principle and this idea.

By way of summary, I would like to say that the decision as to the role of Congress in determining the question of Presidential inability is going to have to be decided sometime. If we do not spell out the procedure in an amendment, the decision will have to be made by the Congress in fashioning implementing legislation. But eventually we are going to tie into it.

Therefore, I encourage not only the serious consideration of this principle of separation of powers in any proposal offered, but also its inclusion in the constitutional amendment recommended.

Now, Mr. Chairman, I have prepared a more formal statement than that which I have just concluded. I would like permission to include it in the record, either before or after my extemporaneous remarks.

Senator BAYH. Without objection it will be included at the termination of your remarks. I have not had the chance to read it, but I am certain it could not approach the eloquence and the articulate manner in which you addressed this problem extemporaneously. It is obvious that you have given this, as I think we all knew, great study. I didn't mean to interrupt. I would like to discuss your thoughts, if I may, when you are through.

Senator HRUSKA. I have concluded my statement, Mr. Chairman. You are most generous in your remarks. If there are any questions or suggestions, I would be glad to try to discuss them with my eminent colleagues.

(The statement referred to follows:)

STATEMENT OF SENATOR ROMAN L. HRUSKA, A U.S. SENATOR FROM THE STATE OF NEBRASKA, JANUARY 23, 1964, BEFORE THE CONSTITUTIONAL AMENDMENTS SUBCOMMITTEE

Mr. Chairman, as one of the final witnesses in this initial 2-day hearing on Presidential inability, I will not go into detail as to those matters which I am sure have already been fully developed.

It is sufficient to observe that the agreements devised by the President and his Vice President in the past two administrations and by President Johnson and Speaker McCormack in recent weeks to cope with an inability crisis are not satisfactory solutions.

Furthermore, it is abundantly clear that the only sound approach is the adoption of a constitutional amendment which distinguishes the inability situation from the three other contingencies of permanent nature, death, resignation, and removal from office, and which recognizes that in the first instance the Vice President becomes Acting President only. In other words, the times call for a repeal of article II, section 1, paragraph 6.

At this point, we encounter the first major difference of opinion. Some would advocate spelling out the procedure for determining inability within the language of the proposed amendment. I disagree. The logic of locking in the procedure deemed appropriate today but which, in the light of greater knowledge and experience, may be found wanting tomorrow, escapes me.

The preferred course would be for the amendment authorizing the Congress to establish an appropriate procedure by law. This practice parallels the situation of Presidential succession, wherein the power is delineated by the Constitution but the detail is left for later determination.

The purpose of the cosponsors of Senate Joint Resolution 84 is to add one fundamental limitation to the process. Language which simply enables the Congress to prescribe by law the method by which the commencement and termination of any inability shall be determined is open to serious criticism and danger. Without any limitation upon the method, the Congress might adopt a procedure

that would violate constitutional doctrines of the most essential character which throughout our history have proved their wisdom and value.

I refer primarily to the doctrine of separation of powers. The maintenance of the three distinct branches of government, coequal in character, has long been accepted as one of the most important safeguards for the preservation of the Republic. However, one does not have to look long or far for cases which would threaten this doctrine. Several pending proposals on Presidential inability illustrate how seriously the doctrine can be impaired.

This is the reason for the limitation contained in Senate Joint Resolution 84 that the "procedure must be compatible with the maintenance of the three distinct departments of Government, the legislative, the executive, and the judicial and the preservation of the checks and balances between the coordinate branches." The particular wording cited here is unimportant. The essential matter is that the method ultimately selected shall have the executive branch determine the commencement and termination of any inability. Stated another way, Congress would be prohibited from prescribing a method which would involve either the judicial or the legislative branch of the Government. This is a significant limitation, as those who propose it will acknowledge, but it is an indispensable one if our efforts to resolve the problem of Presidential inability are to be successful.

The determination of the commencement and termination of any inability of the President is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his office.

Furthermore, this decision must be made with a minimum of delay. In an age of advanced weapons and an accelerated pace in national and international affairs, the luxury of weeks or even days to assemble a quorum prior to reaching a decision cannot be afforded. The executive branch is clearly most capable to respond promptly as well as advisedly to such a crisis.

Quite obviously such a decision should rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or similar extraneous factors. The parties possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.

Lastly, we must be mindful that the President is chosen by the people of the entire Nation. It is their wish and their right that he serve as President for the term for which he was chosen. Every sensible and sympathetic construction favoring his continued performance of such Presidential duties should be accorded him. Indeed, were error to be committed, it should be in favor of such a continuation in office or, were it interrupted by a disability, by his resumption of the office at the earliest possible moment upon recovery. The members of the executive branch are best situated to protect that interest.

From what has briefly been developed, it is readily apparent that neither the judiciary nor the legislative branch should be injected into the decisionmaking process of declaring Presidential inability or recovery. As if in confirmation of the point, we have the recent expression of Chief Justice Warren that it would be inadvisable for the court or any of its members to assume such a role. Our personal awareness of the acutely political role pursued by Members of Congress likewise forbids injection of this branch into that process.

It is for these reasons, Mr. Chairman, that Senate Joint Resolution 84 is offered for your subcommittee's consideration. I repeat that the sponsors are not committed to the language which it contains. They are, however, persuaded to the merits of the limitation it advances.

I look forward to the opportunity of working with the subcommittee in its notable effort to devise a sound and acceptable solution to one of the most delicate constitutional issues facing our country today which cannot brook further delay.

Senator BAYH. I want to make absolutely certain that I interpreted your remarks correctly. Am I correct in saying that we can come to a general consensus between Resolutions 84 and 139 insofar as they deal with disability by taking the Cabinet provisions which are contained in 139, being certain that there is continued separation of the three

branches of our Government, and incorporating all of this in the Constitution? Do you feel that the correct body to determine inability is the Cabinet? You do not object to another body making this determination so long as its membership is confined to the executive branch? You feel that if it can be done, it would be wiser now to incorporate the substance and procedure all in a constitutional amendment, instead of letting the Congress, at some other time of tragedy, provide by law for these contingencies?

Did I interpret your remarks correctly?

Senator HRUSKA. Yes. That is correct, Mr. Chairman. May I ask if the members of the committee have the statement of Mr. Kirby before them? I think I can illustrate how simply this principle may be incorporated into the proposal that he describes.

In paragraph 4 on page 3 of that report, the language reads as follows:

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

And at that point I would underline just four simple words: " 'within the executive branch,' as the Congress may by law provide."

And that would do the job.

Now, I say in principle and in general, I subscribe to that point of view, but it would be easy to implement the thesis of my presentation here by the insertion of those four words.

Senator BAYH. I see no objection whatsoever to that. I am happy to see that the Senator feels that this procedural matter should be incorporated in the Constitution. It seems to be of significant importance that we do that.

Senator HRUSKA. I do not want to get too semantic. However I would not consider this a procedural matter. It is rather a broad limitation. Any way the Congress in its wisdom prescribes within the executive department, would be agreeable. I have an idea that the high regard in which the Cabinet has been held, the Congress will conclude that the Cabinet should make this decision. For future contingencies, when the role of the Cabinet might change, there should be flexibility in the amendment while still limiting the procedure to a body within the executive branch.

Senator BAYH. One of the thoughts that has been expressed is that it is a very serious matter to remove the President from his duties and that certainly sufficient safeguards should be established. For this reason, it has been suggested that it should take more than a majority of the Cabinet to determine inability. Of course, the Cabinet, which works closely with the President, would be reluctant to remove him from responsibility unless his disability is unmistakable. Perhaps some say, you need more than a majority of the Cabinet. Others say that in case of disagreement over disability, Congress itself should be called into the fray as an arbiter. This, of course, runs afoul of your principle of separation. But as an additional safeguard, wouldn't it be wise to provide that two-thirds of the Congress, in the event that the President and the Vice President did not agree on whether a disability existed, would be able to uphold the Vice President

and the Cabinet in declaring the President unable to perform his duties.

This is one possibility, of course. The way you feel about the separation of powers, I would imagine that, first, you do not want Congress to play any part in such a decision. But in the event that I am wrong in this, do you feel that there needs to be additional safeguards? If you do, what would you think of this provision? After a majority of the Cabinet had specified that the Vice President should act as President, that then he would be acting President until a specified percentage of the Congress—one-half or two-thirds—determined that he was relieved of the disability, or that the Vice President would have to retain his position by a two-thirds vote of Congress.

Senator HRUSKA. Well, of course, that goes to the essence of the separation of powers. If the Vice President will continue to serve only so long as the Congress shall will it.

Now, I can understand that there would be some apprehension over a close decision within the Cabinet. However, the greatest likelihood is that those men are loyal to the President. Philosophically, politically, and personally, there would naturally arise that loyalty so essential to the performance of their duties. I would find it hard to believe that they would deny to the President a restoration of his duties if they felt that he was able to carry on. It would require the strongest of cases, it seems to me, for them to deny him that unless he just could not do it.

When we search the specific facts of long periods of disability—there were the two cases of Garfield and Wilson—I do not think it would have been any trouble at all to decide the question of disability. I think in the later part of President Wilson's disability, very likely, the Cabinet would have restored him to his office and would have had no trouble with it at all.

In far the greatest number of cases, this device will work successfully. We cannot overcome every contingency and every conceivable set of facts and say, this will solve them all. Man is not made sufficiently wise to anticipate all these things and solve them all. We are going to have to depend on the success of our Constitution and our system of government, on the good will of men to do the right thing.

Senator BAYH. Congress by law could provide for any shortcomings that we might encounter.

Senator HRUSKA. I think so. If the Congress wants to make it two-thirds of the Cabinet, that is fine. If it is a majority, that is fine, but still, it should be the Cabinet.

Senator FONG. I want to congratulate the distinguished and able Senator from Nebraska for coming before this committee and giving you his philosophy and his thinking. I know that he has made a very, very thorough and deep study of this problem and has given us his ideas, in the usual very lucid and logical fashion in which he does present arguments.

I would like to ask the Senator from Nebraska one question. You feel that the legislative branch and the judicial branch should not be in on this problem of disability. How would you approach the question of succession? Would you still leave the legislative and the judicial branch out of this problem?

Senator HRUSKA. Oh, no; not at all. My presentation here this morning was limited only to ability or inability and recovery. In the matter of succession, as I said in the body of my remarks, the Congress is called upon not to make a judgment of an individual, not to make judgment of a specific fact, but to enact a policy of this Nation which would become effective when the President and the Vice President were unable to serve, either through death or resignation, removal from office, or disability.

That is a logical and proper function for the Congress to perform. That is a policy matter. Will it be the same as the present? Will it be in conformity with the law of 1886 when they resorted immediately to the Cabinet? That is a policy question for the Congress to determine and it should stay just where it was put originally in the Constitution and where it has remained ever since.

Article II, section 1, paragraph 6, would be repealed by Resolution 84. I believe that is restricted, is it not, only to disability and succession of the Vice President. It does not relate to the question of naming a Vice President. The power to enact such a succession law is found in another section of the Constitution. But my resolution does not relate to this aspect of the question.

Senator FONG. I see. Thank you.

Senator BAYH. Senator Hruska, we certainly appreciate your taking the time to embellish in the finest sense the proceedings of this committee.

Senator HRUSKA. Thank you very much, Mr. Chairman. Thank you for being so patient on the score of time. I hope I have not trespassed unduly on the time of the Senator from Idaho.

Senator BAYH. The committee now is happy to see the next witness will be the senior Senator from Idaho. I had the privilege of presiding yesterday and heard the remarks which the Senator made when he introduced his resolution.

Senator Church, we are happy to have you before us.

STATEMENT OF HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CHURCH. Thank you very much, Mr. Chairman.

In the interest of saving your time and the time of the committee, I have prepared here the introductory statement that I used yesterday in introducing the resolution that I have come here to discuss, and I should like to ask that the text of that introductory statement be made a part of the record and it would be then unnecessary for me to read it here.

Senator BAYH. Without objection, it will be made a part of the record at this time.

(The statement referred to follows:)

STATEMENT BY HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO IN SUPPORT OF HIS PROPOSED CONSTITUTIONAL AMENDMENT FOR FILLING VACANCIES IN THE OFFICE OF VICE PRESIDENT

In the history of our country there has been a vacancy in the office of Vice President no less than 16 times. Eight times the Vice President has become President; seven Vice Presidents have died in office; one resigned to become a Senator. The Constitution is silent as to any procedure for filling these vacan-

cies, and none exists. Accordingly, I introduce a joint resolution proposing an amendment to the Constitution relating to the filling of vacancies in the office of Vice President.

Let it be noted that this proposed amendment deals with a problem quite distinct from that of statutory succession to the Presidency, though it is closely related to it. The question of succession is now beclouded by controversy, with some advocating a return to the former practice of placing the Cabinet in line, and others defending the present law under which the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, would precede members of the Cabinet in the order of succession. Wise judgments on this controversy are rendered more difficult by reason of the circumstances that there is no Vice President. The possibility of succession being real and imminent, it is impossible to separate considerations of what office or procedure should be looked to for the successor, from evaluations of the particular persons who currently occupy the offices in question, and who would, in fact, succeed under this or that version of the law.

But repairs to our constitutional roof are rarely undertaken when the Republic enjoys unobstructed sunshine; it is likely that they will be made, if at all, at a time, like the present, when recent crisis has dramatized the need.

It is significant, however, that a constitutional procedure to insure that the office of Vice President would be promptly filled, when vacant for any reason, would render moot most of the argument about statutory succession to the office of President. For the need would arise only in the unlikely event, against which careful precautions are taken, that both the President and the Vice President should perish or suffer disability at the same time.

The question of devising procedures to cover all of the possible contingencies involving Presidential disability is also quite different from that of filling vacancies in the office of Vice President. The problem of Presidential disability is very difficult to resolve. If it is to be tackled in the context of constitutional revision, I think it would be well to divorce it from the problem of replacing a Vice President. To tie the two problems together unnecessarily complicates the solution of either. The amendment I am now proposing is, therefore, addressed to the single objective of instituting a constitutional procedure for filling vacancies in the office of Vice President.

The proper guiding principle in approaching this problem. It seems to me, is to make maximum use of the provisions already in the Constitution, and of the usages which have developed under them. The difficulties in the way of holding a special election to fill the office of Vice President seem to me very formidable. Likewise, selection of a new Vice President by the electoral college, while plausible at first glance, is not really in accord with our present political practice. The members of the electoral college are not in fact chosen to be representative of the people, or for the wisdom needed to make so momentous a judgment. They are chosen to perform a ministerial function, limited to the formality of casting their votes for a previously selected party candidate. But a practicable constitutional analogy can be found, I think, in the procedure for choosing the highest nonelective officials of the Government, such as Cabinet Ministers, Ambassadors, and Justices. In such cases, the President nominates, and "by and with the advice and consent of the Senate," appoints. My amendment would incorporate this procedure in filling a vacancy in the office of Vice President.

Today, however, we are much more conscious than were the Founding Fathers of an intimacy of connection between the Vice President and the President which calls for the closest possible rapport between the two, so that there may be continuity if the need arises. Therefore, it seems to me that something akin to the constitutional role which the House of Representatives plays in relation to the Presidency might be made applicable to the Vice Presidency for the special purpose which here concerns us. Only the House can elect a President if no candidate receives a majority of the votes cast in the electoral college. Accordingly, the amendment I am now proposing would leave the final selection of a Vice President chosen to fill a vacancy in that office to the House of Representatives. The exact procedure is quite simple: I will read now the operative language of the amendment.

"Whenever there shall be a vacancy in the office of Vice President, the President, by and with the advice and consent of the Senate, shall nominate not more than five nor fewer than two persons qualified for the office. The House of Representatives shall immediately, by ballot, choose one of these persons to be Vice President. A quorum for this purpose shall consist of two-thirds of the

whole number of Representatives, and a majority of the whole number shall be necessary to a choice."

Here is a procedure which conforms as closely as possible to the existing practice under the Constitution. It provides the President, the Senate, and the House of Representatives with a role in the selection for which each is best suited: The President exercises his responsibility in such a way as to insure that the new Vice President will be acceptable to him—reflecting the actuality of our present nominating procedures at party conventions—and that continuity of party and policy can be maintained; the Senate scrutinizes the qualifications of each nominee, free from the pressures to which a President may sometimes be subjected, to insure that each is fully qualified for the second highest office in the Nation; the House, most representative of the people, makes the final choice of the candidate it believes to be best endowed with the qualities of leadership and popularity without which no President can realize the full potential of the office.

Mr. President, I hope this suggested solution to the problem we face when there is no Vice President can receive in committee, in the Senate, in the House, and in the country, the close examination which a matter of such importance deserves.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to a vacancy in the Office of Vice President

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 —

"Whenever there shall be a vacancy in the office of Vice President, the President, by and with the advice and consent of the Senate, shall nominate not more than five nor fewer than two persons qualified for the office. The House of Representatives shall immediately, by ballot, choose one of these persons to be Vice President. A quorum for this purpose shall consist of two-thirds of the whole number of Representatives, and a majority of the whole number shall be necessary to a choice.

Senator CHURCH. Mr. Chairman, I know that the scope of your committee's inquiry extends beyond the scope of the resolution that I bring to the committee's attention this morning. You are considering many facets of this serious problem. You are considering, for example, the matter of succession which the Congress can establish by statute, and there has been much controversy of late as to whether we ought to stand by the present law, which places the Speaker of the House and the President pro tempore of the Senate in line for the succession to the Presidency in advance of members of the Cabinet, or whether we should revert to the previous law, which placed the members of the Cabinet in order of succession.

I do not intend to discuss that question this morning, because it seems to me that the urgency of that question could largely be removed if we were to cure the constitutional defect which prevents us from filling a vacancy in the Vice Presidency whenever such vacancy occurs between elections. It is to this question that I should like to present my case this morning. To do so, I should like to read the operative language of the resolution which I introduced yesterday in the Senate. That language would read:

"Whenever there shall be a vacancy in the office of Vice President, the President, by and with the advice and consent of the Senate, shall nominate not more than five nor fewer than two persons qualified for the office. The House of Representatives shall immediately, by ballot, choose one of these persons to be

Vice President. A quorum for this purpose shall consist of two-thirds of the whole number of Representatives, and a majority of the whole number shall be necessary to a choice.

Mr. Chairman, you have various proposals before you. Perhaps it would be useful if I were to differentiate the ways in which this proposal differs from those that I know about that have heretofore been presented to the committee.

This proposal attempts to give the President, the Senate, and the House of Representatives a role to play in the selection of a new Vice President. It attempts to make that role conform as closely as possible to the present practices, both political and constitutional. In other words, it attempts to give to each a role that each is best fitted to play.

I concur with the sentiments of the chairman when he says that the President of the United States has much at stake in the selection of a new Vice President. It is also our current political practice at party nominating conventions that the man nominated for President should have a decisive vote in who should be his running mate. What we give to a party candidate, we ought not to deprive a President. So this proposal commences with a nomination made by the President himself to insure that any man finally selected would have the President's full confidence, that any man finally selected would be a member of the President's own party, and would have such rapport with the President as to be an effective Vice President and as to give continuity in the event that he should have to succeed to the Presidency itself.

I feel strongly, however, that having given so much power to the President in the selection of a new Vice President, we ought not then to reduce the role of the Congress merely to that of ratification.

This is frequently the role assigned to a legislative body in a country where legislatures do not really have important powers. I cannot conceive of a situation, though one might possibly occur, it is hard to conceive of a situation where the Congress would not almost automatically ratify a Presidential choice, for to do otherwise would be to repudiate a President who has just assumed office.

This is quite unlikely to happen. Therefore, if the role assigned to the Congress is merely that of ratification, we give to it nothing more than a formality in the kind of situation that you and I could foresee. It is difficult to foresee a situation where this would be otherwise.

So in the resolution that I have proposed, the President would not nominate merely one man to be the new Vice President, but he would nominate a slate which, at his choice, would consist of not less than two nor more than five. That slate would be then presented to the Senate, just as other Presidential nominations for high and responsible positions in the Government are presented to the Senate, such as Justices of the Supreme Court, Federal judges, ambassadors, and members of the Cabinet. The Senate would then be the ratifier, which is its normal role, and in the event that the President were to select a man in that slate of nominees who was so objectionable or so offensive to the Senate that the Senate would feel required to refuse to confirm, then the Senate would have that prerogative, as it does in connection with these other high offices.

Once the slate is ratified by the normal Senate process, it then would be submitted to the House of Representatives and the House of Repre-

sentatives would make the final selection from among the nominees. This is not unlike the function of the House of Representatives. When a Presidential candidate fails of a majority in the electoral college, the House alone has the right to choose a new President. I suggest that in this situation, it would be appropriate for the House to have the right to make the final selection of a new Vice President. The reason for this is that in the absence of a general popular election, the House of Representatives most closely corresponds to the electorate. It is most closely representative of the electorate. Therefore, it is the most appropriate Chamber for making the final selection.

In this way, Mr. Chairman, it seems to me that the resolution that I have introduced conforms closely to present constitutional concepts, gives the President himself the necessary power, but reserves to the Congress something more than the formality of ratification and thus contributes to a healthy balance, as the Constitution originally conceived that balance. I commend it to your committee's earnest consideration.

One further point I would like to make is that knowing that your committee is also concerned with the vexatious problem of disability, and knowing that this is a more difficult problem to resolve than any other, I would suggest that whatever decision the committee arrives at in connection with this problem, it seems to me it would be wise to present that recommendation in the form of a separate constitutional amendment if an amendment is necessary, rather than wrapping it into one amendment dealing both with the problem of filling the Vice Presidency and the problem of Presidential disability. I think that separating the two would contribute toward the enactment of both in due course. Combining the two might make the enactment of either much more complicated and delayed.

With that, Mr. Chairman, I conclude my extempore remarks with an expression of gratitude to the chairman of this committee.

Senator BAYH. The chairman of the committee is very grateful to the distinguished Senator from Idaho for his fine statement. I understand that the Senator is pressed for time, so we shall not ask him any questions at this time.

The committee will adjourn today's session of hearings. Notice in the Congressional Record will be made a week in advance of the next hearings. It appears now as if they will be some time in the last week or two of February.

We are now adjourned.

(Whereupon, at 12:05 p.m., the committee adjourned, subject to the call of the Chair.)

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

MONDAY, FEBRUARY 24, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh and Keating.

Also present: Larry Conrad, counsel, Clyde Flynn, minority counsel, and Mary Day, chief clerk.

Senator BAYH. The committee will please come to order.

On behalf of my distinguished colleague from New York, and myself, we are happy to start our second session of hearings of the subcommittee on the questions of Presidential inability and means whereby vacancies in the Vice Presidency may be filled.

In earlier hearings, as some of you may recall, several of our distinguished colleagues placed before this subcommittee various plans to solve these two problems. Each Member of the Senate who testified agreed to one basic principle: That it is necessary for this committee and for the Congress to reach a reasonable consensus, which can in turn be submitted to the several States for adoption as an amendment to the Constitution.

These hearings are designed to assist this subcommittee in reaching such a consensus. In the next several days, we will hear testimony from many distinguished leaders in the field of law and political science. Following today's hearings, other witnesses will include former Vice President Nixon, James MacGregor Burns, who was President Kennedy's official biographer, the Honorable Herbert Brownell, who was Attorney General under President Eisenhower, the Honorable Francis Biddle, who was Attorney General under President Roosevelt, and many others.

We are particularly honored this morning and fortunate to have with us Mr. Walter Craig, president of the American Bar Association, and Mr. Lewis Powell, president-elect of the American Bar Association, both of whom will present the views of the American Bar Association on the matter of filling the vacancies in the office of Vice President and the matter of Presidential inability.

Both Mr. Craig and Mr. Powell are both distinguished lawyers of long standing.

Mr. Craig and Mr. Powell were recently responsible for calling together in Washington some distinguished members of the American Bar Association for discussing the question of Presidential inability and vacancies in the office of the Vice President.

I would like to commend them and the American Bar Association for the lead which they have taken in this area.

Before introducing our two honored witnesses this morning, Senator Keating, do you have a comment to make as we resume our hearings?

Senator KEATING. No. I had comments, as you know, at the opening of the hearings before. I have nothing to add at this time. I shall be very interested in hearing the American Bar Association, particularly in determining the reasons for their change of viewpoint from the one expressed in these hearings about 6 or 8 months ago.

Senator BAYH. I would like to introduce at this time Mr. Walter Craig, president of the American Bar Association.

Mr. Craig, do you and Mr. Powell desire to appear jointly or individually?

STATEMENT OF WALTER CRAIG, PRESIDENT OF AMERICAN BAR ASSOCIATION

Mr. CRAIG. Senator, I believe that if I made the first statement as to the actions of the American Bar Association as a result of the Washington conference last week at its midwinter meeting in Chicago, then Mr. Powell will follow me with respect to the reasons on how we arrived at our conclusion.

Senator BAYH. Fine.

You have the floor, sir.

Mr. CRAIG. As you have stated, Mr. Chairman, I am Walter E. Craig of Phoenix, Ariz., president of the American Bar Association.

Mr. Lewis F. Powell, Jr., the president-elect of the American Bar Association, is with me today. We appreciate your invitation to discuss the problems arising in the event of Presidential inability and the related question of succession. This is one of the most urgent matters facing the Congress today.

The American Bar Association has been interested in the subject of Presidential inability for many years. In 1960 the association's Committee on jurisprudence and law reform studied the problem and recommended adoption of a constitutional amendment such as that proposed currently by Senate Joint Resolution 35.

The language of Senate Joint Resolution 35 stemmed initially from the New York State Bar Association and the proposal embodied in that Senate joint resolution has been considered a sound one. It was considered a good proposal because it was concise, clear, and easily understood. It would solve the constitutional question arising in the event of the President's inability to discharge the powers and duties of his office which Mr. Powell will discuss in further detail. It would leave the appropriate procedures to Congress for final determination.

In 1962 the American Bar Association reaffirmed its position calling for a constitutional amendment such as Senate Joint Resolution 35. In addition it endorsed a proposed congressional amendment such as Senate Joint Resolution 35. In addition it endorsed a proposed congressional statute as a stopgap measure.

In 1963, under the chairmanship of the late Senator Kefauver, hearings were held on Presidential inability by this subcommittee. Lewis Powell testified in support of Senate Joint Resolution 35 which was

one of the principal resolutions under consideration and subsequently reported favorably by this subcommittee. The death of President Kennedy directed the entire Nation's attention to the vacancy in the Vice Presidency and to the difficult questions which might have faced the Nation had the President been disabled seriously. As in past years when crisis has occurred in the Presidential office, the American people became acutely aware of the importance of maintaining uninterrupted continuity in executive leadership.

Congressional leaders, constitutional scholars, and many others are in complete agreement that something must be done to eliminate the possibility of chaos in the event of the President's disability. It is also considered highly desirable that the office of Vice President be filled at all times. Unfortunately, no action has been taken by Congress because of the many differing views. In an attempt to develop a consensus among several distinguished lawyers most knowledgeable on this subject, the American Bar Association convened a conference on presidential inability and succession on January 20-21 of this year.

Attending the conference in Washington were: Herbert Brownell, president, Association of the Bar of the City of New York, and a former Attorney General of the United States; John D. Feerick, attorney, New York, who has studied this problem; Paul A. Freund, professor of law, Harvard University; Jonathan C. Gibson, chairman, Standing Committee on Jurisprudence and Law Reform, American Bar Association; Richard H. Hansen, attorney, Lincoln, Nebr., who was an author on this subject and a student of this subject; James C. Kirby, Jr., associate professor of law, Vanderbilt University, and a former chief counsel to the Subcommittee on Constitutional Amendments, Senate Judiciary Committee; Ross L. Malone, past president of the American Bar Association, and a former Deputy Attorney General of the United States; Charles B. Nutting, dean of the National Law Center; Lewis F. Powell, president-elect, American Bar Association; Sylvester C. Smith, Jr., of Newark, N.J., past president, American Bar Association; Martin Taylor, chairman, Committee on Federal Constitution, New York State Bar Association; Edward L. Wright, of Little Rock, Ark., chairman, house of delegates, American Bar Association; and myself.

The 2-day deliberations of this highly distinguished group were intense and thorough. Proposals of this and past Congresses were reviewed in detail. Although there was not absolute agreement by each conferee on all points of the final consensus, there was general agreement on the statement. On the question of action to be taken in the event of the President's inability, it was the consensus of the conference that:

1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

3. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve

upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

4. The amendment should provide that the inability of the President may be established by declaration in writing of the President.

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

5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing ability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress.

On the related question of presidential succession, it was the consensus that:

1. The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The consensus was reviewed thoroughly by the association's committee on jurisprudence and law reform. The committee members agreed unanimously in recommending favorably the consensus to the association's house of delegates on February 17, 1964. The house of delegates adopted a resolution recommending that the Constitution of the United States be amended in accordance with the principles of the consensus. I wish to submit at this time for the record a copy of the recommendations by the house of delegates and the report of the standing committee on jurisprudence and law reform.

Senator BAYH. Without objection, that will be entered in the record at this time.

(The document referred to follows:)

REPORT AND RECOMMENDATIONS OF THE STANDING COMMITTEE ON JURISPRUDENCE
AND LAW REFORM, AMERICAN BAR ASSOCIATION

(As adopted by the house of delegates, February 17, 1964)

RECOMMENDATIONS

The house of delegates adopted the following recommendations of the standing committee on jurisprudence and law reform:

I

Be it resolved, That the American Bar Association recommends that the Constitution of the United States be amended in accordance with the principles set forth in the consensus of the special conference convened by the American Bar Association in Washington, D.C., January 21, 1964, as follows:

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

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

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress;

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

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

II

Be it further resolved, That the American Bar Association reaffirm in principle the support of the need for interim statutory clarification of the problem after the constitutional proposals have been submitted by Congress for action by the State legislatures, such legislation to provide a remedy while the constitutional proposals are under consideration.

III

Be it further resolved, That, in view of the manifest need for a prompt solution by constitutional amendment of the problems of Presidential succession and inability, the American Bar Association urges that State and local bar organizations support by all appropriate means an amendment to the Constitution of the United States in accordance with the principles set forth in the recommendations of the committee on jurisprudence and law reform.

REPORT ON PRESIDENTIAL INABILITY AND SUCCESSION

This supplemental report is submitted at the request of Mr. Walter E. Craig, president of the American Bar Association, to give the further views of the standing committee on jurisprudence and law reform on Presidential inability and succession.

In 1960, this committee and the house of delegates considered the problem of providing for the temporary replacement of the President when that officer is unable to carry out the powers and duties of his office. At that time an amendment to the Constitution was recommended which would have established a method of determining the beginning and the end of the President's inability and which would have given the Vice President the mandate to carry out the powers and duties of the office of President during the period of the inability. The 1962 committee and association action reaffirmed the request for a constitutional amendment and endorsed specific legislation designed to provide for the case of the President who becomes unable to fulfill the powers and duties of his office; and, in 1963, the committee continued to urge that an appropriate constitutional amendment, or legislation, or both, be adopted to deal with the problem.

The problem is a result of the wording of the sixth clause of section 1 of article II of the Constitution which provides:

"In case of the removal of the President from Office, or of his death, resignation, or inability to discharge the powers and duties of the said Office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

This clause does not set forth how or when it may be determined that the President is unable to discharge the powers and duties of the office, nor does it make clear whether the "Office" or the powers and duties of "said Office" devolve on the Vice President in the event of the President's death, resignation, or inability. The debates of the Constitutional Convention and the State ratifying conventions offer no conclusive answer to these questions, although they tend to suggest that the Founding Fathers meant that the Vice President should succeed to the power and duties only and not the office of President.

In 1841 at the death of President Harrison, Vice President Tyler took the oath and assumed the Office of the Presidency. This established a precedent which has been followed by seven Vice Presidents since Tyler. While this practice of the Vice President assuming the Office of President has worked to establish a smooth continuity in our executive branch after the death of the President, it has done nothing to clarify the situation when the President has become too ill or disabled to act as our Chief Executive.

When President Garfield was shot and when President Wilson was gravely ill, their Vice Presidents were reluctant to carry out the powers and duties of the Office, and for extended periods of time the Nation had no Chief Executive capable of fulfilling the important functions of the Office. The reluctance of these Vice Presidents to assume the powers and duties of the Office can be attributed to the lack of a clear provision in the Constitution or statutes which established their right to do so, and to the fear that their assumption of the powers and duties of the Office would have made them the President and would have prevented the return of the elected President at the termination of his disability.

President Eisenhower, President Kennedy, and, it is reported, President Johnson, have sought to clarify the problem by entering into agreements with their statutory successors, establishing a procedure by which the successor would temporarily assume the powers and duties of the Office in the event of the inability of the President. Attorney General Robert F. Kennedy, in 1961, expressed the opinion that article 2, section 1, clause 6, authorizes the Vice President to act as President in the event of the President's inability "until the disability be removed;" and authorizes the Vice President to decide whether Presidential inability exists if the President is unable to do so and empowers the President to determine when his inability has ended. He noted that Attorneys General Herbert Brownell, Jr., and William P. Rogers had expressed the same views on the identical questions in unpublished opinions. (42 Op. Atty. Gen. No. 5 (Aug. 2, 1961).)

But neither the agreements nor the official opinions referred to have served to remove the concern of constitutional lawyers, legislators, educators, journalists, and the public over the vagueness and ambiguity of article 2, section 1, clause 6, regarding Presidential inability and succession. President Eisenhower's three illnesses and President Kennedy's assassination have focused attention on the desirability of removing all doubts regarding a matter so important in assuring that there will be an unfailing continuity in the office of the Chief Executive. This focus of attention has produced a number of legislative proposals designed to provide a statutory or constitutional solution to the problem.

The President of the American Bar Association convened a special conference on January 20 and 21 to consider the merits of the various proposals dealing with Presidential inability and succession. This conference issued a consensus report recommending that the Constitution be amended as set forth in the above recommendation.

The first and perhaps the most important of these proposals calls for a specific provision that in the event of the disability of the President his powers and duties, but not the Office, should devolve upon the Vice President, thus removing the ambiguity and uncertainty that in the past have been deterrents to the exercise of the powers and duties of the office by the Vice President during periods of Presidential inability.

As we noted in our report in 1960, various suggestions have been made as to the methods of ascertainment of Presidential inability, including determination by the President or by the Vice President or by the Cabinet, or both, or by an appointed commission, or by reference to the courts. Another question which has received much attention is how much should be included in the constitutional amendment and how much should be left to legislation by Congress implementing the amendment. In our opinion any one of several methods would provide a suitable solution. The vital need is for the selection of some one workable method that will meet with sufficient general agreement to command the support necessary for the passage of a constitutional amendment.

The proposal for the determination of inability by an appointed commission rather than by the Vice President is grounded upon the theory that the Vice President may be confronted with a conflict of interest in a situation where he is called upon to be a judge in his own case in making a determination whether he shall succeed, even temporarily, to the highest office in the land. The fears in this regard have not been borne out by our history, for Vice Presidents confronted with the problem have been reluctant to assume the duties of the Office in the fact of disability of the President. The Cabinet, composed of men appointed by the President and bound to him by political or personal ties or both, may also be hesitant to act to displace, even temporarily, the Chief Executive.

The solution recommended by the conference providing that inability may be established by action of the Vice President or, if there be no Vice President, the person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide, has considerable appeal. Under this plan the duty of taking the initiative is imposed upon the Vice President with the Cabinet or an appointed commission sharing the responsibility for the final decision. Since the Vice President, under the prevailing interpretation of the present provisions of the Constitution as illustrated by the opinions of three recent occupants of the position of Attorney General, now has the sole duty of determining inability where the President himself makes no declaration, the conference proposal tends to reduce the responsibility of the Vice President and to require that he share it with others. The conference proposed amendment would be self-executing in giving this authority to the Cabinet, although the provision that Congress may by legislation substitute an appointed commission for the Cabinet affords a desirable degree of flexibility.

The next problem is how a President who has recovered from his disability may resume the powers and duties of the office. Under the constitutional amendment proposed by this committee in 1960 and approved by the house of delegates, this would be determined by such legislation as Congress may from time to time enact. The conference proposal would make the constitutional amendment self-executing, providing in general terms how the problem is to be resolved. The first provision of the conference proposal is that the ability of the President to resume his office shall be established by his declaration in writing. This is in accord with what seems to be the prevailing view under the present language of the Constitution—a view supported by Messrs. Brownell, Rogers, and Kennedy. The conference proposal goes further, specifying that in the event the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President announcing his recovery, the issue may then be determined by Congress.

The last conference proposal calls for filling the office of Vice President in the event it should for any cause become vacant. It calls for a constitutional amendment providing that when a vacancy occurs in the Vice Presidency the President shall nominate a person who, upon the approval of Congress shall serve as Vice President for the unexpired term. While some might object to this solution since it gives the President the power to choose his potential successor, this is not a departure from modern political practice. At the present time it is the presidential candidate who actually chooses his running mate subject to convention approval; just as here the President would choose his second in command subject to congressional approval. However, several other plans have been put forward: (1) requiring the election by Congress of the new Vice President, (2) reconvening the electoral college to fill the vacancy, and (3) the calling of a special election to choose the successor.

A special election by the people would be out of keeping with the present system of quadrennial presidential elections and would introduce complications into the political scene. Election by Congress would have desirable features, but Congress may be at times dominated by a political party opposed to the President and in such event would be likely to name a member of its own party as Vice President, giving the Nation a President and a Vice President of different political parties. The selection of a new Vice President by the electoral college would probably overcome the last mentioned difficulty, but the electoral college now performs almost wholly ministerial functions. It does not necessarily command the respect and regard of a majority of the people and is regarded by many as a political anachronism.

This committee concurs in the view of the conference that it is highly desirable that the office of Vice President be filled at all times. We regard it as essential in this atomic age that there always be available a presidential successor who

would be fully conversant with domestic and world affairs and who would be prepared to step into the higher office on short notice and to assume its full responsibilities with a minimum of interruption of the conduct of affairs of state.

The committee has two incidental suggestions for changes in the language of the consensus report. First, the reference to "the Cabinet" should be changed where it first appears to read "the Cabinet composed of the heads of the departments of the executive branch of the Government," the purpose being to incorporate a more specific description of the Cabinet than appears at any place in the Constitution as it is now worded. Second, where the term "the President or person next in line of succession" appears for the first time it should be changed to read "the Vice President or, if there be no Vice President, the person next in line of succession," this suggestion being made for the purpose of greater certainty.

In the light of the January 21, 1964, consensus report of the special conference, the committee has reviewed the 1960 proposal of the association for a constitutional amendment to give Congress the power of establishing a method of temporarily replacing the President during a period of inability, and the 1962 association recommendation calling for legislation specifically designed to solve the problem. We find the conference consensus to be in general harmony with our earlier recommendations on inability, and we concur in the additional conference recommendation that the office of Vice President be filled at all times. We have accordingly made the recommendations above concerning amendment of the Constitution in the manner proposed in the conference consensus report.

JONATHAN C. GIBSON, *Chairman.*
 CHARLES J. BLOCH.
 HUGH N. CLAYTON.
 RICHARD E. H. JULIEN.
 ALOYSIUS F. POWER.
 WELDON B. WHITE.
 LOUIS C. WYMAN.

Mr. CRAIG. The American Bar Association is planning to conduct an extensive nationwide educational program during the next few months on the need for clarification of procedure to be followed in the event of the President's inability and the need for providing a method in filling a vacancy in the office of Vice President.

As President of the American Bar Association, I am appointing a committee of distinguished lawyers to conduct this program. We are currently planning to sponsor a conference in Washington next month at which time leaders of the country's national organizations will be thoroughly informed of this problem. All citizens will be urged to support a constitutional amendment such as we are discussing today.

We shall be seeking to provide the proper leadership in stimulating other groups such as civic, farm, educational, industrial, labor, and professional organizations to support congressional action for a constitutional amendment. We shall be working actively through the more than 1,500 State and local bar associations in seeking support for congressional action and ratification by the State legislatures.

The American Bar Association considers this as a unique opportunity for the legal profession to meet its responsibility in providing the necessary support to solve this serious problem of national importance. This Nation can no longer afford to risk a period where there is uncertainty as to who is exercising the powers and duties of the Presidency. With close cooperation between Congress and the legal profession, the uncertainty can be resolved.

Now, I would request that Mr. Lewis F. Powell, Jr., of Richmond, Va., the president-elect of the American Bar Association, supplement this statement and advise you as to how the conclusions were reached.

Senator BAYH. Without objection, we will let Mr. Powell proceed. Then if you gentlemen would be so kind, I am certain we both would like to ask some questions.

Is that all right with you, sir?

Senator KEATING. Yes, sir.

Senator BAYH. Mr. Powell, it is a pleasure to have you on board this morning.

**STATEMENT OF LEWIS F. POWELL, JR., PRESIDENT-ELECT,
AMERICAN BAR ASSOCIATION**

Mr. POWELL. Thank you, Senator Bayh, Senator Keating.

My purpose this morning will be merely to supplement Craig's statement to the extent of presenting some of the reasons which led to the principal conclusions in the consensus report.

Mr. Craig has read the seven paragraphs in the consensus. I will not again read those.

First, I will deal with the five paragraphs which relate to presidential inability.

The first conclusion in the consensus requires no comment. It makes the obvious point that agreements between the President and the Vice President, while desirable under the circumstances, are not acceptable as a permanent solution to the inability problem.

The second consensus conclusion is an important one; namely, that an amendment to the Constitution should be adopted to resolve these problems. It is true that scholars differ as to whether a constitutional amendment is necessary, as many believe that the Congress now has the requisite authority to act, but a question of this magnitude and importance should not be resolved on a balancing of opinions. It would be unwise to follow a course which could leave the status of the Presidency subject to doubt and possible litigation, especially when another course is available.

We are concerned here with the very fundamentals of our Government, the office of President, and the exercise and continuity of Executive power.

These should be dealt with by an amendment to the Constitution itself.

The next three paragraphs of the consensus deal in principle with the provisions of such amendment to the Constitution. First, it should be made perfectly clear that in the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession.

Such powers and duties shall so devolve for the duration of the inability of the President or until the expiration of his term of office.

The committee, of course, is familiar with the ambiguities in the sixth clause of section 1 of article II. Certain of these ambiguities have always been a source of difficulty and doubt. When President Tyler succeeded in 1841 to the office of President upon the death of William Henry Harrison, he set a precedent which has since been followed without question.

But such a precedent is of little value in the event of the inability, rather than death, of an incumbent President. The two noticeable instances of this inability, with which this committee is familiar, are in the cases of Presidents Garfield and Wilson. For eighty-some days preceding Garfield's death, and for perhaps as much as a year during Wilson's illness, there was a virtual void in Executive leadership.

The Vice Presidents then in office, Arthur and Marshall, were unwilling to assume the powers of President because of grave questions both as to their rights and as to the consequences of such an assump-

tion. They were fearful, of course, that the Tyler precedent might be held to apply to inability as well as death.

It hardly need be said that in the current age, in which our country's responsibilities and dangers are incomparably greater, we cannot afford to run the risk of a Garfield or Wilson situation. This awesome possibility was in the mind of every thoughtful person when the news was first flashed on November 22 that President Kennedy had been badly wounded.

In view of this recent and profoundly shocking experience, there is now widespread agreement that the constitutional amendment should at least clarify all doubts as to the development of the powers and duties. There is somewhat less agreement as to whether other provisions should be included in the constitutional amendment itself or should be left to legislation by Congress implementing the amendment.

Various proposals have been made and many of these have merit. The consensus report, following a careful review of alternatives by the conferees concluded that it was desirable for the amendment to be self-implementing on the basic points. The specific questions relate to determination of the fact of inability, when it commences and when it ends. In some instances, especially involving possible mental inability, these could be difficult and delicate questions.

The consensus report suggests that the amendment itself deal with these questions as follows:

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

It will be noted that this recommended procedure leaves the responsibility, in the absence of further action by the Congress, in the executive branch of the Government.

The conferees were strongly of the opinion that this is compatible with the separation of powers doctrine of the Constitution.

This procedure also has important practical advantages. It would enable prompt action by the persons closest to the President, and presumably most familiar with his condition. It would also tend to assure continuity and the least disruption of the functioning of the executive branch.

It is possible, of course, to have an independent commission make the decision rather than the Cabinet. This possibility was considered by the conferees, and a consensus was reached (for the reasons indicated above) that action by the Vice President with the concurrence of a majority of the Cabinet has significant advantages over other methods presented.

In the interests of providing flexibility for the future, the amendment would authorize the Congress to establish a different procedure if this were deemed desirable in light of subsequent experience.

The determination of when inability ends may be even more difficult than determining its commencement. If there is general agreement that the President has recovered, and he so declares in writing, there is no problem. But in the event the Vice President and a majority of the Cabinet (or such other body as the Congress may provide) should not agree with the President, the proposed amendment would then require that the question be determined by the vote of two-thirds of the elected members of each House of Congress.

It will be noted that if the President has declared in writing his ability to resume the powers and duties of his office, it is presumed that he is right. Thus, it would require the vote of two-thirds of the members of each House of Congress to overrule such a Presidential declaration.

Obviously, vital principles of government are involved. The independence of the executive branch must be preserved, and a President who has regained his health should not be harassed by a possibly hostile Congress. Yet, there must be a means to protect the country from the situation (however remote) where a disabled President seeks to resume office. It is believed that the recommendation provides appropriate safeguards for and a proper balancing of the interests involved.¹

PRESIDENTIAL SUCCESSION

In the past, the American Bar Association has concerned itself primarily with the problem of Presidential inability. But in the discussions of the January conference, it became apparent that the subject of Presidential succession was of equal importance and also merited solution by constitutional amendment. The consensus contains the following recommendations, both of which have not been endorsed by the American Bar Association:

(a) The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

(b) It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The first recommendation merely confirms long-established precedent; namely, that in the event of death, resignation, or removal of the President, the Vice President (or the person next in line of succession) succeeds to the office of the President for the unexpired portion of the current term.

The second recommendation would provide, by constitutional amendment, for the prompt filling of the office of Vice President in the event it should for any cause become vacant.

It would provide, quite simply, that when a vacancy occurs in the Vice Presidency, the President shall nominate a person who, upon the approval by a majority of the elected Members of Congress meeting in joint session, shall become Vice President for the unexpired term.

It is true that this procedure would give the President the power to choose his potential successor. But with the safeguard of congressional approval, it is believed that this is sound in theory and in substantial conformity with current nominating practice. It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence. The importance of this compatibility is recognized in the modern practice of both major parties in according the presidential candidate the privilege of choosing his running mate subject to convention approval. In the proposed amendment,

¹ The President may be removed by impeachment "for treason, bribery, or other high crimes and misdemeanors" (sec. 4 of art. II). The Senate tries impeachments, with the concurrence of two-thirds of the Members present necessary for conviction (clause 3 of art. I). But impeachment is hardly an appropriate proceeding in which to determine physical or mental inability.

the President would choose his Vice President subject to congressional approval.

Various other plans have been proposed, and several of these were considered by the conferees and also by the American Bar Association committee. It has been suggested that the electoral college be reconvened to fill the vacancy. But the electoral college today performs functions which are largely, if not wholly, ministerial. Unless there was a major revision in the electoral college system it is unlikely that a decision by it would command the requisite respect and support of the people. Moreover, the prompt filling of such a vacancy is desirable, and the reconvening of the electoral college might well involve significant delay.

It has also been suggested that a special election to fill the office of Vice President might be desirable. Here, again, there could be a serious question of delay. A special election by the people would be a new and drastic departure from our historic system of quadrennial presidential elections and would introduce various complications into our political structure.

In considering any proposal on this subject, it is well to keep in mind that the office of Vice President has indeed become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance in itself. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. In addition, he has to a large extent shared and participated in the executive functioning of our Government, so that, in the event of tragedy, there would be no break in the informed exercise of Executive authority.

As stated in the most recent report of the American Bar Association's Committee on Jurisprudence and Law Reform :

This committee concurs in the view of the Washington conference that it is highly desirable that the office of Vice President be filled at all times. We regard it as essential in this atomic age that there always be a Presidential successor who would be fully conversant with domestic and world affairs and who would be prepared to step into the higher office on short notice and to assume its full responsibilities with a minimum of interruption of the conduct of affairs of state.

Mr. Chairman and members of the subcommittee, it seems to the American Bar Association that the vital need is for action which will solve these grave problems of Presidential inability and succession.

Discussions of these problems have recurred down through the years, especially following events in history which dramatized the need for solutions. But even the interest aroused by the illnesses of President Eisenhower was not sufficient to bring about action. There has been a resurgence of interest, and indeed deep concern, since the assassination of President Kennedy, and once more responsible voices throughout America are calling for appropriate action. There has been little disagreement as to the need. The difficulty has been in obtaining a consensus as to how best to meet the need. Many proposals have been made, and many of these have undoubted merit.

But surely the time has come when reasonable men must agree on one workable method. It is not necessary, as the Washington conference agreed, that we find a solution free from all reasonable objection or which covers every conceivable situation. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.

It is the hope and strong recommendation of the American Bar Association, which we know is shared by this subcommittee, that past differences be reconciled and that a solution be initiated by this session of the Congress. We urge that the solution be in the form of a proposed constitutional amendment, although this would not preclude interim legislation pending ratification of the amendment. We do not say that the amendment must follow the Washington consensus.²

There are other worthy proposals which merit your thoughtful consideration. We do think this consensus, which is now supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field, contains provisions which are sound and reasonable, and consistent with the basic framework of our Government.

We respectfully commend these proposals to this subcommittee with the hope that they will assist you and the Congress in initiating at this session an appropriate constitutional amendment.

Senator BAYH. Thank you very much, both of you, for your concise statements on the overall problem and your detailed discussion of the consensus report.

I would also like to thank both of you and, through you, the members of the American Bar Association, for the time and effort that you have expended over the past several weeks on this problem. I would like to thank the witnesses for the initiative that the American Bar Association has taken in its efforts to reach a consensus and convening this consensus group. I think that this is typical of the traditions of the American Bar Association and its spirit of public service.

I would also like to thank you for the consideration which was given the consensus subsequently by the house of delegates at your national meeting in Chicago. This shows that you not only are willing to talk about it, but that you are willing to put the great influence of the American Bar Association behind this effort.

I would like to echo the words of our second witness to the extent that this problem is not going to be solved at all unless we can get a meeting of the minds of the Members of Congress as well as the public in general. When we have so many different ideas varying in approach but with the same goal in mind, it is difficult to do.

I hope that those of us who are studying this problem will realize the great effort that you have made within your organization to reach a meeting of the minds. Although I am certain that at the start there was as much disagreement in your group as there is probably in the subcommittee, the full committee, and in the Congress, still you put any personal pride of authorship secondary to the need to reach a consensus or a plan which could be accepted by the group.

You pointed out, I thought very well, the importance of this problem. To further exemplify the importance of this problem the Legislative Reference Service of the Library of Congress has provided us with a rather detailed list of the 16 times in which the office of Vice President has been vacant, the names of the Vice Presidents, and the time of the vacancies.

If there is no objection, I would like to put this in the record at this time.

(The material referred to follows:)

² It is to be noted that the proposals in the consensus are not expressed in the definitive form of a constitutional amendment. Rather, they are intended primarily as statements of the substance of the principles involved.

Instances when the United States has been without a Vice President

Vice President	Termination of office	Term for which elected	Length of time office vacant	President
George Clinton	Died Apr. 20, 1812	Mar. 4, 1809-Mar. 3, 1813	Apr. 20, 1812-Mar. 3, 1813	James Madison.
Elbridge Gerry	Died Nov. 23, 1814	Mar. 4, 1813-Mar. 3, 1817	Nov. 23, 1814-Mar. 3, 1817	Do.
John C. Calhoun	Resigned Dec. 28, 1832, to take seat in Senate	Mar. 4, 1829-Mar. 3, 1833	Dec. 28, 1832-Mar. 3, 1833	Andrew Jackson.
John Tyler	Took oath of office as President, Apr. 6, 1841	Mar. 4, 1841-Mar. 3, 1845	Apr. 6, 1841-Mar. 3, 1845	William H. Harrison, died Apr. 4, 1841.
Millard Fillmore	Took oath of office as President, July 10, 1850	Mar. 5, 1849-Mar. 3, 1853	July 10, 1850-Mar. 3, 1853	Zachary Taylor, died July 9, 1850.
William R. King	Died Apr. 18, 1853	Mar. 4, 1853-Mar. 3, 1857	Apr. 18, 1853-Mar. 3, 1857	Franklin Pierce.
Andrew Johnson	Took oath of office as President, Apr. 15, 1865	Mar. 4, 1865-Mar. 3, 1869	Apr. 15, 1865-Mar. 3, 1869	Abraham Lincoln, died Apr. 15, 1865.
Henry Wilson	Died Nov. 22, 1875	Mar. 4, 1873-Mar. 3, 1877	Nov. 22, 1875-Mar. 3, 1877	Ulysses S. Grant.
Chester A. Arthur	Took oath of office as President, Sept. 20, 1881	Mar. 4, 1881-Mar. 3, 1885	Sept. 20, 1881-Mar. 3, 1885	James A. Garfield, died Sept. 19, 1881.
Thomas A. Hendricks	Died Nov. 25, 1885	Mar. 4, 1885-Mar. 3, 1889	Nov. 25, 1885-Mar. 3, 1889	Grover Cleveland.
Garret A. Hobart	Died Nov. 21, 1899	Mar. 4, 1897-Mar. 3, 1901	Nov. 21, 1899-Mar. 3, 1901	William McKinley.
Theodore Roosevelt	Took oath of office as President, Sept. 14, 1901	Mar. 4, 1901-Mar. 3, 1905	Sept. 14, 1901-Mar. 3, 1905	William McKinley, died Sept. 14, 1901.
James S. Sherman	Died Oct. 30, 1912	Mar. 4, 1909-Mar. 3, 1913	Oct. 30, 1912-Mar. 3, 1913	William H. Taft.
Calvin Coolidge	Took oath of office as President, Aug. 3, 1923	Mar. 4, 1921-Mar. 3, 1925	Aug. 3, 1923-Mar. 3, 1925	Warren G. Harding, died Aug. 2, 1923.
Harry S. Truman	Took oath of office as President, Apr. 12, 1945	Jan. 20, 1945-Jan. 20, 1949	Apr. 12, 1945-Jan. 20, 1949	Franklin D. Roosevelt, died Apr. 12, 1945.

Sources: Congressional Directory, 83d Cong., 2d sess., February 1954, p. 299. Biographical Directory of the American Congress, 1774-1949, Washington 1950.

Prepared by Norman D. Burch, History and General Research Division, Oct. 26, 1954

Senator BAYH. In proposing the consensus in the form of a constitutional amendment, is there some concern on your part about the length of the constitutional amendment, and if so, how do you rationalize this with the detail which is contained therein?

Mr. CRAIG. I will attempt to answer that in part, Senator Bayh. I might do it by way of a short preface as to the legislative policy of the American Bar Association. Probably Senator Keating will recall that a number of years ago, the stated policy of the association, speaking through its house of delegates, was to speak only on definitive legislation; that is, the house felt that before it could be for or against a legislative proposition, the legislation should be before it. This was the policy of the association for many years.

Subsequently, it became apparent that while the association could speak on definitive legislation at any given time, once that legislation was subjected to scrutiny by a committee or, in the event amendments were attached to the proposed legislation, or the legislation was changed in any respect, the pronouncement of the association was no longer a valid pronouncement, because of substantive or even procedural changes in the proposed legislation.

Consequently, the association revised its policy and it now speaks to the principle of legislation. That is what we did in this instance. As Mr. Powell pointed out in his testimony, we are not particularly wedded to the wording of the consensus, but we believe these principles should be encompassed in any proposed constitutional amendment. We further believe that a constitutional amendment is necessary. We are fully aware of the differences of opinion among constitutional lawyers and students in this field. We were certainly aware of that at the time of the Washington conference, where, I suppose, we had, as I recall, 18 people present at the conference, there were probably originally 18 different views on what the proposal should encompass.

I think it was a tribute to the conference that they were able, after 2 days and a night of discussing the problem, to reach a consensus of any kind.

But nevertheless they did.

Now, we do not say that this is the perfect solution and maybe there is one. We do not know it if there is.

The reason, I think, for encompassing some degree of detail, as distinguished from no detail or implementation, resulted possibly from the long history of lack of action in this field. It was felt that while Congress should have the possibly final answer as is set forth in the consensus in two different areas, that at least the amendment should be self-executing to the extent of solving the emergency when the emergency exists.

As to the question on whether or not there is a need for a constitutional amendment as distinguished from a statutory solution, we felt that the very debate itself among constitutional students and constitutional lawyers on this subject, one on the one side stating that constitutional amendment was the only solution and the statements on the other side that there was no need for a constitutional amendment necessitated a constitutional amendment as a solution, because, obviously, at the time of emergency is no time to test the constitutionality of a statute.

We felt for the safeguard of the United States of America, the citizens, and the Government, that this should be clarified in the Constitution.

Senator BAYH. May I add just a bit to the question before recognizing you, please, Mr. Powell?

Mr. POWELL. Certainly.

Senator BAYH. Is it fair to say that constitutional provisions should be drawn to solve a problem without respect to the personalities on the scene at the time? As we notice, the succession laws in the past have been statutory. The first one came in 1792, when Washington and Hamilton wanted to keep Jefferson as far away from the Presidency as they could, so instead of placing the Secretary of State next in line after the Vice President, they selected the President pro tem of the Senate. In 1947, when the present act was enacted, there was little question that the personalities of the Secretary of State and the Speaker of the House were as much responsible as anything for prompting a switch in the line of succession from the Secretary of State to the Speaker. Is this further evidence of the need to exclude personalities from our deliberations?

Mr. CRAIG. I would certainly think it is, and I might add, Senator Bayh, that in the discussions first—well, as far back as 1960, when the committee on jurisprudence and law reform discussed the problem subsequently in 1962, and finally in January of this year, the Washington conference, and subsequently, after submitting the consensus of the Washington committee to the committee on jurisprudence and law reform under Jonathan C. Gibson as chairman, at no time was the question of the personalities of persons in line of succession discussed. The matter was approached as a legal problem and we were seeking a legal solution to that problem. We were not concerned with individual personalities of any particular office or officeholder. We were attempting to reach a solution that would be good for all time as far as we could see it.

Senator KEATING. And let me interject, in fairness to Truman and to the Congress, in 1947, in my judgment the same was true then, despite statements to the contrary. It was decided on a pure basis not of personalities but of the principle involved, and also in fairness to Speaker Rayburn, he was in no way pushing for such a proposal as that at the time, nor was Speaker Martin.

Mr. CRAIG. I understand this.

I think in this area, Senator Keating, that we, here again, as an abstract legal proposition, had in mind the historical concept of separation of powers in seeking this. We discussed problems such as inability. What happens if the then Speaker of the House of Representatives acts as President in the absence of a Vice President? Does he resign his office, which we presume he must in order to assume the Executive power in line with the doctrine of separation of powers, and assume that the President recovers? What has happened? There is a new, by this time, Speaker of the House of Representatives. After 60 days acting in the Presidential prerogative without assuming the office, does this gentleman now go home to Pocatello, as somebody has stated in the past? What happens to him? Is his career after, say, 40 years of effort on behalf of the Government of the United States terminated by happenstance of a 60-day inability of the President?

We did not think that this was an appropriate way to solve the problem.

Senator BAYH. Certainly there are several questions there.

Mr. CRAIG. Yes, there are many questions arising. This is just one of them under the circumstances. But nevertheless, in the final analysis, we left it to Congress in its own good judgment to solve that question with respect to succession, without regard to personalities.

Senator BAYH. Mr. Powell?

Mr. POWELL. Senator Bayh, the first question you asked Mr. Craig related generally to whether we thought this consensus might embody too much detail for the Constitution. I think that was the import of it. It reminded me of a statement that Senator Keating made at the very outset, expressing his interest in whether or not the American Bar Association had changed its mind since I testified here last June.

Senator, I would say that in my view we may have evolved some. I do not think we have changed our mind basically.

The real thrust of the position of the American Bar Association is entirely consistent with what I understand to be the unanimous view of this subcommittee, and that is that the important thing to do is to solve this problem now. A number of suggestions have been made that would be quite acceptable, I think. Now, I am bound to say, in candor, that when I attended the meeting here in Washington in January I started out being an advocate then, as I was last June, of Senate Joint Resolution 35, which is a very simple amendment clarifying the Tyler precedent problem and leaving to Congress the power to implement as to when an inability commences and when it ends. I still think there is a great deal to be said for that, Senator. But after listening to the debate, and it was very earnest, and I think a fair debate, by the scholars whom you met when you were over there on one or both of those days, I swung around to feeling that in view of all the circumstances, it probably is desirable to include in the amendment itself self-implementing provisions to guard against the contingency that the Congress may not act. Yet that is coupled in the consensus with a provision which would permit the Congress to act if it deemed it wise to do so.

So coming back to your question, sir, we have moved the emphasis of our position. The house of delegates debated this matter fully last week in Chicago, and although it had previously twice approved Senate Joint Resolution 35, it nevertheless upon further consideration approved in principle the consensus reached here in Washington in January.

Senator BAYH. I yield for questions here to my colleague from New York.

After you have asked your questions, I have one or two more.

Senator KEATING. Thank you. I want to join with the chairman in expressing gratitude for the assistance rendered by the American Bar Association in this field. We are all malleable and we are all entitled to change our minds. I have no criticism of the change in position. I consider that the consensus evolved now differs drastically from the recommendation made by the American Bar Association twice for the enactment of Senate Joint Resolution 35. The conclusion reached by Senator Kefauver and myself last year is the basis

upon which Senate Joint Resolution 35 was unanimously reported to the full committee and is now on the agenda, that while each of us had his own pet proposal for determining inability, and we had before us many other thoughtful proposals in that regard, it simply was not feasible, first, to get a two-thirds vote in both Houses of the Congress, and then, more importantly, a three-quarters of the State legislatures to ratify a constitutional amendment which went any farther than Senate Joint Resolution 35, giving the Congress the power to act in the premises.

I still adhere to that view and I know how strongly Senator Kefauver felt about it. I think it is apt to be the death of all proposals that we allow this same question to be debated in all of the State legislatures throughout our country. They have not lived with this problem the way some of us have in Congress and they will very naturally feel on matters presented to them that if they have differing views as to how the inability of the President is to be determined, as they undoubtedly will have, they should—they will be reluctant to ratify one view which is given to them, although there is the flexibility inherent in paragraph 4 of the consensus, that Congress be given the power to change it.

But I can hear vigorous debate in State legislatures over giving to the Vice President the authority, or the person next in line of succession, with the concurrence of a majority of the Cabinet, the power to declare the inability of the President. I have no quarrel in substance with the first three of the consensuses adopted by the American Bar Association, but I seriously question the advisability of trying in a constitutional amendment now to go into detail as to how the inability shall be arrived at, even to the extent of, as you put it, making it self-executing. There is a large body of opinion that feels that inability should be determined by a commission, and I guess the American College of Physicians and Surgeons would agree pretty unanimously that that commission should have one or two doctors on it.

I can see how, in a State legislature, a very strong case could be made—would be made—for setting up a commission and those who favor the commission form might well oppose a constitutional amendment with all of the power in it that would be necessary to carry out consensuses 4 and 5.

On December 23, 1963, which was after the tragic events of last fall, Mr. Powell, in, I believe, the newsletter of the bar association, reiterated strong support for Senate Joint Resolution 35 and an article entitled "Presidential Inability: We Must Solve the Problem."

I think it is a very fine statement and I would ask that that be made a part of the record.

Senator BAYH. Yes; and in fairness to Mr. Powell, I think he should specify why this statement was made after the assassination, yet his testimony today would indicate, as he mentioned to you, Senator Keating, that he has changed his mind.

Senator KEATING. If I may now protect Mr. Powell, he admits rather freely that he came to the meeting in Washington in January sold completely on Senate Joint Resolution 35 and his views were modified as the result of the conference held at that time.

(The newsletter referred to follows:)

PRESIDENTIAL INABILITY—WE MUST SOLVE THE PROBLEM

(By Lewis F. Powell, Jr.,* president-elect, American Bar Association)

For reasons familiar to all, there has been a dramatic renewal of interest in the question of succession in the case of the President's death. Editors, columnists, and constitutional authorities have been discussing the adequacies and inadequacies of the succession procedure in the event of the President's death. A related and equally difficult question concerns the duty of the Vice President if the President becomes too disabled to fulfill the powers and duties of his Office.

The tragic weekend of President Kennedy's death could have presented the country with a situation entirely different than that of today. Had the President been disabled so that he could not continue to discharge his immense responsibilities, a series of questions would have arisen. Would Vice President Johnson have acted as President? Who would have determined whether a serious enough disability existed for the Vice President to assume the duties of the Presidency? And if this were decided, would the Vice President actually have assumed the Office of the Presidency or merely the powers and the duties of the Office. If the President's continued disability had become an issue of fact, who would have resolved the issue and in what manner?

Most American citizens probably are unaware that these questions remain unresolved and that in the case of a disabled President, the country could be faced with an extended period of indecision and perhaps disastrous consequences.

Why should this be? The U.S. Constitution does not clearly define the procedure to be followed if the President becomes too disabled to act. The sixth clause of section 1 of article II of the Constitution 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, 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."

A brief reference to history will disclose the difficulties presented by this clause of the Constitution.

First, there was initially the question whether, upon the death of a President, the Vice President succeeded to the "office" of the President or merely to its "powers and duties." The language of the sixth clause did not answer this clearly.

Vice President John Tyler took the oath as President after the death of President William Henry Harrison in 1841. Tyler succeeded to the Office itself, but not without loud cries of opposition. Many thought that he should serve only as "Acting" President; still others continued to address him as Vice President.

Congress, however, passed a resolution forming a committee "to wait on the President of the United States. * * *" This resolution was passed over attempts to insert "Vice President" for "President." The Tyler precedent became firmly established in our history and has been followed since that time.¹

Such a precedent is of little value, however, if an incumbent President is disabled. The two instances of inability, where the Chief Executive continued in Office, were in the cases of Presidents Garfield and Wilson.

President Garfield, shot by an assassin in 1881, was totally disabled for some 80 days preceding his death. Vice President Arthur did not assume the responsibilities of the Presidency because of the fear that Garfield could not have resumed the Office if he had recovered. The problem of Presidential inability was discussed at length in Congress and throughout the country during Garfield's time. It remains unsolved today.

The more serious case of President Wilson's inability presented greater problems. On October 2, 1919, President Wilson suffered a paralyzing stroke from which he was never to satisfactorily recover.

The situation during President Wilson's illness was vividly described in a recent article in the Fordham Law Review:

*Mr. Powell testified on June 11, 1963, before a Senate subcommittee in support of a constitutional amendment which would provide clarification of responsibility and procedures to be followed in the event of Presidential disability. He now calls on members of the bar to urge immediate congressional action on this vital question.

¹ John D. Ferrick, Fordham Law Review, October 1963, p. 73.

"While Wilson lay ill, unable to discharge the powers and duties of his office, many insisted that Vice President Thomas R. Marshall assume them. For fear he would oust the President if he did, Marshall, like Arthur before him, declined to act. Some 28 bills became law by default of any action by the President. Few public matters reached him and the people seldom saw him for the remainder of the term. Mrs. Wilson, Dr. Grayson, and other members of the White House staff were said to be administering executive affairs. History appears to corroborate this opinion. In her memoirs, Mrs. Edith Wilson says she made no decision except as to what matters should go to the President. But was not this administration of presidential affairs?"

"Wilson did not call a meeting of the Cabinet until April 13, 1920. In the interim the Cabinet met unofficially, largely under the direction of Secretary of State Robert Lansing. Furious that these meetings were taking place, Wilson forced Lansing to resign. "The President's action was that of a very sick man." The actual cause of the discharge appears to have been a suspicion that Lansing was plotting to oust Wilson. Patrick Tumulty, Wilson's secretary, reported that Lansing had suggested that Vice President Marshall act as President, to which Tumulty answered: "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." Wilson is reported to have said to Tumulty upon the discharge of Lansing: "Tumulty, it is never the wrong time to spike disloyalty. I am on my feet now and I will not have disloyalty about me."

"The aftermath of Wilson's inability saw a renewed discussion of the problem. Then discussion fell into a lull until September of 1955 when President Eisenhower suffered a heart attack."

Then, as during other times of crisis, the question at hand was widely discussed but remained unresolved.

In more recent years, agreements with respect to Presidential disability have been made between the President and the Vice President in both the Eisenhower and Kennedy administrations. President Johnson and Speaker of the House McCormack have entered into a similar agreement.

These agreements establish these procedures:

(1) In the event of inability the President would, if possible, so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the office.

Although these voluntary agreements serve to lessen the possibility of confusion, they are hardly an acceptable permanent solution to the problem.

The questions which must yet be answered in the case of Presidential inability are basically two:

First: Does the Vice President succeed to the Office of the President or does he assume only the powers and duties of that office?

Second: What constitutes "inability" of the President, and how are the beginning and the end of inability to be determined?

Many proposals have been advanced as answers to these questions. Several highly recognized constitutional authorities believe that Congress presently has the power to establish a commission which would determine whether a President is unable to discharge his responsibilities. Others believe it necessary first to adopt a concise and clear constitutional amendment, specifying that the Vice President is to succeed only to the powers and duties of the President in case of the latter's inability to act, and empowering Congress to prescribe a method for determining the commencement and termination of Presidential inability.

Many believe that the Congress should determine the appropriate procedures to be followed. Others feel that it should be left to the executive branch only to decide when the President is too disabled to act.

* *Id.* at 97.

The objective, which we all seek to attain, is definitive clarification of responsibility and procedures to be followed. Essentially, the American Bar Association's position emphasizes three main points:

1. A constitutional amendment is highly desirable, if not indeed necessary.
2. The powers and duties of the President, not the office itself, should pass to the Vice President.
3. Congress should be broadly empowered to prescribe the method of implementation.

These objectives are met by Senate Joint Resolution 35 of the 88th Congress, sponsored by the late Senator Estes Kefauver and Senator Kenneth Keating. The language of this resolution has the support of the American Bar Association, the New York State Bar Association, the Association of the Bar of the City of New York, and the administration.

The House of Delegates of the American Bar Association first supported a resolution such as Senate Joint Resolution 35, calling for a constitutional amendment, in 1900. The association's position, calling for an amendment to clarify procedures, was reaffirmed in 1962. At that time, in the interest of fostering immediate action by Congress to clarify the problem, the House of Delegates also approved the language of a proposed congressional statute on the subject, but was careful to specify that such action should not be "construed to modify" the previously expressed support for an appropriate constitutional amendment.

The record has been established for a resolution such as Senate Joint Resolution 35. It has been approved by the Senate Constitutional Amendments Subcommittee and is awaiting action by the full Senate Judiciary Committee.

Senator Birch Bayh, of Indiana, the recently appointed successor to Senator Kefauver as chairman of the Constitutional Amendments Subcommittee, has announced plans for early hearings to consider the questions of both Presidential succession and inability. It is hoped that State, city, and county bars will join the American Bar Association in supporting essential clarification of one of our fundamental constitutional issues.

Senator KEATING. I do not want to interfere with his explanation of his position. I am not trying to be an advocate. I agree with the point of view that the most important thing is to find a solution. But I am worried about the practical side of a solution which is not effective. It will not do us any good to pass a constitutional amendment, even if we get the two-thirds vote, and let me say that in the Congress there are strong advocates for a commission form of determination. But that will not do us any good unless we get ratification by three-quarters of the States. The simpler we can make it and do the job, I think the more likely we will get ratification. So that Senate Joint Resolution 35 does not certainly carry out my original ideas as to how to deal with the question of inability as evidenced by several constitutional amendments which I have offered during my service in both the House and the Senate, but I did agree with the late Senator Kefauver that it was the only thing that we could practically get through and get ratified.

Now, after all that long-winded preface, you explain to Senator Bayh your reasons for your position.

Senator BAYH. I do not think he needs to explain anything to me. I think he explained to both of us why his thinking changed, and I think most of us can evolve and grow from one day to the next and change our minds. If we are not able to, perhaps we cannot get any answer that we can get through Congress. But perhaps Mr. Powell should have a word.

Mr. POWELL. Thank you, Senator Bayh.

Senator Keating, when you started reading through that article, I am reminded of every trial lawyer's prayer, namely, that his witness had written a book.

Senator KEATING. Has not written a book—that the witness on the other side has written a book.

Mr. POWELL. That the witness he is cross examining has written a book, right.

I would say, sir, in all seriousness that I do not consider that I am presently supporting an inconsistent position. May I say first that I am speaking in a representative capacity. Whatever my own views might be personally, I am here as an officer of the American Bar Association, as I was last June. But I think it is also accurate to say that the basic principles of Senate Joint Resolution 35 are certainly not inconsistent with the consensus. The consensus merely goes beyond Senate Joint Resolution 35 and incorporates in the amendment certain implementation. So that I think the real question is the one you were discussing, Senator Keating. The real question, in terms of how to get this important task accomplished, is which of these methods would be the more likely to be ratified by the States? There, I am sure, your judgment is far better than mine. Yet I would think it very probable that the States would follow the Congress on this matter. I think this is essentially a Federal question. If I judge the sentiment of the people, there is now not only widespread demand for action but a certain degree of incredulity that we cannot do something about this nagging problem that has worried people for so many years.

So my own judgment is that whichever way the Congress went, whether it adopted a bare amendment that solved the Tyler precedent problem, which Senate Joint Resolution 35 does quite satisfactorily and which I would certainly warmly support and I do support, or whether it went into more detail as the consensus suggests, it is my judgment that the people, speaking through the State legislatures, would welcome the opportunity to ratify the amendment.

Senator BAYH. To show you how things can change and how all of us change our minds, I recall the discussion we had briefly in the full Judiciary Committee, where it was decided not to take up Senate Joint Resolution 35 at that time.

Senator Kefauver himself agreed with Senate Joint Resolution 35 only because he was fearful of the point that you mentioned. As far as the best solution to this is concerned, I wish the distinguished Senator from Tennessee were sitting here now, rather than myself. But in reviewing the past studies that have been made—and Senator Keating, I do not know whether you were a member of this committee at the time—but Senator Dirksen, Senator Hennings, and Senator Kefauver had come up with what they thought was the best proposal. It was almost identical with Senate Joint Resolution 139. It was very similar to the consensus of the bar association proposal.

This is hardly the time and the place to debate the relative merits of the bills. I think that we must come up with a consensus, and as my good friend from New York said, this may well be the death of all proposals. But I wonder which is worse, to kill all proposals or to present one which does not even solve the problem. That is the worry I have about Senate Joint Resolution 35. It would solve the question of Vice Presidential succession—the Tyler precedent—which has been solved, for all intents and purposes, by precedent itself, ever since the first time a President died in office. I do not think there is much question in the minds of the people in the land

as to who and what the Vice President is. Senate Joint Resolution 35 might be a bit easier to pass but it does not deal with the problem of Presidential inability, nor does it deal with the strong need for seeing that we have a Vice President at all times. And Congress has been loath to act in either of these areas, particularly the disability area, although we have had some rather tragic examples: Garfield, back in 1881, President Wilson in 1919, and President Eisenhower three times during his recent terms in office. In those earlier days, when carrier pigeons were a fast means of communication, even then it damaged the Nation to have a President who was ill.

Now I think we need to act and I think Congress has refused to act and I think it would act on a constitutional amendment that did this job once and for all. If we do not act now, I do not know when we ever would.

We have not had a chance to discuss this fully, but I know Senator Ervin and I both have voiced concern about establishing any procedure where a President could be removed for any reason. If you look at the reconstruction era when President Andrew Johnson came within one vote of being impeached, I fear that if Congress could have passed a law by the majority, as they could under Senate Joint Resolution 35, to declare him disabled, it would have done so and thus circumvented the safeguards which were placed on this by our constitutional fathers.

I think probably the best place to hammer these differences of opinion out is in our committee, and I hope we can.

We have a strong advocate of your case who is the next witness. I am anxious to hear him.

Do you have further questions, or do our witnesses have further questions?

Senator KEATING. I would like to make a slight statement. I would not like to leave the record the way the chairman has left it, without comment.

It is, of course, the concept of Senate Joint Resolution 35 that Congress will later make the determination as to the method of determining inability and that it would require further action by Congress. The only thing to settle would be the question of whether the Vice President in case of inability assumed the office or the powers and the duties of the office. I believe that that is what the State legislatures would be willing to do and I am not sure that they would be willing to do more than that; namely, leave it to the Congress to determine. Of course, it is true, it would involve a majority determination by the Congress in laying down the guidelines. I do not believe that that would be determined on any basis of personalities. It would not be a similar case to the impeachment, near impeachment of President Johnson, because that was, of course, a one-shot affair. It was an ad hoc situation. This would be setting up a method of determining inability for the future.

Of course, if the Congress determined a method which was not agreeable to the Chief Executive, such a bill would be vetoed, I assume, in which case it would take a two-thirds vote of the Congress to override such a veto. So that I would not find too great—let me say this—I would prefer to see this consensus embodied in some form of legislation, if that is possible.

Parenthetically, let me say that the American Bar Association's new policy is, I can assure them, a much easier one than their old one, because some of the difficulties we encountered arise from trying to put consensi into words.

It is the practical side of this that concerns me, worries me, whether we can get through the State legislatures a detailed provision for determining inability. There was a time when I thought we could, but I am quite concerned that we cannot now.

Mr. CRAIG. Senator Bayh and Senator Keating, in closing, may I say that while the American Bar Association has proposed to you these recommendations concerning which we have testified today, I should like to assure you that whatever may be the solution that Congress proposes which substantially corrects the situation as it exists today, you may count on the assistance and support of the American Bar Association and lawyers everywhere, not only at the National level but throughout the States. I think I speak for my successor, Mr. Powell, as well as members of the house of delegates, in making that statement.

Mr. POWELL. I think I have already said as much, Senator Bayh and Senator Keating.

Senator BAYH. We certainly appreciate, gentlemen, your taking the time and we will look forward to working with you in trying to solve the this problem. Certainly, the members of the legal profession are looked to for advice and consent.

Mr. CRAIG. Thank you very much.

Mr. POWELL. Thank you very much.

Senator BAYH. Our next witness will be Mr. Martin Taylor, chairman of the Committee on Constitutional Law of the New York State Bar. He has devoted many years to studying this problem and is a senior member of the law firm of Taylor, Read, Hoyt, Taylor & Washburn, of New York City.

Mr. Taylor, it is good to have you aboard, sir.

STATEMENT OF MARTIN TAYLOR, CHAIRMAN OF THE COMMITTEE ON CONSTITUTIONAL LAW, NEW YORK BAR ASSOCIATION

Senator KEATING. May I join in welcoming Mr. Taylor? He is one of our most distinguished members of the bar and we will be interested in his views.

Mr. TAYLOR. Mr. Chairman, members of the subcommittee, I came here to listen today. I have no prepared speech, no prepared statement. But as I have been with the court, I think now 7 years, I think that the position which is taken by our committee—

Senator BAYH. Excuse me, Mr. Taylor; may I say that if you desire to submit a more complete statement or an abridged statement after your testimony here, we will be more than happy to permit you to do that or have you testify a second time.

Mr. TAYLOR. Surely. Thank you very much, sir.

We agree, I think, that the American Bar having taken the thing up is an extremely important step in the right direction. We all agree, and have done for 4 or 5 years, that it requires a constitutional amendment. We all agree that it is the duties and not the office that succeeds.

So we are concerned with two questions. One is a constitutional question as to whether this is the way to amend the Constitution, and then the practical one which Senator Keating has spoken of. This committee which I represent is primarily a committee on constitutional law. So that my emphasis will be on that.

I agree with the position which Mr. Powell stated for the American Bar last June, which was in substance concurred in by the Deputy Attorney General and which I made a concurring statement on. I think the reasons that that supported the conclusion that that was the sound constitutional way to do it still exists.

In the first place, you have a basic fundamental principle of constitutional law that any amendment should be simple. I am substantially quoting from John Marshall. It should not give detail. You see the error of that in a great many proposals because, as time goes by, there might be great disagreement as to the practicability of applying it under changed circumstances. So the fundamental that you give broad enabling powers in the Constitution is what you should rely on, changing, if you please, implementation with changing conditions. That was the way that Senate Joint Resolution 35 came to be eventually evolved. The fundamental notion of it was even before the subcommittee of the Senate in 1956 or 1957. It was reaffirmed, as Senator Keating said—I have forgotten the exact stage of it—but it was substantially approved by your subcommittee last June.

Now, the present proposal of the American Bar, and again I agree that it is important to do something whether we agree about it or not, but the present proposal, I think, violates that basic principle of constitutional law.

It purports to provide the machinery. That may be controversial. Irrespective of whether it is a good principle or not, it does not seem to be the way to do it, because if you take the broad enabling act, the Senate Joint Resolution 35, you give any method to determine inability without the act of any person. Obviously, any tribunal would listen to the President if he said he was disabled. It is not necessary to have a written declaration by him, even for the principle, or determination. It puts a responsibility on the Vice President which, of course, was never contemplated by the Constitution, of making a determination where he might, in the past, have been in—there have been disagreements between Presidents and Vice Presidents. In any event, it requires a decision at a time which involves some measure of self-interest.

Then you have the other possibilities that in determination they do not agree. There is the constitutional point again which I think should be very carefully considered. The actual method of making the determination on going back as provided in this suggestion is an act of Congress. Is that either theoretically or practically sound at a time of disagreement? Let's say a national issue is to be faced. Is it sound to say that Congress should then enter the picture and by vote, if you please, determine whether the inability has ceased?

Then finally—I will supplement it, as you realize I am speaking extemporaneously this morning. Finally, there is the very important thing that I did speak about before, that all implementation should not be in the text of the Constitution. That is a very brief outline of the position which this committee has taken and I may say that has

been reaffirmed by the unanimous decision of this committee after the proposal of the American Bar Association.

I would be glad to answer any questions about it.

Senator BAYH. Senator Keating, this gentleman is one of your constituents. Do you have any questions to ask him?

Senator KEATING. Thank you very much. I, of course, agree with the gentleman.

Senator BAYH. Is this a New York conspiracy?

Mr. TAYLOR. No; we have not conferred.

Senator KEATING. No; because I saw something to the effect that former Attorney General Brownell is now on the other side.

Mr. TAYLOR. That is right; he is.

Senator KEATING. He is for the long document to be written into the Constitution. I disagree with him and I agree with the present Attorney General, who is for the short, concise statement simply giving to the Congress the power to act in this regard. So this is neither a New York nor a political conspiracy, nor should it be, of course.

Mr. TAYLOR. I agree, Senator Keating. I have always disagreed with Mr. Brownell about it. The present Deputy Attorney General also disagrees and thinks the simple amendment is the way to do it. He is on the record as having so stated.

Senator KEATING. I congratulate you on getting your views unanimously adopted by the association of the bar of which Mr. Brownell is now the president.

Mr. TAYLOR. No; this is the State. He is the chairman of the City Bar of New York.

Senator KEATING. Oh, I see; this is the State. Has the Association of the Bar of the City of New York taken any position?

Mr. TAYLOR. It has a committee on Federal legislation which has not yet, I think, acted on it. It previously approved Senate Joint Resolution 35.

Senator KEATING. Yes; I know it did originally approve it. There seems to be some change of view.

If you wish to proceed, Mr. Chairman, I have no further questions.

Senator BAYH. I think we have a very legitimate question raised. As somebody who is an ex-State legislator, I can certainly visualize the realism of considering this fear that Senator Keating has suggested, that we might not be able to get a more detailed proposal ratified by three-fourths of the legislatures.

Did I understand, early in your remarks, that you were concerned about a longer proposal, because it might be more difficult to get through the—

Mr. TAYLOR. You gentlemen would have much more experience and knowledge about that than I would. I thought that was Senator Keating's fear. I expressed no view about that on account of ignorance.

Senator BAYH. You suggested that we should have broad general principles in our Constitution. Yet, can we not have some agreement that there are areas that are somewhat detailed and complex such as the impeachment proceedings, where the Constitution does go into specifics that go so far as to relate where impeachment proceedings shall be brought, who shall try them, and who shall preside?

Mr. TAYLOR. Yes; there are two cases that do it—three, really. There is the impeachment clause. Of course, there is the enumeration

of the President's powers and all those powers that are given to Congress at great length.

Senator BAYH. I find myself in agreement with you in the fact that it should be a broad principle.

Mr. TAYLOR. What you call the enabling powers are quite simple.

Senator BAYH. I agree with you that the whole principle should be a broad statement, but certainly in some areas there needs to be specific loose ends tied down.

Now, as I understand it, you feel that Senate Joint Resolution 35 would do two main things: One, it would clarify the authority of a Vice President who succeeds to the Presidency. He would no longer be acting President as once thought.

Mr. TAYLOR. Right.

Senator BAYH. And second, that this would remove all of the question which exists in the mind of some constitutional scholars, that the Congress does have power to act. These are the two purposes of Senate Joint Resolution 35?

Mr. TAYLOR. I should have said that. There is, as you suggest, great disagreement as to whether it is necessary or unnecessary, but on the theory that someone would raise the constitutional question, it is better to dispose of it by having some amendment, whichever school of thought you agree with. That is to say, you eliminate the problem by having a constitutional amendment.

Senator BAYH. Since Senate Joint Resolution 35 deals solely with Presidential disability—

Mr. TAYLOR. That is right.

Senator BAYH. Do you care to comment on the consensus or some other proposal that is before this committee concerning the replacement of the Vice President?

Mr. TAYLOR. As we have taken no position on that, I would suggest that we hold that in suspense, since I do not know that we have any clear policy on it. I may say a subcommittee has been appointed to consider all of these things and I may later come up with a comment on that.

Senator BAYH. Fine. We would like to have those things for the record.

Senator Keating, do you have any further questions?

Senator KEATING. No; I have none; thank you.

Senator BAYH. I also want to thank Mr. Taylor for coming. Additionally I wish to point out that he was a member of the bar consensus group and has spent a considerable amount of time on this entire matter.

Apparently we have all sorts of differences of opinion among us, but I hope we can come to some general consensus.

Mr. TAYLOR. Thank you very much.

Senator BAYH. This will be the last witness today. I would like to state for the record and for the information of those persons who are present the witnesses who will be appearing tomorrow:

Mr. James MacGregor Burns, of Columbia University; Paul Freund, of Harvard, professor of law; Herbert Brownell, former Attorney General under President Eisenhower; Francis Biddle, former Attorney General under President Roosevelt.

The committee is adjourned until 10 o'clock tomorrow morning. (Whereupon, at 11:35 a.m., the committee recessed, to resume Tuesday, February 25, 1964, at 10 a.m.)

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

TUESDAY, FEBRUARY 25, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m. in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh and Keating.

Also present: Larry Conrad, counsel; Clyde Flynn, minority counsel; Mary Day, chief clerk; and Abbott Leban, counsel to Senator Keating.

Senator BAYH. The committee will please come to order. To assist this committee this morning in dealing with the problem of Presidential inability and vacancies in the Vice Presidency, we have a group of distinguished persons who have consented to share their considerable knowledge on these subjects.

Appearing as witnesses this morning are Prof. James MacGregor Burns, a noted author, who is also, by the way, President Kennedy's official biographer and currently chairman of the Political Science Department at Williams College; Prof. Paul Freund, professor of law at Harvard, a noted scholar in his field; the Honorable Herbert Brownell, former Attorney General of the United States and currently president of the Association of the Bar of the City of New York; and the Honorable Francis Biddle, former Attorney General under President Roosevelt.

I would like to express my thanks to all these gentlemen for taking their time to appear this morning.

Senator Keating, do you have any preliminary remarks to make before we get started?

Senator KEATING. No; thank you.

Senator BAYH. I would like to call as our first witness this morning, Professor Burns. While he is coming to the table, I would like to ask the committee to permit me to put into the record, if its author has no objection, the very concise article by Professor Burns that appeared in the "Speaking Out" column of the January 25 issue of the Saturday Evening Post. It is entitled "Let's Stop Gambling With the Presidency."

If there is no objection from anyone, we will submit that for the record.

(The document referred to follows:)

[From the Saturday Evening Post, Jan. 25, 1964]

LET'S STOP GAMBLING WITH THE PRESIDENCY

(By James MacGregor Burns)

The Nation can survive assassination. But what would we do if the President were disabled?

Nothing could have seemed worse than that news from Dallas last November. But two things could have been worse for the country: if Lyndon Johnson had been assassinated too; or if John Kennedy had been left alive but mentally disabled.

We have gambled too long with the question of Presidential disability. At least three Presidents have been so seriously stricken that they could not perform their duties for weeks and even months.

As Richard Nixon pointed out in these pages last week, we take chances with presidential succession too. Since 1947 we have had a law that could project into the White House men not equipped for the Presidency, or even leaders of the party rejected by the voters in the presidential election. In short, we are slipshod about a situation which demands reflection and reform.

As the Presidency has become increasingly important in our system of government, the stakes in our gamble with the Presidency have become higher too. Consider what might happen in this age of chronic crisis if we had a repetition of the tragic death of President James A. Garfield. A madman named Guiteau shot Garfield in July 1881. For 80 days Garfield lingered, bearing his ordeal with incredible grace. Fevers came and went; cheerful bulletins alternated with cautious ones; infection spread; the sick man rallied, then fell; he underwent operations without anesthesia. The President could do no work, though he went through a few motions. The Government drifted.

"Arthur is President now." Guiteau had shouted as he shot Garfield. But Vice President Chester A. Arthur did not become President during the 80 days. His position was awkward. A New York machine politician, he had been on the outs with the President. The day after the assassination he met with Garfield's Cabinet, but they greeted him so coolly that he almost left. Arthur did not know what to do, so he did nothing.

During this period there was a flurry of interest in the problem of Presidential disability, but concern soon died away. In the fall of 1919 Woodrow Wilson suffered a cerebral thrombosis that brought paralysis of his left side. For days he was in a coma; for a month he was completely inactive; for another month he was a secluded convalescent; never again was he able to dictate to his secretary for more than a few moments at a time. "His mind was uninjured," says historian John M. Blum, "but his emotional balance was permanently upset * * *. What remained was not Woodrow Wilson but a shell and travesty of him."

A critical situation arose. Mrs. Wilson, as any wife might, tried to shield her husband from difficult problems. Neither Congress nor the people were given the truth about Wilson's condition. Should the Vice President take over? Vice President Thomas R. Marshall, an affable politician whose main gift to history was his famous remark about the 5-cent cigar, felt just as Arthur had; he did not want to reach for power. And few thought him competent to exercise it. So Wilson remained President, and once again the Government drifted. But times were more serious now; during Wilson's 18 months of near-disability in office he lost his Senate battle for the League of Nations.

Again there was a flurry of interest in Presidential disability, but again the interest died. Dwight Eisenhower's heart attack raised the whole problem once more. He was unable to meet with his Cabinet for 2 months. Meanwhile Vice President Richard Nixon attended Cabinet meetings but carefully sat in his old chair at the table. There was the usual interest in Presidential disability, but even though Ike had two other serious illnesses, ileitis and a stroke, nothing was done.

Except for one thing. Eisenhower and Nixon agreed in writing after the third illness that in the event of severe Presidential disability, the Vice President could decide on his own to serve as Acting President. But this was a makeshift arrangement that missed the crucial questions: How would Presidential disability be determined? What procedures would the Vice President use to establish his right to take over? Under what conditions would the disabled President recapture his office?

So we were still gambling with the Presidency on November 22, 1963. This gamble is absurd, because Presidential disability is intrinsically one of the least perplexing of our governmental problems. All we need do is agree on a quick, sure, responsible method for determining disability and then—more difficult—get the procedure enacted into law.

Why the delay so far? Largely because Congress has not been able to agree on the best method. Some Members want the decision to be made by the Vice President, others by the Cabinet, others by one or both branches of Congress. All these methods are defective.

The Cabinet cannot make the decision. Consider the problems that Cabinet members would face. They would want to be loyal to their stricken chief, but they would also want to support—and perhaps cultivate—the Vice President. Lacking clear medical advice, they could not even be sure of the facts in the case. Cabinets merely advise Presidents and are not equipped to make decisions; they do not even vote.

The Vice President is the worst person to decide Presidential disability. Not because he would want to make a grab for power (though this is always possible), but the opposite: He would hesitate to take any action that would appear overeager or that might be used against him in the next election. This is the main reason that Vice Presidents have been virtually paralyzed in previous crises.

Nor should Congress make the decision. It is a big, cumbersome body that might not be in session, a slow-moving body that would doubtless argue for weeks over the matter. Worst of all, it might turn the whole question into a great public brawl. Even politicians with the best of motives would be suspect. Questions would be asked. Was the opposition party voting for the good of the Nation or for partisan advantage? Were men in the administration party in Congress trying to curry favor with either the President or Vice President?

The following is, I suggest, a simpler and surer procedure:

To be prepared for any case of Presidential disability we should establish a "Presidential Commission" composed of the Chief Justice, the two ranking Cabinet members at the time (State and Treasury), the Speaker of the House, and the President pro tem of the Senate. Following informal consultations with advisers closest to the President and with the Vice President, the Chief Justice would call the Commission into session. Each member of the Commission would designate one member of a physicians' panel to report the medical facts. On its own initiative the Commission could certify the Vice President as Acting President and later, if possible, restore the stricken President to his Office. If the physicians continued to report Presidential disability—as measured against the Commission's understanding of the requirements of the Presidency—the Commission could certify the Vice President not merely as Acting President but as full President.

Such a Commission could act intelligently and authoritatively. It could be convened quickly and even in the middle of a national emergency. It would have the confidence of the Nation. It could deal with a variety of circumstances.

The above procedure should promptly be voted into law by Congress. But as soon afterward as possible the change should be embodied in more than an ordinary statute, so that Congress later, in a time of political turmoil, could not suddenly alter the law. Hence Congress should also propose a constitutional amendment embodying the essence of the plan. The Eisenhower-Nixon agreement, which was later adopted by Kennedy and Johnson, and which last month was continued by Johnson and Speaker John McCormack, could be redrawn from administration to administration to meet any special or personal needs. Both congressional statute and the Presidential-Vice Presidential agreement should allow for maximum flexibility to deal with all possible eventualities, but within the basic procedures set forth in the proposed new amendment.

The main question remains: After a century of inaction, how can we get such a proposal made into law? Here I would urge again some measures that I presented last June to the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee. (This committee and its House counterpart both plan public hearings on succession soon; presumably they will also study disability.)

First, we should put the Presidential disability provision into a package of "housekeeping" constitutional amendments that would arouse wide, bipartisan support from Americans. Unfortunately, Presidential disability is not our only Presidential gamble. Another is our faulty electoral college system, which allows presidential electors to violate their pledges and to raise hob with the electoral process—even to the point of plunging the country into uncertainty for months, until the presidential election might be thrown into Congress. Not only are the

electors legally free to ignore the popular vote but they do not truly represent the popular vote. In any given State the voting results are often distorted because of the rule of winner take all. Conservatives complain that the system gives the big urban voting blocs excessive influence in electing a President, while liberals argue that they will hang onto this presidential "gerrymander toward the left" as long as the conservatives have their "gerrymander toward the right" in Congress. This controversy keeps Congress from agreeing on fundamental changes. But it could agree at least to make electors keep their pledges and thus carry out the will of the voters.

Perhaps most important of all, the constitutional "package" containing these two proposals, on disability and electors' pledges, should deal with our other great gamble—the handling of Presidential succession in the event both the President and the Vice President die or are disabled. Under the present provision, the Speaker of the House—who is often, as he is today, a septuagenarian—and the President pro tem of the Senate—today an octogenarian—are next in line. As Mr. Eisenhower has suggested in this magazine, we should go back to the pre-1947 arrangement under which the Secretary of State and the other Cabinet members would succeed the Vice President in order of rank. This would protect the President's interests; it would also insure that a leader of the opposition party could not capture the White House (as would have happened in 1948, for example, when Republican Speaker Joe Martin was next in line after Truman). If Congress insists on a safeguard here, it might reserve the power to select the next in line after the Vice President—but only from the Cabinet.

The constitutional package could include other changes that might not be controversial—for example, advancing elections 2 or 3 weeks, thus enabling the President to take office before the New Year and the new Congress; and perhaps giving the President item veto over appropriations—the power to reduce or strike out items in an appropriations bill without vetoing the whole bill.

Can we get such a "housekeeping package" adopted? Not if history repeats itself. But it need not if these reforms could be given some political sex appeal and momentum. Only one man can take the lead in this—President Johnson. He should establish a high-level, blue-ribbon Presidential Commission to survey the strengths and weaknesses of the Federal Government. Not only would such a Commission come up with important findings and recommendations—including one hopes, a proposal on disability. It would also have enough prestige and enough backing from the President to inform and arouse public opinion.

NO MORE THROTTLEBOTTOMS

We must do one other thing to resolve the problem of Presidential disability—and this could be the simplest of all mechanically, though difficult politically. One great problem in the past has been the incapacity of Vice Presidents really to fill the shoes of stricken Chief Executives. The reason for this was often political; the vice-presidential nomination has been thrown as a sop to a party faction opposed to the Presidential candidate, as in the case of Arthur. Or the vice-presidential nomination has been decided almost as an afterthought by exhausted party leaders at the end of a convention. Even in the case of Nixon, General Eisenhower admitted later that he had left the decision largely to a group of advisers, and that he thought Nixon was older than he actually was. Generally, however, the recruitment of vice-presidential candidates has improved in the last 20 years. Clearly, John Kennedy had confidence in Lyndon Johnson's capacity to serve as President; and Nixon's choice of Henry Cabot Lodge as his running mate indicated the nominee's need for a man who stood squarely in the GOP's moderate, internationalist wing. Vice Presidents have also been brought much more fully into Presidential affairs.

If this trend is to continue, we must give up for good our oldtime view of the vice presidency as a place for Throttlebottoms. Not only must the Vice President be able to step into the President's shoes, he must stand for the same programs, or at least the same direction in national and international affairs, for which the President was originally elected. This may take some of the fun out of vice-presidential nominations. It means, for example, that Republicans can toy with the delightful idea of nominating Margaret Chase Smith for Vice President only if they believe that she is equal to the Presidency.

Meantime our frightening gamble with the Presidency continues. Whether we run out of luck one of these days depends on the President and on Congress—and on the people.

STATEMENT OF JAMES MacGREGOR BURNS, CHAIRMAN, POLITICAL SCIENCE DEPARTMENT, WILLIAMS COLLEGE, WILLIAMSTOWN, MASS.

Senator BAYH. Mr. Burns, it is good to have you before us. The floor is yours.

Mr. BURNS. Thank you.

My name is James MacGregor Burns. My address is 115 Park Street, Williamstown, Mass.

I will not take time to stress the seriousness of the twin problems of Presidential inability and Vice Presidential vacancy. You gentlemen would not be investigating this matter so conscientiously and thoughtfully if you were not wholly aware of the problem. I will turn directly to the question: What to do?

First, the problem of Presidential inability. Our failure to resolve this question all these years is especially unfortunate. This gamble is absurd, it seems to me, because intrinsically Presidential inability is one of the least perplexing of our governmental problems. All we need to do is agree on a quick, sure, responsible method for determining inability and then—more difficult—get the procedure enacted into law.

Why the delay so far? Largely because Congress has not been able to agree on the best method. Some Members want the decision to be made by the Vice President, others by the Cabinet, others by one or both branches of Congress. All these methods seem to me to be defective.

The Cabinet cannot make the decision. Consider the problems that Cabinet members would face. They would want to be loyal to their stricken Chief, but they would also want to support—and perhaps cultivate—the Vice President. Lacking clear medical advice, they could not be sure of even the facts in the case. Cabinets merely advise Presidents and are not equipped to make decisions; they do not even vote.

The Vice President is the worst person to decide Presidential inability. Not because he would want to make a grab for power—though this is always possible—but the opposite: he would hesitate to take any action that would give an appearance of overeagerness or that might be used against him in the next election. This is the main reason that Vice Presidents have been virtually paralyzed in previous crises, most notable in the case of Garfield.

Nor should Congress make the decision. It is a big cumbersome body that might not be in session, a slow-moving body that would doubtless argue for weeks over the matter. Worst of all it might turn the whole question into a great public brawl. Even politicians with the best of motives would be suspect. Questions would be asked. Was the opposition party voting for the good of the Nation or for partisan advantage? Were men in the administration party in Congress trying to curry favor with either the President or Vice President?

The following is, may I submit, a simpler and surer procedure:

A case of Presidential inability would immediately bring into being a Presidential commission composed of the Chief Justice, the two ranking Cabinet members at the time (State and Treasury), the Speaker of the House, and the President pro tempore of the Senate.

They would each designate one member of a physicians' panel to report the medical facts. On their own initiative they could certify the Vice President as Acting President and later, if possible, restore the stricken President to his office. If the physicians continue to report Presidential inability—as measured against the commission's understanding of the requirements of the Presidency—the commission could certify the Vice President not merely as Acting President but as full President.

Such a commission could act intelligently and authoritatively. It could be convened quickly and even in the middle of a national emergency. It would have the confidence of the Nation. It could deal with a variety of circumstances. The interests of the disabled President would be represented in his two Cabinet members on such a commission. Both Houses of Congress would be represented. The political neutrality of the Supreme Court would be represented.

Supreme Court Justices, to be sure, usually object to membership in such bodies, but if Chief Justice Earl Warren is willing to chair President Johnson's committee to investigate Kennedy's assassination, he certainly could be called upon to head a far more important body in the very few occasions when this might be required.

I repeat—it is neither necessary nor desirable for either or both Houses of Congress to vote on elevating a Vice President. For the problem is not a political one demanding a decision representative of popular feeling. The problem is one of judgment on the part of experienced, reasonably disinterested men who understand both the condition of the President and the demands of the Presidency.

The above procedure should promptly be voted into law by Congress in my judgment. But the change should be embodied in more than an ordinary statute, so that Congress later, in a time of political turmoil, could not suddenly alter the law. Hence Congress should also propose a constitutional amendment embodying the essence of the plan. The Eisenhower-Nixon agreement, which was later adopted by Kennedy and Johnson, and which last December was continued by Johnson and Speaker John McCormack, could be redrawn from administration to administration to meet any special or personal needs. Both the congressional statute and the Presidential-Vice Presidential agreement should allow for maximum flexibility to deal with all possible eventualities, but within the basic procedures set forth in the proposed new amendment.

The main question remains: After a century of inaction how can we get such a proposal fixed into law? Here I would urge again some measures that I presented last June to the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee.

First, we should put the Presidential disability provision into a package of "housekeeping" constitutional amendments that would arouse wide, bipartisan support from Americans. Unfortunately, Presidential inability is not our only Presidential problem. Another is our faulty electoral college system, which allows Presidential electors to violate their pledges and to raise hob with the electoral process—even to the point of plunging the country into uncertainty for months, until the Presidential election might be thrown into Congress and hence into more political crisis. Actually the whole electoral college system needs extensive reform, but Congress cannot agree

on this either. But I for one have given up hope that Congress will be able to agree on the resolution of the broader problem of the electoral college. But Congress should be able to agree on changing the faulty mechanics, which the late Senator Estes Kefauver described as a "loaded pistol" pointed at our form of government.

I hope that this subcommittee, which has done such important work on this question of electoral college will not become so concerned about the twin problems we are discussing today as to lose sight of this critical problem. After all, the next great crisis might not be a problem of Presidential succession or Vice Presidential inability; it might be a problem of the mechanics of the electoral college.

Such proposals in a constitutional "package" could include other changes that might not be controversial—for example, advancing elections 2 or 3 weeks, thus enabling the President to take office before the New Year and the new Congress; and perhaps the item veto over appropriations for Presidents—a power granted to a number of Governors.

Such a package should include a new provision on the second problem before this subcommittee—Vice Presidential vacancy. Under the present provision the Speaker of the House and the President pro tempore of the Senate, either or both of whom may help lead the party opposing the President, are next in line. I believe that we should go back to the pre-1947 arrangement, under which the Secretary of State and the other Cabinet members would succeed the Vice President in order of rank.

This would protect the President's interests; it would also insure that a leader of the opposition party could not capture the White House (as would have happened in 1948, for example, when Republican Speaker Joe Martin was next in line after Truman). If Congress insisted on a safeguard here, and I hope it would not, it might reserve the power to select the next in line after the Vice President—but only from the Cabinet.

I would like to say further, that if there is any safe person who would meet a consensus of the American people to succeed the Vice President, it would, it seems to me, be the Secretary of State. This is a man who very rarely is a political extremist who would go out beyond the consensus of the Nation. No President today can afford to appoint as Secretary of State someone who is not highly capable. As we look at the roster of Secretaries of State over the last few decades at least, virtually every one of these men would have been perfectly capable of coming in after the Vice President. It seems to me that we have in being the ideal type of person to succeed the Vice President in the eventuality of his being disabled or killed.

Can we get such a "housekeeping package" adopted? Not if history repeats itself. But it need not if these reforms could be given some political stimulus and momentum. Only one man can take the lead in this—the President of the United States. I believe that President Johnson should establish a high-level Presidential commission to survey the strengths and weaknesses of the Federal Government. Not only would such a commission come up with important findings and recommendations—including, one hopes, a proposal on inability. It would also have enough prestige, and enough backing from the President, to inform and arouse public opinion. The League of

Women Voters, bar associations, the junior chamber of commerce, and other civic groups would doubtless stimulate grassroots support for the proposals. But we must have Presidential leadership.

We must do one other thing to resolve the problem of Presidential inability—and this could be the simplest of all mechanically, though difficult politically. One great problem in the past has been the incapacity of Vice Presidents ready to fill the shoes of stricken Chief Executives. The reason for this was often political; the Vice-Presidential nomination had been thrown as a sop to a party faction opposed to the Presidential candidate, as in the case of Vice President Arthur. Or the Vice-Presidential nomination has been decided almost as an afterthought by exhausted party leaders at the fag end of a convention. Even in the case of Nixon, General Eisenhower admitted later that he had left the decision largely to a group of advisers, and that he thought Nixon was older than he actually was. Generally, however, the recruitment of Vice-Presidential candidates has improved in the last 20 years. Clearly John Kennedy had confidence in Lyndon Johnson's capacity to serve as President; and Nixon's choice of Henry Cabot Lodge as his running mate indicated the Republican nominee's need for a man who stood squarely in the moderate, international wing of the Republican Party. Vice Presidents have also been brought much more fully into Presidential affairs. This, too, is a very good development.

If this trend is to continue, we must give up for good our oldtime view of the Vice Presidency as a place for "Throttlebottoms." Not only must the Vice President be able to step into the President's shoes; he must stand for the same program, or at least the same direction in national and international affairs, for which the President was originally elected. This may take some of the fun out of Vice-Presidential nominations. It means, for example, that Republicans can toy with the delightful idea of nominating Margaret Chase Smith for Vice President only if they believe that she is equal to the Presidency, which she may well be.

Meantime, the gamble with the Presidency goes on every day that passes. Whether we run out of luck one of these days depends on the President and Congress—and on the people. I believe we should act now, before interest dies down once again.

May I say in conclusion, gentlemen, that one reason I have stressed today the political problem of getting these changes enacted rather than just the substantive problem of the changes themselves is that I am afraid that we are going to be headed for another interminable period of no action on these problems unless this subcommittee can help devise effective political methods of getting these changes adopted, as well as suggesting good changes.

I think that any changes you propose should be in a context of their likely political acceptance. Otherwise, we are going to face the familiar situation we have had in the past, where people have become tremendously aroused about these problems, then there has been a period of no crisis, no action is taken, and the next crisis does come without any change having been adopted.

I want to congratulate this subcommittee on their concern with this problem and wish you the very best of luck, not only in the presentation of your proposals but in helping get acceptance by the Congress and by the people.

Senator BAYH. Mr. Burns, I want to thank you for your concern that something be done. I think I speak for the entire subcommittee when I say that we share this concern and that it is important for us to get a solution that will be legally and practically acceptable. This is an important ingredient.

Do you mind if I ask you some specific questions?

Mr. BURNS. Please do.

Senator BAYH. You specify that the Cabinet would be unqualified to make this decision lacking any clear medical advice. I think any decision that did not have great dependence upon medical advice would be a faulty decision. However, the blue ribbon panel that you suggest is also unqualified from a medical standpoint. It also would be required to rely on physicians who had some degree of experience. Do you not think the Cabinet would consider carefully the judgment of the people like Dr. Paul Dudley White, who attended President Eisenhower in his last illness, and other people who were qualified from the medical standpoint?

Mr. BURNS. Yes, sir. I think everything here depends upon the motivation of the Cabinet member. There are physicians and physicians. Experience indicates that physicians often are susceptible to private pressures and obligations. Physicians disagree and some of these conditions are terribly hard to diagnose. Hence, I would be afraid that if we left this decision to the Cabinet, not only is the Cabinet not equipped as a body to consider this kind of question but there might be some tendency to turn to the kind of physician that might be most expedient in the situation. Whatever body makes the decision must turn to a panel of physicians. But the advantage, it seems to me, of such a five-man commission as I have recommended and others have recommended is that we would get the likelihood of disinterested choice of physicians, rather than choices that might be influenced by the heavily political nature of the President's Cabinet.

Senator BAYH. Do you feel that the ability to perform the job would be the prime evidence that would determine whether a President were disabled or not? There are some of us who feel that perhaps the Cabinet should at least have some voice in this, in view of the fact that the President at least sees the Cabinet as he performs his duties and thus it would be able to compare his abilities to perform at X moment with his abilities to perform at Y moment. This is one reason for not having a cold, calculated decision based purely on an electrocardiogram or some other purely medical type of data.

Mr. BURNS. Yes, sir. I think the medical decision must be related to, obviously, the demands of the office. But again it seems to me that the Chief Justice and the two ranking Cabinet members and the Speaker and the President pro tempore are men who have sure ideas of the demands of the Presidency.

Senator BAYH. I am sure you know other people feel different ways. I feel one way and Senator Keating does not agree on the method. A consensus proposal has been adopted by the American Bar Association in its recent meeting. Are you familiar with the consensus which says, in effect, that the Vice President, with the majority of the Cabinet, could make a decision when the Vice President would be Acting President, but if Congress cared to, they could choose another body which would be your commission? But as I heard the last

part of your statement, you would not want to leave any loopholes there to permit Congress to move in and change its position on this. Is that correct?

Mr. BURNS. That is correct, and I feel very strongly on this, because this is not the kind of judgment that Congress is needed for in this situation. This is not a problem of representing the country. The country has already made its decision in electing a President and a Vice President, knowing that the Vice President would come into office if anything happened to the President. I am against Congress having any role in this, not only for that reason, but also because I am afraid that the more complicated this process becomes, the less likely it will be to be accepted by the Congress and especially accepted by the constitutional process in the States.

Senator BAYH. Do you feel that if a commission or some similar body other than the Cabinet made a decision to temporarily elevate the Vice President, it would be apt to be taken lightly?

Mr. BURNS. Not if it were composed of those persons.

Senator BAYH. In other words, it would seem to me that even in the event of illness, the removal of the President even temporarily would be something that would only be done under the most serious circumstances.

Mr. BURNS. That is correct.

Senator BAYH. Do you agree with this? You have studied this field thoroughly.

Mr. BURNS. Yes, sir; I do agree with that. If anything has marked this problem over the years, it has not been rash action. It has not been power grabs by, for example, Vice Presidents. Quite the contrary. Vice Presidents have tended to stay out of the problem. Mr. Nixon was extremely careful about this during Mr. Eisenhower's illnesses. Arthur was very cautious when Garfield was incapacitated. Indeed, the problem is here, that in those situations, we needed the Vice President to take over, but he felt inhibited in doing so.

Senator BAYH. Do you believe from your study of these two particular times plus the Wilson-Marshall occurrence that perhaps the Vice-Presidential hesitancy stemmed from a lack of a clear blueprint which he could follow? In fact, that if there was a blueprint, and it said that in given circumstances, the Vice President may assume temporarily the role of Acting President, that the Vice President would not be subject to the criticism, which I think you rightly pointed out that he would be subject to?

Mr. BURNS. Yes, sir; I do agree with that. The Vice President wants to know that he is a legitimate holder of that office. The people want to know that, too. There must be no question about his legitimacy.

Senator BAYH. The Congress and the States or the Congress itself would adopt a plan and you feel this would remove a great deal of hesitancy on the part of the Vice President?

Mr. BURNS. Yes, sir.

Senator BAYH. In your suggestion of a panel, do you contemplate the possibility where we would ever have a panel which would be weighted politically against the President? For example, now we would have two of the five members of the opposite political party

and if we had one House of Congress controlled by the other party, we would have three out of five. Would this get us into political infighting?

Mr. BURNS. Does your question there assume that the Chief Justice might still be acting in a Republican capacity when you talk about three being against—

Senator BAYH. I am just posing this as a possibility. I am sure that the Chief Justice would try his very best to be impartial.

Mr. BURNS. It is terribly hard to find completely disinterested, non-partisan officials in a government that is partisan and should be partisan.

Senator BAYH. Let me phrase it this way. Do you feel that there should be a continuity of political philosophy following a tragedy and temporary illness, that we should have a plan that minimizes the possibility of transition from one party to another at a time like that?

Mr. BURNS. Yes, sir.

Senator BAYH. I want to compliment you on your admonition that we should remove the Throttlebottom philosophy we have had in the past as far as the Vice Presidency is concerned.

One other question I wanted to ask. You mentioned in your statement that in certain events, after continued illness of the President, the Commission then could make the Vice President not just Acting President but President.

Mr. BURNS. Yes, sir.

Senator BAYH. In what circumstances short of death itself would you remove the President from office completely?

Mr. BURNS. With clear information from the panel of physicians, that the illness was such as to remove the hope that the President would recover.

Senator BAYH. Would there be anything to be gained from having the President removed specifically as long as the Vice President was acting and carrying out the duties, unless we give up all hope of miracles as far as recuperation is concerned?

Is this not a rather dangerous precedent to set?

Mr. BURNS. I do not believe so, because this step would not be taken, as I suggest, without clear indication. Here again, I think political leaders would be very cautious about taking an unwarranted step. But even beyond that, I believe that the Presidency has become such a crucial instrument, especially in an emergency, that the people of this country and above all, foreign leaders, must have a clear sense of who is in command, and hence, ultimately, it seems to me, there should be a clear indication that this is the man that leaders of foreign nations will have to deal with and that they cannot hope for a swing back and forth between two persons.

Senator BAYH. One question about the second horn of this dilemma namely, the Vice-Presidential vacancy. You favor a return to the previous law which would permit the Secretary of State to succeed after the Vice President.

Some of us feel that the President still needs an "assistant President"—the Vice President—to perform various duties that are designated to him by statute and others assigned to him at the discretion of the President.

Does this concern you at all, the need to fill the vacancy in the Vice Presidency?

Mr. BURNS. No, sir. I do not feel this is a crucial problem. To a great extent, the Vice-Presidency in history has been an awkward institution, as you know, despite the steps which we have taken in recent years. I think it would be dangerous to develop this institution any further, both because it may clutter up the national establishment, and also because it again would weaken the chances of a change being adopted by the people. It seems to me that if—

Senator BAYH. How would it weaken the chances of a change being adopted?

Mr. BURNS. Simply again because the more complex this proposal is, the more controversy it will arouse, the more confusion will exist.

I think this is the kind of proposal that might make for confusion.

If we have simply the old presidential succession, the pre-1947 arrangement, there is something very clear and simple about this, something that people can understand, because almost everybody understands the position of the Secretary of State.

If a Vice President comes into office, he would still have the power to use the Secretary of State as he might wish. There are all sorts of special arrangements that a President can make. I think we should allow the President maximum flexibility here. The more you build into law these institutional arrangements, especially in the Presidency, which has grown to its greatness, I think, largely because it is a simple and centralized and responsible institution, the more you build in other arrangements like this, the more I am afraid it would tend to divide presidential authority and again to make complicated a problem that does not need to be made complicated.

Senator BAYH. You feel that this would be true even if the President were to have a great voice in deciding who this new Vice President would be?

Mr. BURNS. Yes, sir; I think this would be an added complication that is not necessary in this situation.

Senator BAYH. Senator Keating?

Senator KEATING. Thank you very much, Professor Burns, for your very enlightening testimony. Your suggestion for a Presidential Inability Commission chaired by the Chief Justice is not very far different from the views which I entertained at one time. If we should decide on this, I think we would have to enlist your efforts to get the Chief Justice to serve in that capacity, because in 1958 he declined in most vigorous terms in a letter to me, stating that it was the unanimous view of the members of the Court that the Chief Justice should not serve on such a commission. Since his acceptance of the Chairmanship of the Commission To Investigate the Assassination of the President and the ensuing events, I have had a further talk with him, in which I have indicated that apparently President Johnson is more persuasive than I am, which would come as no great surprise to anyone. He still adheres to the view that the Court should not participate. He draws a distinction between the two. The present position which he is occupying is inclined to be more temporary, whereas this would be a continuing commission. So I reached the conclusion that it would be indelicate to press for that type of commission due to the reluctance of members of the Court to serve on it. I modified the makeup of my commission accordingly.

The late Senator Kefauver and I had hearings. I believe you testified before us at that time. I then had this commission idea. Senator Kefauver also inclined toward a commission.

We finally reached the conclusion that the only practical thing to do was to report Senate Joint Resolution 35, which would simply do two things. One, it would provide that in the case of inability, the Vice President would assume only the powers and duties and not the office itself, and secondly, it would give to Congress the power to legislate with reference to determine inability. We felt that that would be the only practical way to approach it, since otherwise, if you tried to set up an inability commission or any other particular form and tried to debate that in every State legislature in the land, you would never get the necessary three-fourths approval of the State legislatures.

Now, you have the impression, in the first instance, that this commission could be set up by law without a constitutional amendment; am I correct in that?

Mr. BURNS. No; I think there would have to be a constitutional amendment in broad terms and brief terms to make possible the establishment of the commission, but the commission could come into existence. This, I think, is one of its great virtues, could come into existence as an active group on the initiative of the Chief Justice. That is, in effect, this commission would exist under constitutional authority, but would obviously never meet. But once the Chief Justice concluded that the commission should meet, he would call it into existence.

Senator KEATING. You mean that he could do that just on his own without any legislative enactment whatever?

Mr. BURNS. No; that is why I say to make it an active body. No; there would have to be, as I say in my statement, both a constitutional amendment and an act of Congress.

Senator KEATING. Would not the constitutional amendment have to come first?

Mr. BURNS. Yes, sir.

Senator KEATING. In other words, the approach, if I understand you correctly, the approach agreed upon by Senator Kefauver and myself and approved by the Department of Justice, of simply giving Congress the power to act with reference to the matter, would be the first step, you would think, in this process. Am I correct?

Mr. BURNS. As I envisage this, there would first of all be the enabling constitutional amendment that would permit Congress to take this step. Secondly, Congress would pass the statute—

Senator KEATING. After the constitutional amendment had been ratified by the States and was a part of our body of law.

Mr. BURNS. Yes, sir; what I am trying to get away from is the need for any congressional action after the disablement of the President. What I would like to see is an existing statute so that after a constitutional amendment has been passed, an existing statute that would allow the Chief Justice at any time, on his own initiative, to call together that group of five men.

Senator KEATING. You would not pass the statute until the constitutional amendment had been ratified, would you?

Mr. BURNS. No, sir; there has to be the amendment first.

Senator KEATING. Then the statute would set up the inability commission?

Mr. BURNS. Yes, sir.

Senator KEATING. If the Chief Justice declined to serve, as he did expressly decline in 1958, how would you think the commission should be set up?

Mr. BURNS. I do not know, Senator Keating, that we should defer to the Chief Justice on this occasion. Perhaps Professor Freund would comment on the power of the Supreme Court to declare unconstitutional—it certainly has that power—an act affecting the powers of the Supreme Court. I doubt, however, that the Supreme Court ever would act in this capacity. When one considers how critical this problem is when it arises and when one considers how infrequently this problem will arise, it seems to me that for the one occasion in perhaps 20 or 30 or 40 years, or much more, that this problem would arise, it is not asking very much of the Chief Justice to serve in this role.

The problem goes back to the questions that Senator Bayh was raising. It is very hard to find disinterested persons to make this kind of judgment. If we do not get help from the Chief Justice on this matter, we are going to have to turn to political party leaders who are most of the other officials of government and that immediately gets us into very difficult problems of party attitudes and party biases. It seems to me that this is a situation where we want party to interfere as little as possible, and I say this as one who is a great believer in strong political parties.

This is a matter for judgment, for detached understanding of the condition of the President and the needs of the office. I think it is simply imperative that the Chief Justice have this role. It is not a very demanding role. It is not a very time-consuming role and I think your original recommendation was a very good one.

Senator KEATING. Well, I do not want to give the impression that Chief Justice Warren's reluctance to act was based upon the fact that it would give him more work to do, because he certainly is a hard-working man if there is one in the world. But it was the separation-of-powers doctrine which made him feel, and he said all of the Court agreed with him, that he should not serve in such a capacity. I think it would be quite unfortunate and I think almost impossible to ask the Chief Justice to serve unless there was a change in attitude in that regard.

Mr. BURNS. Senator, could I comment on that point? On the point of separation of powers, it seems to me this is a very late time in the history of the Republic for the Chief Justice to be raising the question of separation of powers as a reason he should not serve in this capacity. The Supreme Court, for good or for ill—many of us think for good—has been intervening in wide areas of the national life, especially in recent years. For the Chief Justice to refrain from this small but critical role in the face of the role that the Supreme Court has been taking on seems to me to be a false—to be an exaggeration of the role of the separation of powers today.

Senator KEATING. Well, of course, it is true that the Supreme Court has somewhat broadened its activities. But they have been related to specific cases brought by litigants before them. Now, the Chief Justice has taken on this assignment at the request of President Johnson, but except for that and some activities which I, myself, have

criticized—activities of certain Justices getting close to the political realm—except for those instances they have been confined to particular cases that they had to decide one way or the other.

Mr. BURNS. I wonder if another way to look at this would be not so much in terms of the separation of powers but in terms of the balance of powers, the interrelation of powers, in a time of national crisis, which is the time of Presidential disability. It seems to me that since this is a government of checks and balances, a government of related national institutions, the great need is to give the Supreme Court a role in this critical situation rather than for it to refrain.

Senator KEATING. That may be. There was, however, you will remember, widespread criticism of Justice Owen Roberts for serving on the Pearl Harbor Commission. There was widespread criticism of Justice Jackson for serving as a war crimes prosecutor. I think that that undoubtedly was in the minds of the Supreme Court Justices when they reached the conclusion they did in 1958.

I do not know how they felt—they never expressed themselves about Chief Justice Warren becoming the Chairman of the present Commission. But I am reluctant to be the messenger myself to Chief Justice Warren, having had conversations, very pleasant conversations, with him about it.

I am inclined to share your view that the Chief Justice would normally be the appropriate one to be chairman of such a commission.

Regarding your Commission, do you just provide for the Speaker of the House and the President pro tempore of the Senate being on it?

Mr. BURNS. Yes, sir.

Senator KEATING. No other Members of Congress?

Mr. BURNS. No, sir.

Senator KEATING. It seems to me that the second and third full paragraphs on page 3 of your statement, in which you deal with the importance of the office of the Vice President, make a strong argument, which I am sure is not intended on your part for the proposal I have made to elect every 4 years two Vice Presidents. You do not favor that, I gather?

Mr. BURNS. No, sir.

Senator KEATING. It seems to have aroused great controversy. I find that I have many new-found friends and many new-found enemies in that regard. But it is the only way I know of whereby the succession would be nearly assured to a man who has been elected by the people. Proposals which have been made for having the Congress elect or the President nominate with the advice and consent of Congress, calling together the electoral college (in my judgment, the least desirable of all the proposals) none of those provides for an election by the people of the country. I feel strongly that the people should have the say and that when they have voted for a particular party, they should have that party in power for 4 years. That might not happen under the present arrangement. It usually would happen if the succession after the Vice President went back to the Secretary of State, but not necessarily so. But I think popular approval is essential, and that is one reason that I have made this proposal for two Vice Presidents.

Tell me, is your objection to it the one voiced by Vice President Nixon, that it would downgrade the Vice-Presidency?

Mr. BURNS. Not so much that, Senator Keating, as first of all, as I understand it, they would be both selected on the ballot at the original election, just as a Vice President is today. This is a trend that would be a step back toward the long ballot, more names on the ballot. I think the voters are terribly confused already by the number of names on the ballot.

Secondly, and more important, it relates to the role of the President. As I suggested earlier, this has become such an absolutely crucial institution in American Government that anything that is done that might fragmentize or cloud the central authority of the President would be a dangerous step. When you have even one Vice President, this often historically has been a problem for the President. Often the Vice President has been one of the President's worst enemies. I grant we have gotten away from that to a great extent, perhaps by luck or design. But if there were a second Vice President, I would be concerned that here would be one more political leader, perhaps an ambitious man with his eye on all kinds of future developments, who might act much more as a divisive force in the administration than a helpful force, especially as long as there were these two men without major responsibilities.

Now, they can be given major responsibilities, but these men have a certain independence from the President. All Vice Presidents do if they wish to exercise it. Hence I am simply afraid that this would be a threat to the single, centralized control of the executive establishment that we need so badly and which has been the great tendency in the Presidency for the last 30-or-so years, and also again, that this is the kind of controversial proposal that will make change less easy to adopt in the way of formal constitutional action.

Senator KEATING. Well, there are a great many people who share my view that it is the only way to assure an election by the people and the people would back it where they would not some of these other proposals. But I was interested to get your point of view on it. My feeling is that there is a great deal of work to be done which would keep two Vice Presidents busy, and this was on my mind a year or two before the great tragedy of last fall, that there was a need for two Vice Presidents, whether you call them first and second or executive and legislative. One of them, the Legislative Vice President, could have the constitutional duties of the present Vice President and be second in line, and I do not share your apprehension over the danger that they would not work in harness with the President. After all, he would have had a large voice in their selection, as he does today in the selection of his running mate. I believe that this proposal deserves a lot of thoughtful consideration, this proposal, which I am sure it is having. One of the most interesting reactions I have had is from those who initially opposed it and have come around to the point of view that they feel it has a great deal of merit as a method of solving this problem.

There is only one other question. I wanted to say that I find myself in agreement with your housekeeping constitutional amendment in many respects. The item veto, as you probably know, has been one of my pets for a long time.

Mr. BURNS. Yes, sir.

Senator KEATING. To tie that in with Presidential succession and all these other things into a housekeeping amendment would be great, from my personal point of view. There is not very much there that I disagree with, although I have not gone over it in minute detail. But we have a practical problem here of getting two-thirds of both Houses of Congress, and on top of that, three-fourths of the State legislatures to agree. I think we must leave to a bare minimum the amount of debate that can take place if we are going to get to come to grips with the inability question, leave to a bare minimum the amount of debate which will take place in the Congress, first in our committee and then in the Congress, in the House and Senate, and then in every State legislature. That has been the reason for my feeling that about the best we can do is to get the State legislatures to say, well, all right, let Congress legislate on inability. We will give Congress the power to do it, but we shall not try to debate it here. If we get all these other things into a constitutional amendment and then we got some State legislature opposed to just one of them, we would be in hot water. I have pushed this item veto for a long time as a constitutional amendment, without marked success; I might say, and also the amendment abolishing the electoral college. I think it is an anachronism. I think we ought to get rid of it. But I have never had the temerity to put them all into one package and I congratulate you on your courage in thinking that it is possible to get any such thing as that through the Congress and through the State legislatures. But I would be glad to join forces with you on abolishing the electoral college and getting through an item veto. But I am afraid we would find ourselves in a small but courageous band. We would not get to first base. There are a lot of practical sides to this that are not always apparent.

Mr. BURNS. Senator, I respect your political judgment on that problem, and you may well be right. My hope was that some of these proposals might seem so sensible, like the item veto, if people only learned about them, that they would help the other proposals. But my suggestion here does turn on a tremendous national effort. It requires Presidential leadership, as I suggested, the kind of participation from the American Bar Association and other organizations that we have been witnessing.

I would hope, too, that if there were a package proposal, this would not all be part of a single constitutional amendment. I would hope that this could be a set of amendments that could be treated pretty much together, but one would not hang on the other.

Senator KEATING. Excuse me, Mr. Chairman. I shall be back.

Senator BAYH. Professor Burns, we are very grateful to you. We have differences of opinion among us, but we appreciate very much your letting us have your views. I might say that I share your faith in our State legislatures being able to withstand the test a little bit more than apparently my colleague does, although this is certainly a problem that has to be considered. Thank you very much for being with us.

Mr. BURN. Thank you for the invitation, Senator.

Senator BAYH. Professor Freund?

Professor, I understand that you have to catch a plane before too long, so without further ado, let me just ask unanimous consent to

submit what I feel is, although it is very impressive, it is still far too inadequate a résumé of your accomplishments in the record and ask you to please proceed.

(The résumé referred to follows:)

PAUL A. FREUND

Born St. Louis, Mo., 1908.

Educated at Washington University and Harvard Law School.

Law clerk to Mr. Justice Brandeis, 1932-33.

Served 7 years in Solicitor General's Office, Department of Justice.

On faculty of Harvard Law School since 1939, becoming Carl M. Loeb University Professor in 1958.

Served as Pitt Professor of American History and Institutions, Cambridge University (England), 1957-58.

Author of books and articles on the Supreme Court, constitutional law, and conflict of laws.

Coeditor of a casebook on constitutional law.

STATEMENT OF PAUL A. FREUND, PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. FREUND. Thank you, Mr. Chairman. I am Paul A. Freund, professor of law at Harvard University.

Mr. Chairman, I greatly appreciate the opportunity to respond to the invitation to present my views on the subject of Presidential inability and succession. I had the privilege of participating in the consultations of the American Bar Association group last month, and my views are in substantial accord with the recommendations of that group.

Presidential inability and Presidential succession are two distinct problems, but they are interrelated. In considering both of them, our aim should be threefold: to assure prompt action when required in an emergency; to avoid an abrupt shift in administration policy; and to provide safeguards against intrigue or other extraneous motivations.

I would suggest that in considering any of the proposals before the committee, these three criteria be used to judge them.

Presidential inability is, to be sure, a delicate and distasteful subject to contemplate but in all prudence it must be faced. The Constitution leaves the subject in a state of uncertainty in two crucial aspects: What is the status and tenure of the officer who serves during the disability of the President, and how is the disability to be determined in its onset and its termination? Article II juxtaposes death, resignation, removal, and inability as occasions for a vacancy in the office of President. Although the historic evidence seems to have pointed the other way, consistent practice since the accession of John Tyler has established that upon the death of the President, the Vice President succeeds to the office and title for the unexpired term, and not simply to the exercise of the powers and duties of the office.

There can hardly be disagreement that this was a wise interpretation, but it poses a problem in the case of mere inability of a living President. President Truman, for example, has expressed himself as believing that the Vice President or other office next in line of succession succeeds to the office itself for the remainder of the term even in the case of the President's inability. So long as this uncertainty persists it ought to be resolved in the most authoritative way, through

a constitutional amendment. To treat temporary inability in the same way as death for purposes of succession would, it seems clear, cause great reluctance on all sides to transfer the responsibilities of the office where the inability appears to be curable within the term. Such an inhibition on placing the responsibilities of the office in active, responsible hands would be highly unfortunate in the periods of crisis which have become more and more the staple of our national life. The first requisite, therefore, is a provision by way of constitutional amendment to differentiate the position of one who succeeds to the office on the death of the President from that of one who assumes the powers and duties of the office during the President's inability.

The next question obviously concerns the determination of inability. Does a provision on this subject require a constitutional amendment, or might it be effected through ordinary legislation? To this question the answer is unclear. If we were concerned simply with the inability of a President who had himself succeeded to the office through the death of the former President, leaving no Vice President, so that the line of succession next to be invoked would be that prescribed by the act of Congress, a good case could be made that Congress could provide the procedure for determining inability, as an adjunct to its constitutional power to provide the line of succession after the Vice President. But the problem is broader than this and extends to the case where the President may be disabled while a Vice President is in office.

In favor of a congressional power to deal with this case of inability, the necessary-and-proper clause might be invoked; that is, arguably Congress could legislate to enable the President and Vice President more effectively to discharge their powers and duties with regard to the filling of the office. But against this construction there is the strong countervailing principle of separation of powers, particularly as it affects the two highest Executive offices. The power to determine disability is vested in the President and Vice President by implication, just as the power of removal of high executive officers is vested in the President by implication from his power of appointment. When Congress undertook to require the President to submit removals to the Senate for its approval, in the case of officers for whose appointment their approval had been required, the Supreme Court in a celebrated decision declared the law to be an unconstitutional intrusion on the province of the Executive (*Myers v. U.S.*, 272 U.S. 52 (1926)). Even apart from the serious constitutional doubt concerning the authority of Congress in this sphere, it seems appropriate that so fundamental a matter as a transfer of powers in the highest Executive Office should be dealt with in our fundamental law.

The President, of course, has the primary responsibility for determining his own disability. But occasions may arise when he is not in a position to make such a declaration or even to recognize its necessity. In that case the responsibility would fall on the Vice President; but that officer should be spared the task of shouldering the responsibility alone. Leaving aside actual self-interest, the very appearance of self-interest might impel him to refrain from a decision which by objective standards ought to be taken. An advisory body to share the responsibility should be designated, and the heads of the executive departments would seem to be the most appropriate existing group for the purpose. A constitutional amendment should so provide.

There is much to be said, as an alternative, for a special Presidential Disability Commission, which would be appointed by the President at the beginning of his term and which would undoubtedly include very distinguished citizens, among them perhaps former Presidents, certain members of the Cabinet, representatives from the Congress, and possibly a medical expert. It would be rather awkward to provide for such a commission in the Constitution—that is to say, in any detail—but authority should be given to Congress to provide through regular legislation for the appointment by the President of such a body. In this way the constitutional amendment would first fill the void by specifying the heads of the executive departments; and, second, would introduce a measure of flexibility by empowering Congress—with the approval of the President through the lawmaking process—to set out in detail a plan for a different and more specialized body. The Commission would have the advantage of being a disinterested group, designated by the President himself, and prepared to take action without any hint of extraneous motivations.

A contingency might conceivably arise when the President would disagree with the Vice President and a majority of the heads of departments or of the alternate body. In that unhappy eventuality the office ought not to be at the hazard of an incapable President, and he would be relieved of his powers and duties upon the action of the factfinding group. But such a controversy ought not to be left unresolved. It could be dealt with when the President declares the termination of his disability. If the Vice President and the fact-finding body concur with the President, the matter is ended. If there is disagreement, the question should be placed before the Congress. For this purpose it seems advisable that the Congress meet in joint session, and that a two-thirds vote of all the elected Members be required to resolve the difference against the President. This procedure would be taken by analogy to the process of impeachment. Meanwhile, it should be noted, the office itself would not be left unfilled or filled by one whose capacity was in serious doubt, since the Vice President would continue to serve until the final action of Congress was taken.

I turn now to the question of the succession to the Presidency. It hardly needs to be said that this problem cannot be profitably considered by envisaging the personal qualifications of individuals who may hold various offices, whether as Speaker of the House, President pro tempore of the Senate, Secretary of State, or whatever, in the unforeseeable future for which we must necessarily provide. The problem is a structural, an institutional one.

The key to the assurance of continuity of administration policy and the avoidance of extraneous considerations in deciding whether to make a transfer of power lines, in my judgment, is keeping the Office of Vice President filled at all times. This is important in itself, given the increased usefulness of the office in recent years, and for the sake of orderly transition, whether temporary or for the remainder of the term.

Of the several methods which have been suggested for the selection of an interim Vice President, the most satisfactory, in my judgment, would be election by Congress with the approval of the President. This could be done by the President's submission of one or more nominees to the Congress. The Vice Presidency should have a popu-

lar base and at the same time be in harmony with the Presidency. These objectives can best be achieved by associating the Congress and the President in the selection, with the opportunity for informal consultation to be expected in such a process.

Senator BAYH. Thank you very much, sir. That was certainly a very concise statement.

If I might hastily ask a question or two, keeping one eye on the clock—

Mr. FREUND. Do not bother about that, Senator; I can make my arrangements.

Senator BAYH. We have a police escort waiting, if that will make it a little easier to get there on time.

Do you see some possibility of conflict of interest as far as the judgment of the Cabinet? This is a question which has been raised previously and which Professor Burns raised appropriately. Do you feel that there would be other circumstances which would cause the Cabinet, because of its familiarity with the President and the job he is doing, or for other reasons, to avoid making a decision?

Mr. FREUND. Of course, in all of these alternative proposals, one is trying to steer a course between two polar risks: One, that the body will be motivated aggressively by self-interest, and the other that the body will be too passive, too negative, in order to avoid the appearance of self-interest. I think that the role of the Cabinet as the factfinding body is closely tied in with the question of succession. This is one of the respects in which, as I noted at the beginning of my statement, the two problems—that of determining disability, and that of succession—are interrelated.

Now, Professor Burns, as I understand it, envisages or advocates a return to succession through the Cabinet. I could well understand that if that is to be the line of succession, particularly if the Vice-Presidency is not to be filled, then one might hesitate to make the Cabinet the factfinding or advisory body on disability.

My suggestion, however, and that of the bar association, is that the problem of succession be circumvented for practical purposes by keeping the Office of Vice President filled and thus the Secretary of State would have a highly remote interest in the office.

Senator BAYH. Do you feel that the timidity that has been expressed in the past by Vice Presidents to assume this role is related to at least some extent to the standby procedure he has followed in the past?

Mr. FREUND. I do, decidedly. I think that a solemn constitutional responsibility, spelled out in our fundamental law, would impel the Vice President and the heads of departments to act on the matter objectively, more so than they would if the arrangement were a purely informal extraconstitutional one, as it has been in the past.

Senator BAYH. Senator Keating may have a question or two to pose to you. I am most anxious that you be able to catch that plane.

Senator KEATING. I do not believe I have. I was necessarily called away. I know Professor Freund's point of view. I can only say that my chief reason for differing with him is very largely a practical one.

Senator BAYH. I have not discussed the professor's thoughts on our mutual concern about the State legislatures.

Senator KEATING. I would be happy to hear you say how you are going to successfully get through all the State legislatures anything more than a simple authority to the Congress to act.

Mr. FREUND. Well, Senator, I wonder if this question of specificity versus generality does not cut both ways so far as popular acceptance is concerned. That is to say, I should find it rather embarrassing, myself, to go before State legislatures with something in the nature of a blank check to the Congress. Legislatures might suggest all sorts of possible and, to them, horrendous mechanisms which will pass the Congress and which might even get the approval of the President, which might even get the reluctant approval of the President, because something is needed and we do not have anything.

Now, it seems to me the merit of the bar association proposal is that it tries to make the best of both worlds; that is to say, it sets up a specific and what seems to me a reasonable and appealing procedure, but at the same time leaves it to Congress through the lawmaking process to set up a different mechanism if a better one is seen and approved. But meanwhile, the void is filled.

I, myself, see a good deal of merit in the inability commission idea, particularly if the commission is appointed by the President at the beginning of his term. Yet such a commission could be spelled out very awkwardly at best in the constitutional document. I think that is the kind of thing to leave to Congress. But if you simply gave Congress a general power, would not the State legislatures say, "Well, suppose Congress will take the power on itself to decide when the President is disabled. Are we really voting for that?" Or they might say, "Why has not Congress acted in the past? Is it so clear that they do not have this power?"

In short, I am as troubled by the skeletonized version so far as the State legislatures are concerned, as you are, Senator, by this, as I would see it, middle-of-the-road version, which is both specific and flexible.

Senator KEATING. Well, I have no doubt that some of those views would be voiced in some of the State legislatures. But we have considerable precedent in the income tax amendment and in the prohibition amendment, where Congress was just about given blank check power to legislate; that is, there is some precedent for it. It would be my political judgment that there would be less likelihood of full-fledged debate and defeat in State legislatures for a simple authority to the Congress to legislate than there would be in such a long and not particularly involved, but somewhat involved proposal such as is embodied in Senate Joint Resolution 139, which I would assume—I have not researched this, but I would assume if anything of that kind was made a constitutional amendment, it would be the longest one in history. You are more of a student of the Constitution than some of the members of this committee, but I do not offhand think of any constitutional amendment which is as involved as this one.

Mr. FREUND. Well, for one thing, Senator, this would deal with two topics—disability and succession—which could be in the form of two amendments. Furthermore, the Presidency has been a very complicated textual part of the Constitution, as you know. The 12th amendment is quite complex.

Senator KEATING. Well, I respect your viewpoint.

Mr. FREUND. Actually, when you analyze the proposal, it is really quite simple.

Senator KEATING. Yes; it is not particularly complicated and I do not have too much objection to it. I would just like to see something done and I just do not think that you will ever get through 38 State legislatures if you do get a two-thirds vote in the Congress, that you will ever get through a proposal such as this. I hope I am wrong, because I hope that whatever we come up with will permit the support of the State legislatures and I share the view that it is more important to do something than to do any specific thing.

Mr. FREUND. Yes. I would agree, Senator. I am a little troubled whether Congress, having been given the authority, would reach a consensus and one that would be satisfactory to the then President. This is another contingency under the open-ended or skeleton version of an amendment.

Senator KEATING. Well, that is a possibility, but certainly you would have a better chance of getting the majority vote in the Congress than you would a two-thirds vote for a specific proposal at this time.

Mr. FREUND. Well, except that this is a specific proposal which also given Congress full authority to decide on another body. It really takes nothing from Congress. It adds to or confirms the power of Congress, but meanwhile fills the void.

Senator KEATING. And by that very token, it seems to me it is open to the objections which you raised to the general proposal. This would have debate from both sides of the State legislatures, because they would say, "Well, we do not want to give the people that you feel might cause trouble—say we do not want to give Congress—the power to make a change, and if that provision will just be deleted, we will take up the amendment again." Well, the trouble with a constitutional amendment is, as you know, you cannot amend it in the legislature in New Mexico.

Mr. FREUND. Well, we are getting into subtle psychological projections. I think, really, my fear is that if Congress is given this power in blank, so to speak, and in view of the urgency of the situation, a measure might be adopted and approved by the President which would not have commended itself to a Congress and a President acting more reflectively and deliberately.

Senator KEATING. Then they could change it. If it is by law, then they can change it at any time. If they have it tied into a constitutional amendment, then it is not open to change.

Mr. FREUND. Well, it is open to the extent that the amendment leaves it open. To be specific, Senator, I think there is a great basic issue here of separation of powers, whether the predominant authority in determining disability shall be on the executive side or on the legislative side. Some of the proposals in the past, as you know better than I, have reflected, in turn, each of these positions.

Now, the amendment proposed by the bar association does resolve that issue, largely on the side of the executive but not wholly, because in the most solemn and difficult and desperate contingency, where there is a division within the executive branch between the President on the one hand, and the factfinding body on the other, in that ultimate, desperate contingency, the problem is left to Congress by a vote

which is weighted as in impeachment on the side of the President. So from every point of view, it seems to me, the proposal is a balanced one.

May I say, Senator, for the record, that I heartily agree with your position on the question of associating the judiciary in any such fact-finding body. I would recall that we have had at least one experience in history where a member of the Supreme Court has been associated in the selection of a disputed presidential office; namely, the Hayes-Tilden Electoral Commission of 1876-77. As you know, the chairman was Justice Bradley, selected by the four other Justices who were on the Commission; those four representing two parties equally and Justice Bradley being designated as the nonpartisan chairman, and of course, associated with the other members represented by Members from Congress.

Now, there is every reason to believe that Justice Bradley did his work faithfully and conscientiously, but I would say in retrospect that it did no good to the Court, to Justice Bradley, or to the country to put that issue, even though it was in form an issue of law, more clearly than the inability of the President would be a typical legal or judicial function—even though it was in the form of an issue of law, it was so close to the bone of party politics, as the succession or disability would be, that the judiciary really ought not to be involved. It seems to me on a proposition where every member of the Supreme Court, as you have reported through Chief Justice Warren, is in agreement, in that almost unique present-day situation, there is a strong presumption that the proposition is sound.

Senator KEATING. Thank you very much.

Senator BAYH. Thank you very much, Professor Freund. You have added immeasurably to our record and we trust that you will make your appointment.

Mr. FREUND. Thank you very much.

Senator BAYH. Next on our list of witnesses is the Honorable Herbert Brownell, former Attorney General of the United States, and president of the Association of the Bar of the City of New York.

Mr. Brownell?

Senator KEATING. As a fellow New Yorker, I want to join in welcoming the former distinguished Attorney General, who is now a very successful and illustrious practicing lawyer in New York City, the center of finance, culture, and all good things. We welcome him here.

I know we shall benefit by his testimony.

STATEMENT OF HERBERT BROWNELL, PRESIDENT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. BROWNELL. Mr. Chairman and Senator Keating, I have a brief statement. Is it all right if I read it?

Senator BAYH. Fine.

Mr. BROWNELL. Presidential disability and the related question of presidential succession constitutes major constitutional problems. Every thoughtful citizen will welcome the intensive efforts of your committee to resolve them. Our very survival in this age may rest upon the capacity of the Nation's Chief Executive to make swift and

unquestioned decisions in an emergency. Therefore, it becomes of critical importance to provide the machinery for such decisions at the time of temporary presidential inability to discharge the powers and duties of the Presidency.

As has been mentioned before this morning, students of the Constitution have differed for many years over the meaning of the paragraph in the U.S. Constitution which deals with presidential disability. The Senate Judiciary Committee has in the past collected the data from relevant researches which have been carried on, from which I believe it is reasonably clear that it was the original intention of the framers of the Constitution to have the Vice President on his own initiative assume only powers and duties of the Presidency, not the Office of President, during any period of presidential disability. But one cannot ignore the fact that a division of opinion has existed and still exists over the constitutional validity of a temporary devolution of presidential power.

In other words, some persons insist that the Vice President takes over as President for the balance of the presidential term. It is probable, certainly it is possible, that in any future crisis concerning presidential disability the same conflicts in opinion would arise. History and logic demonstrate that if a Vice President is to take the monumental step of assuming the powers of the Presidency even for a specific temporary period, he must do so by reason of unquestioned authority that satisfies public opinion.

Ordinary legislation, without a constitutional amendment, would only throw one more doubtful element into the picture for the validity of such a statute could not be tested until the occurrence of the presidential disability, at the very time at which uncertainty must be precluded. The simple fact is that no mere statute can alter, transfer, or diminish vested constitutional power. Even a statute which sought to do nothing more than declare the original intent of the framers would have to be construed in the light of previous constitutional interpretations and the precedents based on those interpretations, and would therefore be valueless in resolving doubt and uncertainty.

The first point I would make, therefore, is that a constitutional amendment, not merely a new statute, is necessary to solve the presidential disability problem.

Many persons who have considered this problem have assumed that its most important aspect is the factual determination of presidential inability. But the history of 170 years shows no real difficulty attends the determination of when or whether a President is unable to perform the duties of his Office. The crux of the constitutional problem has been, and I believe will be, to insure that the Vice President can take over with unquestioned authority for a temporary period when the President's disability is not disputed, and that the President can resume Office once he has recovered.

So long as there is a lingering doubt as to whether the Vice President, in the event of presidential disability, assumes not merely the powers and duties of the Presidency, but the Office itself, our history has shown that a Vice President will not in fact act to assume the powers and duties of the Office for fear that he will be accused of illegally ousting the President from Office during the balance of his term.

I support the proposed solution of this problem as presently set forth in Senate Joint Resolution 139 by Senator Bayh, which states that 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.

Here I might interpolate the point sometimes overlooked, that the President may be en route abroad or otherwise out of reliable communication for meeting an unexpected emergency and in such event he may wish for national security reasons to transfer to the Vice President the powers of his Office for a specified period, perhaps even for only a few hours.

Senate Joint Resolution 139 further provides that if the President does not so declare in writing, the Vice President, if satisfied that such inability exists, shall, with the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the Office of Acting President. I also support the provisions of Senate Joint Resolution 139 as to the detailed machinery by which the President would resume the discharge of the powers and duties of his Office at the end of the period of disability.

The Vice President with the written approval of the heads of the executive departments may, however, declare that the disability has not terminated, whereupon Congress shall consider and decide the issue under the procedures that are set forth in Resolution 139.

I would like to make this point also: That ultimately the operation of any constitutional arrangement depends on public opinion and upon the public's possessing a certain sense of what might be called "constitutional morality." Absent this feeling of responsibility on the part of the citizenry there can be no guarantee against usurpation. 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 popular sense of constitutional propriety exists.

I believe that the combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative and judicial branches of the Government.

By way of contrast, the advocates of some specially constituted group or commission to determine Presidential inability face many dilemmas. If the President is so incapacitated that it is obvious that he cannot declare his own inability, no need exists for a factfinding body. Nor is a factfinding body necessary if the President can and does declare his inability.

If, however, in a most unusual situation, the President and those around him differ as to whether he does suffer from a disability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission almost regardless of its makeup runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able for the time being, to perform the powers and duties of his office? What power could he exert during the rest of his term, by common knowledge, a change of one vote in the commission proceedings could yet

deny him the right to exercise the powers of his office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause him summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

To summarize, my reasons for supporting the principles of Senate Joint Resolution 139 on Presidential disability are:

(1) It deals with the question by constitutional amendment rather than statute;

(2) It makes abundantly clear that when the President is disabled the Vice President takes over the powers and duties of the Presidency only as the Acting President for the period of the disability;

(3) It provides that the President may voluntarily declare his inability and that if he does not, the initial determination of fact shall be made within the executive branch—that is by the Vice President, on the written approval of a majority of the heads of the executive departments in office;

(4) The President may resume the powers and duties of the Presidency upon his own declaration that he is again able to handle them; the Vice President and majority of the heads of the departments in office may so certify, and in such event, Congress, in the final analysis, shall settle the disagreement.

Most important, this proposal achieves these goals in consonance both with the original intent of the framers of the Constitution and in consonance with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

I have also been asked to comment on the proposed solutions for the problem of succession to the Presidency in the event that neither the President nor the Vice President is in office and able to exercise the powers and duties of the office. This problem, too, is a most important one and calls for prompt action. In my opinion it would be advisable to provide in the same constitutional amendment which deals with the question of Presidential disability, a provision that when a vacancy occurs in the Vice Presidency, steps shall be taken immediately, in a manner to be defined in the amendment, to fill the vacancy in the Vice Presidency for the unexpired term.

This would minimize the risk that our Nation will be faced with a situation where neither the President nor the Vice President is available. Of the various suggestions that have been made as to how to fill the Vice Presidency vacancy I support the solution set forth in Senate Joint Resolution 139 that the President shall nominate a person who, upon the approval of Congress, shall serve as Vice President for the unexpired term.

We are all familiar with the fact that at the regular quadriennial national conventions of our political parties, it is the practice of the conventions to turn to the newly nominated presidential candidate to ask him to choose the vice presidential candidate subject to convention approval. Under Senate Joint Resolution 139 the President would likewise be called upon to choose his second in command, but subject to congressional approval. In this way the public would be assured that

the Vice President would be of the same political party as the President and would be someone who could presumably work in harmony with the basic policies of the President.

I am aware of the fact that suggestions have been made that the new Vice President should be chosen by the electoral college and, in theory, this plan has merit.

However, I am of the opinion that there are enough hazards involved in such a proposal as to make it an impractical solution. The use of the electoral college machinery would mean that the various States would have to work out methods of filling the vacancies which had occurred in the college since the preceding presidential election. Many procedural problems would also be involved in organizing an emergency convening of the electoral college. These would be cumbersome and time consuming and subject to legal challenge at a time when prompt action was called for. Presumably, some of the difficulties which I mention could be eliminated by careful framing of a plan to use the electoral college, but I see no way of eliminating two basic objections: (1) The delay would be greater than under the proposal set forth in Senate Joint Resolution 139, and (2) the person chosen by use of the electoral college machinery might not be compatible with the then President.

If the plan envisaged in Senate Joint Resolution 139 is adopted, that is, the President shall nominate a Vice President subject to approval by Congress, a major aspect of the succession problem will have been satisfactorily solved. There remains the possibility, however, that the Nation might be faced with a cataclysm under which neither a President nor Vice President is constitutionally available to discharge the powers and duties of the offices of President.

I believe, therefore, that the constitutional amendment covering the succession problem should provide that in such event, succession shall devolve upon the heads of the executive departments in the order of their establishment. This plan of succession was in effect during much of our national history until 1947. It has the advantage over the post-1947 succession plan of not involving the contemporaneous disruption of leadership of the legislative branch of the Government at a time when there is disruption in the leadership in the executive branch.

I recently participated in the Conference on Presidential Inability and Succession convened by the American Bar Association on January 20, 1964, the one that Professor Freund mentioned. This conference was composed of persons familiar with the constitutional problems we are discussing today. In the beginning, they differed widely in their views just as individual Senators probably do. But they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences. They agreed on the principles of a solution which are basically contained in the solution I have recommended. Their recommendations were later approved by the house of delegates of the American Bar Association and, as I understand it, have also been approved by the Association of American Law Schools.

In closing, I wish to express my appreciation to the chairman and the members of the subcommittee for the invitation to be present here today and participate in your deliberations which I trust will eventuate

in a solution of two of the most vexing constitutional problems with which this distinguished committee has dealt over the years.

Senator BAYH. Thank you very much, Mr. Brownell. You pointed out one thing I don't believe any of the previous witnesses have touched upon. In the disability provisions that are contained in the American Bar Association consensus or in Senate Joint Resolution 139, the procedures contained therein would not be called into play in most cases, but would be obviated by the simple fact that the Vice President or the President himself would deal with the situation.

Mr. BROWNELL. I think that is right.

Senator BAYH. Let me ask you one question which I have had in mind here. Is it wrong that the Vice President and the Cabinet working together are not what you would call completely disinterested parties in a matter like this? The fact that the Vice President has been timid in the past, would this be remedied by giving him a procedure which he could follow? What is your feeling about this criticism which has been expressed?

Mr. BROWNELL. If I could draw on my own experience here, I was in office at the time of President Eisenhower's heart attack. This was the first time in our generation that this problem had arisen, and, of course, there was very great disturbance throughout the country as a result of it. You will recall that when there was doubt at the beginning as to the seriousness of his heart attack, the solution, the ad hoc solution that was called upon was to have the Vice President consult with the members of the Cabinet and from time to time make statements as to the seriousness of the situation. There never came a point where the Presidential powers had to devolve upon the Vice President, because of the fact that we were very fortunate, it was a time when no great international crisis was involved, Congress was not in session, there were no bills to be acted upon, so we did not ever have to actually exercise the powers.

Senator KEATING. That time will never recur again. Congress will always be in session and there will always be an international crisis.

Mr. BROWNELL. That is right; that seems to be the modern precedent.

The point I was going to make was this, that there was general public acceptance throughout the country that this was a sensible way to act. It gave me a very strong feeling that public opinion would support this solution. I think that is a very important factor.

Senator BAYH. Did you feel any great tugging between the need to be loyal to the disabled President or the feeling that you had better not be too loyal because the Vice President might in fact soon be in authority?

You have had more firsthand experience than anyone else we have had before us to date. Let us know the inner feelings of the Cabinet and how it would react in the situation.

Mr. BROWNELL. Well, I think that their first basic loyalty and the loyalty that the people would expect them to have is to the President, and I think that is a very good thing in consideration of this proposal. Because there is one thing that the people do not want. They have elected this man and the people, the majority of the people have supported him, they want him for their President and they do not want to take any chances of usurpation of power. I believe that this system would guard against any such rash action, or any danger that the decision might be made by persons who are unfriendly to the President.

Senator BAYH. Do you have questions, Senator Keating?

Senator KEATING. For the record, I think it should appear that Mr. Brownell is now president of the Association of the Bar of the City of New York.

But as I understand it, you are testifying here this morning as an individual, not as the President or as a representative of the Association of the Bar of the City of New York?

Mr. BROWNELL. That is correct. Although I have consulted the chairman of the committee involved and told him the story of the consensus of opinion by the American Bar Association conference and the subsequent action of the house of delegates of the American Bar Association and of the Association of American Law Schools. He has told me that he believes it quite clear that in the interests of expediting action on this matter, bringing this national debate to a conclusion, that they would be prepared to go along with the so-called consensus.

Senator BAYH. If I may interrupt just briefly, I think as long as we are clarifying the record, I think Mr. Martin Taylor yesterday said he was speaking only as the chairman of a committee of the New York State Bar Association, not in behalf of the entire bar association. As I recall, in fact, there were several members of the delegation of the State of New York who had joined in the consensus. Am I right?

Senator KEATING. I may be wrong. I thought Mr. Taylor was speaking for the New York Bar Association.

Senator BAYH. It has been my information—Mr. Brownell, you may care to speak to this point.

Mr. BROWNELL. I think I am correct in the point that he speaks for the committee and there has been no official declaration on the part of the New York State Bar Association.¹

Senator KEATING. A witness from the bar of the city of New York spoke for the Federal committee on—

Mr. BROWNELL. The Committee on Federal Legislation.

Senator KEATING. The Committee on Federal Legislation, chaired by Mr. Gasparini, when they previously testified in these hearings. I would respectfully suggest that if they are going to reverse their position now, it would be well for them to put that on the record, because they are already on record in favor of Senate Joint Resolution 35 introduced by Senator Kefauver and myself.

Mr. BROWNELL. I like that suggestion and I shall take the initiative in that.

Senator KEATING. It will clarify the situation.

You, I take it from your testimony, would be opposed to the suggestion that has been made about a temporary statute pending the passage of a constitutional amendment to solve the Presidential disability problem?

Mr. BROWNELL. I would think that there might be some danger in that, that the argument might then be made that the constitutional amendment was not necessary and I think it is so terribly necessary in order to solve the uncertainty.

Senator KEATING. I certainly agree with the school of thought that thinks you can not do this by statute. I am opposed to the idea of such a temporary statute.

¹ See telegram of Martin Taylor, p. 262.

Now, I have said on many occasions and I repeat that I think action is more important in this field than specific action and we thought we had arrived at something when we unanimously reported out Senator Kefauver's resolution, Senate Joint Resolution 35. One reason for his agreement with me as the ranking minority member of that committee and with the Attorney General, who favors Senate Joint Resolution 35—one reason for our consensus was that while we had differing views as to the preferable method of meeting this problem of disability, we felt that as a practical matter, about all you could expect from Congress and then three-fourths of the State legislatures was to have a constitutional amendment giving authority to the Congress to act in this field.

Now, you have served in the State assembly and you know something about the merits and shortcomings of these legislative bodies. You have served in a distinguished way in the New York State Assembly. You might have been speaker if you had stayed there. Do you not envision in the State assembly a considerable debate over a constitutional amendment of the length of this document known as Senate Joint Resolution 139, and do you not think that when you try to get specific as to how inability is to be determined, you are raising hurdles which are apt to result in no action at all—more apt to result in it than if you just say, all right, we are going to give Congress the power to act in this field?

Mr. BROWNELL. I would like to comment on that. In the first place, I can quite understand the reasoning which went into the decision that you mentioned to report to the actual committee the Senate Joint Resolution 35. Since that time, an awful lot has happened. The assassination of President Kennedy brought this subject into sharp focus again and that, on top of the heart attack of President Eisenhower, meant that twice in our own recent lifetime, this problem has shaped up as one of really major importance. These recent happenings, I think, have also brought the attention, especially in the last few months, of the public to the relationship of the succession question to the disability question. That has been clarified in a way which was not as clear to a great many people, including myself, even as short a time as a year ago. So I do not think there is anything inconsistent about having been for Senate Joint Resolution 35 a year ago and now recognizing the greater complexity of the problem and the interrelationship of the succession problem with the disability problem with which 139 deals.

Now, so far as the reaction of the State legislatures is concerned, it appears to me this way. First, the public opinion in favor of a decision in this matter is really, I think, overwhelming and it would be very well received, I think, throughout the country, if the Senate and the House brought this debate to a close and presented a specific problem.

The narrower point that you mentioned is would it be as a practical political matter, easier to get through a proposal, if it is a three-line proposal which leaves everything to Congress than it would be to get through the four and a half page amendment, which is of usual length?

I think that there would be, since this deals with the separation of powers between the three branches of our Federal Government, it be-

longs to the people to make that decision rather than any one branch of the Government itself, and that there would be more support throughout the country for a, well, what you called a detailed plan, the longer plan, because it settles with some certainty the framework of the change, leaving, however, the flexibility Professor Freund mentioned for eventual action by the Congress if needed.

So that I am inclined to think that it would be fully as acceptable, if not more so, in the legislatures of the various States, to have before them a detailed plan, detailed because of the importance of the problem, and because the people themselves, I think, basically do not want to have one branch of the Government have discretionary authority over the extent of the powers and duties of another branch.

You fought for that, I know, many times in other contexts here, first in the House and then in the Senate. That is as basic a problem as we have; that is, maintaining the proper separation of powers. So that that, to my mind, is much more important and outweighs the disadvantages of having more words than the shorter plan had.

Senator KEATING. Well, you may be right about it. It is 180° opposed to the unanimous conclusion that we reached a year ago.

Mr. BROWNELL. Well, 2 years ago, of course, the subcommittee reported out the more detailed plan on inability, with bipartisan support.

Senator KEATING. Yes; they did; that is true. That was in our minds when we discussed this last year, and our conclusion unanimous of the subcommittee was that it would be a mistake to try to do that. That other one never got to first base and now Senate Joint Resolution 35 has not gotten to second base. It has gotten just as far as the other one, reported out of the subcommittee and resting on the agenda of the full committee.

Mr. BROWNELL. I do think the recent happenings that I mentioned, and I know that this is in the minds of all of you, have dramatized these issues to an extent that did not appear possible, even just a short time ago, and that if the Congress exercises its best judgment as to the proper solution, the State legislatures know the people are not going to be too much worried about whether that constitutional amendment consists of 100 words, as long as it is right.

Senator BAYH. Probably at no other time in our lives has there been more dramatic and tragic happenings in the normal course of history to alert the entire population to the need for a piece of legislation.

Mr. BROWNELL. I believe that is true.

Senator BAYH. Mr. Brownell, I thank you very much for spending some time with us and letting us have the benefit of your experience at a time of crisis in our country when you have had the insight that only a few have had.

Mr. BROWNELL. Thank you.

Senator BAYH. Our next witness is the former Attorney General of the United States, Mr. Francis Biddle, who has been very patient waiting to be with us.

STATEMENT OF FRANCIS BIDDLE, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BIDDLE. It is a privilege to be called to testify on this. I think it is the most difficult problem, or part of it is the most difficult prob-

lem, that I have ever touched at all. I had prepared an interesting discourse and got Mr. Conrad to copy it for you, then looked it over yesterday and found that it was entirely inadequate and I had already, after a little study, changed my opinion.

May I for the moment divide the issues here? It seems to me that two issues are exceedingly simple. The other issue, the disability issue, is extremely complicated, complicated by the difficulty of foreseeing the future, which complicates all legislation.

Now, I entirely approve the suggestion of the bar association, which I understand General Brownell is also in favor of, of the Vice President being, where there is a vacancy in the Vice President's office, appointed by the President subject to the approval of the Congress.

I do not think there is any objection to the Constitution. I think it carries out the genius and tradition of our Constitution and the practice, because after all, the President does in fact nominate his Vice President at the conventions. So from the popular point of view, it seems to me completely understandable.

The other question which, I think is simple, and I do not mean simple in the sense of there being difference of opinion; I mean simple in a solution which can be understood and is brief and short and practical—the other question is the question of succession. I have always felt that succession statutes were badly drafted, in view of the fact that they designated offices, because they designate, really, individuals to be chosen in the future, of whom they have no idea whether they will be competent or incompetent, and it seems to me to designate a Secretary of State or the Speaker of the House to act, in case there is neither President nor Vice President, for that reason is a bad thing.

It seems to me that a perfectly simple way of doing it would be to put it up to Congress. Why cannot Congress elect a Vice President? They have other similar functions, and it seems to me that it would fit in with those constitutional provisions with respect to the lack of a majority in the Presidential election which, in a certain sense, this falls into.

So much for those two things.

Now, the disability agreement, which I think is difficult—let me for a moment look at the two disabilities in the past: first, Garfield and then Wilson. Now, they were both very bad. I think Garfield was practically unconscious for something like 80 days and President Wilson for a far longer period than that was not in condition to do his work. That seems to me to show that it is essential to provide specifically for whatever body acts to make the suggestion of the successor subject to the approval of the Congress, to have in mind total disability of the President, to be considered immediately. That has never been sensed through some, perhaps, sentimental reason. I should have thought that Garfield should have been declared unable to carry out his functions immediately, and probably so President Wilson. There might be a little more doubt in that. Therefore, that power should also be put into any either constitutional amendment or statute, whichever you wish to use.

Now, how, exactly, could that be done? It seems to me that it is inconceivable—I believe in concentrating power in a case like this in as few hands as possible. I think we are sometimes afraid of that.

I am more inclined to trust the Cabinet to be loyal and to trust them not to conspire against the President, to trust the Congress to follow along the responsible administrative suggestions than to distrust them. Therefore, the somewhat complicated mechanisms that have been suggested, I think, are without merit.

I would even consider the possibility, and I think incidentally in connection with what General Brownell so admirably covered toward the end of his talk, I think the country will take anything that is readable and not too long, because I think they feel very much this very desperate situation. I think they will take it, particularly if it is done promptly at this psychological moment. But it seems to me that there is no reason for appointing a commission. I think it very bad to drag the Supreme Court into this kind of consideration.

I have no doubt, although not by direct information, that the Chief Justice recently accepted this appointment reluctantly but like a command from royalty and felt he ought to do it. I think it was a mistake to do it. I think it was a mistake to appoint Bob Jackson. For over a year, Bob Jackson was away from the Supreme Court. Chief Justice Stone, as you all know, felt it terribly and was continually complaining about the burden of work that was to be done. It is not so much, I think, the technical separation of powers as what it does to the Court psychologically. The Court has a good deal of criticism to meet, particularly at this time. To add to that burden by giving them other jobs seems to me particularly unwise, although I think no specific, particular harm has been done.

Let me say one simple thing, and then I shall welcome questions, because when you have practiced before the Supreme Court, you cannot get used to not having many questions.

What are the general considerations we should bear in mind? First, I think, unity—unity of the administrative process in this type of crisis. There is no time now, apparently, that does not touch on crisis—that sort of unity. Now, unity means speed. Speed can best be attained by a small group of persons exercising it. I suggest for your consideration, although I know it is a suggestion which perhaps will not be warmly received, that it is not necessary to call the whole Cabinet together to approve what the Vice President suggests about the inability of the President. I would have a group of perhaps three men—three is an admirable group, because there is always a majority—three men suggest that the President has been disabled and then send it to the Congress or not. I would not send it to the Congress if the inability was temporary in their opinion. I would, of course, send it to Congress if they suggested that the inability was permanent. And I would so frame the amendment or the enabling statute so as to provide that the mere serious sickness of the President could be the basis of his being unable to continue. The pressure of that office is so terrific that it seems to me unwise to permit a very sick man, even if he can sign his name, to continue this exercise.

Now, one other thing about the approach. I disagree with Mr. Brownell about the length of the constitutional amendment. Long constitutional amendments are apt to deal with details. I think, for instance, Senator, that your admirable bill, and I think it is much the best bill that has been drafted so far, could be shortened if you have in mind an enabling statute to use as well. I think that a single

very brief phrase, following, I think, section 6 of article II, the old constitutional provision—you have that in mind, of course. I think it could be very briefly phrased to provide simply that when the President is disabled, action should be taken to substitute the Vice President during his temporary disability, or to remove him in case of permanent disability. It can be very brief, if you want to do it that way.

And you might wish, if you wanted to do this in separate bites, to get rid first of the present situation by providing that the President can nominate the Vice President, as a single constitutional amendment to be followed up later by the disability amendment. I think that at least should be considered. I know the urgency and importance of this, but do not forget it has been a great many years since this has been done and perhaps it might be wiser to bite off one hunk at a time. I am not certain of that. That is the thing which you gentlemen in the Senate and House are more able to deal with.

I think that is about all I have to say, but I do think that this needs a second very careful look—your bill, I should say—with respect to drafting.

I think as a first draft, it is excellent, and you always start a first draft and say, now, come in and help me on it. I would get the best draftsmen you can—perhaps you have one here. If not, Paul Freund would be an excellent draftsman, or perhaps Professor Wechsler, head of the Law Institute at Drexel. Take what you want to do and what the statute provides and then add or deduct from that and divide it into two things: one your constitutional amendment and the other your statute, facing each other. It is an excellent way of seeing how much the statute can carry the constitutional law, if that is desirable. I dislike any details in the Constitution. They always cause trouble.

Senator BAYH. Thank you very much. Let me say your testimony has been of very great value to us. Let me add that Senate Joint Resolution 139, which was referred to by General Brownell, was introduced by myself and several colleagues, but I have no particular pride in authorship.

Mr. BIDDLE. You should not give yourself away that way, Senator.

Senator BAYH. This is a place from which to start, and I subsequently have expressed my willingness to exert all the power at my command, which is subject to some debate, of course, toward the proposal of the American Bar Association consensus group which has made some changes in our original proposal. I think that we need to come up with some consensus and, indeed, your suggestion has been helpful. We are going to continue to look.

Mr. BIDDLE. We need a little more thinking. I think it is not quite enough imagination.

Senator BAYH. I would like to point out there are some areas of the Constitution and subsequent amendments that your predecessors in Government have felt were very difficult to deal with in generalities. As you well know, the electoral procedure itself as embodied in the 12th amendment is a very detailed procedure, as well as the impeachment proceedings.

Mr. BIDDLE. I realize that. I am not sure that is not better than what happens when you put details in. I think the other details will turn up. I think both considerations are important.

Senator BAYH. Let me ask you one or two questions to clarify for the record your position, if I may.

You mentioned that you thought that Congress could and should elect a new Vice President because of the need for the Vice President to work harmoniously with the President. Do you have any objection—

Mr. BIDDLE. No; I did not say that. I said if you want to have a succession bill.

Senator BAYH. I am sorry.

Mr. BIDDLE. A succession bill where no President or Vice President exists should be elected by Congress. I said with respect to filling the present vacancy, that should be filled by the President, with a majority of the Congress.

Is that not what you provide?

Senator BAYH. Fine. Then you were talking only about what you would do if we lose both the President and the Vice President?

Mr. BIDDLE. That is it exactly.

Senator BAYH. Fine.

Do you believe that in the event we have a disability situation, where the President is disabled, that the Vice President, on assuming the duties of the office, should be the President or merely the acting President for the term of office, even if it is a relatively permanent disability?

Mr. BIDDLE. I think it is a very close question. I am inclined to think that where there is total disability, he should become President. Where there is partial disability, he should only carry out the powers of the Presidency.

There might also be wisdom in providing that after the disability had lasted a certain period of time, then it should become a total disability. That would be, perhaps, statutory, or whatever method you use. Because when a man with a stroke has been sick for 2 months, it would seem wiser even if he recovers to put in someone else who can do his job better and not submit him to the pressure of death under his job.

Senator BAYH. You have been a member of the Cabinet, of course. In fact, you were a member when we were subjected to a crisis on the death of one of our great Presidents. During this tenure of office, would you care to comment on your feelings as to what you feel the strain or the question of loyalty would be if the Cabinet officials were given the responsibility of determining whether a President was disabled or whether they would be torn between loyalty to their Commander in Chief or to the Vice President who was needed to fill the office? How do you feel about the Cabinet officers' loyalty?

Mr. BIDDLE. Let me put it this way. I would feel that the actual Cabinet, with one exception, whose name I shall not mention, were completely loyal to the President. I think the enlarged war Cabinet, in which the heads of many other offices sat in on Cabinet meetings, like even Fiorello La Guardia—I cannot remember his function for the moment—sat in on Cabinet meetings. I think the Cabinet were really thoroughly loyal to the President, thoroughly so. I was a little surprised at this—it is a small matter, but I think it was in your bill, you used in one instance the expression "the heads of the executive

offices" and in another, the succession bill, outlined them by name. Was there a reason for that, sir?

Senator BAYH. Yes; because there is some question as to whether the revision in the Defense Department, in which we had the Secretary of Defense now supersedes the Army, Navy—

Mr. BIDDLE. Oh, I see. Is it very clear in the law what that phrase means, "the heads of the executive offices"?

Senator BAYH. The drafters of the bill suggested that this was the best way to get what we wanted, to put the Secretary of Defense in his position.

Mr. BIDDLE. Why not mention them the way you did in the first section?

Senator BAYH. Here again we get into more words.

Mr. BIDDLE. That ought not to be in an amendment, anyway. It need not. You can pass a succession act today, can you not? Is there any constitutional problem in that?

Senator BAYH. None whatsoever as far as a succession act. But this was dealing with part 3 of our bill.

Mr. BIDDLE. You are quite right, yes. But you know, like any group, there are always leaders of a group and, roughly, I think you can pick the leaders out by their jobs in today's Cabinet—five, if you would like. It might be well, considering that we must have unity in American policy as long as possible. Otherwise, the papers abroad begin to speculate at once.

Senator BAYH. Unity and I think we can add public acceptance if we are going to have a smooth transition during a crisis. Has it been your experience that the public in general would accept this responsibility being placed upon the President and the Congress as far as a replacement of a Vice President?

Mr. BIDDLE. Oh, completely. I do not think there would be the slightest doubt. I think now they will accept almost anything within reason that you will give them. I think General Brownell was so right about that. I do not think it is a problem of ratification.

Senator BAYH. Attorney General Biddle, I want to thank you very much on behalf of the committee.

Did any of you gentlemen have any questions?

Mr. LEBAN. I would like to say, of course, Mr. Chairman, that a transcript of this will be available to Senator Keating and I know he will want to go over your remarks very carefully, General Biddle, when he gets the transcript.

Senator BAYH. Thank you very much for joining us this morning. The next session of the committee will be on Friday morning, and the following session will be on the 5th of March, which may or may not be the final session. We hope to be able to draw to a close as rapidly as possible.

We are recessed.

(Whereupon, at 12:25 p.m., the committee recessed, to reconvene Friday, Feb. 28, 1964.)

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

FRIDAY, FEBRUARY 28, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh, Johnston, Keating, and Fong.

Also present: Larry Conrad, counsel; Clyde Flynn, minority counsel; Mary Day, chief clerk, and Abbott Leban, counsel to Senator Keating.

Senator BAYH. The hearing will please come to order.

We are happy this morning to have joining us a member of the full Committee of the Judiciary, the distinguished Senator from South Carolina, Senator Johnston, who is going to participate in our hearings today.

Senator, do you have any comments to make?

Senator JOHNSTON. I have no comment. Just to gather information.

Senator BAYH. Fine. We are all trying to do that.

The committee is fortunate this morning to have four witnesses who are not only experts in the field of constitutional law but who have made extensive and dedicated studies of the problem of Presidential succession and inability.

Their knowledge of this subject will be of great assistance to this subcommittee in its attempt to find solutions to this problem and present them to Congress.

Our first witness this morning is Mr. John D. Feerick, who recently served on the American Bar Association's panel on Presidential inability and succession and who, in addition, has written various articles on the problems we are considering.

Mr. Feerick, it is very good to have you with us this morning.

Mr. FEERICK. Thank you, Senator, it is my pleasure.

Senator BAYH. We are very happy to have you take time from your busy schedule to be with us.

STATEMENT OF JOHN D. FEERICK, ATTORNEY

Mr. FEERICK. Thank you, Senator.

I am greatly honored, Mr. Chairman, by your invitation to appear here today and testify on the vital problems of Presidential inability and succession. I think this committee is performing a public service of the highest order. Inability and succession are not election issues.

Few votes will turn on whether or not this committee or the Congress does anything about these issues. What will turn on whether these problems are solved is the continuity of our Government and, perhaps, the very survival of this Nation.

I would like to address myself this morning to the subject on which I have spent most of my nonoffice time during the last 2½ years. That subject is Presidential inability, and I consider it to be the most important problem facing this committee and the Congress today.

My study of this subject culminated in the publication, in the October 1963 issue of the *Fordham Law Review*, of an article entitled "The Problem of Presidential Inability—Will Congress Ever Solve It?" I said in that article and I say it again: It is imperative that Congress act now.

On November 21, 1963, this problem was all but forgotten by the Congress and the public. On November 22 it almost caused a national crisis. Had our late President lived, hovering unconsciously between life and death, there would have been no one clearly authorized either to say that the President was unable to make a major decision if one had to be made. The circumstances surrounding the death of President Kennedy should have taught us that we can no longer afford the uncertainty that presently exists regarding the critical problem of Presidential inability.

Perhaps one of the main reasons for the continued failure to solve this problem has been the great diversity of proposals. All have some merit. None is completely without objection. Each proposal has its adherents. No proposal has ever commanded enough support to be adopted. I am convinced that this problem can be solved.

However, I am equally convinced that the problem will never be solved if the trend persists whereby each of us stubbornly adheres to his own point of view. If this problem is ever to be solved men must agree and if they are to agree, they must actively work at it.

The time has come for those who are genuinely interested in the safety of this Nation to stop emphasizing those points on which they differ and to start emphasizing those points on which they agree. It is urgent that the problem be solved now. To miss this opportunity and again leave unsolved one of the most serious problems ever to confront the Congress would be to trifle with the security of this great Nation. Therefore, we must make every human effort to agree on a workable solution.

A tremendous advance in the effort at agreement was made a little over a month ago. At that time the most workable solution which I have seen to date was proposed by a group of lawyers who were called together by the American Bar Association.

That group included a former Attorney General of the United States, a former Deputy Attorney General, presidents—past, present, and future—of the American Bar Association, professors of law, and practicing lawyers. It should be noted that the members of the group represented a variety of points of view regarding the question of how to solve the problem.

The group spent 2 days in closed session examining the various proposals to solve this important problem. It issued, at the close of its deliberations, a consensus which has been endorsed by the American Bar Association and other groups. The very fact that 12 individuals

who represented nearly as many points of view could reach such a consensus is, in my opinion, a tremendous thing.

The consensus is, necessarily, a compromise, but it represents those points on which a group of persons who had studied the problem could agree. For that reason, it offers the best hope of solving this problem and, therefore, I support it wholeheartedly.

I know you are familiar with the recommendations of this group, Mr. Chairman, but I feel that they are of sufficient importance to justify my briefly examining and explaining them.

First, the panel agreed that a constitutional amendment is necessary to solve the problem. An amendment was thought to be essential for several reasons. Some members of the panel believed that Congress has no power at all to legislate on this subject—that it merely has the power to legislate on the line of succession beyond the Vice President.

Most of the panel believed that the Vice President now has the constitutional power to determine inability and, therefore, this power could not be, constitutionally, taken from him by legislation. The panel further believed that if a legislative solution to the problem were enacted, it would be subject to constitutional challenge which would come very likely during a time of inability—when we least could afford it.

I am happy to say that I think that the necessity for a constitutional amendment is one point on which most people agree.

Second, the panel recommended that an amendment make it clear that in cases of inability the powers and duties of the Presidency devolve on the Vice President for the duration of the inability, while in cases of death, resignation, and removal, the office of President devolves for the rest of the term.

This would eliminate the fear that the Vice President would oust the President if he acted as President in a case of inability. It would also give constitutional recognition to the Tyler precedent.

This is another point on which most people agree.

Third, the panel recommended that the President be able to declare his own inability in writing. There is no good reason why this should not be.

Again, most people are in agreement here.

Fourth, to meet the case where a President is disabled but is unwilling or actually unable to make a determination, the panel would give the decisive role to the Vice President and the Cabinet. In such a case, the Vice President, with majority approval of the Cabinet, could make the determination.

The panel believed that the Vice President should not have the sole power as he would be an interested party and, therefore, too reluctant to make a determination.

On the other hand, it was felt that he should not be eliminated entirely as it would be his duty to act as President and, therefore, he should have a say in determining when to act. The Cabinet was thought to be the best possible body to assist him in making the determination.

That Cabinet members are close to the President, that they would likely be aware of an inability and would know if the circumstances were such that the Vice President should act, that they are part of the executive branch, and that the public would have confidence in the

rightness of their decision were reasons for the selection of this body. A primary consideration for a so-called Vice President-Cabinet approach was that it would involve no violation of the principle of separation of powers.

It has been said that Cabinet members, out of loyalty or fear of losing their jobs, might be too hesitant to find the President disabled. This is flatly contradicted by the fact that the Garfield and Wilson Cabinet actually urged the respective Vice President to act as President.

Fifth, the panel recommended that the President should be able to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.

In a case where the Vice President and a majority of the Cabinet disagree with the President's declaration of recovery, review by Congress would be required. The Vice President would continue to act in the interim, however. It would take a two-thirds vote of both Houses of Congress to keep the President from resuming his powers and duties.

A two-thirds vote was decided upon in order to weight the provision heavily in favor of the President and also because it would conform with the two-thirds vote required by the Constitution to remove a President from office.

Sixth, the panel recommended the inclusion of a provision that Congress could change the Cabinet as the body to function with the Vice President. It was felt that this had the advantage of flexibility so that if it should become necessary to do so, Congress could, by legislation change the procedure relatively quickly without having to resort to a new constitutional amendment. (I would like to say, parenthetically, here, that I, personally, would like to keep Congress out of the matter altogether so that I would give Congress no power to change the method.)

Seventh, the panel recommended that the Vice Presidency be filled at all times. It suggested that the President be allowed to nominate a new Vice President, subject to confirmation by the Congress. My own examination of all the debates surrounding the various succession laws for a forthcoming article in the *Fordham Law Review* suggests that the best way to solve the succession problem is by filling the Vice Presidency since the Vice President is the official who is in the best position to succeed to the Presidency, having been chosen and trained for that purpose.

The major objection to the panel consensus, I gather, is that the method for determining the inability of the President should not be embodied in a constitutional amendment. It is argued that an amendment, with details, would not conform to the rule that a Constitution should contain only general principles and that it would never receive the necessary approval by three-fourths of the State legislatures. I disagree with this position most emphatically.

To the first objection my answer is that the Constitution is quite specific as to the election of the President and quite specific as to how he may be removed. Thus, it is clearly consistent with the pro-

visions dealing with the Presidency to embody the method of determining inability in an amendment.

As to the objection that such an amendment would never get ratified, my judgment is that to give Congress carte blanche authority to adopt by legislation any method it saw fit might have even less chance of passage.

On the positive side, I firmly believe that if an amendment which included the method were adopted by the Congress, it could not fail of adoption by the States. Merely to give Congress a broad power to establish a method for determining the beginning and ending of inability is, in itself, no solution, for a method would have to be agreed upon by Congress—and that could take years.

The problem must be faced and solved now.

Surely the Founding Fathers would never have sanctioned such a broad power in the hands of Congress. They were careful to provide only one way for a President to be deprived of his powers and duties; that is, impeachment, and were quite specific about how this would work.

Since a determination of inability would also deprive a President of his prerogatives—at least temporarily—the method of determining the same would be no less specific and should be written into the Constitution itself. The whole matter would thus be raised above the whims of different Congresses and, more basically, would be consistent with the principle of separation of powers. The wisdom of the framers of the Constitution is legendary. It bears repeating that they wrote a Constitution embodying a philosophy of government whereby powers were separately distributed among the legislative, executive, and judicial branches. This separation of powers was made subject to specified checks and balances. No others were intended, nor should any others now be written into the Constitution. The determination of inability, I submit, should be left in the executive branch and the method included in the amendment itself for we must not forget that we are dealing with the Presidency—the single, most powerful office in the world.

I believe the ABA panel consensus offers the best hope of solving the problem of Presidential inability. Without further legislation it is complete, is practical, is consistent with the principle of separation of powers, gives the decisive role to those in whom the people would most likely have confidence, involves only persons who have been elected by the people or approved by their representatives, and embodies checks on all concerned—the President, Vice President and the Cabinet.

Finally, since it would be embodied in a constitutional amendment, there would be no question about its constitutionality.

In closing, Mr. Chairman, I would like to thank this committee for allowing me to express my views on these problems. I wanted to be brief because I know the time of the committee is precious. I am sorry to say that my interest in these problems would not permit me to be so. It is essential that the problem of Presidential inability be solved now, while the tragedy of November 22, 1963, is still fresh in our memory. I think it would be a terrible mistake and a terrible performance in the art of statesmanship for the 88th Congress not to solve this problem.

Thank you, Mr. Chairman.

Senator BAYH. Thank you very much, Mr. Feerick, for your statement, which, contrary to your closing remarks, I did not feel was overly long. It was very precise and to the point and substantiated your position very well.

I would like to mention that Senator Fong, who has recently become a coauthor, with the chairman of the subcommittee, of Senate Joint Resolution 139 which is very close to the American Bar consensus proposal, had to leave for another committee meeting. He will testify on March 5 which will be the last day of our Senate hearings.

Senator Johnston, you do have further committee meetings. Do you have any further questions?

Senator JOHNSTON. I don't believe I have any questions. I am very much pleased with your remarks.

Mr. FEERICK. Thank you, Senator.

Senator JOHNSTON. I realize fully we ought to do something in this field to take care of the matter and especially when the President becomes unable to function and do his duty as President.

Of course, right now there is a situation where nobody knows what would happen in that field, and for that reason, for the good of our Government and for the protection of the people, something should be done.

Senator BAYH. Thank you very much, Senator Johnston.

I want to compliment you, Mr. Feerick, for your participation as a member of the bar association panel that took such a great deal of time to study this problem.

Really, I thought that the brightest ray of light toward the solution of this problem was the fact that this many individuals, all of whom had definite ideas of their own, were able to sit down more or less in a closed room, for a couple of days, and then come up with a meeting of the minds. This is not an easy thing to do, and I hope we in this committee and the Congress can do the same thing.

Let me ask you just a few brief questions if I may.

It is my understanding, from listening to your statement, that you would adhere to the philosophy that we should have a constitutional amendment when there is doubt as to whether a statute would be sufficient.

Mr. FEERICK. Yes, Senator.

Senator BAYH. Since there is some difference of opinion among scholars in the field we should be sure to put this into the bedrock of our law of the land by amending our Constitution.

Mr. FEERICK. Yes, and I am also happy to say that most commentators do say now that a constitutional amendment is necessary. The question of whether Congress has the power is one question. Many think Congress does not have the power. But taking the group that believes perhaps Congress does have the power, I think many would say we still need a constitutional amendment to eliminate all uncertainty and doubt on the question.

Senator BAYH. In your discussion of the pros and cons of whether we should have a loosely drawn, all-encompassing amendment or a specific one, you mentioned the possibility of giving Congress blank-check authority.

As I read it, you are not concerned with the length of Senate Joint Resolution 139.

Mr. FEERICK. Yes, Senator, the proposal is obvious from my statement, that the amendment should be specific and if the amendment ran on for several paragraphs I would not be specifically concerned with the length so long as the method itself was that method which most people could agree as the best possible method after all this time of consideration and I go back, way back to the First Congress.

Senator JOHNSTON. Did you in your discussions look into the hearings of the Judiciary Committee back when we were changing the different ones to become President in case the President should die? We at that time looked into this particular matter also, and I think we were in doubt as to whether Congress did have the right, and certainly there was a serious doubt and we certainly ought not have a serious doubt about a matter of such importance and so we stayed out of that field at that time for that reason.

But we did proceed to legislate as to who would succeed in case of a death of the President and the Vice President and on down the line. We stayed out of this field for this reason, I believe, if you will remember, because we were in doubt as to whether or not the Constitution to enter this field from a legislative standpoint permitted it.

Mr. FEERICK. I would like to just carry my thought one step further, Mr. Chairman. I feel a solution which would do nothing more than give Congress a broad power to establish a method at some future time is really no solution and we are kidding ourselves if we think it is.

I think that the time is here when we must solve this problem and I think the only way you can solve it is to arrive at a method, and put that method in the Constitution itself, and sort of put the matter above the whims of different Congresses and political considerations at the time of inability, and I think the only way we can do that is by specifying it in the Constitution, getting back, Senator, to your initial question, no, I don't have any concern if the amendment was rather long.

Senator BAYH. Let me ask you: it was pointed out earlier in the hearings, I think last Tuesday, that we really had an all-encompassing, detailed amendment that involved two aspects of Presidential power—one, disability, and the other, succession or replacement of the Vice President. In the past it could very well have been that these would have been put in two separate amendments and thus the length would not have been so long compared to other amendments to the Constitution.

Have you given any thought as to whether the correct approach to this is to encompass both aspects in one amendment and move them through because they do deal with Presidential power, or that the criticism of length is of sufficient significance that we should consider dividing them?

Mr. FEERICK. Well, personally, Mr. Chairman, my main concern is with an amendment which would seek to change the present line of succession, and to change it to some other group, because I feel if we have one amendment which seeks to change the line of succession, and also includes inability, and also includes a provision for filling the vacancy I have great concern that such an amendment will never pass the Congress.

I do feel that the best approach to the succession problem is to fill the Vice Presidency, and I think if an amendment did nothing more than provide for filling the vacancy in the Vice Presidency and also had a procedure for inability, I do think that amendment might pass the Congress, but I think if you add to that amendment provisions on succession, I have some doubt, simply because I think it is a real political matter right now, and probably will be for some time to come.

Senator BAYH. When you say succession, you mean below the Vice Presidency?

Mr. FEERICK. That is correct, Senator.

Senator JOHNSTON. You reached the conclusion, too, that that could be done in a constitutional manner; isn't that true?

Mr. FEERICK. Succession?

Senator JOHNSTON. Succession.

Mr. FEERICK. Well, of course, Congress presently has the power to change the succession order if it so wills, and I think that perhaps the only correction that could be made there in a constitutional amendment would be to change the word "officer" to "a person." But I personally would lean toward no constitutional amendment on the line of succession beyond the Vice Presidency. I feel very deeply that the problem that must be solved is that of Presidential inability, and I feel if we are going to have any amendment, a new line of succession, also provisions on inability, and also provisions for filling the vacancy in the Vice Presidency we will not get that amendment through the Congress.

Senator BAYH. Let me ask you—

Senator JOHNSTON. I am going to have to leave you. I am chairman of Post Office and Civil Service; we are having a meeting of the full committee so I think I had better be there.

Senator BAYH. Thank you, Senator. We appreciate your coming over.

Let me ask you one other question. In previous testimony, of course, there has been divided thought on whether a commission would be best to determine Presidential inability.

One point that was made, I think, by Professor Burns, was that members of the Cabinet would hardly have sufficient expertise to determine, medically, the incapacity of a President.

I think you point out very accurately in your statement that they have the opportunity to compare his present performance with earlier performance. I wonder whether or not it would be wise to consider that the Cabinet would consult the best expert witnesses in the medical area.

Also, do you have some concern that it would be difficult for the Vice President and also the Cabinet members to act with the necessary degree of impartiality?

Would they be torn between loyalty to the President and the Vice President? I think all of these are legitimate questions for us to discuss before making a final decision.

Mr. FEERICK. I feel this way, Mr. Chairman. First of all, I feel that nobody outside of the Cabinet would have the confidence of the people of the country. Certainly the Cabinet is a body that is recognized as consisting of people close to the President.

I think it would be a good thing if they were elected.

Senator BAYH. In other words, you don't think removal of a disabled President is something to be taken lightly?

Mr. FEERICK. Not at all, Senator. I feel very strongly that any provision which we adopt should be weighed as heavily in favor of the President as possible, because it seems to me that this is the single greatest institution we have, and I would be very reluctant to see us set up a commission consisting of people who were neither appointed or elected, simply because they may have certain medical qualifications.

Inability is far more than a medical question. It is a question that one determines one way or the other, depending on the circumstances in the country at the time, the need for a Vice President to act as President, so that I don't know that a medical commission is by any means the answer to the question.

I do believe that a medical commission would be an affront to the dignity of the office of President if such commission were given powers to examine the President periodically. I think that is absurd.

Senator BAYH. What about a commission that would contain top legislative leaders, and the Chief Justice of the Supreme Court as chairman?

Do you see some problem here or would this have the type of respect that you feel is necessary?

Mr. FEERICK. No; I think that—I have several objections to such a commission, and let me start by saying that I think it is very inadvisable for the Chief Justice to take part as chairman of some commission.

I know many lawyers including myself have much concern about the idea of members of the judiciary taking part in commissions of this nature. I think that we have a problem of the separation of powers here and, as the chairman well knows, the present Chief Justice has spoken out against his participation or the participation of other members of the court precisely on these grounds.

I also think that a commission of legislative leaders of both parties is not wise because of the possibility of a split vote, and it is too much of a political question, it seems to me that it becomes more political than not when you include as members of this commission the members of the legislature.

I also think we have a question of speed, of swiftness. It is quite conceivable we may have a situation where a quick decision is necessary, and I think that the Cabinet and the Vice President are in a far better position to make a speedy decision because they have command of all the facts, they are close to the President, presumably close to the doctors who frequently attend the President, and I think that they are the best people, in the best position to make that determination.

Senator BAYH. Does minority counsel, Mr. Flynn, have a question?

Mr. FLYNN. Only that one.

Senator BAYH. Mr. Flynn asks a question, did the American Bar Association group consider having a subgroup of the full Cabinet determine inability? It was suggested by one of the witnesses Tuesday that perhaps two or three of the ranking members of the Cabinet or a larger number than that could act more quickly than the whole Cabinet.

Mr. FEERICK. Let me answer it this way.

Senator BAYH. Did the bar consider this?

Mr. FEERICK. We did not as such. Of course, in 2 days it is hard to cover all these areas, but it was our general thinking that the determination should be in this group known as the Cabinet, and we understood by that the full Cabinet, and I don't think it would be fair for me to say that the group gave it any serious thought so that it reached a decision that it must be the whole Cabinet.

I, personally, Senator, have wondered to myself whether it might not be a workable point here to say that the Vice President shall act with consultation with the Cabinet.

In other words, I have wondered many times whether or not we should actually require the Vice President to have a majority support of any group, and I would have it coming back, in other words, as a check. If there is a disagreement between the President and Vice President, I believe this was something that was mentioned back in 1956, that it is quite conceivable we might have a situation where an immediate decision is necessary, and particularly during a time of war, and if the man who is to act must secure a majority approval from some group we might have a problem of time there.

But I think of any group, the Cabinet could act as swiftly, more swiftly than any group.

Senator BAYH. If there are no further questions, I want to thank you again for joining with us.

Mr. FEERICK. Thank you, Senator.

Senator BAYH. And I appreciate any additional comments you might have as we move through the legislative process.

Mr. FEERICK. Thank you very much.

(The biography of Mr. Feerick follows:)

BIOGRAPHICAL SKETCH OF JOHN D. FEERICK

EDUCATION

Fordham College, B.S., 1958; Fordham Law School, LL.B., 1961; (Editor-in-Chief of Law Review in 1960-61).

OCCUPATION

Practicing attorney with law firm of Skadden, Arps, Slate, Meagher & Flom, 551 Fifth Avenue, New York 17, N.Y. (Member of New York Bar, 1961).

OTHER

Author of "The Problem of Presidential Inability—Will Congress Ever Solve It?" 32 Fordham Law Review 73-134 (October 1963).

Author of articles on subjects of Presidential inability and succession to be published in future issues of Fordham Law Review, New York State Bar Journal, and American Bar Association Journal.

Member of American Bar Association Panel on Presidential Inability and Succession, January 1964.

Member, American Bar Association; New York State Bar Association; Association of the Bar of the City of New York and its Committee on State Legislation.

Married; member of U.S. Armed Forces Reserve program.

Senator BAYH. Our next witness this morning is Ruth C. Silva. We are happy to have you with us this morning. Miss Silva is a professor at Pennsylvania State University and is a noted author and authority in this field. One of her best known works is "Presidential Succession."

If the witness has no objection, or minority counsel, I will ask that we include in the record at this time a résumé.

I think to try to read your résumé or a list of your publications would probably take almost as long as your testimony. I will ask that they be included at this point in the record.

(The biographical sketch and its list of publications are as follows:)

BIOGRAPHICAL SKETCH OF RUTH C. SILVA

A.B., A.M., Ph. D., University of Michigan.

1944-46: Teaching fellow, University of Michigan, Ann Arbor, Mich.

1946-48: Instructor, Wheaton College, Norton, Mass.

1948—: Pennsylvania State University; professor since 1959.

Listed in: "Biographical Directory of the American Political Science Association," (1961), page 229; "Who's Who in the East," (1964-65), page 857; "Who's Who of American Women" (1964-65), page 926; "Dictionary of International Biography" (London, 1963), volume I, page 257.

1952-53: Fulbright Professor, Cairo University (Egypt).

Spring, 1956: Research consultant and speech writer (on elections) for the Honorable Paul H. Douglas, Senator from Illinois.

Fall, 1956: Margaret Elliott lectures, Woman's College of the University of North Carolina.

Spring, 1957: Research consultant (on constitutional law), U.S. Department of Justice, Office of the Attorney General, the Honorable Herbert Brownell.

1957-58: National Secretary of the American Political Science Association.

1959-60: Research consultant (on legislative apportionment and on the executive article), State of New York Temporary Commission on the Revision and Simplification of the Constitution.

1961-62: Research consultant (on legislative apportionment), law firm of Robinson, Silverman, Pearce & Aronsohn (New York City).

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"Legislative Representation With Special Reference to New York," *Law and Contemporary Problems*, volume 27, pages 408-433 (1962).

"Apportionment of the New York Senate," *Fordham Law Review*, volume 30, pages 595-650 (1962).

"The Legal Aspects of Reapportionment and Redistricting: *Baker v. Carr*," *Fordham Law Review*, volume 30, pages 581-595 (1962).

"Apportionment of the New York State Legislature," *American Political Science Review*, volume 55, pages 870-881 (1961).

"New York" in *Compendium on Legislative Apportionment* (New York, National Municipal League, 1st ed., 1960), pages 76-78; (2d ed., 1962), pages 83-85.

"Party and Constituency in the United States" in Alfred J. Junz (edition), "Present Trends in American National Government" (London: Hansard Society, 1960; New York: Frederick A. Praeger, 1961), pages 12-30.

"Presidential Inability," *University of Detroit Law Journal*, volume 35, pages 139-173 (1957). Also reprinted in the *Congressional Record*, volume 104, pages 4182-4193 (Mar. 13, 1958).

"The Presidential Constituency and Party Alignment," a paper presented at the 53d annual meeting of the American Political Science Association, New York City, September 6, 1957 (mimeographed from the A.P.S.A.).

- "Presidential Incapacities * * *," Harvard Law Record, volume 23, No. 6, page 1+ (Nov. 1, 1956).
- "Presidential Succession and Disability," a paper presented at the 52d annual meeting of the American Political Science Association, Washington, D.C., September 7, 1956 (mimeographed from the A.P.S.A.). Also published in *Law and Contemporary Problems*, volume 21, pages 646-662 (1956).
- "The Life and Public Services of Congressman David Crockett," Michigan Alumnus Quarterly Review, volume 62, pages 246-253 (1956).
- "The Lodge-Gossett Plan for Changing the Electoral College," Nomination and Election of President and Vice President, Senate Committee on the Judiciary, 84th Congress, 1st session. (Government Printing Office, 1955), pages 334-339.
- "The Mundt-Coudert Plan for Changing the Electoral College," *ibidem*, pages 339-350. See these two studies quoted at length throughout the Senate debate on the Daniel-Mundt-Thurmond Resolution, Congressional Record, March 20-27, 1956.
- "A Look Into a Crystal Election Ball," New York Times magazine (Oct. 10, 1954), page 13+.
- "Reform of the Electoral System," Review of Politics, volume 14, pages 394-407 (1952).
- "Responsible Parties: The Constituency and Party Alinement," a paper presented at the 47th annual meeting of the American Political Science Association, San Francisco, August 29, 1951 (mimeographed from the A.P.S.A.).
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- "State Law on the Nomination, Election, and Instruction of Presidential Electors," American Political Science Review, volume 42, pages 523-529 (1948). Also reprinted in Julia E. Johnson (edition), "Direct Election of the President" (New York, W. H. Wilson Co., 1949), pages 87-92; and elsewhere.

Senator BAYH. The floor is yours, Miss Silva.

STATEMENT OF RUTH C. SILVA, PROFESSOR, PENNSYLVANIA STATE UNIVERSITY

Miss SILVA. As I told you, Senator Bayh, when I was invited to testify I did not come with a prepared statement, and I came thinking this would be a dialog rather than a monolog and let you pick my brains. I certainly have no quarrel with what the gentleman who preceded me had to say.

Senator BAYH. Let me say that you are free to pursue your means of expression any way you desire. We can discuss this together or you may talk and then we will have some questions, however you prefer.

Miss SILVA. It makes no special difference to me. If you have some questions—

Senator BAYH. I would prefer if you have no objections to have your thoughts on this and then we might have a question or two to ask of you.

Miss SILVA. I might simply react to the statement of the gentleman who preceded me and I think he was commenting on the American Bar Association proposal.

Certainly, I would have no quarrel with the first four points. Like that gentleman, I would agree I would like to keep Congress out of the matter altogether on the grounds of separation of powers, and in an effort to protect the integrity of the Presidential office, and I might just comment on the fifth, sixth, and seventh points.

The fifth point doesn't disturb me very much because, first of all, I don't think that you are going to have a public disagreement between the President and the Vice President.

I think this is just naive to conceive, and certainly a two-thirds vote would be a sufficiently heavy majority to protect the integrity of the office.

Senator BAYH. Does this complicate the whole thing?

Miss SILVA. I think it complicates it. I think it is unnecessary. I would just simply not pick a fight with it because I think it never would be used.

Senator BAYH. It was done merely as a safeguard. As Mr. Feerick said, this should not be taken lightly, and I think probably you are right, it probably would never be used.

Miss SILVA. It would never be used. I remember back in 1957 when the Justice Department was working on this, they put a provision of this sort in, and I objected to it quite strongly at the time, and I think that Mr. Willkie's point, who was then Assistant Attorney General, I think his point was that there were some people in the House who wanted it and since it would never be used let's put it in and make them happy.

Senator BAYH. You don't think this complicates the measure but would assist its passage?

Miss SILVA. No; the sixth point I would object to allowing Congress to change the body from the Cabinet to some other kind of body because they could very well create a complication and then you are in your commission problem.

I think a commission would be an affront to the Presidency. I think it is very naive to think it is a medical problem. It is political medicine. I think all you need to do is to look at the Wilson case to realize that there is political medicine.

Dr. Durkum, the psychiatrist who was attending Mr. Wilson, from New Jersey, made the decision that Wilson was not disabled largely on two or three grounds.

One was his view of the treaty. Another was his view of Vice President Marshall, two things in which he had no particular competence, and the third thing was that he thought it would be bad for his patient.

That it would be such a shock to Mr. Wilson to declare an inability that he would lose his will to live. So long as this man had breath in his body it was quite obvious no inability was going to be declared, not with Dr. Durkum's agreement.

So, I think it is a bit naive to think this is a medical problem and these doctors are going to get together and make this decision on medical grounds.

So, I would object to allowing Congress to change the body from the Cabinet. I know at the time that we discussed it in the Justice Department—putting the Cabinet in here—everybody felt that this was the case that nobody would act without consulting the President, without consulting the Cabinet. It was not restraining the Vice President but to push him to act because history indicates his reluctance to act and I think a little common sense and judgment suggests the same thing and that in all probability the Cabinet would mean it would invite him to act and that is the way the concurrence would come about.

This is the way it would happen.

Senator BAYH. May I interject one question here?

The proponents of a commission point out that this very reluctance of the Vice President to act in the past, at least in the cases of Garfield and Wilson, is evidence we need some machinery that goes into effect automatically, that does not include the Vice President's decision.

It seems to me as I read it that it is the very lack of machinery that has impelled the Vice President to be reluctant, and if we do establish machinery where he does have the authority that he would be less reluctant to act.

Miss SILVA. I don't think that is the basic cause for his reluctance. That is a very minor cause of it. I think the basic reason for his reluctance to act, in fact, the basic cause for the Justice Department's reluctance to urge Mr. Nixon to act at the time of the heart attack, was the question about the President's status following his recovery.

I think if we clarify that that it was simply the powers and duties—

Senator BAYH. This is what I meant by part of the machinery that he would be only Acting President.

Miss SILVA. I see; in terms of machinery I thought you were talking about commissions and cabinets.

Senator BAYH. No. I should have said precedents instead of machinery.

Miss SILVA. I think if you clarify the status and tenure of the President after he recovered you would remove 80 or 90 percent of the problem.

And I think that certainly in those instances at least where the President was able to ask the Vice President to act he would if this were clarified.

I think the problem probably or the time when the Cabinet would enter here would be when the President wasn't able, he was unconscious or something of the sort, and the Vice President was reluctant to act, although I think the Vice President would be less reluctant to act once this question of status and tenure of the President following removal of his inability were clarified.

Senator BAYH. The Justice Department, then, was fearful that the Tyler precedent might also be applied to disability as well as to the—

Miss SILVA. This was the feeling at the time of the heart attack, the stroke that didn't materialize. I think we had overcome this fear,

and had come to the position that we would, if necessary, establish a precedent of our own, along the lines of the subsequent agreements, the one between Eisenhower and Mr. Nixon, and the one between Mr. Kennedy and Mr. Johnson.

The seventh point that the gentleman talked about here was a device for filling the Vice Presidency. This looks to me very much like the proposal in my book for an Assistant President except we call him a Vice President.

I don't care what you call him, I still think it is a good idea. I don't see that it makes really very much difference whether he is confirmed by the full Congress or by the Senate. I think my proposal was that we just appoint an Assistant President here, make him a successor, and have the confirmation in the usual way by the Senate.

It doesn't seem to me it makes a great deal of difference whether it is done by two-thirds or by a simple majority of the two Houses jointly or the Senate. It may make the House feel better.

Senator BAYH. It might help to include the House for political and practical reasons, as you may well imagine, in getting a piece of legislation to pass.

Miss SILVA. Yes.

Senator BAYH. Do you feel this would make the individual less responsive to the job or less qualified to subject him to both Houses?

Miss SILVA. I suspect you are going to get a two-thirds vote in the House more easily if that is in.

I think it is quite clear that the House and Senate don't exactly represent the same concurrence of opinion in the country.

But after all the nomination is made by the President.

Senator BAYH. One thought I heard expressed was that the members of the Senate and House sitting jointly would be in exact numerical duplication of the electoral college and it was felt Members of Congress were elected to make decisions and the people would accept this much more than they would the electoral college.

What are your thoughts about the plan to reconvene the electoral college in the event of Vice Presidential vacancy?

Miss SILVA. I certainly wouldn't favor that.

First of all, reconvening the old electoral college would accomplish nothing but confusion. The electors are not elected to the college because the people have faith in their judgment but simply because people know what their judgment is.

They are a largely rubberstamp decision that the people have made in November.

Now, you reconvene a body here that has no mandate for anything. There was no presidential—I mean the Presidential candidates now considered when the college reconvenes are certainly not the presidential candidates that were considered in November.

It seems to me you might as well vest the selection of the Vice President in the American Bar Association, American Medical Association, almost any group.

Why the college?

Senator BAYH. One thought that I read was that, if the college were given this additional duty, it would upgrade it in the eyes of the public by giving it additional responsibility. What are your thoughts on that?

Miss SILVA. That would be a good reason not to reconvene it.

Senator BAYH. My first thoughts were that this might be the case in the immediate succeeding years but these are provisions which we hope and pray we never have to use.

Miss SILVA. Yes, but it seems to me that we have had enough free wheeling electors in the last couple of elections to not do anything to encourage the idea that an elector has discretion.

Senator BAYH. I am not trying to sell the program. I just wanted to let the record have the benefit of your thoughts on this subject.

Miss SILVA. I think it might encourage the idea that electors had discretion, and we have seen, I think, a little bit too much of that lately anyway.

And secondly, they have no mandate in this area, because you haven't held a popular vote on presidential candidates before the convention of the college, I think it would be a step away from democratic control not a step toward it.

Senator BAYH. Do you have concern about using the constitutional amendment procedure? We have had some criticism of the bar association consensus. For example, some of the criticism of Senate Joint Resolution 139 has been that it is too long and that it would be more easily passed by the legislatures if it were a broad constitutional amendment such as Senate Joint Resolution 35 which merely puts the Tyler precedent in line with tradition and clears up the question of whether Congress has the power to act in these areas.

Do you feel that a detailed proposal such as the bar association consensus—

Miss SILVA. I would favor the bar approach because my objection to simply empowering Congress to do this is my objection to even allowing Congress to be—it would be the same as my objection to giving Congress the power to change the body.

I want to keep Congress out of this because I think this presents a danger to the integrity of the Presidential office to bring Congress in so that it can change the body from time to time.

Let's settle it, and I don't see why it needs to be unnecessarily long. After all, if you take the provision out for Congress acting by two-thirds vote and this sort of thing, it is pretty short. The thing that accounts for more than half of the length of this amendment is the provision bringing Congress into it. It is a very short amendment if you take that part out.

Senator BAYH. One other proposal that has been made as far as point 7 of the concensus has been that whether we call him an Assistant President or Vice President that many of our succession problems would be solved if we made certain that there was a Vice President at all times.

One of the distinguished members of this subcommittee, Senator Keating, has proposed we have two Vice Presidents elected at the same time the President is elected, feeling that this would guarantee that the electorate had spoken.

Have you given this any thought, Miss Silva?

Miss SILVA. Yes, I have; I think in my book I discuss the matter of the second or third Vice President. This I would object to because I think it is naive to think that the electorate has spoken in the case of the Vice President. The Vice President rides along on the President's

coattails and there is no way that you can vote for a presidential candidate without voting also for the vice-presidential candidate, and the more Vice Presidencies you have here probably the more opportunities you have to reconcile various factions of a party, and by giving the vice-presidential spot to each.

But also the greater the chances, too, in case of succession that you are going to have somebody brought into the Presidency that represents quite a different faction of the party whose policies might be quite different from the President's.

I would much prefer the recommendation of the bar association where the President makes the recommendation and it is confirmed by two Houses of Congress or by an equal number of Senators and Representatives. Because here I think you are going to get a greater continuity in policy and I think vice-presidential candidates are not really choices of the people and I think it is pretty naive to think that they are.

Senator BAYH. You have certainly answered a great many questions even before they were asked. I have no further questions. I appreciate very much your coming.

If you have additional thoughts, you may extend your remarks at a later date.

Miss SILVA. I came to answer questions. If you don't have any—

Senator BAYH. I imagine there is nobody in the United States who has given more thought and has written more extensively in this area than you have. You are recognized, so far as I have been able to ascertain, as the No. 1 scholar in the field.

Miss SILVA. Thank you.

Senator BAYH. And I think it is a compliment to the committee that you would take the time to help in solving a very critical problem facing our constitutional form of government. I want to thank you again on behalf of our subcommittee in coming before us.

Miss SILVA. Thank you, sir.

Senator BAYH. Prof. Richard Neustadt is our next witness. Mr. Neustadt is a professor of government at Columbia University and is the author, among other works, of "Presidential Power."

Rather than read his résumé and his many accomplishments, with his permission I will ask if there is no objection to have his résumé included in the record at this point.

(The résumé referred to follows:)

RÉSUMÉ OF PROF. RICHARD NEUSTADT

Dr. Neustadt, 44, is professor of government at Columbia University. He was educated at the University of California, Berkeley, and received his doctorate from Harvard. In addition to his professorship at Columbia, he has been a visiting professor at Cornell, Princeton, and Oxford University, England.

He is author of "Presidential Power" (1960) and of numerous articles in various scholarly journals.

Dr. Neustadt is currently a member of the Council of the American Political Science Association and is a member of the Council on Foreign Relations.

Along with his academic career he has extensive Government experience. He served at the Bureau of the Budget (1946-49) and on the White House staff (1949-53). He was a special consultant to the Senate Subcommittee on National Policy Machinery (1959-61) and is currently a special consultant to its successor, the Subcommittee on National Security Staffing and Operations. During the transition of 1960-61 he served as special consultant to the President-

elect, and thereafter as a consultant to President Kennedy. He is currently an occasional consultant to the Bureau of the Budget and to the Department of State.

Senator BAYH. Professor Neustadt, it is an honor to have you with us, sir.

STATEMENT OF RICHARD NEUSTADT, PROFESSOR, COLUMBIA UNIVERSITY

Mr. NEUSTADT. Thank you, Mr. Chairman.

I must apologize to the committee for doing what I warned your staff I might, come without a prepared statement, but I am prepared to make a statement. Suppose I do this with the understanding that I am open to interruption and questions at your option.

Senator BAYH. Fine. Would you prefer to make the statement and then be questioned or be questioned as you go along?

Why don't we let you make the statement and not interrupt you?

Mr. NEUSTADT. Why don't I start with a statement because it saves us the trouble of getting started and then you interrupt just as you choose.

Senator BAYH. Thank you.

Mr. NEUSTADT. I won't lose my train of thought and if I do it won't matter too much, I am sure.

Since you have limited time, may I begin by saying that this isn't a detective story. I will tell you what my conclusions are and then try to proceed to justify them.

Regarding both succession and disability, I have only three small things to propose: The first, a joint resolution of Congress acknowledging and accepting the right of a President to make the sort of informal arrangement with his putative successor we have now had three times and incidentally giving it as the sense of both Houses that in the event of temporary disability the successor would act as Acting President.

This is not a constitutional amendment. I would be dead against a constitutional amendment. It is simply adding to the legitimacy of the agreements already entered into and the possibility of future agreement.

Second, a simple statute creating an office of Acting Vice President, to be filled by the President by and with the advice and consent of the Senate in the event the office of Vice President is vacant.

And third, at least worth consideration, a constitutional amendment although I hate to get into the range of constitutional amendments, which would break the bar against Members of the Senate and the House holding an executive office in the case of this office of Acting Vice President.

So, that a President could, if he chose, nominate a sitting Member of one of the Houses for the office.

That is absolutely all I would do to the Constitution or the statutes.

Now, let me separate what you have to say between succession and disability and start with the first and keep them distinct.

In the case of succession there are, it seems to me, five desiderata, five considerations, that we ought to be aiming for.

First and most obvious, no break in the continuity in the office of President.

Second, no ambiguity about who is President.

Third, no break, no sharp break, in the continuity of the administration and party installed in the Executive by the last national election.

Fourth, the least possible interference with the flexibility and the freedom of action of the President of the United States, both the one who succeeds and the one who is succeeded, within their own constitutional spheres.

And fifth, maintenance, insofar as possible, of the symbols and sense of legitimacy of the man exercising that sphere of authority, and legitimacy in our system requires that the symbolism of popular sovereignty be maintained.

Now, looking at these considerations I would have, I think, the usual criticisms of the 1947 statute.

None of these criticisms are ad hominum. I have had the privilege of working with Speaker McCormack in the past and I have a great deal of respect for him. I think it is most unfortunate that to criticize the act is often taken as criticism of him and there is none of any sort intended. But I think it is fair to say, as has been pointed out by others, that we run a number of risks with the Speaker in the immediate line of succession as it is now, with a Speaker.

First, ready possibility that he may actually be the representative of another party.

Second, the less obvious fact that in modern times, under modern conditions, men who are in the line of choice for the speakership are following a rather different career line, and are generally quite distinguishable from men who are in the line of nomination by a national convention for the Presidency or the Vice Presidency.

Next, a very obvious fact that the Speaker's own preoccupations as Speaker, his own tasks as Speaker, make him unavailable to perform the sort of duties that recent Vice Presidents have performed on behalf of Presidents, and I should think make it very difficult for any Speaker to perform the observational task, the spectator sportsmanship, if you will, that both Mr. Nixon and Mr. Johnson were able to perform watching what was going on as preparation for taking over.

Then, there is the other problem which I am sure you have heard of often enough before, the difficulties, the obscurities involved in a constitutional prohibition of holding Executive Office by holding legislative office.

The Speaker must resign when the occasion arises. This has obvious effects with regard to temporary disability but also casts some doubt and ambiguity over the immediate timing of transfer of power.

Finally, the clauses in the 1947 statute which have become colloquially known as bumping clauses, which creates all kinds of ambiguity, if the Speaker has refused to take over, the President pro tempore has not taken over, Cabinet officer has taken over, and then in theory the Speaker or the President pro tempore could qualify themselves at a later time.

For all these reasons, I would favor, in the case of succession, some simple amendment of the 1947 statute, but in terms of the considerations I have set forth I would like to keep it very, very simple indeed.

What I would propose is the creation by statute of an office of Acting Vice President, to be filled by the President, as all offices are filled,

by and with the advice and consent of the Senate in the case of a vacancy in the Vice Presidency.

No doubt any such statute should also provide on a more remote contingency basis if that office were unfilled and simultaneously the Vice Presidency and the Presidency were unfilled that succession should pass to somebody and I think the simplest somebodies are the Cabinet line of succession.

Now, this appeals to me because it is the nearest thing I can envisage to contemporary practice, not to the formal terms of the Constitution but if you will to the common law of the Constitution as it has operated.

In fact, the choice of Vice President by the presidential nominee in convention, which is, after all, the model in our practice, this choice by the sitting President of Acting Vice President, subject to confirmation, is the most nearly parallel operation I can think of.

In this connection, I recognize that in dealing with the Senate there is a certain embarrassment in suggesting to you gentlemen that confirmation of this nomination be by the Senate alone. The House has now acquired a role in the selection of the Acting Vice President by the 1947 statute out of proportion to its former role, and perhaps would not look kindly on a diminution of its role.

But the weight of our system is on the side of leaving to the Senate the power of confirmation, and I should think if I were in this body, I would look with some concern on the notion that one office should now be made subject to confirmation by an unusual special procedure.

I see no reason for that.

Now, there is one variant on this preferred solution, which is worth putting before you. It seems a pity that if a President were to nominate an Acting Vice President he would be barred from nominating a sitting Member of the Senate or the House for this office. No such bar would obtain at the time of national convention when a presidential nominee were actively participating in the choice of a vice presidential candidate. Here I think one might contemplate a constitutional amendment, simply providing that in the case of this one office, the barrier against membership by legislators to the Executive Office be broken.

Now, as for disability, I think all the considerations I have previously mentioned, the desiderata I mentioned, apply.

Continuity of office, and of the administration party, avoidance of ambiguity regarding who is President, the least possible interference with the President's prerogatives, within his own constitutional sphere, his freedom of action, his flexibility.

But in the case of disability, I think these considerations need elaboration at two points: First, I am appalled at the thought of regency councils. I think they have no place in our constitutional system. I cannot conceive of any form of commission, including the Cabinet, given constitutional power to put a President out of office, which is not an interference with the practical political power of a sitting President.

I find this both constitutionally and practically very offensive, indeed.

There should not be in anybody's hands, so far as I am concerned, by Constitution or by statute, as an attribute of office, independent

of the President or of the man holding this Office, there should be no authority in anybody else to remove a President.

If this authority were granted to anybody, and were there as a matter of right, not of agreement, but of right, it hangs over the head of every incoming President. It affects the relations of the incoming President with every member of this body, whatever it might be. It does in some way influence the calculations of everybody or it might, and I see no reason to introduce this element into our system.

It seems to me that the arrangements for declaring inability now in effect by informal agreement is entirely adequate. The President can declare himself unable or by his personal agreement with his Vice President, his successor, the successor can declare his inability; I see no reason why that responsibility of declaration should be vested in more than one man, particularly if he is the man in whom once he has succeeded we are perfectly content to vest the constitutional authority as Commander in Chief and all the power it provides.

If he is to exercise that second power, I see no reason why he should not be granted responsibility for the power to declare the President unable to act. But I would keep that power to declare the President unable a matter of personal agreement between the sitting President and his sitting successor.

I think it desirable, because of the ambiguities, Mr. Chairman, of which you spoke to the last witness, that there be a concurrent resolution or a joint resolution, to make it the simple sense of Congress that the informal arrangements entered into are reasonable, and that in the case of temporary inability the Vice President would be understood by Congress to act as Acting President, and not to succeed to the office.

I suggest this not as a matter of statute or constitutional requirement, but merely as an addition to the precedent, and something of a clarification of them, a sense of the Congress is joined to the sense of the present President and his two predecessors adding a degree of legitimacy to their informal arrangement. I must say on this matter of declaring inability, that the agreement entered into first by Mr. Eisenhower and Mr. Nixon, and then by their successors, indicates how flexibly our system can operate by common law accretions to the Constitution.

We do not have to have a constitutional amendment every time we foresee a new problem. A good deal can be left to the commonsense of the people who are responsible and are on the scene. Commonsense has been exercised three times now, and it has the advantage over any sort of—

Senator BAYH. May I interrupt you long enough to say—

Mr. NEUSTADT. Yes.

Senator BAYH (continuing). Then you think the three occasions on which we have had cases of Presidential disability they were handled in a commonsense manner?

Would you include the Garfield and Wilson cases?

Mr. NEUSTADT. No, sir; I am talking about the three occasions where the disability agreements have been entered into.

Senator BAYH. Yes.

Mr. NEUSTADT. All I am suggesting—since Mr. Eisenhower's heart attack, three successive Presidents have addressed themselves responsibly to a contingency problem and have resolved it as well as I can see it resolved without changing the Constitution, without changing statutes, without hardening anything or without removing the informal relation of one politically responsible officer to another politically responsible officer. I think this is fine.

Now, we didn't have these precedents set in Garfield's time or Wilson's time and so forth. We do have them set now, and if we let the common law develop, I think it will serve us well. That is all I am saying.

There are two problems connected with this matter of temporary inability that I don't think are always sufficiently recognized.

First, is what I might call the Nixon problem in 1956. Now, I cannot speak to this except as an outside observer. As an outside observer, reading the newspapers, I would remind you that apart from any concerns of Mr. Nixon's or the Justice Department's or whether he could act or whether he would have to succeed, quite apart from that, there are certain horrible practical problems for a responsible politician.

If I read the Times correctly, there was at the time when Mr. Eisenhower was in an oxygen tent in Denver, there was a growing dispute within the administration on the size of the foreign aid budget for the following year.

According to all the news reports, Mr. Nixon was on the side of Mr. Stassen and Mr. Rockefeller on this matter while the Secretary of the Treasury, the Under Secretary of State, and the Foreign Aid Administrator were opposed and there was an internal struggle going on as there always is.

Suppose Mr. Nixon had made the other decision or Mr. Eisenhower had asked him to act, and suppose he were content to assume he could act, he wouldn't take over the office. What would he do about the budget decision that had to be made in November? He would be in a dreadful position if Mr. Eisenhower were coming back to office in 2 or 3 weeks or a month.

What does an Acting President do about appointment, resignations, budgetary policy, legislative recommendations, innumerable things when he knows that the President is going to recover and take over again.

You can almost be sure that if this situation stretches out for very long the President, when he finally resumes office, will despise a great many things that the Vice President has done or the Vice President in concern about that prospect will be terribly hesitant to do anything.

I think if any elective politician puts himself for 5 minutes in the shoes of the Acting President with a President waiting in the wings to resume office, the problem I am suggesting would be very clear.

It seems to me, therefore, that when we talk about temporary disability we are talking about an acting Presidency for a very short term, which would be active only in matters of the highest emergency, war and peace decisions, military decisions, use of force decisions.

Senator BAYH. I think in all fairness to the other proposals that have been made, Mr. Feerick and Miss Silva both said this matter of

removing a President was certainly not to be taken lightly and this would also be the case whether it were done by the Vice President and Cabinet or the informal agreement that you propose.

Mr. NEUSTADT. Certainly, sir.

Senator BAYH. It seems to me even in your informal agreement that if we are going to make any provision at all for an acting Vice President, either informally, constitutionally, or by statute, he is going to have to have power to make decisions or there is no need to put him in there. The same things are going to be in the President's mind when he takes over and indeed we hope he will be able to take over when he recovered.

I thought perhaps you might clarify this difference.

Mr. NEUSTADT. Yes, sir.

I am not suggesting that either the ill President or the Acting President would be in the least irresponsible, nor am I suggesting that occasions may not quite conceivably arise in which the President would have to declare himself temporarily disabled or if he were unable to do so the Vice President would have to do so for him and take over.

What I am suggesting is that with every week that passes the problem of having two Presidents at once becomes more difficult for the poor fellow who is Acting President.

Senator BAYH. The question I am trying to pose is this: Would this be any less or more difficult?

Mr. NEUSTADT. No, sir.

Senator BAYH. If it were done by constitutional amendment than by informal agreement?

Mr. NEUSTADT. None. There is no advantage in a constitutional amendment.

Senator BAYH. Is there any advantage to an informal agreement so far as making this less difficult for him?

Mr. NEUSTADT. There is great advantage to that.

Senator BAYH. As far as this specific question is concerned.

Mr. NEUSTADT. Right.

Senator BAYH. Is it less difficult for him because it is an informal agreement than it would be if it were a legislative matter?

Mr. NEUSTADT. In my estimation it is much less difficult. This is partly symbolic and partly in the atmosphere of the thing. A President and Vice President are nominated, they campaign and are elected to office, and then they, as two men sit down and make an agreement. I grant you by the fifth or sixth agreement the tradition will be so firmly set that it will be difficult to make the agreement very different from the one that the last people entered into but at least you have two human beings who have perhaps a difficult relationship to contemplate, themselves personally working out an arrangement between themselves.

I think this is very much to be preferred when one has to contemplate the difficulties of putting it into discussion.

To the situation in which once the Vice President were nominated, assuming his election, he would by right and titlement, no relation to the President, have the responsibility of deciding when to take over.

These things are hard to be concrete about but I think you can see that there is a difference in the feelings of these two responsible politicians having to work with each other, it seems to me, to make a con-

siderable difference. It would be easier in the subsequent situation in which the Vice President were acting if the terms under which he were acting had been thrashed out between him and the other man when the other man was healthy.

It just seems to me it helps. Is that responsive to your question, Mr. Chairman?

Senator BAYH. Yes, it is responsive. I wanted your views. We all have our differences of opinion, and you speak with some experience in this field.

Senator BAYH. I wanted your opinion.

Mr. NEUSTADT. Sure.

Mr. NEUSTADT. Well, again, it seems to me that the people who can think this through best are people in your position.

Senator BAYH. We need the benefit of many of the folks outside.

Mr. NEUSTADT. But you were talking about the human relations, you two elected politicians, and you are an elected politician, I am not, I would leave that sensitivity to you.

Senator BAYH. Let me ask you another question.

Whether an elected politician or not, we are trying to get the best workable solution. Let me ask you, in this private agreement, what would we do in the event we had a President who was really disabled mentally, let's say, but did not realize it, and there was a difference of opinion between the Vice President and the President. There would be no precedents in common law to provide for this.

Mr. NEUSTADT. Right.

Senator BAYH. Whereas if there was legal authority established by enactment of law or constitutional amendment there would be. What would you say it ought to be for this particular problem?

Mr. NEUSTADT. Well, sir; this seems to me the one hole in the present disability arrangement. It is the only serious gap.

Senator BAYH. It is the really only difficult problem with disability because most of the time we are going to have the President saying, "I am ill, take over," or he is going to be obviously so disabled that the whole country is going to be aware of this.

But the real problem is when you have got this one area.

Mr. NEUSTADT. Well, I have a very uncomfortable reply to give you. I am less fearful of the commonsense and sense of responsibility of the people at the time than I am of a legislated solution anticipating contingencies whose exact character we do not know in advance.

I think we have no absolute way to cure this problem, and no statute you are going to pass, no constitutional amendment is an absolute cure for this problem.

If this situation did arise and the President said, "I am able," and some commission of doctors or lawyers or justices or somebody else said, "No, you are not."

Senator BAYH. Or an informal arrangement?

Mr. NEUSTADT. Or, if under the present arrangement the man who was acting, said, "You can't come back," and the man who had been elected said, "I am coming," all right, if that situation arises, you are going to have trouble and statutes won't really help you. They won't help you any more than you can be helped by relying on the sense of responsibility of the actors on the scene.

Now, I have a good deal of faith in the ability of our political system to devise solutions to concrete problems as they arise. I would point out to you in 1876 when we had an absolutely unprecedented situation in which there was no constitutional provision, Congress was ordered to an extra constitutional device nobody ever heard of, there was no word about it, there was no such thing as a congressional commission to decide who was an elector in the electoral college. It was done. The President who had a majority of the popular vote accepted the commission's decision, and the President who had a minority of the popular vote was installed by the electoral college in office, it was done. I don't believe it would have been better done if back in 1930 somebody had gotten a constitutional amendment passed trying to anticipate that situation.

One of the difficulties with this anticipation is that you never anticipate exactly what is going to arise, and you run the risk of setting offside effects, consequences you didn't foresee which can be just as difficult as the things you are trying to cure.

There my example would be the 20th amendment. You will recall that we abolished the lameduck Congress and shortened the interval of Presidential succession after an election, because of the experience between November 1932 and March 1933. But one of the things we created by this process which nobody discussed at the time, nobody thought about at the time, was a terribly tight transition period for an incoming administration in a period of world war and world crisis. We cured the problem we were aware of, but we opened up a problem we had never given any thought: What would have happened to Mr. Lincoln had he had to come into office under the provisions of the 20th amendment?

So that I don't think you can legislate against this sort of contingency.

If the people on the scene at the time have bad will, bad judgment, bad sense, they are going to mess up the legislative solution.

If they have good will and good sense they can manage the informal solution, and I think we are dependent on their good sense. After all, sir, just one last word, the man who might be guilty of such a mental aberration in this circumstance is the elected President of the United States or the man constitutionally installed, he might be guilty of such an aberration in some other circumstances, too, we run this kind of risk every day of our lives and I don't see that this particular one is qualitatively different.

I don't know that constitutions can protect you against madmen. The people on the scene at the time have to do that. And that is true when you are talking about the use of the commandership in chief authority as well as this authority.

So, I would leave it alone and assume that there are going to be a lot of sensible and responsible people around to work something out pragmatically. I don't see any other way.

And by leaving it alone you avoid the chance that the amendment you enact sets up an unintended wayward side effect; none of us thought if that produces some new difficulty we were not aware of at the time.

Senator BAYH. I appreciate your statement.

Let me ask you a couple of questions. I think it is immaterial that we have differences of opinion. I want to ask a couple of questions to clarify your thoughts.

Mr. NEUSTADT. Yes, sir.

Senator BAYH. In the event of a vacancy in the Vice-Presidency you would permit the appointment of an Acting Vice President?

Mr. NEUSTADT. Yes.

Senator BAYH. Is that correct? What would happen in the event that the President died? Would this man then become Acting President or would the Tyler precedent make him President?

Mr. NEUSTADT. The Tyler precedent would make him President. The only reason I propose that you create an office of Acting Vice President instead of providing authority to fill the Vice-Presidency, is to avoid a constitutional amendment.

I assume, although you would want to check this with Justice, that Congress has the authority to create an Acting Vice Presidency by simple statute. But the Tyler precedent, that seems to me would govern.

If the President died the Acting Vice President would become President.

Senator BAYH. This brings my second question: Apparently you disagree with those who feel that this problem should be dealt with finally in the basic framework of our law, and there is no need for a constitutional amendment? You haven't dwelled specifically on that.

Mr. NEUSTADT. Yes, sir.

Senator BAYH. Could you give us just a moment of reflection as to why—

Mr. NEUSTADT. Yes, sir.

Senator BAYH. I think you seem to feel the least we can do with this, the better. Things are going pretty well now and you are afraid of overaction rather than underaction.

Mr. NEUSTADT. Yes, I am genuinely—I have a genuine distaste for monkeying with the Constitution any more than is absolutely necessary. We have the great virtue of a short and somewhat ambiguous Constitution and we have been able to roam around in it for nearly 200 years under conditions utterly unanticipated by its Founders because of its shortness and fortunate ambiguities.

We have changed that Constitution in innumerable respects without amending it. The popular election of the President, which is the office we were talking about, is certainly one of those changes. A great change in the living Constitution which was never incorporated into statute, and I would prefer to see changes come about in this fashion, minimum changes done with the least formalitiness, rather than by changing the formal framework. Now, there are some occasions where you have to. If you were going to put my minimum solution into effect and create this office of Acting Vice President by statute, if you wanted to make it as flexible as I would like to see it, you would have to have a constitutional amendment, Mr. Bayh, to permit you or Mr. Keating to be chosen as Acting Vice President which might be a good thing sometime.

Senator BAYH. You said we were dealing with reasonable men. [Laughter.]

Mr. NEUSTADT. All right. Senators increasingly, it seems, are going to be candidates for nomination as Vice President. It seems a pity that they can't be candidates for nomination as Acting Vice President. There a very simple change in the Constitution might be justified.

But I am just against fiddling with this document any more than is absolutely necessary.

Senator BAYH. Thank you. I wanted full clarification of your views in the record. I have no further questions.

Senator Keating, we are glad to have you again with us this morning. Do you have any questions?

Senator KEATING. In the first place, I want to thank Professor Neustadt for coming here and giving us the benefit of his views. He is one of the best informed and leading experts in the country in the field of government.

I know that by reputation and I know it by personal experience because my counsel, Mr. Abbott Leban, was one of your students and I know he has been well trained.

Mr. NEUSTADT. That is a compliment to Mr. Leban rather than to me.

Senator KEATING. No, he tells me otherwise. [Laughter.]

I am interested in your proposal for an Acting Vice President. The succession proposal which I have made is for a constitutional amendment calling for two Vice Presidents to be elected every 4 years at the conventions and to be elected by the people. I would prefer that to having an appointed Acting Vice President, and I think probably you are correct that you could create by statute a new office, give its incumbent any title you wanted to and place him next in line of Presidential succession. Mr. Rockefeller, I read from the newspapers, wants to call him the First Secretary.

But I am particularly interested in your inability problem, because I think that is much more serious than succession, and am rather intrigued by your position that it is better to do nothing on balance at this time.

First, this very simple amendment known as Senate Joint Resolution 35 cosponsored by the late Senator Kefauver and myself just does two things: First, it says when a Vice President takes over in case of inability he shall take over only the powers and duties and not the office, and my personal opinion as a lawyer is that is what the Constitution says now but there are, as you know, those who feel differently.

Mr. NEUSTADT. Surely.

Senator KEATING. Don't you think that much clarification is desirable?

Mr. NEUSTADT. I think it is desirable that Congress find a means of associating itself with these informal agreements, associating itself with what the President, the last three Presidents have been doing and that, of course, is the intention of what they have been doing.

That Congress recognizes it and as you suggest, say, "This is our position, too, that it is desirable."

Senator KEATING. In other words, you feel that can be handled by a sense-of-Congress resolution.

Mr. NEUSTADT. I should think so, sir.

Senator KEATING. If the Constitution says otherwise, I don't see how you are going to change what the Constitution says by a sense-of-

Congress resolution. If at a later time it were held that the Constitution said no, he takes over the office, I have never been able to envision just how that will be litigated.

Mr. NEUSTADT. That is my problem. That is where my confidence comes from.

Senator KEATING. In other words, you haven't either been able to determine how it ever would come up, and, therefore, you don't think it ever would be litigated. That may be an answer to the argument we should do something about it.

Turning to this other point, Senate Joint Resolution 35 would simply authorize the Congress to act in setting up the method of determining inability. It doesn't require the Congress to act. Wouldn't it be a good thing to give the Congress that power and let it decide whether to exercise it, and then, if it did, let it decide how.

Mr. NEUSTADT. I don't think it would be a bad thing, sir, because the Congress already had that power but doesn't Congress already have that power in the necessary and proper clause?

Senator KEATING. The power of setting up the method of inability?

Mr. NEUSTADT. Oh, I am sorry.

Senator KEATING. I am talking about inability now, not succession.

Mr. NEUSTADT. There, I guess, I do have a personal disagreement, sir.

It goes back to something I said before you came into the room. I am scared of regency councils, all kinds, types, sizes, and descriptions of them. I would rather leave it to the President and his designated successor to make this determination, because I cannot conceive of a body of men in whom I would be happier to put the authority. I can't really conceive that in the case of any combination of men I can think of in our history we would not have a worried, thoughtful, responsible, concerned decision.

Senator KEATING. Well, of course, if the Congress accepted that viewpoint then they wouldn't act. I assume. But you are a little afraid of giving them even the opportunity to act to set up something which you call a regency council.

Mr. NEUSTADT. Well, I guess the simple answer to that is yes. I think of Mr. Lincoln's discomforts during the Civil War faced with a Congress which had and was prepared to exercise that authority.

Now, this is on a remote contingency but that is, you know, there it is.

Senator KEATING. One objection which has been voiced to my proposal for electing two Vice Presidents, voiced emphatically indeed by a former Vice President, is that it would downgrade the office of Vice President.

I take it your objection to that would not be based on that ground or you wouldn't be recommending the establishment of an office called Acting Vice President?

Mr. NEUSTADT. No, sir. I think that your proposal is the neatest solution to the succession problem, neater in many ways or neater, clearly neater than mine.

My objection to it doesn't rest on the Vice President as concern that two is not as prominent as one. My concern is that two is at

least twice and possibly four or five times as much potential problem for the sitting President. It is a purely operational matter.

Senator KEATING. Well, you have been in the seat of power with a sitting President. You were with President Truman, I judge from your testimony, after he recommended the 1947 succession law with which you disagree.

Mr. NEUSTADT. Yes, sir.

Senator KEATING. And so you think he or any other President would be more concerned if he had two Vice Presidents to deal with at all times.

Mr. NEUSTADT. It is not just, I don't mean to suggest that a President must go around worrying about his Vice President, and two is worse than one. It is a mutuality between these men, among these men. The Vice-Presidency is a very frustrating position; it is a devilish position for a first-rate man, and to carry it with honor and grace in the relationship between the President and Vice President, the one man is close to power but has very little, and the other man has it all, for the two of them to deal as gracefully as, say, in the last 3 years, I think, President Kennedy and Mr. Johnson have done, this is at best, with good will on both sides, not an easy role for either of them.

Now, to complicate that with a third man it seems to me to multiply the difficulties inherent in the relationship. The third man who had even less to do, I guess.

Senator KEATING. There is a third man now, namely the Speaker of the House, so that—

Mr. NEUSTADT. Yes, but the Speaker is a busy, occupied man filling an office.

Senator KEATING. I agree. But I don't envision as much difficulty in that regard as you do. At least when former Vice President Nixon appears before us to attack the plan for two Vice Presidents on the ground that it would downgrade the office, I hope to be able to cite your testimony as supporting my thesis that it wouldn't downgrade the office any more than—you envision, of course, that the Acting Vice President be a man qualified to step into the Presidency.

Mr. NEUSTADT. I would not envisage, sir, that you fill that office as long as there was a Vice President acting as Vice President.

I would regard this as an office to be filled upon a vacancy in the Vice-Presidency, so I wasn't envisualizing two at once.

Senator KEATING. I see.

Mr. NEUSTADT. But my concern was—Mr. Nixon, of course, sat there, and since I didn't I have less concern, I suppose, for downgrading the office than he does.

My concern is just in the operational relationships among one President and two underemployment men.

Senator KEATING. Well, I disagree with you on their being underemployed. I think they would have a great deal to do.

That is all, Mr. Chairman. I appreciate Professor Neustadt's appearance here. He has been very helpful.

Senator BAYH. We are very grateful for your testimony and for taking the time to come.

Thank you very much.

Mr. NEUSTADT. Thank you, Mr. Chairman.

Senator BAYH. The next witness this morning is Mr. Sidney Hyman, who will be our last witness this morning, who is a distinguished author and student in this field. He has authored "Beckoning Frontiers," "The American President," the Pulitzer-Prize-winning "Roosevelt and Hopkins."

We are very happy to have you with us this morning, Mr. Hyman.

May I, while you are collecting your thoughts, although this is probably not necessary, ask our reporter to introduce into the record immediately following Mr. Hyman's testimony a letter from Governor Nelson Rockefeller. Isn't he from New York, Senator Keating?

Senator KEATING. I believe so.

Senator BAYH. Governor Rockefeller wrote this committee a rather extensive letter on this very subject we are studying and I think in all fairness to Mr. Rockefeller and to make our record complete that this should be in.

I ask this interruption, Mr. Hyman; I may have to leave before you have completed the answer to the questions that Senator Keating or I might have.

Senator KEATING. Mr. Chairman, if you would allow me to interrupt, I might say that I read in the paper about Governor Rockefeller's views on this subject. I was interested to read them and if reported properly in the press he is in favor of a First Secretary which is something like the Acting Vice President that has been referred to here. I very hurriedly have taken a look at this letter and I find quite a few things in it with which I would be in disagreement, including particularly his discussion about making—could I have that letter?

His suggestion on inability is, as I understand it, for the agreement between the President and his successor to be amended to provide for the beginning and ending of the President's inability to be determined by the Chief Justice of the United States after consultation with medical and psychiatric experts.

Well now, Mr. Chairman, we have been all through that, and had a prolonged discussion here. I hope before making the proposal that Governor Rockefeller has been more successful with the Chief Justice in getting him to be willing to take on such duties than we were when we tried to have him head up the commission.

In any event, Mr. Chairman, there is so much about this letter of the Governor which has not come to my attention until this morning that I think he ought to be asked some questions about it in order to clarify some of the views set forth in this letter, and I would suggest we invite him to appear at the next hearing to amplify his views.

Certainly there are some questions about this proposal of his which I would like to put.

Senator BAYH. May I interrupt? This would be most interesting since one of our witnesses at the next hearing is another one of your constituents, the former Vice President of the United States, and I would think the two gentlemen would enjoy a discussion.

Senator KEATING. I have that in mind, and their views apparently differ and they both apparently differ with mine.

Senator BAYH. Procedurally, I am not certain whether this would be possible because of the time limitation of the filibuster, but let's see if we can't investigate the possibility of getting your Governor here.

Senator KEATING. In other words, if we can do it within the limits of time the chairman would agree it would be helpful to have him here and expound his views which he set forth in the letter. He could be subjected to some questions.

Senator BAYH. I think it is impossible on the next day but we will probably have to have another day's hearings.

Senator KEATING. I thank the chairman.

Senator BAYH. Pardon us for the interruption, Mr. Hyman. You have the floor.

STATEMENT OF SIDNEY HYMAN

Mr. HYMAN. I have been collecting my thoughts and I hope I won't be accused of unlawful assembly on that basis. I can practically summarize everything I have to say by saying "Amen" to what Professor Neustadt has said. But I have enough modifications on what he has said, it seems to me and in amplification to what he said in response to some of the questions of Senator Keating and some comments on the specifics of the two amendments to justify, if you don't mind reading this.

Senator BAYH. Proceed.

Mr. HYMAN. In the Constitutional Convention, when Benjamin Franklin urged that each session be opened with a prayer, Alexander Hamilton reportedly jumped to his feet with an objection, saying: "I am opposed on principle to calling on any foreign power for help."

If the tale is true—and if Hamilton returned to life as a member of this Senate committee—I doubt if he would now be so irreverent. The greater certainty is that he would pray for help from any quarter, foreign or domestic, in framing a solution to the questions of Presidential inability and succession that would be universally acceptable.

It has been observed already no solutions to these questions can be without fault or flaw. None can be certified as being secure, against possible abuse. All pay some price in weakness for the elements of strength they have. None cover in detail every possible contingency that might arise under them. All can inspire apocalyptic visions of future horror if they should become law.

But above all, no matter how carefully any proposal is framed, the greater part of what will happen under it—should it become law—will depend on the interplay between the constitutional morality of the Nation, and the wisdom and uprightness of the chief officers of state. If the Nation's constitutional morality is so depraved as to permit men to usurp power and get away with it, then a thousand restraining laws on paper, will have no more restraining power than confetti.

On the other hand, we have had these circumstances where men have acted way beyond the law, have acted under emergency circumstances where the Nation has understood it. We had a circumstance here in Washington in the War of 1812 that would be comparable to what might happen during an atomic attack.

The British burned the White House, the President fled, the Government was nowhere in being, the only one person on the scene was the Secretary of State, Monroe, who ventured to act simultaneously as Secretary of State, Secretary of War, Secretary of the Treasury, and Commander of the Military District, and he issued every manner of order which went beyond the law and afterward the country and the

Congress ratified and acclaimed him a hero for doing it and then they had to elect him President because they recognized there was a vacuum at the height of power, somebody had to decide, and the commonsense of the country said under these emergency circumstances he did right.

Now, the fact that we must live with doubt does not absolve us from the need to decide in a specific case we have before us, and it seems to me that your committee can proceed to the act of decision on the basis of the answer it gives to four general questions.

Will a proposal in fact correct the present imperfections in laws relating to Presidential succession and disability, or will it serve only to distort the picture further?

Do the points of strength in a proposal outweigh and thus justify accepting the known risks present in its weak points?

Will a proposal fit in with our constitutional and extraconstitutional design for responsible power, or will it break into that design in ways that will divorce power from responsibility?

Is it possible to deal pragmatically with the questions of Presidential succession and disability by the device of a statute that can readily be enacted and repealed in the event experience shows it to be faulty? Or is there no real solution except through a constitutional amendment—with all that this entails in the way of enactment and repeal?

I want to talk first on the subject of succession.

On the provisional assumption that we must have a Vice President at all times—and on the further provisional assumption that this requires a constitutional amendment—then it seems to me that the “permanent” solution comes down to a choice between Senator Keating’s proposal and Senator Bayh’s. Both have their strong points. Both have their weak ones. And the question to be decided is whether the net strength of the one is, on balance, greater or less than the net strength of the other.

Senator Keating’s proposal, as I understand it, calls for the election of two Vice Presidents simultaneously with the election of the President. One would be designated an Executive Vice President. The other would be designated a Legislative Vice President.

So far, the proposal is clear. The people at election time would know how the line of succession will run. It provides for an automatic succession, without any need to convoke any electoral body to decide who shall move up to fill the vacancy created when the first Vice President succeeds to the Presidency.

It corresponds to a fundamental constitutional principle; namely, that except in the case where no one wins a majority of the electoral votes—the choice of a President and Vice President shall proceed on an independent plane of its own, outside the will of the Legislature.

If on these counts the structural form of Senator Keating’s proposal gains favor with this committee, I would hope that the committee would modify several of its details.

One modification I would make would be to drop the designation of Executive Vice President and Legislative Vice President, and use numbered designations instead. For as the proposal stands under its present nomenclature, the effect would not be to weaken the Vice Presidential office as former Vice President Richard Nixon has reportedly argued. It would be to weaken the Presidency itself.

Why the Presidency?

Here I repeat what Professor Neustadt was saying because it would foreclose the President's right to use or not to use a Vice President according to his own needs, according to the talents of a Vice President, and according to their mutual interests and temperament.

The august titles of the Vice President would tend to acquire an autonomous authority of their own, and would most likely place the President under pressure to make the Executive Vice President the equivalent of his Chief of Staff, and the Legislative Vice President his chief congressional lieutenant.

Either way, he would tend to become a hostage to his Vice Presidents, or would be compelled to resort to every manner of subterfuge to uphold their dignity while denying them any effective powers.

It may be argued that we ought to codify the increased role the Vice Presidency is said to be playing in the work of the Presidency, dating back to 1953.

I know, for example, that a Vice President now sits on the National Security Council, in the Cabinet, presides over both in the absence of the President, and takes good will trips. But to say all of this is to say nothing intelligible. A chair also sits. A metronome also presides. A bird also takes good will trips.

The real test of what has happened to the Vice Presidency is to ask whether the Vice President who sits, presides, takes trips, or even is put in charge of an executive commission or agency, is in a position to make the yes or no decision in any great matter of State, without leave of the President.

The simple truth is that no Vice President, not Mr. Nixon, nor Mr. Johnson in his time, has been able to do that, or would even dare to do that. Nor should he ever be permitted to, in any manner except in a clear case covered by any Presidential disability laws that have yet to be framed.

Indeed, I am so much of a strict constructionist where the Vice Presidency is concerned, that I am opposed to vesting in the Vice Presidency any kind of administrative functions that touch on the work of the Presidency.

For when the Vice President, in his role as an administrator, collides with a second administrator who is not the Vice President, the President may be forced to choose between them.

And if the choice goes against the Vice President, the psychological and political consequence must inevitably be as messy as they were when President Roosevelt was forced to choose between Commerce Secretary Jesse Jones and Vice President Henry Wallace, and sided with Secretary Jones instead. The Nation did not understand that Mr. Wallace, the administrator, was being cast down. It only understood that the Vice President, the man standing second in the land, was cast down.

The Vice President, in our system of government, is, and should remain the equivalent of England's constitutional Monarch. Apart from the functions specifically vested in him as the President of the Senate, the only additional rights he is entitled to, is the right to warn the President, to inform the President, to be informed by the President—all of which comes down to nothing more than the rights of consultation.

It is from this point of view, therefore, that I would go on to make a further modification in Senator Keating's proposed amendment. If two elected Vice Presidents are to be provided for, let the first Vice President under the new canon be nothing more and nothing less than what a Vice President has been up to now. But let the amendment focus on the second Vice President, to lift in his case, the constitutional restriction against holding two elective offices simultaneously, and here again I am in mind with Professor Neustadt's line of argument.

For it is hard to imagine that any man of talent who is at the height of his career as a Senator or Governor, would wish to give up what he is doing in order to serve as the Second Vice President. He would know that in all probability he would be a displaced person in our constitutional system, with no clearly defined base of action, and with no real function except to take trips and shake hands. It would, however, be possible to get men of talent to accept the post of Second Vice President, if, until such time as they may be called upon to serve as the First Vice President, they could pursue their career in other posts where they feel they are doing something worthwhile. So much for Senator Keating's amendment.

Senator KEATING. May I just interrupt there to say, Mr. Hyman, and, of course, we all respect deeply your views as one of our leading experts on government, I am rather inclined to agree with your first objection that it would be better to call them a First and a Second Vice President. It was framed that way in order to indicate just exactly what you rather object to, I think, in your second suggestion, that one would be in the nature of a chief of staff, and the other would have the very—head up the very important relationships with the Congress, and so on.

Anyway, it is very helpful to have your ideas on the proposal.

Mr. HYMAN. Senator Bayh's proposed amendment is also clear, and it avoids the troublesome question of what to do with a Second Vice President.

On the other hand, it entails a delay until a Vice President is chosen to fill the vacancy created when the elected Vice President is chosen to fill the vacancy created when the elected Vice President succeeds to the Presidency upon the death of the incumbent.

It assumes that the Vice President who is to do the succeeding to the Presidency, will not have died before the President he is to succeed. That is to say, it assumes that he will actually be in a position to nominate his own successor as Vice President. And, lastly since it calls for the intervention of the joint Chambers of the Congress, in order to elect a new Vice President, it does not take into account the emergency circumstances when the Congress may be in no position to convene.

Still, if it is the view of this committee that the risks arising out of these gaps of construction are worth running in order to get at the merit of Senator Bayh's proposal, I have one modification to suggest.

I would deny to the House of Representatives any role in the election process. The Vice President, to be elected, would be elected, after all, to serve as President of the Senate.

It makes no more sense to give the House a say in the choice of a President of the Senate, than it would to give the Senate a say in

the choice of the Speaker of the House. The concept of a joint election of a Vice President by the Senate and the House, appears to be a product of the illusion I have referred to previously—namely, that the Vice President nowadays is or should be a quasi-President, when he should be nothing of the sort.

Moreover, if I read the Constitution rightly, the Senate alone has the right to elect a Vice President in event no vice presidential candidates receive a majority of the electoral votes cast.

And in fact, the Senate once exercised that right after the election of 1836, when it chose Richard M. Johnson, of Kentucky, as Vice President. It would, therefore, be more congruous with the existing language of the Constitution, and with past precedent, if Senator Bayh's proposal were modified to restrict the election of a Vice President to the Senate alone.

As things stand, it is unlikely that Senator Keating's proposed amendment, even if approved by the Congress, could be ratified by the States in time for the 1964 nominating conventions to nominate two Vice Presidents.

The amendment, if ratified, would at best be relevant only in the context of the 1968 election. Senator Bayh's proposal would have an operational relevance once it is ratified, without regard to the 1964 nominating questions. But we can anticipate some delay at least, before it would become law.

In the circumstances, is there any stopgap solution to the questions of Presidential succession that can be provided for by statute in this session of the Congress—one that would be operative at the time of the conventions, and that could be repealed automatically the moment any permanent solution in the form of a constitutional amendment is ratified? I think there is such a stopgap solution.

I conceive of a statute which would say in effect that on Inauguration Day, 1965, beyond the Vice President, the line of succession shall run through two men chosen in a designated order by the 1964 nominating convention of the party that won the Presidency in the election of that year. The statute would further say that beyond these two men, the order of succession would run through the Cabinet—subject to such shifts as might be necessary in the event a Cabinet Officer was one of the two men who had previously been designated by the nominating conventions.

This, I repeat, would be but a stopgap solution.

The argument for it is this. The nominating convention is the one and only place where a major political party comes into full view before the eyes of the Nation. It is the one and only place where it can be held to a collective responsibility for the decisions it makes.

This, then, is the time and place to make the party as a whole stand behind the worthiness of the men it thinks fit to succeed to the Presidency from within the party. If it certifies well-known charlatans and mountebanks, the party will suffer at the polls.

If it certifies men who were known for their integrity and wisdom, it will gain at the polls.

In any case, the line of succession would be known to the Nation when it goes to the polls—the succession itself would be automatic.

It would not require the intervention of any electoral body. It would give the national representatives of the national party a voice

in deciding the line of succession from within the party—whereas an election of a new Vice President by the Senate, would reflect the bipartisan balance of local forces within the Senate alone. And the Senate, by deliberate constitutional design, is and was meant to be a uniquely unrepresentative Chamber.

The stopgap proposal, to be sure, would not mean that the Vice Presidency would be filled at all times. But until Senator Keating's or Senator Bayh's amendment is approved we could in any case find ourselves living without a Vice President.

If the concept of the stopgap statute I have just sketched in should prove acceptable to this committee and to the Congress, I would suggest that there is latent in it the possibility for a further step bearing on the question of presidential disability.

Let me say first in this connection that in any realistic view, the most acute challenge put to us by the question of disability does not arise when the President is disabled and can declare his disability.

Nor for that matter, does it automatically arise when a President is both disabled and unable to declare his own disability. Even under the latter circumstances, the routine business of the Government could go forward for some months without the intervention of any second person, acting in the name of the Presidency, if not the President.

The question of disability becomes acute in the context of a national emergency, or, alternatively, in a case where time itself is central to what happens. A type case could arise when various measures in a President's program had been approved by the Congress and are awaiting his signature, but are left in limbo because he is physically unable to sign or veto them. In such circumstances, the danger we now face is not that the Vice President would cross the thin line between subordination and insubordination to the Presidential Chief. The danger we face is, that the Vice President who ought to act on behalf of a disabled President who cannot declare his own disability, would hold back from doing anything of the sort, out of fear that he would be charged with usurpation.

If the choice were mine to make between a plain grant of discretionary power to the Vice President to declare the disability of a President who cannot declare it himself—a discretionary power that could be abused—and no grant of such power that could be involved in time of a grave national emergency, I would prefer the first to the second course of action.

Furthermore, I would prefer vesting that discretionary power in one man who would always be the object of jealous watchfulness, than to vest it in any committee of men whose chief actors could not be singled out and called to account for what they did. This is another way of saying that I am not in favor of disability commissions, much less standing disability commissions and for the reasons Professor Neustadt has spelled out.

I recognize, however, that there is a great reluctance in the Congress and in the Nation to give a Vice President exclusive discretionary power to declare the disability of a President who cannot declare it himself. I also recognize that a Vice President might be reluctant to exercise this discretionary power on his own recognizances, even when the case for him to do so was overwhelming.

I would, therefore, suggest that in any stopgap statute I have been talking about, this committee and the Congress might give some thought to the following formula. Let it be said that as of Inauguration Day, 1965, the Vice President shall be plainly invested with the power to declare the disability of a President who cannot declare it himself. But in the act of exercising that power, he shall do so with the advice and consent of one or both of the two men designated in the 1964 nominating convention as coming after the Vice President in the order of Presidential succession.

We would have here, once again, a focusing of party and political responsibility for the decision that is made—or ducked. And I emphasize party and political responsibility, because the question of a President's disability, as one of the earlier witnesses commented, is only in part a medical question.

In equal or in greater part, it is a political question—to be decided not by judges but by political men—a political question in the sense that it turns on the need to decide whether the political condition in which the Nation finds itself, does or does not demand a formal determination of the President's disability.

Moreover, as part of that same political act of judgment, it might be well if the stopgap statute provided when the Vice President declared the disability of a President, he should make the declaration in the presence of the Congress.

After the manner of a naval officer who invites a court-martial to clear his name of any suggestion of dereliction of duty in the loss of a ship, the Vice President could then invite the Congress to institute impeachment proceedings if it was of a mind to do so. My guess is that given the emergency conditions I have been assuming the Congress and the Nation would cheer rather than censure his conduct.

Senator KEATING (presiding). Thank you very much, Mr. Hyman. It is an intriguing suggestion you make, and entirely new so far as I know, that the political parties at their nominating convention should designate pursuant to a statute two people next in line after the Vice President.

I see another merit as one in political life——

Mr. HYMAN. So do I.

Senator KEATING (continuing). To your proposal, and that is that wherever you go at this time of year you are asked what are going to be the issues in the next election, and that is always a very difficult thing to say as far ahead of an election as this.

If we had this statute you could certainly say with certainty, one of the major issues would be two men that they selected to follow a Vice President, and that would simplify problems for some of us who are constantly asked that question, because there can be no doubt about it that the caliber of the men selected at the nominating conventions would be bound to be an important issue albeit ad hominum.

Our chairman was required to leave and has asked me to take over. Mr. Conrad, do you have some questions you would like to put to the witness?

Mr. CONRAD. Senator. I would just like to say for Senator Bayh that he had to go to the floor. Mr. Hyman, he appreciated your coming today and the testimony you gave.

One thing I would like to ask. Several times you mentioned in your statement your agreement with Professor Neustadt. I was wondering whether or not you would concur in his views that the least amount of change possible would be the best?

Mr. HYMAN. Yes; completely. I think that—I don't want to argue against a constitutional amendment entirely. I wouldn't go quite as far as he did on that respect.

I would agree with him that constitutional amendments are very tricky things. The minute you put in a comma in the Constitution, it takes on a life of its own and you don't know where it is going to lead you, the classic example was the 15th amendment which was a civil rights amendment, and it became the law of corporations, which was very remote and I am always afraid of sticking anything in because you have to take it out and the strange thing is most of the amendments to the Constitution apart from the Bill of Rights and civil rights amendment have had to do with trying to clear up imperfections in preceding amendments or preceding provisions of the Constitution relating to the election of Vice Presidents and Presidents, and for this reason I have a natural reluctance to tinkering as he said with the Constitution.

I have a natural reluctance to going along with the concept of a constitutional amendment.

However, if the judgment is made that you have to have a Vice President at all times, and that is a political judgment, and if the legal judgment is made that you cannot have a Vice President at all times except by a constitutional amendment then I would go along with a constitutional amendment. I said on these double assumptions, and progressing beyond these two assumptions, I would say that I don't know of any better proposal in the form of a constitutional amendment, I do think the choice comes down between Senator Keating's proposal and Senator Bayh's.

They both have very strong points to commend themselves. They have the weaknesses that I have been trying to indicate.

Mr. CONRAD. Would you prefer those over an informal type of agreement which the last two administrations had?

Mr. HYMAN. My preference would be for an informal type of agreement but I am not sure that the country would stand for it.

I think that what we are really talking about on the question of disability again is an emergency circumstance. I don't see that the President could lie in bed for 3 months and your taxes would still be collected, you would have to still pay your taxes.

The Government is going to go on. It runs by the momentum of its own mass, but the real problem is what happens when you have an emergency circumstance, a national emergency of a kind, and then you have to have a man making life and death decisions and I am not sure that—I am just not sure that the country would feel comfortable with just an informal agreement.

I have another suggestion to make to this committee which I did not put into this presentation, and that is that this committee might look at the whole body of emergency legislation we have.

Once you declare a national emergency, a whole body of law becomes active, and it depends on whether it becomes, if you say a national emergency due to such and such circumstances then certain of the clauses in the law become active.

If you say it is due to the imminence of war or threat of war, a whole body of other clauses become operative and I was wondering whether it might not be worthwhile for this committee to take a look at that legislation and to consider that in the act of declaring a President disabled whether you might not put the act of declaring a President disabled, that very act alone, within the context of a national emergency, and, therefore, you would create by that, by the declaration of a national emergency due to the disability of the President, you would segregate whatever you do, and keep it within the context of an emergency, and once the emergency is declared to be over, then all the powers that had been assumed would subside again.

I would also take a look at what specific kind of legislation do you mean, pinpoint legislation to your need, in the events a President is disabled and the machinery of Government still has to go forward.

For example, the whole work of a Congress can be nullified if the President is disabled at the end of a Congress, he has got a table full of bills and he can't sign them.

Well, what happens? All those things become pocket vetoes if he doesn't sign them.

Would you give the Vice President the power to affix his signature? This is a specific power you could grant, it seems to me, by legislation and I would go through the whole list of emergency measures and see whether, which of those you would single out.

Mr. CONRAD. I think that is all.

Senator KEATING. Thank you very much, Mr. Hyman. You have been very helpful and it is an interesting and challenging proposal you make. That is one reason why you have so much reader interest. You always make thoughtful suggestions. Whether one agrees or disagrees is beside the point.

(The letter referred to follows:)

STATE OF NEW YORK, EXECUTIVE CHAMBER,
Albany, February 25, 1964.

HON. BIRCH EVAN BAYH, JR.,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR BAYH: Your subcommittee is taking testimony on a matter of vital concern to the American people—the urgent and critical questions of succession which would arise in the event of the death or inability of the President, and which are presently unresolved. Based upon many years' experience in Government, I would like to comment upon the matter of succession and the determination of Presidential inability and submit suggestions for the consideration of your subcommittee.

I. SUCCESSION

In my view, the present succession statute, enacted in 1947, does not adequately cope with the Nation's needs at a time of international crisis and tension when the "hot line" to Moscow might have to be used on short notice by the Nation's Chief Executive.

The present statute which places the office of the Speaker of the House next in line of succession to the President after the office of the Vice President, does not adequately protect the people of the United States in the event of the President's death or inability. This is not meant to reflect on the abilities and competence of Speaker McCormack nor any other person who has held the office of Speaker in the past or may hold it in the future. The office of the Speaker of the House is an extremely important and demanding position in the House of Representatives—one-half of the legislative branch of Government which is coequal with the executive and judiciary branches under our Constitution.

However, no Speaker can adequately perform his duties on Capitol Hill and also participate in the day-to-day process of decisionmaking at the highest levels of the executive branch.

The same concerns and problems apply to the possibility of the subsequent succession of the President pro tempore of the Senate.

What is needed in the present circumstances is a full-time person of ability, who would be selected by the President, who would be confirmed by the Senate, who would be available to assume the Presidency at a moment's notice, and who would have first-hand knowledge and experience, especially in the field of national security and international affairs.

In my opinion, none of the measures pending before your subcommittee can wholly achieve this purpose. In 1960, in an appearance before the Subcommittee on National Policy Machinery of the Senate Committee on Government Operations, I suggested the "creation of the post of First Secretary of the Government to assist the President in exercise of his constitutional responsibility and authority in the area of national security and international affairs." The concept of the First Secretary of the Government was developed by President Eisenhower with his Committee on Government Organization of which I had the honor to be chairman. The man appointed by the President as First Secretary would be confirmed by the Senate and would exercise authority as delegated by the President. He would be a member of the Cabinet and would preside in the absence of President and Vice President. He would have statutory designation as Executive Chairman of the National Security Council. In this latter capacity, he would be responsible for coordination among the areas of foreign policy, national defense, economic cooperation and intelligence.

An individual with the knowledge and experience gained from this position would be well suited to succeed to the Presidency in the absence of a Vice President. He would provide the essential continuity of Government in our international relations and leadership of the machinery of Government.

I therefore suggest that an appropriate bill be enacted which would provide for a new member of the Cabinet, whose title could be First Secretary of the Government, and who would be designated by statute as Executive Chairman of the National Security Council and as first in line of Presidential succession after the Vice President. The remaining members of the Cabinet would follow in the line of succession in the same order as is provided in the present act. He would under the circumstances that exist in Washington today act much as an Executive Vice President. Under normal conditions with both President and Vice President functioning, he would, as noted above, assist the President in the area of national security and international affairs and be available for succession behind the office of the Vice President. His salary and emoluments would be somewhere between the Vice President's and the Cabinet's level. He would not have a term or tenure but would serve in the same manner as other members of the Cabinet.

There is no question that Congress has the power to create such a new position. The First Secretary would be appointed by the same procedures presently applicable to the appointment of other Cabinet members: the President would appoint him "with the advice and consent of the Senate" pursuant to article II, section 2 of the Constitution. Furthermore, he would fall within the constitutional provision of article II, section 1, clause 6, which authorizes Congress to designate an "officer" to act as President in the absence or inability of both the President and the Vice President. The First Secretary would clearly be such an "officer."

It is my belief that if the Congress and the President proceed with expedition, this proposal could be implemented within 30 days.

I believe that this plan has the following merits:

1. It will provide a method by which a full-time person of ability intimately acquainted with current problems would be available to assume, in the present circumstances (in the absence of a Vice President) and at a moment's notice, the Presidential duties.

2. Under normal circumstances, the President could place in the line of succession immediately after the office of the Vice President a member of his own party and someone in whom he has trust and confidence and with whom he can work closely.

3. The caliber of an appointee to such a position of First Secretary would be protected by the requirement of confirmation by the United States Senate as representatives of the people.

4. The proposal is clearly constitutional and its implementation would not require a constitutional amendment.

II. DETERMINATION OF INABILITY

A further requirement, in my judgment, is a procedure which will provide an agreed-upon method of determining the inability of a President.

The letter agreement between President Johnson and Speaker McCormack, which presently addresses the question of Presidential inability, provides no method for determining when Presidential inability begins (at which time the successor assumes the Presidential powers and duties, but not the office) or when Presidential inability ends (and the President takes over again). I suggest that, pending a permanent solution through constitutional amendment, the agreement between the President and his successor be amended to provide that, in case of dispute, the beginning and ending of the President's inability be determined by the Chief Justice of the United States, after consultation with appropriate medical and psychiatric experts designated by the Surgeon General, the president of the American Medical Association, or by similarly qualified persons to be agreed upon.

Perhaps a different person or group of persons may be thought to be more appropriate than the Chief Justice; but the identity or makeup of the authority charged with determining the beginning and ending of inability is less important than the fact that such an authority be agreed upon in advance. The vital principle is that the President and his successor agree upon an arbitrator or arbitrators to decide the issue, if and when it arises.

These suggestions are submitted for your consideration, because I believe they have merit and would provide prompt solution.

But regardless of specifics, the current laws, agreements or customs relating to succession in the event of the death or inability of the President must be changed to assure continuity and effectiveness of the Nation's leadership. The best interests of the people of the United States—and the times in which we live—require immediate action.

Sincerely,

NELSON A. ROCKEFELLER.

Senator KEATING. At this point I would like to make mention of two other proposals in the area of Presidential inability and succession which have come to my attention during the past week or so.

The first comes from Mr. Laurens M. Hamilton, an old friend, and one of whom it can be said is both a gentleman and a scholar.

His scholarly interest over the years have been focused on American constitutional history. Mr. Hamilton is here this morning and with the chairman's permission we are going to hear from him.

STATEMENT OF LAURENS M. HAMILTON

Mr. HAMILTON. Mr. Chairman and gentlemen—

Senator KEATING. I would just like to preface it a little further, Mr. Hamilton.

Mr. HAMILTON. For the benefit of the official reporter, I will state my name is Laurens M. Hamilton. My home is in Fauquier County, Va., near Warrenton which is the county seat.

Senator KEATING. While Mr. Hamilton, I am sure, would prefer me not to refer to this, it is in a way particularly fitting that a recommendation for constitutional amendment in this field comes from him.

He happens to be a direct descendant of Alexander Hamilton. Alexander Hamilton, of course, was a constituent of my earliest predecessor in the Senate.

Hamilton, it will also be recalled from previous studies of the subcommittee, was intimately connected with the provision of article II of the Constitution which has given rise to the problems we are now

seeking to resolve. He was a member of the Committee of Style at the Federal Constitutional Convention.

When the draft Constitution went to the Committee on Style, as contemporary studies show, it was made clear by several provisions that the framers never intended the Vice President actually to become President under the succession clause, but only to assume the powers and duties of that office.

The Committee on Style had been authorized to clean up the draft language, but it had no power to make substantive changes.

Nevertheless, when the draft emerged from the Committee on Style, there was in the succession clause a new ambiguity, doubtless inadvertent, which made it uncertain whether the Vice President was to succeed only to the powers and duties of the Presidency rather than to the office itself.

But the Committee on Style, in my judgment, knew what it meant, and this is demonstrated in large part by subsequent statements by numerous delegates to the Convention, and by Hamilton himself in the *Federalist* No. 68, to the effect that the Vice President would only act as President or exercise the office but not actually assume the office himself.

Of course, with the benefit of full access to the historical background, the ambiguity persisted until set to rest, at least in cases where the President dies in office, by Vice President John Tyler's assumption of the Presidency in 1841. This subcommittee is now attempting to enact the Tyler precedent into the body of the Constitution in cases of death, impeachment, or resignation of the President but also to go back to what appears to have been the original intention of the framers in cases of Presidential inability, that the Vice President receive merely the powers and duties of the Presidency for the unexpired balance of the 4-year Presidential term.

Hamilton, therefore, had much to do with the subject of the subcommittee's labors, and I am glad that his descendant has graciously is now offering us his contribution toward finally solving some of the problems with which his illustrious forebear also grappled.

I want also to refer to a very thoughtful letter to go with a draft of proposed legislation received from Captain Leslie C. McNemar, U.S. Navy, retired, of Culpeper, Va. I understand that he has had some correspondence with this committee. Captain McNemar has had considerable legal experience in connection with official assignments on active duty with the Navy.

In his judgment, a constitutional amendment is unnecessary, and his draft bill represents his solution to the twin problems of succession and inability through ordinary legislation.

Although both he and I recognize that the subcommittee would have no jurisdiction over an ordinary bill, nevertheless, it seems to me, his proposal should be studied by this subcommittee for its possible contributions to the constitutional amendment proposals, and therefore, I would ask—I just express some disagreement also with the views of Captain McNemar, but I do think that he is thoughtful, and that without objection on the part of anyone, I will place a draft of his bill at this point in the record.

(The bill referred to follows:)

A BILL To provide for filling the vacancy in the Office of the Vice President of the United States; to insure the uninterrupted operation of the Government of the United States; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That the House of Representatives of the United States be and the same is hereby authorized and directed to select at least two but not more than three constitutionally qualified members of the same political party affiliations as that of the former Vice President whose in-term vacancy in the Office of the Vice President is being filled, in the same manner as to quorum and majority as provided for the House of Representatives in voting to fill the office of President of the United States under the provisions of article XII of the amendments to the Constitution; and that the names of the persons so selected to fill the unexpired term of said Vice President, be transmitted forthwith to the Senate of the United States for the selection of the Vice President from among the persons so named, in the same manner as to quorum and majority as provided for the selection of a Vice President under the provisions of said article XII of the amendments to the Constitution.

SEC. 2. Where the Congress is in session when the vacancy occurs in the Office of the Vice President, the election of the new Vice President shall remain the unfinished business on the calendar of each branch of the Congress until its functions and duties, relative thereto, have been completed.

SEC. 3. Where the Congress is not in session when the vacancy occurs in the Office of the Vice President, it shall convene in special session at the earliest possible date for the sole and exclusive purpose of selecting a new Vice President as hereinbefore set forth and, upon the completion of the selection of the new Vice President, the Congress shall adjourn sine die.

SEC. 4. In the case of a tie vote in the voting in the House of Representatives under this Act, said tie vote shall be broken by the Speaker of the House of Representatives or the person duly acting for him. And in the event of a tie vote in the voting in the Senate under this Act, said tie vote shall be broken by the President pro tempore of the Senate or the party duly acting for him.

SEC. 5. The new Vice President so selected shall be officially notified by the President pro tempore of the Senate or the party duly acting for him, of his selection. And upon being so notified, he shall take the oath of office prescribed in the Constitution of the United States and immediately enter upon the duties of his office. If by so doing another vacancy is created in the Office of the Vice President, the Congress shall immediately proceed to the business of selecting another new Vice President to fill the vacancy in that office thus created by the recent Vice President being advanced to the Office of President as provided by article II, section 1, paragraph 5, of the Constitution of the United States, or by his vacating the Office of Vice President under any of the other provisions of the Constitution of the United States applicable thereto.

SEC. 6. In the case of the removal of the President from office or of his death, resignation, or impeachment, the powers and duties of the said office shall devolve on the Vice President immediately upon his taking the oath of office prescribed by article II, section 1, paragraph 7, as soon as practicable after the death, resignation, impeachment, or removal of said President from office.

SEC. 7. In the case of the inability of the President to discharge the powers and the duties of his office due to a permanent incapacitating mental or physical disability or disabilities such as incurable cancer or other incurable disease, mental psychoses or disability due to an accident, the powers and duties of said office of President shall permanently devolve on the Vice President upon his taking the oath of office prescribed by article II, section 1, paragraph 7, immediately following the determination of the permanent nature of said disability or disabilities by a permanent board of three medical practitioners, two of whom shall be appointed by the Chairman of the National Food and Drug Administration for a term of two years, the third to be the President's personal White House physician, all of national reputation for the successful practicing of the healing arts in the field of medicine with particular reference to their knowledge of the mental or physical disability under consideration, which medical practitioners shall be of the same political party affiliations, as the President and Vice President.

SEC. 8. The Board of Medical Practitioners herein created shall convene and render their final decision, which may be by a majority vote, within not more than thirty days following the original diagnosis, or a reasonable temporary deter-

mination by one or more of the members of said Board, that the President has an incapacitating disability which renders him incapable of performing his constitutional duties as President. The Board shall also determine at that same time whether said disability is permanent or temporary and the President and Vice President shall govern themselves accordingly. The Board, if it deems necessary, shall avail itself of the facilities of the Walter Reed and/or the Bethesda Hospitals and such other like facilities as it may require in the performance of its duties under the provisions of this Act.

Sec. 9. Neither the President, nor anyone in his behalf, shall interfere with the convening of, deliberations of, or the decisions of said Board. This Board shall also perform the duties hereinabove set forth in connection with such permanent or temporary disabilities as may arise affecting the duties of the Vice President as in the case of the President. And the Vice President shall be governed thereby except the Vice President shall be removed from office only in the case where he is found by the Board to be suffering from a permanent disability. Where the Board finds that the Vice President is afflicted only with a temporary disability no further action will be taken by it.

Sec. 10. In the case of the inability of the President to discharge the powers and duties of his said office due to a temporary incapacitating mental or physical disability or disabilities, such as a major curable disease or operation or a curable mental or physical disability regardless of its origin such as accidents resulting from any source, for a period of not less than ten days nor more than twelve months, the powers and duties of said Office of President shall temporarily devolve on the Vice President and he shall exercise said powers and perform such duties as "Acting President" for the period of said disability. And upon the termination of said temporary disability by the President returning to duty upon the advice of his White House physician, the Vice President shall return to his legally constituted duties of Vice President.

Sec. 11. In case the President of the United States, by detention or design, is to be, or is, in fact, absent beyond the continental limits of the United States, or beyond the jurisdiction thereof, in either case for a period of time in excess of thirty days, the Vice President shall assume the duties of the Office of President as "Acting President" as soon as practical after the beginning of said absence and he shall continue to so act until the President has permanently reentered the continental limits of the United States or the jurisdiction thereof and is otherwise physically and mentally qualified to perform his constitutional duties. In the event said absence has become permanent, or the President is not physically or mentally qualified to perform his duties as such, the Vice President shall assume the duties of President pursuant to the provisions of article II, section 1, paragraph 5, of the Constitution; take the oath of office prescribed in article II, section 1, paragraph 7, and thereafter perform the executive duties and exercise the constitutional powers invested in the President of the United States by article II, section 1, paragraph 1, of the Constitution of the United States, not as "Acting President" but as President.

Sec. 12. The Office of the Vice President shall not be held to be vacant while the Vice President is serving as "Acting President" under the provisions of this Act. The Vice President shall be required to take the oath of Office of the President as prescribed by article II, section 1, paragraph 7, before entering upon his duties as "Acting President"; his oath as Vice President not being deemed adequate for that purpose. The powers exercised and the duties performed by the Vice President as "Acting President" shall have the same force and effect as if performed by the President. The President, however, shall not perform any official duties connected with the Presidency, while the Vice President is performing the duties of the Office of President as "Acting President." The Vice President shall also be relieved, during the period while serving as "Acting President," from performing any of the duties which attach to the Office of the Vice President, unless such duties also are an integral part of the duties of the Office of President and would be performed by the President in the absence of the Vice President. Hereafter the Congress may prescribe duties to be performed by the Vice President as "Acting President" which are not deemed to require the action of the President.

Sec. 13. In the case where neither the President nor the Vice President chosen by popular vote at the last national November presidential election has been certified by the House of Representatives or the Senate as elected as required in article XII of the amendments to the Constitution, before the date fixed by law for his inauguration, the then existing President and Vice President shall con-

to continue in office and continue to perform the duties and exercise the powers of President and Vice President until the new President and new Vice President chosen at the national November presidential election have been certified as elected as provided in article XII of the amendments; or in the event the candidate for President chosen at the national November presidential election is absent or unavailable for any reason, the Vice President chosen at the national November presidential election shall be certified by the Senate as the President as provided in article XII of the amendments and upon the certification of the new President either by the House of Representatives or the new Vice President by the Senate, the President and Vice President serving in the interim shall vacate their respective offices upon the newly elected President assuming the duties of President by taking the oath of office prescribed by article II, section 1, paragraph 7 of the Constitution.

SEC. 14. The national political parties, in convention assembled, shall each nominate a candidate for President and a candidate for Vice President and they shall each nominate a first and a second alternate as candidates for President and a first and second alternate as candidates for Vice President: to be voted on by the electors in the order established by the national convention, in the event that either of the original candidates for President or Vice President through death, withdrawal or any other unalterable circumstance has become unavailable as a candidate prior to the national presidential election on the Tuesday next after the first Monday in November of each fourth year; or between that date and the date the electors meet in their respective State Capitals to certify their lists of electors between that date and the date upon which the ballots of the electors are counted in the presence of the Senate and the House of Representatives in joint session. And the House of Representatives in counting the electoral votes for the office of President under the provisions of this section of this Act, shall, if necessary, substitute the name of the first alternate, and, if he is not available, the name of the second alternate in the order fixed by the national political convention and adjudge that candidate to be the elected President, if available for that purpose at that time. And the Senate, in counting the electoral votes for the Vice President under the provisions of this same section of this Act shall, if necessary, substitute the name of the alternate candidate in the order fixed by the national political convention and adjudge that candidate to be elected Vice President, if available for that purpose at that time. Where a vacancy occurs in the office of President between the time of his certification of election by the House of Representatives and his taking the oath required by article II, section 1, paragraph 7, of the Constitution the Vice President, certified by the Senate to be the duly elected Vice President, shall be advanced to the office of President under the provisions of article II, section 1, paragraph 5, of the Constitution and the vacancy in the office of Vice President shall be filled as provided in section 1 of this Act. Where a vacancy occurs in the office of Vice President between the time of his being certified by the Senate as being elected and his taking the oath of Vice President the vacancy shall be filled as provided in section 1 of this Act. In any case where a vacancy in the office of Vice President is being filled under the provisions of section 1 of this Act, the names of the alternate candidates for the office of President and the alternate candidates for the office of Vice President, who are available for consideration, shall be first considered by the House of Representatives in the course of performing its prescribed duties under the provisions of section 1 of this Act.

PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES
RE PRESIDENTIAL SUCCESSION

SECTION 1. Whenever the office of President shall become vacant due to the death, resignation, or impeachment of the incumbent, the Vice President shall immediately succeed to the office, authority, and duties of the Presidency. He shall immediately take the oath or make the affirmation provided for in section 1 of article 2 for the President and shall serve the remainder of the term for which the former President was elected.

SEC. 2. At times when the President is unable through illness or other cause to discharge the powers and duties of his office, the Vice President shall assume such powers and duties as Acting President so long as the disability of the President continues but not longer than the balance of the term for which the latter was elected.

SEC. 3. The inability of a President to discharge the powers and duties of his office may be determined by himself by issuance of an Executive order to that

effect, or, should his inability be such that he is unable to execute such Executive order, then the Chief Justice of the Supreme Court and the two senior Associate Justices of the Supreme Court shall immediately determine the disability of the President; and shall in due course, should the President in their opinion recover from his disability, promptly declare the disability to be at an end, and the President shall then immediately resume the powers and duties of his office.

SEC. 4. Should a Vice President die, resign, or be removed from office during the term for which he has been elected, the President shall promptly submit to the Senate a nominee who shall, upon confirmation by the Senate and upon taking the required oath, assume the title and powers of Vice President during the balance of the term for which his predecessor was elected.

Should the Congress not be in session when a vacancy in the office of Vice President occurs, the Senate shall be immediately called into special session for the sole purpose of action on this nomination without debate or postponement.

SEC. 5. When the Vice President succeeds to the office of President, as provided in section 1 of this article, he shall, within thirty days, submit to the Senate a nominee who shall, upon confirmation by the Senate, assume the title and exercise the functions of Vice President during the remainder of the term for which his predecessor was elected. Should the Senate reject the nominee of the President, the President shall forthwith submit the names of two nominees and whichever of such nominees as shall receive the higher number of votes for confirmation shall be duly declared Vice President.

SEC. 6. This amendment shall take effect immediately upon ratification by the legislatures of three-fourths of the several States and its provisions shall supersede any in conflict therewith in the Constitution or in laws previously enacted thereunder.

Senator KEATING. Mr. Hamilton, we are delighted to have you here, and if you will proceed we will be happy to hear from you.

Mr. HAMILTON. Thank you, Senator. It is an honor to sit here in the reflective glory of the distinguished ancestor whom you have named. But I want to make clear I appear as a private citizen; I hold no office.

I have no academic or legal achievements which qualify me as many of the witnesses who have testified before this committee before.

But such service as I have had personally in both state and Federal Government, in elective and appointive positions, plus a hereditary interest in the Constitution itself, over the past 40 years and more does, I believe, qualify me to stress some points which I do not think have been touched on this morning.

Most of what I had in mind to say has already been said and better said by the first witness who appeared this morning, Mr. Feerick, and to that I can only say, "Amen."

But due to the lateness of the hour, I have limited my possible remarks to about 10 minutes, to bring to the attention of this subcommittee four points which I consider deserving of attention.

In the first place, I think it is a mistake to refer to any action in the line of Presidential succession or filling Vice-Presidential vacancy which is to be taken by both Houses in joint session. There is no precedent in our history and there is no provision in our Constitution for any action to be taken by both Houses of the Congress in joint session.

The only mention of it in the Constitution, as a matter of fact, is that they meet in joint session on the January following a presidential election, so that the report from the electoral colleges in the several States may be opened and counted in their presence.

But the Constitution, even as amended by the 12th amendment, does not refer to choice of a President and Vice President to both Houses of Congress. It very wisely provides that if no one candidate for

either of those offices received a complete majority of the electoral vote the Senate shall act on the two candidates for Vice President receiving the highest vote, and the House of Representatives shall act on the three candidates for President receiving the highest vote.

I point out further that in such a case it is provided that the House shall vote by State units not as individuals.

In other words, one State delegation, one vote, not one Congressman, one vote.

Now, the danger of a disabled President being unwilling to declare himself disabled has been touched on this morning. I would like to stress that even more. The arrangement such as President Eisenhower had with Mr. Nixon and such as President Kennedy had with Mr. Johnson, in cases of disability, might have been workable in some ways but I think there would have been very grave question and had either of those, either Mr. Nixon or Mr. Johnson, as Vice Presidents, assumed the authority of President, as to whether they had a legal and constitutional authority to act, for instance, as Commander in Chief of our Armed Forces.

We live in a day when a lightning sneak attack might be made on us by an aggressor. Our greatest defense, our greatest deterrent against such attacks, is our ability of instant retaliation.

All those national security plans which are naturally top secret leave the final work up to just one man, the President of the United States. He and he alone has authority to push the vital button or to deliver the agreed code word over hot-line telephones.

Whether without some constitutional amendment such as is being considered by your subcommittee any Vice President would be legally authorized to exercise such authority is questionable.

But the amendments can make it perfectly clear, the amendments regarding disability, that the President may by Executive order declare himself disabled and delegate authority to his Vice President.

If that were in the Constitution in the form of an amendment, it would leave no question whatsoever as to the authority of a Vice President acting as President during the disability of the President.

Furthermore, it would bring in as acting President a man who during the term of himself and the President under whom he serves would be far more familiar with the innermost secrets of our national security and defense plans than would any man from any other branch of government.

He would also, in all probability, be far more familiar with the confidential and top secret information about our relations with various foreign powers, which is of the utmost importance, and would be of even greater importance in a time of crisis.

Now, under that unwillingness of a President to declare himself disabled to which I referred, the best example I can give you is mentioned in an article which appears in the March issue of Reader's Digest entitled "Needed, a Vice President"; it is by one Douglass M. Allen. And in that article which appears on pages 73 to 77 of the Digest, on page 74 he refers to the 18 months between the fall of 1919 when he was stricken, and the March 1920, when President Harding was inaugurated when President Wilson was incommunicado.

None of his Cabinet officers could even have any access to him, and any messages they had to take up were usually handled by Mrs. Wilson or by Mr. Tumulty, President Wilson's confidential secretary.

A book on that subject on those 18 months under the title "When the Cheering Stopped" is to appear this spring.

So that I think it important to cover not only cases where the President is willing to declare himself disabled and able to declare himself disabled by signing an Executive order, but also questions when through extreme illness, unconsciousness, possible mental breakdown, a President might be unwilling to declare himself disabled and yet, at the same time, unable to discharge the powers of his office.

The fourth point to which I would draw your attention is that in the stipulation in the 1947 act setting up the line of succession there is a particular stipulation that the Speaker of the House, who is the next in line, must resign as such and as a Member of Congress before "acting as President."

I would point out that that in one way settles the succession problem, that it doesn't matter who comes after the Speaker of the House because, I believe, there will always be a Speaker of the House, and should one Speaker have to resign to act as President, the House would very quickly elect another Speaker who would automatically be next in line. The great disadvantage in my opinion to having the succeeding fall upon a Member of Congress is not only that he would probably not be familiar with top-secret foreign affairs and national security matters in the executive branch as would someone having the President's confidence, but he also might well be, and during recent years frequently would have been, of a different political party from the President's.

So that logic of providing for succession through members of the Cabinet as it existed from 1886 until the enactment of the 1947 law would seem to make far more sense.

It is true that members of the Cabinet are not elected officials, whereas Members of your body and Members of the other House are elected. But in the case of the Senate none of you is elected by a unit larger than one State, be it a large State such as Senator Keating represents, or a small State such as Senator Fong represents.

In the House it is equally true that except for the few instances where a Representative is elected at large, he is elected by the voters in one congressional district.

On the other hand, a Secretary of State, although not elected, can only be appointed with the advice and consent of a majority of the Senate, and the Senate has, since our Constitution first went into action, found that has been very satisfactory. It applies not only to Cabinet officers, it also applies to the Chief Justice and all the Associate Justices, and most of the Federal judges in the judicial branch.

So that there is every precedent for the Senate being the logical body to consider any nomination that any President might make in either the executive or the judicial branches.

Furthermore, we live in an age where expedition is all important. The Constitution was adopted in a day when the speed of a horse at full gallop was the fastest known means of transportation, and where flintlock rifles and smoothbore cannon were our major weapons, our only weapons. And yet that Constitution has been sufficiently, was sufficiently well designed, sufficiently well built, so that through the ensuing 177 years it has been able—it has been elastic enough to cover a population which at that time was between 3 and 4 million in 13

former Colonies along the Atlantic seaboard, until we are now a nation with a population of over 190 million and we stretch from the Atlantic to the Pacific and from Canada to Mexico, not to mention our 2 newest States in noncontiguous territories.

I, therefore, feel that there is within the Constitution itself, and certainly within the traditions of constitutional amendments during the intervening years, ample precedent for your committee to proffer changes made necessary but which can be made within the limits of constitutional precedent and tradition.

I mentioned expedition. It is my thought that, should an emergency occur at a moment when Congress might be in adjournment, it would be easier for the President to convene the Senate in special session for the specific purpose of acting on a nomination than it would be to convene both Houses of Congress.

The right of a President to convene one House is derived from section III or article II of the Constitution which gives him the right to convene both or either House at his discretion. So there is constitutional authority for the President convening the Senate and the Senate alone into special session for such purpose, and that could certainly be done and the transaction of business in the Senate could certainly be done more quickly than it could if both Houses had to be convened and some 536 individuals had to act on it and comment on it rather than 100.

Gentlemen, that is about all I have to stress at this point. If there are any questions I would be delighted to answer them to the best of my ability.

Senator KEATING. Well, we are very grateful to you, Mr. Hamilton, and you obviously have given a great deal of thought to this subject, and we have had the benefit of it.

Counsel, do you have any questions?

Mr. CONRAD. No.

Senator KEATING. Thank you very much.

The committee will meet next on March 5 and we will hear at that time former Vice President Nixon and Clinton Rossiter, and we will have after that one additional, at least one additional day's hearing.

The subcommittee now stands in adjournment.

(Whereupon, at 12:50 p.m., the committee adjourned, to reconvene on Thursday, March 5, 1964.)

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

THURSDAY, MARCH 5, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 8:45 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh and Fong.

Also present: Larry Conrad, counsel; Clyde Flynn, minority counsel; Mary Day, chief clerk; Abbott Leban, counsel to Senator Keating and Bernard J. Waters, minority counsel.

Senator BAYH. The subcommittee will now come to order.

Prior to introducing our first witness this morning I have three items which I would like to insert in the record.

The first item is a statement from Nicholas deB. Katzenbach, the Deputy Attorney General of the United States, the statement which was delivered by Mr. Katzenbach in person on Thursday, June 18, 1963, when the subcommittee was considering the problem of Presidential inability. There have been many events which have transpired between that time and this but Mr. Katzenbach's testimony is still the same, and, of course, he is such a busy man; we have had an agreement, and if there is no objection, we will insert it in the record to prevent him from taking the needed time this morning.

(The statement referred to follows:)

STATEMENT OF NICHOLAS DEB. KATZENBACH, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY NATHAN SIEGEL, ATTORNEY, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. KATZENBACH. I am delighted to be here, Senator. I have a prepared statement. Would you like for me to read that?

Senator KEFAUVER. Yes, if you will, sir.

Mr. KATZENBACH. Once again this subcommittee is confronted with the very difficult and all-important task of attempting to clarify the law relating to succession of the Presidency in the event that the President is unable to discharge the powers and duties of his office.

There are three proposals before you designed to have this effect by amending the Constitution as it relates to the contingency of Presidential inability. One, a relatively clear and uncomplicated proposal, is Senate Joint Resolution 35, introduced by Senator Kefauver and Senator Keating, which seems to us the best of the three. Another, Senate Joint Resolution 84, introduced on May 28, 1963, by Senator Hruska and Senator McClellan, is similar to Senate Joint Resolution 35, except for one provision which I shall discuss hereafter. The other, more elaborate and detailed, is Senate Joint Resolution 28. Each of these proposals would replace and repeal by implication the sixth clause of section 1, article II of the Constitution, which provides as follows:

"In Case of the removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall

devolve on the Vice President, and the Congress may by Law, provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

The subcommittee may recall that in 1961 the Attorney General rendered an opinion to the President dealing with the question of Presidential inability. With your permission I should like to make this opinion a part of the record in this hearings.

Senator KEFAUVER. Without objection, it will be made a part of the record in the appropriate place.

(The document referred to is printed in the appendix to the record as exhibit No. 3.)

Mr. KATZENBACH. Since it comprehensively discusses the problem and its history, and inasmuch as the subcommittee is already fully aware of this background, I see no point in reviewing the matter again except as it may be necessary to an understanding of what is contemplated by the proposed amendments.

It is generally agreed that the sixth clause of article II, section 1 no longer provides any problem in the event of the death of a President. In such a contingency, as a matter of historical practice, established by John Tyler, and followed by six other Vice Presidents, the Vice President becomes President. The first sentence of Senate Joint Resolution 35 reflects this tradition in the case of death, but extends the same principle to a case of removal of, or resignation by, the President. In these three contingencies—removal, death, or resignation of the President—the Vice President would become President and be sworn in as President.

Senator KEFAUVER. Just a minute, Mr. Katzenbach. We are glad to have Senator Fong, a member of the subcommittee, with us.

Senator, our witness is Deputy Attorney General Katzenbach.

Senator FONG. Thank you.

Mr. KATZENBACH. When we turn to the problem of Presidential inability, however, a similar settled practice on which to rely does not exist although the Eisenhower-Nixon agreement and the identical Kennedy-Johnson agreement represent a basis upon which such a practice may be established. It is with respect to inability that article II, section 1, clause 6 is unclear on two important points. The first is whether it is the office of the President, or the powers and duties of the said office, which devolve upon the Vice President, in the event of Presidential inability. The second is who shall raise the question of "inability" and who shall make the determination as to when it commences and when it terminates.

Senate Joint Resolution 35 is designed to clarify both of these points. Its second sentence makes it clear that it is not the "office" but merely the "powers and duties" of the office which devolve on the Vice President until the inability has been removed. While the language used may be adequate, in order to make it clear beyond dispute in what capacity the Vice President would be serving, signing proclamations, orders and other documents in this situation, I would suggest that the words "as Acting President" should be included after the words "Vice President" in lines 6-7, page 2 of the proposal, as was done, for example, in sections 2 and 3 of Senate Joint Resolution 28. It seems to me that if a Vice President undertook to exercise Presidential power under the second sentence of Senate Joint Resolution 35 he would feel assured that no one would look upon him as a usurper. It was precisely this fear which deterred Vice President Arthur from acting after President James Garfield was shot in 1881 and lay in a coma for 80 days completely unable to perform any of the duties of the Presidency. So, too, when Woodrow Wilson suffered a stroke in 1919, Vice President Marshall refused to assume any of the powers of the Presidency because of the constitutional uncertainty of some as to whether Wilson could resume his office upon his recovery. The second sentence of Senate Joint Resolution 35 is intended to provide a disabled President with a clear constitutional guarantee that he can return to his office as soon as he determines that his inability has ended.

The third sentence of Senate Joint Resolution 35 relates to cases of removal, death, resignation, or inability of both the President and Vice President is involved, the proposal makes it plain that the officer who shall act as President (presently under and pursuant to the Succession Act of 1948) shall do so on a temporary basis until a President is elected or the inability is removed.

The last sentence of Senate Joint Resolution 35 leaves it to Congress to decide what the procedures shall be for determining "the commencement and termina-

tion of any inability." This is, of course, bound to be the most controversial feature of Senate Joint Resolution 35.

One objection may be that this provision is a blank check which, if abused, could upset the balance of power between the legislative and executive branches, and place the President at the mercy of a hostile Congress. I think this danger is quite remote, and at all events not great enough to outweigh the advantages of conferring this authority upon the Congress which represents the national electorate over more complex constitutional provisions. If the methods adopted by Congress for dealing with the problem do not meet the standards of the separation of powers or otherwise satisfy the President, he may veto the bill, and his veto could be overridden only by two-thirds of each House. Moreover, if Congress enacts a measure which is approved by the President, and thereafter attempts to amend or repeal it, its action will also be subject to approval or veto by the President. It seems unlikely, therefore, that any bill would ever be enacted into law which was not acceptable to the President, and which did not afford adequate protection to the people and to the office of the President.

It may be noted that a proposal such as Senate Joint Resolution 35 has the support of the American Bar Association, the New York State Bar Association and the Association of the Bar of the City of New York. It is hardly likely that there would be such unanimous support for this proposal among these eminent lawyers if they believed the risk of impairing the balance of power under the Constitution was substantial or real. Congress, it will be recalled, presently has the authority under the Constitution to enact laws of succession when both the President and Vice President have suffered inability. Vesting similar authority in the Congress to determine procedures on the inability of the President alone would not therefore be a drastic departure from the authority it has always had under the Constitution; rather it would be consistent with it. Indeed, there are many eminent scholars—among them Everett S. Brown, Edward S. Corwin, Charles Fairman, Davis Fellman, James Hart, Arthur N. Holcombe, and Mark DeW. Howe, to name only a few—who are of the opinion that Congress may deal with the problem merely by statute, and that it requires no amendment to the Constitution. Without regard to whether these scholars are right, there are persuasive arguments against freezing any specific plan in the Constitution by which a President's inability may be determined in the event of an impasse between the President and Vice President.

I think Senator O'Mahoney summed up very well the reasons why the approach to the problem taken by a proposal such as Senate Joint Resolution 35 should be preferred over others. Testifying before this committee in 1958, he said:

"The President is the only Federal officer elected by all the people of all the States. The Members of Congress are elected by the people of several States and congressional districts.

"We are, of course, dealing with the highest elective office which is in the power of the people of the United States to bestow on any man. * * * The determination of the inability of the President of the United States must be publicly accepted and the vehicle calculated to gain public acceptance most readily, it seems to me, is the vehicle to be adopted. There is no group, nor could there be any individual, who represents a better cross section of public opinion than the Congress of the United States. Their decision would be less apt to be motivated by temporary gain than any other agency for any such temptation would be tempered by the knowledge that they would soon have to stand accountable before the people of the United States in free and open elections."

While the Department in general favors the procedures provided for in the fourth sentence of Senate Joint Resolution 35, it is of the opinion that it should be clarified. Presumably it is not intended by this sentence that, after ratification of the amendment but pending enactment of implementing legislation by Congress, a President and Vice President shall be precluded from entering into an understanding such as was approved by the past two administrations. For, after ratification but prior to enactment of implementing legislation, such an understanding would still continue to serve the useful purpose of encouraging a Vice President to discharge the powers and duties of the office of President, until the latter's disability was ended, and make possible the uninterrupted operation of the affairs of the Government. Indeed, such an agreement helps to solve most of the problems, although admittedly it does not solve them all. However, it is at least arguable that, in its present form, once the amendment is ratified, the language of the last sentence of Senate Joint Resolution 35 may render the understanding of no effect, since, read literally, it may be interpreted as meaning that

even before implementing legislation is enacted, only Congress shall establish the method for determining the commencement and termination of the inability. This would be a most unfortunate result which I am quite sure the authors of the proposal do not intend.

The primary purpose of the last sentence is to confer broad discretion on the Congress to deal chiefly with the unusual situations such as where the President and Vice President have reached an impasse, or an atomic attack or like holocaust prevents communication and agreement between the President and Vice President. I think that this intention would be reflected more clearly if the word "shall" after "ability" in line 15, page 2 of Senate Joint Resolution 35 were changed to "may." There would then be no question but that the existing understanding between President Kennedy and Vice President Johnson, which is identical to the understanding between President Eisenhower and Vice President Nixon has been left unimpaired and that it will remain operative until Congress passes implementing legislation.

I recognize, as was observed before, that there are eminent statesmen and constitutional scholars who are of the opinion that Congress has power to act in this matter under the "necessary and proper" clause (art. I, sec. 8, clause 18), that a statute would therefore suffice as a solution to the Presidential inability problem, and moreover, that enactment of a statute is to be preferred because it would likely take less time than the ratification of an amendment. On the other hand, there is equally distinguished authority, including the opinions of former Attorneys General Brownell and Rogers as well as Attorney General Kennedy, that the only definitive method of settling what problems remain despite present arrangements is a constitutional amendment. While the current understanding between the President and the Vice President does resolve the major problems in my judgment, it cannot resolve all problems which would conceivably arise, unlikely as they appear to be. For example, some observers have theorized as to the possibility of disagreement between a President and a Vice President as to the existence of inability—both as to when it has begun and when it has ended.

There remain for discussion Senate Joint Resolution 84 and Senate Joint Resolution 28. Senate Joint Resolution 84 is similar to Senate Joint Resolution 35 except that it expressly imposes the limitation on Congress that in establishing a procedure to determine the inability of a President to discharge the powers and duties of his office, such procedure "must be compatible with the maintenance of the three distinct departments of Government * * * and the preservation of the checks and balances between the coordinate branches."

While I am wholly sympathetic with the sentiment which has prompted the recommendation, I do not believe it is necessary or desirable. For one thing, it expresses a principle which already pervades, and is inherent in, the Constitution. To include this principle in merely one section of one article of the Constitution may open the door to the argument that the principle no longer applies to other portions of the Constitution. Moreover, in its specific context, the limitation on the Congress is quite elusive and may be susceptible of varying interpretations and accompanying confusion. Then again, if the method adopted by Congress for determining Presidential inability does not meet the standards of the separation doctrine or preserve the system of checks and balances between the coordinate branches, the President may veto the bill, and his veto, as already noted, could only be overridden by two-thirds of each House. It seems most unlikely, therefore, that any bill dealing with the matter of Presidential inability could ever be enacted which did not afford adequate protection under the separation doctrine.

I now turn to the consideration of Senate Joint Resolution 28. Sections 1 and 2 of this proposal are similar in their effect to the first two sentences of Senate Joint Resolution 35. At this point, marked differences between the two proposals appear. Section 3 of Senate Joint Resolution 28 deals with cases in which the President is unable or unwilling to declare his own inability. In that event the Vice President, with the written approval of a majority of the heads of the executive departments in office, would assume the discharge of the powers and duties of the office of Acting President. Section 4 covers the situation of a disagreement between the President and Vice President as to whether the inability has ended. The President would be permitted to resume the powers and duties of his office by making a public announcement that his inability has ended. This he could do on the seventh day after making the public announcement. But Congress would be called on immediately, whether in session or not, to re-

solve the question of Presidential inability if objection is raised in writing by the Vice President, supported by a majority of the heads of executive departments in office at the time of the President's announcement. In that event, Congress would decide the issue. If two-thirds of the Members present in each House acting by concurrent resolution determined that the President's inability had not terminated, the Vice President would continue to serve as Acting President. The President could, however, thereafter resume the powers and duties of his office either if the Vice President proclaimed that the President's inability had ended, or Congress, by a majority of the Members present in each House, determined, by concurrent resolution, that the President's inability had come to an end.

It is true that the procedure embodied in section 4 of Senate Joint Resolution 28 has definite advantages over the impeachment process. For one thing, of course, Presidential inability could scarcely fall into the category of a high crime or misdemeanor for which impeachment lies under the Constitution. In addition, under section 4, the stigma of impeachment would probably be absent. Of greater consequence, impeachment would bar the President from returning to office after his disability ceased. Moreover, impeachment proceedings could be carried on only if Congress were in session.

While the procedure under Senate Joint Resolution 28 is intended to avoid the stigma of impeachment, it may, however, be interpreted by the people in that light. Apart from the wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The chances are that supplemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future—not covered by Senate Joint Resolution 28—where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35 makes this possible; Senate Joint Resolution 28 does not.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures. We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35, which treats the contingency of inability differently from situations such as death, removal, or resignation, which states that the Vice President in case of Presidential inability succeeds only to the powers and duties of the office as Acting President and not to the office itself, and which declares that the commencement and termination of any inability may be determined by such methods as Congress by law shall provide. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding.

Thank you.

Senator BAYH. The second thing in the record is a letter from Michael H. Cardozo, executive director of the Association of American Law Schools. The letter was delivered to me personally this morning by Dr. Charles B. Nutting, who, as we know, is dean of the National Law Center of the George Washington University Law School. He is acting as representative of the American Association of Law Schools.

Dean Nutting was a member of the American Bar Association consensus group which recently met in Washington and which we have discussed earlier in the hearings. This consensus, the record also discloses, was later adopted by the American Bar Association's House of Delegates in Chicago.

I am extremely delighted to receive this letter from the American Association of Law Schools since it does concur in the principles which were contained in the Bar Association consensus, and Dean Nutting,

of course, is past president of the Association of Law Schools and is recognized throughout the United States as an expert and learned scholar in legal matters.

Dean, I want to take this opportunity to thank you personally for your interest in trying to solve this problem as well as the important message which you are delivering at this early hour in the morning.

Thank you very much for this message and without objection I will ask it be included in the record at this particular point.

(The letter referred to follows:)

ASSOCIATION OF AMERICAN LAW SCHOOLS,
OFFICE OF THE EXECUTIVE DIRECTOR,
February 25, 1964.

Hon. BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendment, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR BAYH: At a meeting in Chicago on February 15, 1964, the Executive Committee of the Association of American Law Schools, which is charged with the conduct of the affairs of the association, voted to lend its support to the sponsorship by the American Bar Association of the consensus of the Conference on Presidential Inability and Succession that was convened in Washington on January 20 and 21, 1964. A copy of the text of this consensus, which has been introduced before your subcommittee by representatives of the American Bar Association, is annexed to this letter.

It will be appreciated if this expression of support for the consensus could be recorded in the record of the hearings on this subject.

Sincerely,

MICHAEL H. CARDOZO.

ABA CONFERENCE ON PRESIDENTIAL INABILITY AND SUCCESSION,
WASHINGTON, D.C., JANUARY 20 AND 21, 1964

Following is the full text of the consensus report:

"The Conference considered the question of action to be taken in the event of inability of the President to perform the duties of his office. It was the consensus of the Conference that:

"1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

"2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

"3. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

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

"5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.

"The Conference also considered the related question of Presidential succession. It was the consensus that:

"1. The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

"2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term."

Senator BAYH. The third item which I would like to have included in the record this morning is a very comprehensive letter on the question of Presidential succession and disability from the distinguished senior Senator from Massachusetts, the Honorable Leverett Saltonstall. I would like to read two points from Senator Saltonstall's letter and ask that the entire letter be included in the record at this particular time.

The two points which I think are particularly significant this morning are these:

(2) I believe it is necessary to do more than merely change the order of succession to the Presidency. We should take no chances with the Government of our Nation and risk having a vacancy in both of the country's top offices. It is my feeling, therefore, that article II, section 1 of the Constitution should be amended to provide that in the event of a vacancy in the office of Vice President, the President could nominate a successor. If the nominee were not confirmed by a majority of the Senate and House sitting in joint session, as many names could be offered as were necessary to choose a person acceptable both to the President and to the Congress.

(3) The question of presidential disability is a further problem which has never been clarified. On the three occasions in our Nation's history when a President has been disabled, the steps taken were those that seemed the most expedient at the time. Since the Eisenhower administration, informal agreements as to what should happen in the event of Presidential disability have been made between the Chief Executive and his successor. This situation should be clarified by constitutional amendment to avoid any confusion about when and to what extent the second in command should assume the duties of the President. Perhaps the best method of resolving this problem would be to establish a committee, made up of the four senior members of the Cabinet as provided by law and eight Members of Congress, four from each body, which would have the responsibility of determining the extent of the President's disability.

(The entire letter referred to follows:)

U.S. SENATE, COMMITTEE ON APPROPRIATIONS,

March 4, 1964.

Hon. BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendments,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: I respectfully request that this letter be included in the transcript of the hearings which you are now conducting on the question of Presidential succession and Presidential disability.

It is important to insure that the line of succession to the Presidency, as provided for by the Constitution and carried out by the Congress, is clear and unequivocal and that the necessary changeover be both rapid and efficient. In the time of a tragedy such as we witnessed last November, the continuity of the Government must be maintained.

As I see it, there are three basic issues which merit the careful attention of this subcommittee: (1) Modification of the present line of succession to the Presidency, which would require only an act of Congress; (2) provision for the assumption of the duties of the vice-presidential office if for any reason it should become vacant; and (3) promulgation of a clear policy on what should be done in the case of the disability of the President. Both of the latter would require constitutional amendment.

(1) The present law, enacted in 1947, calls for the Speaker of the House to take over the duties of the Presidency if something happens to both the President

and the Vice President. However, it is conceivable that under this system the successor could belong to a different political party than the deceased President. In fact, for 8 of the last 16 years, the succession of the Speaker to the Presidency would have put into control of the White House the party which had lost the previous presidential election. Such a change in the highest levels of the Government would hardly be conducive to the smooth and uninterrupted conduct of the Nation's affairs. I believe, therefore, that the succession law should be amended to provide that the Secretary of State, followed by the other Cabinet officers, should assume the duties of the Presidency if this occasion should arise, as was the case before 1947. The Secretary of State, with his vast knowledge of foreign affairs and his close advisory relationship with the former President, would be best equipped to carry on the policies and practices of his predecessor until the next election. However, any such change should not take effect before November 1964 so that it would not directly affect anyone now in the line of succession.

(2) I believe it is necessary to do more than merely change the order of succession to the Presidency. We should take no chances with the Government of our Nation and risk having a vacancy in both of the country's top offices. It is my feeling, therefore, that article II, section 1 of the Constitution should be amended to provide that in the event of a vacancy in the office of Vice President, the President could nominate a successor. If the nominee were not confirmed by a majority of the Senate and House sitting in joint session, as many names could be offered as were necessary to choose a person acceptable both to the President and to the Congress.

(3) The question of Presidential disability is a further problem which has never been clarified. On the three occasions in our Nation's history when a President has been disabled, the steps taken were those that seemed the most expedient at the time. Since the Eisenhower administration, informal agreements as to what should happen in the event of Presidential disability have been made between the Chief Executive and his successor. This situation should be clarified by constitutional amendment to avoid any confusion about when and to what extent the second in command should assume the duties of the President. Perhaps the best method of resolving this problem would be to establish a committee, made up of the four senior members of the Cabinet as provided by law and eight Members of Congress, four from each body, which would have the responsibility of determining the extent of the President's disability.

I am hopeful that these hearings will lead to legislative proposals which will provide the United States with a clear and definite constitutional and legislative policy on this matter, carefully designed to meet every conceivable eventuality.

Sincerely,

LEVERETT SALTONSTALL, *U.S. Senator.*

Senator BAYH. Additionally, I wish the record to note a statement from the distinguished Senator from Minnesota, Senator McCarthy. Because of conflicting committee meetings, Senator McCarthy has been unable to testify at these hearings. Therefore, I ask that his statement be herein included.

(The statement is as follows:)

STATEMENT OF HON. EUGENE J. MCCARTHY, A U.S. SENATOR FROM MINNESOTA

Mr. Chairman, I appreciate the opportunity to present a statement to the subcommittee regarding the problem of Presidential succession.

No President has attained office under any of the succession laws, but the office of the Vice President has been vacant on 16 occasions in our history—8 times because the Vice President succeeded to the Presidency, once through resignation of the Vice President, and 7 times through death of a Vice President.

I commend the subcommittee for holding hearings. Even though the possibility of succession is remote, we should carefully consider adjustments in procedures which might better protect the national interest in case of succession.

The Constitution and constitutional amendments emphasize the important role of Congress in extraordinary occasions involving the office of the President.

Article II, section 1, paragraph 5 of the Constitution states:

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same

shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

In addition to this direct grant of authority, the responsibility of Congress was set forth in the original section 1, paragraph 3, of article II, of the Constitution. This placed the right to elect the President with the House of Representatives, in the event the electoral college failed to elect.

This procedure was reaffirmed by the 12th amendment which was ratified in 1804. The 20th amendment in 1933 further extended the right of Congress by providing for congressional action when neither the President-elect or the Vice-President-elect shall have qualified.

In my judgment, the Constitution provides sufficient authority to enable Congress to act by statute. I am not absolutely opposed to the adoption of a constitutional amendment to provide a more detailed system, but I believe there is some advantage in retaining the flexibility which now exists.

In any case, the route of amending the Constitution is often slow. The proposal which I am suggesting can be achieved by statute, and it would be effective January 20, 1965.

Under the bill which I have introduced (S. 2597), the Congress would create a new office, that of Deputy President. The office would be filled only in event the office of the Vice President is vacant. Nomination to the position would be made by the President within 30 days following the vacancy in the office of the Vice President. Confirmation of the nominee would be by the Senate, according to the regular procedure. I would prefer that approval of both the House of Representatives and the Senate be required for confirmation of the Deputy President, if this can be provided without a constitutional obstacle. I would appreciate consideration by the subcommittee of this point.

My bill designates the Deputy President as first in line of succession to the Presidency in event of the death or disability of the President. It removes the Speaker of the House of Representatives and the President of the Senate from the line of succession, but in other respects it follows the succession law of 1947 in providing for succession through the members of the Cabinet, in case the office of Deputy President is vacant.

The Congress has exercised its responsibilities under the Constitution to enact succession laws in 1792, 1886, and 1947. I believe these laws have protected the basic national interest, but conditions change and we should again examine the succession law in the light of new circumstances.

One clear fact is that the responsibilities of the President have increased greatly in recent years. So has the need for the official next in line for succession to be experienced and well informed about the duties he may be called upon to assume. The President cannot share his responsibilities fully, but it is possible for the officer next in line to have daily familiarity with the operations and policies of the administration and with the executive personnel with whom he must work, in case he is called upon to head the Government.

The creation of the office of Deputy President would provide an officer who could give full-time assistance to the President and who would gain practical experience with the responsibilities of the Presidency. Neither the Speaker of the House, as under the present law, nor the Secretary of State, as once provided, can as adequately fulfill this twofold responsibility. These are very important positions in their own right. They require the full attention of those holding them. On the other hand, their responsibilities are specialized.

The President has need of a Vice President, or equivalent officer, to assist him in the performance of his duties; and the Nation should have the assurance that the Vice President, or other officer, is prepared to assume the office of President if it becomes necessary.

This proposal, in effect, returns the succession policy to the procedure provided from 1886 to 1947. During this time, the Secretary of State, a Presidential appointee confirmed by the Senate, was next in line for succession. In this respect, my proposal follows a procedure accepted for 60 years as constitutionally sound. The difference, of course, is that my bill provides for a new officer, the Deputy President, to be first in line of succession; but this office can be created by an act of Congress in the same manner that Congress created that of Secretary of State.

A major advantage of establishing a new office, to be filled only when the Office of Vice President is vacant, is that the choice of the Deputy President

would be made under politically realistic conditions. A weakness of our previous succession laws has been that the designated successor often attained his position for reasons and considerations quite apart from the possibility of succession.

Under the terms of my bill, the choice of the Deputy President would be made with the full understanding that he would have the right of succession.

The bill I have introduced provides that the President shall nominate from among those experienced in Government: the members of the Cabinet, the Members of Congress, the Justices of the Supreme Court, and the Governors of the States. The Deputy President, of course, would be required to resign this office on assuming his duties.

I appreciate that there might be difficulty in getting a Member of Congress to resign his office to fill an abbreviated term as Deputy President, but the choice is somewhat similar to that which one must make when he, in anticipation of election, accepts the nomination for Vice President. This would be true, also, for Governors and members of the Supreme Court. It should present no difficulty if the President nominated a member of the Cabinet as Deputy President.

In addition, my bill provides that the President shall have no obligation to nominate a Deputy President if the vacancy occurs less than 180 days before the expiration of the then current Presidential term. In any case, I believe we can be confident that when the President asks a man to help him and the Nation meet this serious problem, well-qualified men will be available.

In contrast to the existing succession law, my proposal would guarantee continuation of leadership by the political party which won the previous election. As you know, in 8 of the past 18 years the Speaker of the House has been a member of a different party than that of the President. In the event of a double vacancy, a complete change of administration would have followed. The succession law should respect the mandate of the people, who vote not only for a man but also, in a broad way, for his party and his program. The elevation of a leader of another party in midterm is undesirable in principle and could have most unfortunate practical effects.

Inasmuch as President Johnson and Speaker McCormack have already made arrangements for keeping the Speaker informed and for action in the event of Presidential disability, the bill which I have introduced provides that the new succession procedure would not become effective until January 20, 1965.

I know we all share the hope that no succession law will have to be used in the future, even as the other acts have remained unused for 170 years of our history, but I agree that the responsibilities of the President have become too great not to develop the most effective procedure possible in the event the succession law is needed. I would appreciate consideration by members of the subcommittee of the proposal which I have made, and I ask that a copy of the bill I have introduced be printed along with the statement.

[S. 2597, 83th Cong., 2d sess.]

A BILL To establish the office of Deputy President, to provide for the continuous discharge of the powers and duties of the office of President, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Succession Act of 1964".

OFFICE OF DEPUTY PRESIDENT

SEC. 2. (a) Within thirty days after the date on which the office of Vice President becomes vacant because of (1) the death, removal from office, or resignation of the Vice President, (2) the death of a Vice-President-elect before the time fixed for the beginning of his term, (3) the assumption by the Vice President of the powers and duties of President by reason of the death, removal from office, or resignation of the President, or (4) the assumption of the powers and duties of President by a Vice-President-elect by reason of the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall nominate, and by and with the advice and consent of the Senate shall appoint, a person to be Deputy President.

(b) Within thirty days after the death, removal from office, or resignation of a Deputy President who has not entered into the discharge of the powers and

duties of President pursuant to section 3, at any time at which there is no Vice President, the person who is discharging the powers and duties of President shall nominate, and by and with the advice and consent of the Senate shall appoint, another person to be Deputy President.

(c) Any person nominated to be Deputy President shall be chosen from persons who are qualified to be elected as President and who are Members of the Congress, members of the Supreme Court, heads of the executive departments of the Government, and Governors of the States. Acceptance by any person of appointment as Deputy President shall constitute his resignation as a Member of the Congress, a member of the Supreme Court, the head of an executive department, or Governor of a State.

(d) If at the time at which any nomination is to be made under this section the Congress is in adjournment, the person discharging the powers and duties of President shall convene the Senate to consider such nomination. Such person shall have no obligation to make any nomination under this section at any time less than one hundred and eighty days before the expiration of the then current presidential term.

(e) A Deputy President who has not entered into the discharge of the powers and duties of President pursuant to section 3 shall perform such executive duties as the person who is discharging the powers and duties of President may direct, but no Deputy President shall discharge any powers or duties within or as a member of the legislative branch of the Government. The appointment of any person as Deputy President shall terminate upon the qualification of any person duly elected as Vice President. Except as otherwise provided by section 3(c), a Deputy President while so serving shall receive compensation at the rate provided by law for the heads of the executive departments.

DISCHARGE OF THE POWERS AND DUTIES OF PRESIDENT

SEC. 3. (a) If at any time, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor a Vice President who is able to discharge the powers and duties of the office of President, but there is a Deputy President who is able to discharge those powers and duties, the Deputy President shall enter into the discharge of those powers and duties and shall act as President until the expiration of the then current Presidential term, except that—

(1) if his discharge of the powers and duties of the office of President is founded in whole or in part upon the failure of both the President-elect and the Vice-President-elect to qualify, he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office of President is founded in whole or in part upon the inability of the President, he shall act only until the removal of the inability of the President.

(b) (1) If, by reason of death, resignation, removal from office, inability, failure of appointment, or failure to qualify, there is no President, Vice President, or Deputy President who is able to discharge the powers and duties of President, the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President or disqualified by section 4, shall act as President: the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Postmaster General, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, and the Secretary of Health, Education, and Welfare.

(2) Whenever the powers and duties of President devolve upon any person pursuant to this subsection, he shall continue to discharge those powers and duties until (A) his death, resignation, removal from office, or his inability to discharge those powers and duties, (B) a qualified President or Vice President is able to discharge those powers and duties, (C) a Deputy President, duly appointed before the date on which the powers and duties of President devolved upon the person who is discharging those powers and duties pursuant to this subsection, is able to discharge those powers and duties, or (D) the then current Presidential term expires, whichever event occurs earliest.

(3) The taking of the oath of office to act as President by any person described in the list contained in paragraph (1) shall constitute his resignation from the office the holding of which qualified him to act as President.

(c) During the period in which any person acts as President under this section, he shall receive compensation at the rate then provided by law for the compensation of the President.

DISQUALIFICATION OF OFFICERS

SEC. 4. (a) No officer included in the list contained in section 3(b) (1) may act as President under this section unless—

(1) he was appointed to his office, by and with the advice and consent of the Senate, before the occurrence of the latest of the events which resulted in the absence of any President, Vice President, or Deputy President who is able to discharge the powers and duties of President; and

(2) he is eligible for election to the office of President.

(b) No person may act as President under this Act if he is under impeachment by the House of Representatives at the time the powers and duties of the office of President otherwise would devolve upon him.

REPEAL

SEC. 5. The Act entitled "An Act to provide for the performance of the duties of the office of President in case of the removal, resignation, death, or inability of both the President and Vice President", approved July 18, 1947 (61 Stat. 380; 3 U.S.C. 17), is repealed.

EFFECTIVE DATE

SEC. 6. This Act shall take effect at noon on January 20, 1965.

Senator BAYH. Further, I ask that the statements of Congressman Ayres, of Ohio, and Congressman Wyman, of New Hampshire, be set forth in the record at this point.

(The statements are as follows:)

STATEMENT OF CONGRESSMAN WILLIAM H. AYRES, A REPRESENTATIVE FROM THE STATE OF OHIO

Mr. Chairman, it is in the spirit of nonpartisanship that I address this most important subcommittee of the Senate Judiciary Committee. I shall preface my remarks by saying that the legislation which I have introduced was drawn without reference to any incumbent. Matters of this sort must be considered as permanent legislation, affecting national administrations far in the future.

I know that this subcommittee is addressing itself to the problem of arriving at a constitutional amendment that will provide for the orderly and wise succession to the Presidency of the United States of America.

Within 10 days after the death of former President John F. Kennedy, I introduced a joint resolution (H.J. Res. 818) for a constitutional amendment. Under this suggested amendment, the President would submit a list of three to five names of persons at any time that a vacancy existed in the office of Vice President. These names of persons who are duly qualified for the Presidency, would be submitted to the U.S. Senate. That body would then elect a Vice President. The balloting would be confined to the President's selections. I hope that this subcommittee will deem this joint resolution worthy of its consideration.

I now call to your attention a matter of even greater urgency. The office of Vice President has become highly important during the past two administrations. Former Vice President Richard Nixon was given most important and confidential duties by former President Dwight Eisenhower. I have been given to understand that President Eisenhower placed in the hands of Vice President Nixon, custody of our missile-bearing arms when there was even a possibility of his own temporary disability.

In these days of the "hot phone," even momentary disability could be disastrous. I have no doubt that the late President Kennedy placed the same trust in his Vice President and that a similar arrangement existed.

You will recall that the two preceding Presidents also had definite agreements in the event of disabilities of longer duration. It even permitted the Vice Presidents to make the final judgment if the President was unable to serve notice of the transfer of authority. In considering a matter of this importance, we must consider every eventuality. I understand that President Lyndon Johnson has made such an arrangement with the Speaker of the House.

Our founders were deeply concerned with the separation of powers. The Constitution is very clear on this point. No one can be a member of both the legislative and executive branch. If the President should be disabled, or not fully in possession of his faculties, even for a few days, the Speaker of the House would have to resign, both as Speaker and as a Member of the House of Representatives, before he could assume the office of "temporary" President. Upon completion of this duty, he would no longer be the Speaker of the House and would then lose his right of succession to the Presidency. If the President should die during the time that he was serving as temporary President, the gentleman then occupying the Speaker's chair would become President. I know that any Speaker would sacrifice his career at this call of duty, but, is it just for us to call upon him to do so?

Our problem now is that we have no one filling the office of the Vice President of the United States. Certainly President Johnson appreciates the importance of this office.

An immediate solution to this matter is imperative. I refer you to H.R. 9305. I introduced this resolution on December 2, 1963. It would create a new office in the executive branch of our Government. It would be called that of Acting Vice President. I hasten to add that the person elected to this position would not be in line for succession to the Presidency.

The resolution would permit the Congress to elect this Acting Vice President from a list of three to five names submitted by the President. No constitutional amendment would be necessary. I favor an amendment, but realize that its passage will require at least a year for ratification. The enactment of my resolution into law could be almost immediate. Appreciation and consideration for the arduous duties of the President should compel us to act speedily.

STATEMENT OF CONGRESSMAN LOUIS C. WYMAN, A REPRESENTATIVE FROM THE
STATE OF NEW HAMPSHIRE

Mr. Chairman and members of the committee, my testimony relates to the problem of Presidential inability and not to the larger problem of Presidential succession.

There are wide differences of view concerning succession, but these are less pronounced on the matter of inability. I believe it is fair to say that virtually all are agreed that the Congress should act now, at the current session to initiate a constitutional amendment dealing with the risk of a Presidential inability.

During my chairmanship, the American Bar Association Standing Committee on Jurisprudence and Law Reform recommended a specific statutory solution to the house of delegates in February 1962. This statutory proposal (calling for a commission with initiating powers) was unanimously approved by the house of delegates without receding from the prior 1960 ABA endorsement of a constitutional amendment the terms of which would have simply made it crystal clear that section 1 of article 2 of the Constitution was broad enough to permit a statute providing a method for determining the existence of an inability and its termination. I respectfully refer the committee to my testimony before his subcommittee (then chaired by the late Senator Kefauver) on June 18, 1963, pages 40-55, Hearings, 88th Congress, 1st session, on Senate Joint Resolution 28, etc., where the statutory proposal is set forth and explained at some detail. For further reference the bill which I introduced in the House in the first session of this Congress (H.R. 1164) proposes such an interim statute.

The urgency of the problem of presidential inability derives, of course, from an awareness that a crippling inability is a daily possibility with any President. We hope nothing will happen but we must be forehanded with a legislative course of action provided in a statute in case something does happen to a President because in this atomic era seconds can be crucial. There is no excuse for congressional failure to require by statute that there shall be no gap in the executive responsibility for Government of the United States at the very top.

History has recorded several occasions of Presidential inability, some from sickness, others from attempted assassinations. Our present President has had a heart attack in the past. One does not need expert medical advice to know that the constant pressures of the highest office in the land risk heart attack or cerebral thrombosis to the healthiest of men, and that such a risk in the case of a man who has once had a heart attack is even greater.

We are not concerned with the problem of death, resignation, or removal, for in such event the Vice President becomes the President. He succeeds to the office, he must, yet it would do no harm for a constitutional amendment to say this explicitly. What all of us are concerned with in relation to the problem of inability is a situation where a President has an inability to perform the powers and duties of the office but either by reason of a mental or physical block is unwilling or cannot declare it, and a Vice President or person next in line of succession is unwilling to take the initiative lest he be criticized as grasping for control. Here there must be an agency capable of taking the initiative.

Should this agency be the afflicted President's own first team, the Cabinet? Or should it be an independent commission with tenure the same or varying from that of the Presidential team? Or should it be some combination of these?

Any incumbent President has a very proper concern that the power to remove him temporarily from office should not get into the hands of opponents. For this reason there is a great deal of force to the contention that the Cabinet should have a prominent role in initiating a process whereby the Vice President assumes Presidential powers and duties. Yet here, the relation of Cabinet members to the line of succession (whatever it then may be) is of undeniable significance since persons themselves placed closer to the Presidency by their own decision will be suspect in the public mind whether or not motivated by the loftiest of considerations in their actions. I, therefore, most earnestly recommend to the consideration of this subcommittee that the Congress provide for a Commission with powers of initiation if a Vice President is reluctant, and include within the composition of the Commission several, even a majority, of the Cabinet, but only after insuring that no such Cabinet officer shall be closer in line of succession than six steps. The framework within which the Commission might operate, without offense to any incumbent President, is specified in H.R. 1164, section 2b, providing essentially that if a President does not announce an inability but the Vice President is satisfied that he has one, he shall give written notice to the Chairman and members of the Commission, which Commission is required to convene for the purpose of preliminary determination of the question of fact of whether such an inability exists upon receipt of such a notification from the Vice President or upon its own motion whenever a majority of its membership is of the opinion that such an inability exists. After preliminary consideration of the question (which can be in a matter of hours, if necessary) if the Commission determines the inability to exist, its written notice to the Vice President or person next in line of succession requires the Vice President to assume the powers and duties of the office, pending final determination of the question of inability.

H.R. 1164 then suggested that this be done by a combination of the House and Senate, with the same procedure to apply to a determination that an inability had ended. In the event that Commission action occurred when the House and Senate were not in session, the temporary finding of the Commission would apply until the House and Senate should convene.

In H.R. 1164, offices rather than individuals comprised the small Commission consisting of the Chief Justice as Chairman, majority and minority leaders of the House and Senate, and the Surgeon General. However, the particular form and composition of the Commission is more a matter of form than substance. The substance is that there should be a Commission with some tenure rather than to leave the resolution of the leadership of the United States, (with its awesome power to issue the countermanding order for the Strategic Air Command fail-safe procedures, the gold telephones, the red telephones, and the electronic pushbuttons of nuclear war) solely in the hands of a Cabinet whose tenure is at the pleasure of a President whom they might be asked to remove, even temporarily.

The proposal for a constitutional amendment that is already before the committee I heartily endorse insofar as it relates to inability. It is important that a constitutional amendment be as simple as possible so that it shall engender as little controversy or misunderstanding as possible in the legislatures of the States asked to ratify it. It is important that its language be in terms of general authorization rather than specifications inasmuch as events and situations can change rapidly in the space age.

Finally, and again more perhaps with regard to policy than detail, I sincerely urge that the committee be prepared with a statute to deal with the problem of

Presidential inability once a constitutional amendment has been proposed to the several States. I happen to be one of many who, despite all the learned arguments to the contrary, find no difficulty in interpreting section 1 of article 2 of the Constitution, when read with other general powers of Congress set out therein, to permit a statute specifying a method for determining the existence, duration, and termination of a Presidential inability. Likewise, I have little difficulty in reading section 1 of article 2 to itself provide, as presently written, that in the event of Presidential inability, that it is only the powers and duties of the office of the President that devolve on the Vice President and not the office itself.

However, while it does no harm, and probably much good, to have an amplifying constitutional amendment that makes it clear that Congress has such power, we must not defer to the questionable later date of ratification the enactment of a statute providing a means of assuring there shall be no gap in the safe Executive direction of the Nation in the interim.

It has been a favorite bone of contention of those who urge the necessity of a constitutional amendment as a condition precedent to such a statute that the enactment of a statutory solution to cover the interim between the congressional proposal of a constitutional amendment and its ratification by the States, would defeat ratification because State legislatures would conclude that since a statute was on the books the constitutional amendment was unnecessary. Such a contention is not only unsound in the face of both congressional and Presidential requests for State ratification, but we must not fall into the trap of the contrary inference; namely, that since a constitutional amendment has been proposed, Congress has decided that a statutory solution is unconstitutional. This is not so and should not be allowed to be taken as an inference. I am hopeful that the committee, in the preparation of its report of transmittal of any constitutional amendment, will negate the drawing of such an inference in explicit language.

A constitutional amendment may be adopted within a year and a half. Likewise, it may not be adopted for as long as 5 years. In the meanwhile, confrontations with Communist challenges or provocations give no sign of cessation, any one of which can involve a showdown in a matter of hours.

It is our duty and responsibility to be forehanded and vigilant in this risky, uncertain, pushbutton world by providing an interim statute (once a constitutional amendment has been proposed), which will provide that should a President get sick, be captured, disappear, or go mental, there may swiftly and responsibly be assured to the American people the immediate control of the powers and duties of the Office of the Chief Executive by the Vice President or person next in line of succession.

As some indication of the urgency and importance I personally attach to the need for such a statute upon our books, I respectfully invite the attention of the committee to the fact that I have constantly urged this since first difficulties of former President Eisenhower. I devoted an order of first importance to it when I was president of the National Association of Attorneys General; I made it the first order of work of the committee of jurisprudence and law reform of the ABA during my two terms as its chairman, and I have introduced a bill (H.R. 1164) on January 9, 1963, as virtually my first act as a Member of the 88th Congress.

Senator BAYH. We are honored this morning to have as our first witness Prof. Clinton Rossiter, a John L. Senior Professor of American Institutions at Cornell University, a noted author, whose works include the book, "The American Presidency."

Professor Rossiter has been kind enough to honor us with his presence at this particular hour, and I am sure that the subcommittee will find his presentation helpful. He has submitted to the chairman of the subcommittee two very comprehensive papers, one on succession to the Presidency and one on disability of the Presidency.

Professor Rossiter, the floor is yours to use it as you will, either to read your statements, to paraphrase from them, or to take an entirely different course. We are honored to have you with us and thank you very much.

STATEMENT OF CLINTON ROSSITER, PROFESSOR OF AMERICAN INSTITUTIONS, CORNELL UNIVERSITY

Mr. ROSSITER. Thank you, Senator.

I am honored indeed to appear before this subcommittee and to voice my support of its laudable efforts to provide workable solutions to the persistent problems of Presidential inability and succession.

As you say, I have submitted for the record two statements, one on inability, and the other on succession and the filling of a vacancy in the Vice Presidency and from these I would like, if you will permit me, to extract several points for emphasis.

First, I would like to say in all seriousness that this problem is not a shadow, but a very real problem, indeed. It is, as you say, real in history in the disability particularly of Presidents Garfield and Wilson. It is even more real in the threat of demoralized chaos that it constantly poses.

May I put it this way: Perhaps the most pressing requirement of good Government in the United States today is an uninterrupted, unchallengeable exercise of the full authority of the Presidency. We need a man in the Presidency at all times who is capable of exercising this authority, and we need one, moreover, whose claim to that authority is undoubted. No man should be expected to, no man should be permitted to, wield the power of the Presidency without the clearest of titles to it. And whatever arguments may exist for the great doctrine on which our system of constitutional government is based, that all power must be, first of all, legitimate, apply with a kind of double severity to the power that is lodged in the American Presidency.

My second point is to praise, as an interested citizen, the simple, sensible arrangement worked out by President Eisenhower and Vice President Nixon in 1958, and since reconfirmed by Presidents Kennedy and Johnson.

My third point is to state that we need something more than this arrangement which has been a useful stopgap, but can be pushed just so far, and however compelling a precedent it may be for future Presidents.

At the same time, I think we need something less than one of the grandiose complicated systems presented for our consideration in the past few years and, indeed, before this subcommittee in the past few weeks.

I say something more than the Eisenhower-Nixon or now Johnson-McCormack arrangements, because there are simply too many people of good will, of influence, of decision, who remain in doubt about this question.

I say something less because it would be either feckless or reckless to lay out an elaborate plan to solve a problem that in one sense is not much of a problem at all and in another is quite insoluble.

Next, I would agree with those Congressmen, Senators, and scholars who think that most of what we can reasonably hope to do can be done by a joint or perhaps even a concurrent resolution of Congress in support of the presidential and vice presidential arrangements. Such a resolution could end debate on at least five doubtful issues, and the rest could probably be left to the men of good will and good sense we expect to govern us in the years to come, and these briefly, are the

points that such a resolution could make with conviction principally because they express what has always been the most thoughtful opinion on the matter.

I think we can agree on these things: First, that the President of the United States has the right to declare his own disability, and to bestow his powers and duties upon the Vice President or in the event there is not a Vice President upon the next officer in line of succession.

Two, if the President is unable to declare his own disability, the Vice President is to make this decision on his own initiative and responsibility. I assume all this incidentally in writing.

Third, in the event of disability, the Vice President shall only act as President. His original oath as Vice President shall be sufficient to give full legitimacy to his orders, proclamations, and other official actions in behalf of the disabled President.

Fourth, the President may recover his powers and duties at any time simply by informing the Vice President that his disability no longer exists.

And, finally, disability, to use the words of Professor Silva, means any *de facto* inability, whatever the cause, whatever the duration, if it occurs at a time when the urgency of public business requires executive action.

Now these points, sir, add exactly nothing in my opinion to the situation as it now exists, and as it was so honestly put in the Eisenhower-Nixon agreement.

But, if a resolution of the Congress incorporating them would help clear the air of doubt, let us by all means have it. For the benefit of those who would still have doubts, let us consider declaring these principles in an amendment to the Constitution. However, I would inject the opinion that, I don't know how you feel, but I don't much like constitutional amendments. I don't know if I should say that before this subcommittee because I don't want to put it out of business.

Senator BAYH. That is why you are here; we want it straight from the shoulder.

Mr. ROSSITER. But I think, in general, the less we load up the venerable Constitution with extra words the better off we are.

However, if you think it absolutely necessary, if the peace of mind of the country would be greater, then let us put on top of the executive arrangement a resolution, on top of the resolution a constitutional amendment.

But, sir, my next point, let us be careful to do no more than that. Let us not write a law or amendment that tries to provide for all the eventualities that might arise, let us, like the framers of the Constitution and of the best laws under which we live, not trap our descendants in a snare of technicalities.

In particular, I would advocate, with President Eisenhower, that we think very carefully before we go beyond the President and the Vice President in search of machinery to decide doubtful cases of disability. I think we should consider perhaps bringing Congress into the picture but I hope that we will not construct, if I may call it that, a monstrosity that raises more doubts than those it is supposed to settle.

I owe it to you, sir, in all candor to say that I see almost nothing to give us confidence. Rather a great deal to give us pause in the

various schemes that would bring Congress or the Cabinet or the Court or the Governors of the States or former Presidents into the picture.

A judgment of Presidential disability is in both great senses of the word a political decision, a high determination of policy, and the men who count politically in this country, whether in the Congress or in the Cabinet, are going to have their say, they are going to be consulted, and I think we should leave it to them and to the men who take action with the President or the Vice President to decide how best to hear that said.

Above all, I would be deeply distressed and troubled as a citizen if in any way the Court or the Chief Justice were brought into this picture.

As to this general proposal of a special tribunal, a Presidential disability commission, the notion that it could lay our doubts to rest seems to me quite unsubstantial.

The last thing we would want to do is to provide some method resembling a trial, complete with expert witnesses and cross-examination in the face of the Nation's difficulty. In circumstances that call for action, it would use up too much time. In a crisis that called for unity, it would open up needless wounds.

Another point I would make is we should be careful not to provide a method that would make it too easy for a President to surrender his powers temporarily. We have labored, sir, for generations to preserve the great essence of the Presidency, which is unity, and I would be unhappy to see us open the door even a little way to pluralism in this great office. I do not need to tell you that we are not talking about an ordinary office, the generalship or the headship of a corporation. We are talking about an indisposed President of the United States, the greatest constitutional office the world has ever known, and there is surely a qualitative difference between it and all others in and out of the Government.

I am led by these considerations to repeat my observation that in one sense, perhaps the most important sense, the problem of disability is quite insoluble. We may solve it legally by framing and understanding in law and custom or in the Constitution that leaves no doubt about the terms on which power is to be transferred from a really ailing President to a healthy Vice President, and we could perhaps do away with the practical difficulties we met in 1881 when we had a Vice President who was an outsider, or in 1919 when we had a President who was an authentic giant.

But a period of clearly established Presidential disability in any case is going to be a messy situation, one in which caution, perhaps even timidity, must mark the posture of an Acting President; a period of doubt, a period in which a Roosevelt declines or an Eisenhower recovers will be even messier, and I don't think it is any help at all to ask why a Truman or a Nixon should not take over in such a situation.

My answer, sir, is that he cannot. That the Presidency is an office governed by almost none of the ordinary rules, that a wise custom of the American people command us at all reasonable costs to guard the unity of the Presidency and of the dignity of the man who holds it.

Now, sir, may I say a few words on the problem of succession?

On this problem I am aware of the reluctance now felt in the Congress to amend the act of 1947, and to return to the rather more simple solution of the act of 1886, by placing the succession in the Cabinet.

Nevertheless, I am bound to say in my opinion that the act of 1947 is a poor one, in many ways one of the poorest ever to emerge from this stately and distinguished body. I am not even sure, Senator, that it is a constitutional act, and sooner or later it will have to be amended, if not scrapped.

In the meantime, I am willing to settle for less. In particular, I would agree with the carefully worked out views of yourself, at least part of the views of the American Bar Association conference on Presidential inability and succession, and with those expressed in the letter from former President Eisenhower.

In particular, I think that we should go against this problem today and solve it, except in the most ghastly and unforeseen of circumstances, by providing a dignified, open and conclusive means of filling the Vice Presidency whenever it has been vacated.

If we could be sure that there would always be or almost always be a Vice President then perhaps we would not need to worry our heads too much over the really quite unanswerable question whether the Secretary of State or the Speaker of the House at any particular time would make a better president or acting president.

With all due respect to my Senator, if I may describe him that way, Senator Keating, I do not think the proposal of a Second Vice President to be elected with the President and Vice President on the same ticket is a happy one.

Not many of our able men, I fear, would be candidates for a position of even less power and promise than the Vice Presidency itself. We have labored long and hard to make the Vice Presidency a distinguished position which our most able politicians seek. I think we would have to start our labors all over again.

With all due respect to my Governor, if I may describe him that way, Governor Rockefeller, I do not see much that gives me confidence in the proposal of a super Secretary standing between the President and his great officers of state with the line of succession vested in him, and if I may say so, sir, I pointed this out in a report to President Eisenhower's Commission on National Goals in 1960. I am sorry to see that Governor Rockefeller has revived this idea.

Several methods have been proposed, as you know, to fill the vacant Vice Presidency. We could have, first of all, some kind of convening in the States or in Washington of the electoral college, especially for that purpose. We could have designation of a Vice President by the President alone. We could have his election by one or both Houses of Congress. We could have, I suppose, a specially called national election because Congress clearly has that power.

Finally, we could have nomination by the President and confirmation by one or both Houses of Congress.

The first of these methods, sir, I think is inadmissible, because the electors are very rarely men of national standing, and the electoral college is simply not designed for this kind of action.

The second method, designation by the President, is inadmissible because no President should be permitted to act entirely on his own in choosing a successor.

The third is equally inadmissible because no Congress should be permitted to shove a successor upon a President against his will and judgment especially if the President's party is in minority in Congress.

The fourth is inadmissible because I think it would be simply too much turmoil and chaos and expense to have a special nationwide election to choose a new Vice President.

It is this final method, sir, which would join the three great political branches of our Government—President, Senate, and House—in a solemn and responsible act which strikes me as much the most sensible and convenient way to handle this delicate and vital problem.

There would be, I think, a clear burden on the President to nominate a man of the highest stature and abilities. There would be a clear burden on the Congress to withhold its approval unless such a man were nominated, and to give its approval if such a man were nominated. Because the President disposes, we could expect the promise of continuity in the executive branch, and because Congress, as it were, disposes, we could assume the fact of legitimacy. We would have once again that doublecheck, that system of checks and balances, that has made our system so great and lasting.

I think we could expect the President and the joint session of Congress to work together in this vital area of the national interest and indeed expect a real display of statesmanship.

Senator, in my opinion, an amendment to the Constitution would be necessary in this instance to fix this particular reform firmly in the American system of government. But I see no reason, political or constitutional, why we should not have Congress enact a temporary law for the time being creating the office of Acting Vice President of the United States, providing for filling it in the manner described above in the event the Vice Presidency is vacated, and designating its occupant, as Congress has a right to do, as first in line of succession, and would recommend to you with all humility this double step, a proposal of an amendment to the Constitution to fill the Vice Presidency when it becomes vacant, on the nomination of the President, and the confirmation of a joint session of Congress and at the same time a, if you wish to call it that, stopgap law.

This, I think, is the surest way to solve the enduring problem of which we have been so dramatically reminded by the tragic death of President Kennedy.

One final point, Senator: I would like to point out to you that there are yet other loopholes in our system. We do not, in fact, know what we would do if we were to lose our elected President, our popularly elected President between, as it is this year, November 3, when we all go to the polls, and December 14, when the electoral colleges meet in the several States to cast their ballots; we do not know what would happen if we were to lose the President between December 14 and then January 6 when you meet with your colleges in House and Senate to open the ballots and to register them, so to speak.

May I remind you, Senator, that in the 20th amendment, the famous Norris, or lame duck amendment, in sections 3 and 4 there is a definite plea for congressional action on this point.

Myself, I think that perhaps—I know you have studied this with great care but if you feel that this is at all possible, it might be a useful thing, that a special commission, a bipartisan commission, a commis-

sion chosen by the President and the leaders of Congress, with Members of the Congress, members of the executive, and citizens in whom we can have confidence, perhaps even a professor or two, for that matter, might well be set up to study and to report on all these problems, on all the obvious loopholes we have in this part of our constitutional system.

I am grateful, Senator, for having been offered this opportunity to express my views, and I welcome any questions you may wish to put to me.

(The statement of Mr. Rossiter follows:)

STATEMENT BY CLINTON ROSSITER

THE PROBLEM OF DISABILITY IN THE PRESIDENCY

The problem of disability is, then, a real problem, real in history and even more real in the threat of demoralized chaos it constantly poses. Perhaps the single most pressing requirement of good Government in the United States today is an uninterrupted exercise of the full authority of the Presidency. We need a man in the Presidency at all times who is capable of exercising this authority; we need one, moreover, whose claim to authority is undoubted. No man should be expected or permitted to wield the power of the Presidency without the clearest of titles to it. Whatever arguments may exist for the grand doctrine of constitutional Government that all power must be first of all legitimate apply twice as severely to the power that is lodged in the American Presidency.

In my opinion, we need something more than this arrangement, however compelling a precedent it may be for future Presidents, and something less than one of the grandiose schemes presented for our consideration in the past few years. I say "something more" because there are simply too many people of influence who remain in doubt about this question, "something less" because it would be either feckless or reckless to lay out an elaborate plan to solve a problem that in one sense is not much of a problem at all and in another is quite insoluble.

I would agree with those Congressmen and scholars who think that most of what we can reasonably hope to do can be done by a joint or even concurrent resolution of Congress.

Such a resolution could end debate on at least five doubtful issues; the rest could properly be left to the men of good will and good sense we expect to govern us in the years to come. And these are the points it could make with conviction, principally because they express what has always been the most thoughtful opinion on the matter:

(1) The President of the United States has the right to declare his own disability and to bestow his powers and duties upon the Vice President or, in the event there is not a Vice President, upon the next officer in line of succession.

(2) If the President is unable to declare his own disability the Vice President is to make this decision on his own initiative and responsibility.

(3) In the event of disability, the Vice President shall only act as President; his original oath as Vice President shall be sufficient to give full legitimacy to his orders, proclamations, and other official actions.

(4) The President may recover his powers and duties simply by informing the Vice President that his disability no longer exists.

(5) Disability, to repeat Professor Silva's words, means "any de facto inability, whatever the cause or duration, if it occurs at a time when the urgency of public business requires Executive action."

These points add exactly nothing, in my opinion, to the situation as it now exists, and as it was so honestly put by President Eisenhower; but if a resolution incorporating them would help clear the air of doubt, let us by all means have it. And for the benefit of those who would still have doubts, let us at the same time move to declare these principles in an amendment to the Constitution.

Let us be careful to do no more than that. Let us not write a law that tries to provide for all the eventualities that might arise, lest we trap our descendants in a snare of technicalities. Let us not go beyond the President and Vice President in search of machinery to decide doubtful cases of disability, lest we construct a monstrosity that raises more doubts than those it is supposed to settle.

As to the proposal of a special tribunal, a Presidential Disability Commission, the notion that it could lay our doubts to rest seems quite unsubstantial. The last thing we should do is to provide a method that resembles a trial, complete with expert witnesses and cross-examination. In circumstances that called for action it would use up too much time; in a crisis that called for unity it would open up needless wounds.

I am led by all these considerations to repeat my observation that in one sense, probably the most important sense, the problem of disability is quite insoluble. We may yet solve it legally by framing an understanding in law and custom that leaves no doubt about the terms on which power is to be transferred from an ailing President to a healthy Vice President; we can even do away with the practical difficulties we have met in the Vice President who is an outsider or the President who is a giant, not to mention the President who is mentally alert but physically confined.

A period of clearly established Presidential disability will always be a messy situation, one in which caution or even timidity must mark the posture of the acting President.

THE PROBLEM OF SUCCESSION TO THE PRESIDENCY

The problem of succession could best be solved, except in the most ghastly and unforeseen of circumstances, by providing some dignified and conclusive means of filling the Vice-Presidency whenever it has been vacated. If we could be sure that there would always, or almost always, be a Vice President, then we would not need to worry our heads too much over the really quite unanswerable question of whether the Secretary of State or Speaker of the House would make a better President.

The proposal of a second Vice President, to be elected with the President and Vice President on the same ticket, is not a happy one. Not many of our able men, I fear, would be candidates for a position of even less power and promise than the Vice-Presidency itself.

Several methods have been proposed to fill a vacant Vice-Presidency:

- (1) A vote of the electoral college, especially convened for this purpose.
- (2) Designation by the President.
- (3) Election by one or both Houses of Congress.
- (4) Nomination by the President and confirmed by a joint session of Congress.

The first of these methods would be inadmissible because the electors are rarely men of national standing, the second because no President should be permitted to act entirely on his own in choosing a successor, the third because no Congress should be permitted to shove a successor upon a President against his will and judgment—especially if the President's party is in the minority in Congress.

The fourth method, which would join the three great political branches of our Government together in a solemn and responsible act, strikes me as much the most sensible and convenient way to handle this delicate and vital problem. The burden would rest upon the President to nominate a man of the highest stature and abilities, upon the Congress to withhold its approval unless just such a man were nominated. Because the President proposes we could expect the promise of continuity in the executive branch; because Congress disposes we could assume the fact of legitimacy.

An amendment to the Constitution would be necessary to fix this reform firmly in the American system of government, but I see no reason, political or constitutional, why Congress could not enact a temporary law creating the office of "Acting Vice President," providing for filling it in the manner described above in the event the Vice Presidency itself is vacated, and designating its occupant as first in line of succession. This double step, a proposal of an amendment to the Constitution accompanied by a stopgap law, is the surest way, in my opinion, to solve the enduring problem of which we have so dramatically been reminded by the tragic death of President Kennedy.

Senator BAYH. Thank you very much, Professor, for your very precise, enlightening statement.

I would like, if I may, to ask some questions. You made reference to the rather "sticky situation" involved in Presidential disability.

Do you believe that almost any solution to this problem must presuppose the presence of men of good will if we are ever going to solve

this problem, particularly with the glare of the public focused on them and the normal desire of a public official to perform his duties in accordance with his constitutional mandate?

Mr. ROSSITER. Yes, sir. I think this is true, and I really feel we should have confidence in ourselves, in our elected legislators, and indeed in our descendants.

If there is any area in which statesmanship would be just obviously called for, this would be it.

I know that we draft our laws for, as it were, all sorts of men to execute. I know that the Constitution was written by men who expected not too much of human nature, but they expected something, and I think they expected in particular that men would rise to great occasions, and indeed, if we cannot expect good will, statesmanship, clear decision in this sort of matter, when or where can we expect it?

Senator BAYH. Yes.

Mr. ROSSITER. I think we ought to have some confidence in ourselves in this matter.

Senator BAYH. I think this is necessary, and any law or constitutional amendment is not going to solve the problem unless we can assume this type of individual or individuals is going to be on the scene.

In your disability proposal do you suggest that, first, the President himself declare his own disability, which is part of the consensus solution and part of Senate Joint Resolution 139?

Second, would you give the Vice President his own initiative in cases where the President is clearly disabled, say unconscious? In time of national emergency, I think the Vice-Presidential initiative would be a clear answer. The situation that has concerned us most of all is the case in which the President in actuality is clearly disabled, say, from a mental disorder, but is still able to walk around and appear to perform his duties. In such a situation there could be a real dispute between the Vice President and the President. This is why we thought it necessary to provide for that one chance in a hundred, that one we hope never comes along, where there would be a serious dispute between the Vice President and the President over disability. In such a situation we need to have written into the solution a moderating force such as a Cabinet or, as is in the bar association consensus, the Congress as a last alternative.

Now, are these superfluous details? I know you are concerned about getting a document that is too long.

Mr. ROSSITER. Yes.

My feeling is that in such a case this President that you imagine would be sworn, about whom we would really know the facts. Never underrate our instruments of publicity. You remember the rather grim and even vulgar details we were getting on President Eisenhower's condition within 24 hours of his first heart attack, quite different from the day when we didn't learn about Grover Cleveland's operation for cancer until 1917. I assume that the Vice President, who after all operates in these precincts, would be a man in touch with all of those whose opinion really counts.

There would be the informal consultations that would be, in my opinion, of the greatest importance, and that when the Vice-Presidential statement of the President's disability came he would have this sort of overwhelming support from both Houses of Congress.

I don't quite understand, you see, how this thing could be laid out. Would we set up a table like this, would we bring in the television cameras, would we have psychiatrists come in who would testify on their observations of the President? Would we then inevitably have to permit cross-examination, and other psychiatrists to come in? You see this is the sort of thing that I am trying to keep away from because I think it would upset the country terribly. I feel that the Vice President, in a very clear situation of that nature, which would certainly be clear to him and clear to all the people who had worked with the President in the last days or weeks, would be able to act especially if supported by this concurrent or joint resolution or even as you prefer, with the constitutional amendment.

Senator BAYH. With those who work closest to him, it seems to me we would not be treating this lightly.

As you mentioned, the removal of the President—even temporarily—is something to be taken seriously. The reason we were thinking about the Cabinet is that this is a flexible body. It does work closely with him. I disagree with those who feel that you have to specify the need for a neurosurgeon and a cardiologist and a psychiatrist and the Chief Justice of the Supreme Court because I think the Cabinet or the Vice President will make a decision like this only after the greatest consideration of expert testimony.

Mr. ROSSITER. Yes, but even then we may have the mess.

Suppose the Cabinet is six to four that the President is disabled. Supposing we were to bring in, let's say, the Senate Committee on the Judiciary, and it split very narrowly, then we find ourselves in a very real mess.

Senator BAYH. I don't think the Senate Committee on the Judiciary should be involved.

Mr. ROSSITER. Then you want some special body. I do think that the Court, the Governors, a special panel of citizens, generals, President's wives, ex-Presidents, the Surgeon General, and so forth, are left out, and the decision one way or the other formally or informally is made by the responsible political leaders of this country.

Senator BAYH. Doesn't history show that in the situations faced by Arthur and Marshall? There was plenty of evidence upon which to act, and if we had given him a good crutch to lean upon such as the Cabinet, and if we had clearly established a procedure in the Constitution, both probably would have acted? Would there be more reluctance to act if they had to make the sole decision?

Mr. ROSSITER. I don't think Vice President Marshall would have acted in a hundred years. His one opinion was that we needed a 5-cent cigar, and President Wilson was the man, here was this giant figure who had—you know really was the first American President to have this worldwide reputation, a man of pride, of dignity, in many ways in the best sense of the word, a jealousy of his position and prerogatives, and I simply cannot imagine Thomas R. Marshall acting for Woodrow Wilson as President of the United States; I just can't imagine it. That is why I say that in some ways, no matter how carefully, how painstakingly your subcommittee and committee and the Congress can labor we are not going to plug all the holes. We can't ask of laws and institutions to give us things that will obviate every difficulty in the future, and I think that to concentrate on the re-

sponsible political leadership, in other words, I will concede the point to you that perhaps the Cabinet could be brought in in some way.

But, for goodness sake, let's not go beyond the Cabinet and let's not go beyond the Congress, whether the whole Congress or some committee of Congress, in this sticky situation that you mentioned.

Senator BAYH. In bringing up these questions I am not trying to argue.

Mr. ROSSITER. No, no.

Senator BAYH. I merely want to have your answers for the record.

Mr. ROSSITER. Well, you know this is something that men of good will and intelligence, as we can agree we are today, can argue forever.

Senator BAYH. We are very close to agreement. We want to keep the solution as simple as possible, and yet I have a feeling we also ought to keep it as safe as possible, and I think you share the feeling that we should not have a President temporarily without a Vice President.

Let me ask you a question. There are many of us who believe that the Constitution today adequately permits the Congress to enact laws to provide for instances of removal, resignation, disability, or death of a President.

However, there is another body of constitutional thought, another group of constitutional scholars, who disagree with this. And it has been our feeling to date that when you do have this rather sizable split in opinion that we should be sure so that we do not have a disability law which, when we are in a position of national crisis, would be tested and found to be unconstitutional. For that reason, wouldn't it be safer to amend the Constitution?

When in doubt, be sure.

Mr. ROSSITER. Well, that may be true. But don't underestimate the power you already have been given by the framers of the Constitution. They told you to provide by law for these various situations, and I believe that you have a very real power and in many ways it has not been exerted.

I think what you and I would agree on is that a constitutional amendment has a kind of sanctity, a kind of legitimacy to it that no law can ever have, no matter how well it works, no matter how old it is.

Well, let's agree, you make it a nice short amendment and we will try to ratify it out there in the States.

Senator BAYH. I happen to be one of those who believes that you couldn't state more specifically in the Constitution that the Congress does have the power to act but there are those who have studied this for a lifetime, and are scholars of the Constitution, who disagree with this and that is why I more or less changed my original position to one in which we would be sure.

But I will buy this compromise of a short constitutional amendment.

We have had some considerable dispute concerning what should be in the constitutional amendment, whether it should be a long one or a short one and what, in fact, constitutes a short or long one.

My good colleague, of New York, absent this morning to attend the funeral of Mayor Wagner's wife, is firmly of the opinion that we do not want any details whatsoever in the constitutional amend-

ment, and he is proposing Senate Joint Resolution 35, which merely clarifies Congress to act and removes the question about whether the Vice President, should the President die or be removed from office, shall be the President or merely Acting President.

But as far as disability is concerned it confines itself to merely saying Congress shall have the authority to act.

Do you believe that this type of amendment is the way to approach it? Is this, in fact, necessary, or should we have an amendment which attempts to keep this to a minimum of detail but yet set out some specific formula?

Mr. ROSSITER. With all due respect to Senator Keating, I read the Constitution as saying that you already have the power to act. I don't know how the words of the Founding Fathers in 1787 could have been any clearer. In a Constitution full of rather vague, frugal, sophisticated subtle, indirect statements which incidentally, I think, is why it has lasted so long, thank God for it, compare it with almost any State constitution, here is a very clear statement that the Congress shall, by law provide, and then for these various possibilities.

If we are to have a constitutional amendment, and you are convincing me that perhaps that would be the way to lay this question to rest as much as we ever can, I would like to see it first in very brief, frugal language state this consensus that we apparently agree on and that has been stated by, in the Eisenhower-Nixon, Kennedy-Johnson, and Johnson-McCormack agreements, and then provide this very brief method of filling the vacant Vice Presidency.

Those two things, I think, we could put together in one amendment.

Senator BAYH. We are agreeing then, are we not, that in a disability amendment we are talking about the powers and duties of the office and not the office itself.

Mr. ROSSITER. Right.

Senator BAYH. Being assumed by the Vice President?

Mr. ROSSITER. Absolutely.

This is the very clear point that it is—he would become an acting. As I tried to say in my statement that I put in the record, after all you can't have two Presidents. You can't have one mending on the shelf and one exercising the powers. You can only have one President.

Incidentally while I am about it, I do hope eventually some consideration will be given to that Succession Act of 1947. Whether the succession should be put in the speakership first or the Secretary of State is I suppose a great political decision and you have to make it although I think there are certain arguments as I put them in the record here for the Secretary of State.

But the notion that the Speaker of the House has to resign the speakership and resign as Representative before he can then take over as Acting President, especially if the President is not dead but simply disabled—is, you will pardon the expression, a monstrosity. I am almost tempted to ask who wrote this act, and how could we put, let's say Speaker McCormack, under the kind of pressure he would be under if President Johnson were to be disabled for a couple of months with another heart attack, God forbid, we ask Speaker McCormack to give up his speakership, his seat, this is a terrible thing to do.

One can assume that the people of his district would keep the office, keep the Representative's office open, and he could go back into the

House, whether the gentlemen of the House would reelect him Speaker, I suppose there could be some kind of agreement on that except there is no time to consider those things.

If the President becomes disabled, at that moment, and not 3 days later after a lot of bargaining and understanding, the Speaker has to become Acting President. We cannot let the great power of the Presidency lie unused for 2 or 3 days.

That was all right in 1881. It may even have been all right in 1919, although I doubt it. It certainly is not all right in 1964.

Senator BAYH. I think we are both agreed, are we not, that any legislation should in no way constitute a direct attack on the person of the Speaker but rather on the system.

Mr. ROSSITER. Absolutely not.

Senator BAYH. Let me ask you a question or two in addition to the statement you have already made about the alternatives for selecting a new Vice President.

One of the main criteria for a solution to either one of these problems is to have a solution that would be readily acceptable to the American public so that the transition or the temporary solution will not create hysteria.

This was one reason why, despite the tragedy in Dallas, we were able to continue almost without losing a step. But do you see this as a possible fault in the idea of utilizing the electoral college?

Mr. ROSSITER. Yes.

Senator BAYH. I think the electoral college is too cumbersome and, as you well know, most of the electors named for various kinds of political and public services as a kind of honor. They register the votes, except in one or two of our States, as they have been told to register those votes, and the electoral college, as it was imagined by the framers, of course, has not existed now really for over 160 or 170 years.

Mr. ROSSITER. I feel that in this situation the most legitimate source of authority in the United States is the joint action of the President, the Senate, and the House, and I cannot imagine a higher source of authority for this particular position.

I still would feel that if this is a real problem that this possibility of an Acting Vice President which you could create by law under your powers, while the amendment is going through might well be considered.

After all, I believe you can attach the powers of the Vice Presidency to almost anybody, the Governor of the Virgin Islands if you want to.

Senator BAYH. It is true the electoral college is today antiquated.

In fact there are some who say we don't need a college at all. But be that as it may, it is here now and some say if you give the electoral college this additional, very important responsibility that this would tend to upgrade the college and get men of greater standing and of wider reputation to run for college electors.

Do you see this as an argument?

Mr. ROSSITER. I see this as a possibility but I am still left with this uneasy feeling that the President might have thrust upon him someone who is of different party, quite different political attitudes, and whose succession would create a violent change in the administration, and I think we all agree, Republicans, Democrats, and independents alike, that what was superb in the high political sense about November

22, was the smoothness of the transition and the way in which in that very tragic hour everybody in this country was ready to accept Lyndon Johnson as President of the United States.

Now, that is a product of law, custom, constitutional amendment, the opinions, the traditions of the people. I don't think that the electoral college would have this kind of legitimacy, and I, myself, would not be disposed to let this thing be done by men who do not, as it were, have to live with the decision they make.

In other words, I will be blunt about it. I have a thousand times more confidence in you and in your colleagues—

Senator BAYH. Will you repeat that for the record, please?
[Laughter.]

Mr. ROSSITER. I will repeat that for the record.

Senator BAYH. It is not necessary.

Mr. ROSSITER. I have 2,000 times more confidence in you and your colleagues who have to live in Washington with the results of the decision, and are all of you known men, visible men, men we can hold to account, rather than in this sort of really anachronistic thing called the electoral colleges or electoral college made up by and large of people who are back there in their States, and may I remind you, as I do not think I need to that by the Constitution you, and all people like you, are ineligible to serve as electors. We would be going completely outside the structure of responsible power in our present Government and having a man, as it were, thrust upon the President by people who then don't have to live with that decision.

I don't think this is good practical political science or politics.

Senator BAYH. Let me ask you a question about your proposal, mine and the bar association consensus. One of the major criticisms I have heard levied upon it is the example to which you alluded of the divided executive and legislative as far as political party is concerned.

Do you see this as an insurmountable problem? Might there be a Congress of a different party and would it want to play politics with the office and refuse to let, say, a Republican President select a Republican Vice President merely because a Democratic Congress was in power or vice versa?

Mr. ROSSITER. Well, two points on that: I am assuming for this point that politics, petty politics would be pretty well laid aside but in addition remember that the onus then is placed on the Congress, they can confirm under the system that you and I have agreed on, the President's nomination, but they can't then reject and then put someone else in.

Senator BAYH. There would be—

Mr. ROSSITER. Simply the vacancy would continue and the burden would be on Congress for continuing this vacancy; do you see what I mean?

Senator BAYH. Are there not two points that we could also consider? First, that this situation has existed in the past and Congresses of different party have, with little confusion, ratified nominations of the President for offices such as Secretary of State which, of course, has been in the line of succession.

Mr. ROSSITER. Yes.

Senator BAYL. And, too, there has been great public opinion at the time of crisis for the Congress to get about their business and stop playing politics in such an important thing.

Would these not be significant factors.

Mr. ROSSITER. Absolutely.

I haven't got my fact book with me, but in the 80th Congress with the Republicans in command of both Houses, and Harry Truman was alone in the Presidency we had the vacant Vice-Presidency and as I remember Mr. Truman replaced Mr. Stettinius with—I really should know this, I am glad my students aren't here to hear me—with Secretary Byrnes.

Now, the Republican Senate confirmed, and yet it was confirming the man next in line for the Presidency, and knew it.

Senator BAYL. To me, this very example is another little bit of evidence for the desirability of placing provisions for disability and replacement of the Vice President in the Constitution. In the past we have had personalities who are on the scene determine what course we were going to take. In the original one, Hamilton persuaded Washington that they did not want to put the then Secretary of State Jefferson too close to the line of succession so they went to the President pro tem. I think the situation that you just described certainly had something to do with changing the line of succession from the Secretary of State to the Speaker, and we don't know who the personalities are going to be on the scene 50 years from now when we may have to use this again.

Mr. ROSSITER. But the point still is for the solution of 1886 that you are taking a man out of the executive, therefore providing continuity, and therefore, as it were, elevating him in no way that upsets him, whereas if you take the Speaker of the House, and you force him to resign, and you force him to give up his seat, this is more than a man should have to undergo.

Senator BAYL. Let me ask one other question here. I don't mean to drag this out.

Mr. ROSSITER. I have all day, Senator.

Senator BAYL. But I would be happy to have your thoughts.

I notice with interest your thoughts about one of the other proposals that is being considered by this committee—the proposal that we have two Vice Presidents. In the event there is a vacancy then we would always have an additional Vice President. I also noted your emphasis time and again, and I think I quote you correctly, where you talk about the unchallenged exercise of the authority of the President.

Some of the criticism which is levied at the proposal for two Vice Presidents has been that it would downgrade the office of Vice President.

However, in recent testimony we have had some other thoughts that would go to your idea of unchallenged exercise of the authority of the President. If we had two Vice Presidents, some say, there would be a greater tendency to divide the authority of the Chief Executive, and that this would, in fact, create additional problems of dissention among the two Vice Presidents and the President.

Do you see this as a possibility?

Mr. ROSSITER. No; I think it is a very real thing. I repeat that one of the great virtues of our system, and even if it isn't a virtue it is something we have gone with for over 170 years, is the unity of the Chief Executive, and this would, I think, lead to a little bit more pluralism than we would want.

I assume that people who speak of a second Vice President have some kind of executive duties in mind for him. I once made such a proposal myself and hereby I publicly retract this proposal, because if certain executive functions were given to the Vice President in which he was basically to aid the President, he would be doing them for a man who in the end does not have any real political control over him, and the one thing we can say about the present position is that those who execute the laws, the great officers of state, are immediately responsible to the President, and immediately removable by him as a kind of symbol and fact of that responsibility. And I feel that in all honesty, that the notion of the Executive Vice President—well, I wish I had never dreamed it up.

Let's say I was a graduate student when I did. We all are graduate students at some point, at least in my profession, and we think up some very silly things.

On the other hand, professors think up some silly things, too.

Senator BAYH. With all fairness, though, to whoever first proposed this, there was no disagreement among any of us there would be sufficient duties for the Executive and Legislative Vice Presidents.

Certainly there would be plenty of jobs that these individuals could perform.

Mr. ROSSITER. But jobs that don't have to be done as we are demonstrating at the moment when we don't have a Vice President of the United States.

He can be a nice helper for the Vice President but there is nothing he really has to do, is there? My point is we need a Vice President more than we need a Vice-Presidency.

We need an heir apparent more than we need a man to share some of the ceremonial and other burdens, and one final point on that, we have spent literally generations getting the Vice-Presidency up to a place where it has real distinction, and first-class men are willing to accept it, as they certainly were not 50 or 60 years ago, and I think we ought to do everything within our power to keep it that way, and I think that to try to institute a second Vice President would get us right back to where we were before.

If anybody, we used to call him a kind of fifth wheel, well, can you imagine a sixth wheel, and this is, I think, what a second Vice President would do.

Senator BAYH. Professor, I don't want to delay you further. We are very grateful to you.

Any questions?

Mr. LEBAN. Professor Rossiter, I would just like to ask you two questions relating to the proposal embodied in Senate Joint Resolution 139 for filling a vacancy in the Vice-Presidency, which you also favor. Section 2 of that resolution reads:

In case of the removal of the Vice President from office, or of his death or resignation, the President, within a period of thirty days thereafter, shall nominate a Vice President, who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting.

Now, you raised the possibility, it isn't very likely, to be sure, that the Congress in joint session would reject a particular nominee of the President, but that it would have no power to substitute another name in the stead of that person:

My question is perhaps a lawyer's question, but supposing that 30 days after the President had been removed from office or had died had expired by the time the Congress acted upon and rejected the new President's initial nomination, do you see the necessity for any additional language to that section so that it would be possible for the President to send down a new name?

MR. ROSSITER. My reaction to that would be that of the nonlawyer. I can imagine again a sticky situation here. I would simply strike out the 30 days, and either leave it or put in the word "immediately," or "at his earliest convenience," or something of that sort.

Again, I think we have got to have faith in the good will and commonsense, indeed, statesmanship of those who govern us, and if the President doesn't act to fill the Vice Presidency, obviously he is derelict in his duties. Presidents are not generally derelict in their duties and I think we could count on his filling that, or rather nominating a man to fill that office very speedily indeed.

So my, what Senator Connally used to call horseback opinion is, take out the 30 days and either leave it as blank, in other words, the President is to act in a way at his own convenience or put in the word "immediately" or perhaps "with all due deliberation."

MR. LEBAN. The second question I have is this: We have had previous witnesses before the subcommittee. I believe Professor Neustadt of Columbia University, and also Mr. Laurens M. Hamilton, a former member of the New York State Legislature, who is a descendant of Alexander Hamilton, who was somehow responsible for—

MR. ROSSITER. He is responsible for an awful lot of things, sir, that he is not given credit for.

MR. LEBAN. That is right.

The point was made that confirmation by both Houses of Congress rather than by the Senate alone would be inconsistent with the practice we have become familiar with throughout our history whereby Senators alone confirm Presidential nominees.

Moreover, the thought was raised that the House of Representatives has no stake in who is to become the Presiding Officer of the Senate, and third that in case the Congress were at that time in adjournment it would be less cumbersome for the President to reconvene the Senate alone in special session than all 535 Members of the entire Congress.

Would you comment on that?

MR. ROSSITER. I think that the first couple of points are what Hamilton would have called too much refinement.

As to the last point, I simply feel that if the House itself sees some difficulties and is willing to put this in the lap of the President alone, then let's have it that way. Whichever way we did it, if it were finally established in a constitutional amendment, it would have, I hate to keep using these words, sanctity, legitimacy, force, and what was a joint session of Congress or the Senate acting alone, I don't see that it would make much difference.

May I remind you that at present, after all, the people of the United States, through their electors, thrust a Presiding Officer on the Senate every 4 years. Some of those men I don't think knew where the Senate was when they arrived in Washington, and they never did get along very well with the Senators.

Remember most of our Vice Presidents have not been Lyndon B. Johnsons or Richard Nixons, men who had been in the Senate. Some of them came from very far back in the hills, and did not make very good Presiding Officers over the Senate at all.

Mr. LEBAN. I have just one last question along the same line.

Mr. ROSSITER. Please.

Mr. LEBAN. In the last part of your statement you indicate that it would probably be constitutional, in your opinion, for Congress to provide a stopgap piece of legislation setting up an office of Acting Vice President to be filled through Presidential nomination, and congressional confirmation.

Do you see any aspect of unconstitutionality to setting up by statute a procedure for joint congressional confirmation rather than senatorial confirmation as provided for in the Constitution now?

Mr. ROSSITER. Of the Vice President or the Acting Vice President?

Mr. LEBAN. Of the Acting Vice President to be established by statute.

Mr. ROSSITER. Right offhand, no; but it is conceivable that in the particular instance the Senate alone as the confirming—a constitutional amendment can provide any method of confirmation.

Mr. LEBAN. I certainly agree with you there.

Mr. ROSSITER. But I certainly would be willing to make this alteration in my proposal. I suppose that is why we meet together, we sharpen each other's minds and clear them up of confusions. I would say probably if we were to be constitutionally certain that this office of Acting Vice President would be filled by nomination of the President and confirmation of the Senate.

But I see no constitutional inability to create such an office if Governor Rockefeller wants us to create the office of First Secretary, we can certainly create the office of Acting Vice President.

But the constitutional amendment, what it does is to lop off the word "Acting." I do not think we can fill the Vice Presidency by statute. We have to fill that by constitutional amendment.

With that I might agree.

Senator BAYH. I might ask one other question so far as this is concerned. If we deal with this problem of a temporary law, whether it is a stopgap Vice President or an Acting Vice President or temporary disability law, do we run into the danger of dividing our shots, so to speak, in which we mobilize all of our forces for one effort?

Public opinion is aroused for one program, get this through, and because of the urgency of it, if we solve the problem even temporarily is there not a tendency of some to say, as Congress has said these many years so far as disability is concerned, "Well, why make it a permanent solution?"

Mr. ROSSITER. That is very possible, Senator, and I suppose I am being a tiny bit Machiavellian in this, but I have a feeling that, you know, it is very hard to get a constitutional amendment, and in a way I have in mind the idea that we might never get that amendment any-

way. Then if we don't get it then at least we have got this, as I think he would be, great officer of State. I cannot imagine the President nominating any less imposing a figure for the Acting Vice President than he would nominate for the Vice-Presidency if he were in fact first in line of succession to the Presidency.

But you will have to decide within your own halls what tactics are possible here. I think the people of the United States, public opinion, as you call it, will support any effort made with the kind of good will and careful examination that you people are making.

I think this is one place where opinion simply is we ought to do something, and it ought to be clear cut and simple, and it ought to obviate the difficulties that we have known and we can anticipate and what you gentlemen come up with, I think will have real public support.

Senator BAYH. Any further questions?

Mr. LEBAN. That is all I have, Mr. Chairman.

I just want to say Senator Keating will have the benefit of your views through the official transcript, and if he were here I know he would be very glad to welcome your appearance, especially as a representative of sorts from one of our distinguished universities.

Mr. ROSSITER. Thank you.

Senator BAYH. Thank you very much, Professor Rossiter, you have been a very great help to the committee, and we thank you again for coming to be with us this morning.

Mr. ROSSITER. Thank you.

Senator BAYH. We have had a slight delay in the arrival of the next witness, former Vice President Nixon, who should be here according to latest report in about 10 or 15 minutes.

While we are waiting his arrival, which has been delayed because of inclement weather that prevented him from getting in last night as he planned, and which, I understand, delayed Professor Rossiter several hours, let me read into the record, if I may, two other pertinent pieces of correspondence.

One a letter from Dr. Paul Dudley White, who, as I am certain everyone recognizes, was the personal physician of President Eisenhower during his illnesses:

DEAR SENATOR BAYH: It is with great appreciation that I received your kind invitation to attend one of your hearings in behalf of the medical testimony on the questions of Presidential inability and vacancies in the Vice-Presidency. I am sorry that I cannot attend myself because of the heavy pressure of my work and other obligations, especially at this time of the year when I am involved in the heart campaign.

However, I wish to tell you and the members of the Subcommittee on Constitutional Amendments that I am in complete accord with the recommendations of the American Bar Association. I don't believe that the medical problem would be great. Naturally, as occurred when I was asked to see President Eisenhower, there is a group of doctors in charge of the patient and it is they who give the advice to the Vice President and others in the Government as to what should be done medically. I don't think decisions can be made ahead of time for every case is different from the next, or the last, and must be decided on its own merits.

I hoped this would be of particular value to the committee in light of the hesitancy that some have and the feeling that some have that we should have a panel of medical experts as an official body to determine Presidential inability but, as Dr. White points out, always in the case of

Presidential illness there are the best experts in the land ready to advise under these circumstances.

The second letter is one which we received yesterday from former President Dwight D. Eisenhower. President Eisenhower's letter follows:

DEAR SENATOR BAYH: Responding to your letter of the 27th, which reached me only this morning, March 2, it is obvious that my answer must be brief because of the time limit you have indicated.

Regarding the matter of Presidential succession, I favor the law that existed before 1947 over the one now controlling, but after reflection I have come to believe that a better method for handling this matter might well be adopted.

I suggest that at any time a Vice President succeeds to the Presidency he should immediately nominate another individual as Vice President to fill the vacancy with the nomination to be approved, preferably, by both bodies of the Congress rather than merely by the Senate.

Should such an event occur during recess of Congress, I believe that a special session should be promptly called so that there could be no question that public opinion, as represented by the Congress, would approve of the new President's nominee.

There, of course, arises the bothersome possibility that some type of disaster might remove the President and the Vice President simultaneously. I believe that to cover this contingency we should return to the provisions of the law that governed succession before 1947, but with the proviso that if both President and Vice President should be lost their successor should be considered only as an "Acting President" and the Congress should provide for another election of a President and a Vice President to serve out the Presidential term then current.

I believe that these changes should be accomplished by constitutional amendment.

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

A disability could be of different kinds, one caused by physical or mental illness, or another by an absence from the seat of government of such a character that would preclude Presidential decisions and action in time of emergency. Wherever possible I believe that a President's disability should be acknowledged and announced by himself. If circumstances made this impossible I think the Vice President should voluntarily step forward, announce the disability, and with the concurrence of a majority of the Cabinet, assume the Presidential responsibilities and duties. However, I believe it should be made clear that in this case the Vice President is merely an "Acting President" and would require no new oath of office and would receive no Presidential emoluments.

The end of the disability would be determined by the President himself upon his declaration in writing that he was ready to resume his office. Should there be any dispute between the President and the Vice President as to whether the former is ready to resume his duties and the Cabinet should agree with the Vice President, then the Vice President should continue to serve for the time being, while the matter should go to a commission comprised of the three senior members of the Cabinet, the Speaker of the House of Representatives, and the leader of the minority party in the House, the President pro tem of the Senate, and the leader of the minority party in the Senate, and four medical personnel recognized by the American Medical Association as competent in their fields and whose function it would be to advise the other members of the commission. Each member of the medical portion of the commission should be selected and requested to serve by a majority vote of the Cabinet.

I should add that the chance is very remote that such a dispute might occur for the simple reason that we must assume that in these serious affairs the individuals concerned would be men of good will, concerned with the welfare of the Nation as a whole. The only possibility to be feared is that a President might become so mentally deranged that his personal convictions regarding his recovery might be logically doubted by reasonable men, thus requiring a deci-

sion of the kind that a politically and medically competent commission could make. However, again recognizing the value of public opinion, I believe that the findings of the entire commission might well be submitted to both Houses of the Congress for approval.

There is, of course, no completely foolproof method covering every contingency and every possibility that could arise in the circumstances now under discussion. We must trust that men of good will and commonsense, operating within constitutional guidelines governing these matters, will make such decisions that their actions will gain and hold the approval of the mainstream of American thinking.

Sincerely,

DWIGHT D. EISENHOWER.

I would like to ask Mr. Leban, who is Senator Keating's right-hand man in matters of this nature, to read a statement from the Senator. I want to make the record clear that as chairman of this subcommittee, I feel we are very fortunate to have a man of Senator Keating's caliber on this subcommittee, a man who has studied this matter for a number of years. I regret that a combination of the most untimely and unfortunate death of Mrs. Wagner, plus the elongated and early starting sessions of Congress have necessitated our adjusting our schedule to the place where Senator Keating is unable to be here.

Mr. Leban, would you please read the Senator's statement?

STATEMENT OF HON. KENNETH B. KEATING, A U.S. SENATOR FROM THE STATE OF NEW YORK, PRESENTED BY ABBOTT LEBAN

Mr. LEBAN. Thank you, Mr. Chairman.
Senator Keating's statement follows:

Mr. Chairman, I deeply regret that due to my attendance at the funeral services for the late Mrs. Robert F. Wagner, I am unable to take part in the subcommittee's hearings this morning and to hear the statements of our distinguished witnesses. I am especially sorry to miss the testimony of former Vice President Nixon. I know that as one who has had unique first-hand experiences in the area now under examination by the subcommittee, Mr. Nixon's views will be most valuable to us and deserve the closest attention.

I intend to review the transcript of this morning's proceedings and give careful consideration to the statement offered by Mr. Nixon, as well as those of today's other eminent experts.

I must say, from what I have read of the separate positions taken by Mr. Nixon and Governor Rockefeller, that despite areas of common agreement among us on broad purposes, there is a wide divergence as to detail on concrete proposals.

I had hoped to be able to question Mr. Nixon in several of the matters in which we go our separate ways. I am completely puzzled by his proposal to use the electoral college in filling a vacancy in the Vice Presidency. I doubt if it would work, and I think it would give rise to questions of succession and inability in the electoral college and hence compound our present difficulties.

I am still hopeful that the subcommittee may have an opportunity to receive testimony directly from Governor Rockefeller if a mutually convenient date can be arranged at some later time.

Due to my enforced absence, I would sincerely appreciate it, Mr. Chairman, if at the appropriate time after Mr. Nixon completes his statement, my counsel, Mr. Abbott Leban, could be given leave to ask several questions in my behalf.

Senator BAYH. The committee will please reconvene.

We are honored this morning to have with us the man who can speak with greater personal authority than any other living American regarding the challenges confronting the Nation in the time of Presidential disability. The record has shown and the testimony has provided graphic evidence with reference to President Garfield's 80-day

disability, President Wilson's almost 16-month disability, as well as President Eisenhower's three individual disabilities.

We are honored this morning to have first-hand information from a man who served in the Nation's No. 2 Office.

Vice President Nixon, we are honored to have you with us, sir, and you proceed as you desire by making a statement or remarks or question and answer, anything you prefer, and we will follow your lead.

**STATEMENT OF HON. RICHARD M. NIXON, FORMER VICE
PRESIDENT OF THE UNITED STATES**

Mr. NIXON. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear before this committee and having been a member of Senate investigating committees as well as committees conducting hearings as this committee in terms of legislation, I know that at about this time in your proceedings witnesses begin to repeat as far as the various statements that they make. I have taken the liberty of reading summaries of the testimony that has been given to this committee to date, and consequently, I will try not to bore you by repeating those particular ideas that have already been expressed by others.

I think perhaps the best service I could render to the committee in the hearings is to present to you those areas where I might disagree with proposals that might be considered by the committee and any new proposals that I might have that have not already been presented to you.

I would like to begin by stating that in my opinion the hearings being conducted by this committee are the most important hearings from the standpoint of the country that are being conducted in Washington today.

Others are more sensational, others may have greater, shall we say, political effect, but these hearings involve the future of the United States as no other hearings perhaps in recent years have.

It involves the Office of the Presidency and the powers of the Presidency, and as I will point out in my remarks with regard to disability, it involves the defense of the United States of America.

As I appear before you, I want to make it clear that I don't have any pet idea here to sell. I naturally have strong convictions that the proposals I have made with regard to succession and disability are perhaps the best approach.

But what is important is not that this committee adopt my proposals, what is important is that this committee make a recommendation to the Congress, to the Senate, and to the Nation which will get action on these two problems, the problem of succession and the problem of disability.

I say that because when we look at the American Constitution, a very remarkable document, it has very few weaknesses or flaws in it. The major weakness was that with regard to disability, which, as the chairman has pointed out in his opening statement, has caused concern in this country several times since the Constitution was adopted.

With regard to succession, we all know that there has been a shifting idea as to how that problem should be handled. But now it seems to me that, as I am sure it does to the members of this committee who

have been participating in these hearings, the time has come to remedy the constitutional flaw with regard to the Office of the Presidency itself in respect both to succession and to disability.

I say the time has come because the American people, as a result of the assassination of President Kennedy, and as a result prior to that time of President Eisenhower's illnesses, I think are aware of the problem. They believe that something should be done about it but the more time that is allowed to elapse between those events the less urgency for it will be felt by the American people and, of course, by the Congress to get action to deal with these problems.

So, the time is now, and I would urge the committee to proceed as effectively as possible in getting a united proposal, backing it and getting action on it.

I would say further in the general sense, that while these hearings deal with succession and while succession, as I note from the reports in the papers and the reports of the committee's hearing, seems to attract the most attention and the most interest, in my opinion, the major problem, and the problem that needs most urgent attention is not succession but disability.

We do have a succession law at the present time. There is, on the other hand, as far as disability is concerned only an informal agreement which has no standing as far as law is concerned between President Johnson and Speaker McCormack who is the next in line in succession, the same agreement that President Eisenhower had with me and that President Kennedy had with Vice President Johnson.

So, I would agree in this instance with the position that Senator Keating, I understand, has taken very strongly before this committee of which he is a member, that disability is the more urgent of the two problems.

However, I would say that this is the time to deal with both problems, succession and disability, and to strike, in effect, while the iron is hot.

Now, turning to specific proposals, I would like to discuss first the problem of succession.

I have set forth my views on succession in an article which I wrote for a magazine and, with the chairman's permission, I would like to submit that article for the record and thereby save the time of the committee by reading it into the record.

Senator BAYH. Without objection we will include it at this point in the record and the Chair would like to compliment the author for his very incisive argument which I read with a great deal of interest.

(The magazine article referred to follows:)

[From Saturday Evening Post, Jan. 1, 1964]

WE NEED A VICE PRESIDENT NOW

(By Richard M. Nixon)

We must fill the office of Vice President immediately, says a man who held the job 8 years. Here is his compelling proposal.

The 8 weeks that have passed since the assassination of President Kennedy have been a period of great soul searching for the American people. We have asked ourselves how this tragic act of violence could have happened in our country. We have urged that steps be taken to provide better protection for our Presidents in the future.

We have also a new, hard look at the question of Presidential succession. And we have concluded that there is a serious deficiency in an otherwise remarkable constitutional process.

While everyone knows that eight Vice Presidents have succeeded to the Presidency upon the death of an incumbent, it is not so well known that another seven Vice Presidents of the United States have died in office, and one has even resigned. The Office of the Vice President has been vacant 16 times. In other words, during over 40 years of our history, this Nation has not had a Vice President and there has been no constitutionally elected successor to the President.

Three times the Congress has dealt with this problem.

The first law, passed in 1792, made the President pro tempore of the Senate and then the Speaker of the House of Representatives the next in the line of Presidential succession after the Vice President. These congressional officers were put ahead of the President's Cabinet because Hamilton, the Federalist Party leader, wished to block the path of Secretary of State Jefferson.

This law was changed in 1886, during the Democratic administration of Grover Cleveland. His Vice President had died the year before, and the Senate was controlled by the Republicans. To prevent the possible elevation of a member of the opposition party to the White House, the line of succession was given to the Cabinet, starting with the Secretary of State.

The last change was proposed by President Truman in 1945. He requested Congress to make the Speaker of the House his successor. Some observers at the time suggested that he was motivated by the belief that Speaker Rayburn would make a better President than Secretary of State Stettinius. And so, since 1947, when this law was enacted, the line of succession to the Presidency has run: Vice President, Speaker of the House of Representatives, President pro tempore of the Senate, the Secretary of State, and finally the other members of the Cabinet.

Assuming that a law should be written for all time and not just to deal with a temporary situation, the conclusion is inescapable that the laws of Presidential succession have in the past been enacted for the wrong reasons.

Now is the time to make a change for the right reason.

The right reason is not that a Speaker of the House is always less qualified to be President than a Secretary of State. Sam Rayburn, for example, would have been a better President than Edward Stettinius. And the present Speaker, John W. McCormack, is a man with a distinguished record of 40 years' service to our Nation, who has always stood in the forefront of the fight against communism both at home and abroad.

Yet, as recent Presidents have rightly given more and more responsibilities to their Vice Presidents, the present system now raises to what has truly become the second office in the land a man who already holds one of the most burdensome offices of government—the Speaker of the House. Moreover, it is not unlikely that a Speaker could be of a different party from the President's. This was the case during the 80th Congress when President Truman would have been succeeded by Republican Speaker Joseph Martin.

So, putting present personalities aside, we must write a new law of Presidential succession. And as did the framers of our Constitution, we must write for posterity, not merely for the moment.

There have been three serious proposals recently made for changing the law of Presidential succession.

First. It has been proposed that we go back to the old system of putting the Secretary of State and the Cabinet ahead of the Speaker of the House in the line of succession. But a good Secretary of State doesn't necessarily make a good President. While a particular Secretary of State might be an excellent choice, just as a particular Speaker might be, this proposal offers us no such guarantee. It is significant to note that no one who has held the office of Secretary of State has been elected to the Presidency since James Buchanan. And, as President Truman suggested in 1945, I believe, there are advantages in elevating a man to the Presidency through the elective, rather than the appointive, office.

Second. It has been proposed that the Congress elect a new Vice President. A similar plan would have the President appoint a Vice President with the consent of the Congress. Both of these proposals, however, could create grave difficulties if the Congress happened to be controlled by the opposition party, which has been the case during the terms of 16 Presidents.

Third. Senator Kenneth Keating, of New York, has introduced a constitutional amendment to provide for the election of two Vice Presidents. First in the line of succession would be an Executive Vice President who would have no other

constitutional duties. The second Vice President, or Legislative Vice President, would then follow in the line of succession, and would have the constitutional duties of presiding over the Senate and breaking tie votes. The major disadvantage of this novel proposal is that by dividing the already limited functions of the office, we would be downgrading the Vice-Presidency at a time when it is imperative that we add to its prestige and importance.

How can we best design a new law which will not have these objections? I believe the trouble in the past was that changes in the law of succession have been made to deal with an immediate, personal situation. Because it was thought that a particular individual should not be President, the plan was changed to block that man. Instead of trying to devise a plan which will promote or block a particular man, what we need to do is to direct our thoughts generally to the question of the kind of man who would be best fitted to succeed to the Presidency of the United States and then design a plan which will find that man.

What qualifications should a Vice President have?

He should be a man qualified to be President.

He should be a full-time Vice President with no other official duties.

He should be a member of the same political party as the President.

He should have a political philosophy which is close to that of the President, particularly in the field of foreign affairs.

He should be personally acceptable to the President, but since he may potentially hold the highest office in the land, his selection should reflect the elective, rather than the appointive, process.

What kind of plan will allow the selection of such a man?

I believe there is one proposal that has not been given adequate consideration to date and that would best accomplish this purpose. It would take the form of an amendment to article II, section 1, of the Constitution and would read as follows:

"Within thirty days after a vacancy occurs in the office of Vice President, either because of death, removal, or the elevation of the incumbent to the Presidency, the President shall reconvene the electoral college for the purpose of electing a Vice President of the United States."

This proposal, as is the case with Senator Keating's, recognizes that merely changing the law of succession does not necessarily fill the office of the Vice President. And the office of Vice President itself, apart from the question of succession, has become necessary to the country.

By using the electoral college as the instrument for selecting a new Vice President, we would be relying on a popularly elected constitutional body which in contrast to the Congress always reflects the will of the people as of the last presidential election. While it is true that the electoral college is now a constitutional anachronism, this important new function would upgrade the body and would bring about the selection of more responsible persons to serve on it.

Besides filling the Vice Presidency and reflecting the will of the electorate, this plan assures continuity of programs and the selection of a Vice President who can work with the President. For, as in the case of the nominating conventions, where the presidential candidate has the greatest voice in selecting his running mate, so too could we expect the President to have the greatest influence in the deliberations of the electoral college. He would probably recommend the man most acceptable to him as the new Vice President.

But the fact that the electoral college would have the final authority to make the decision would be a safeguard against arbitrary action on his part. Most important, it would mean that whoever held the office of President or Vice President would always be a man selected by the people directly or by their elected representatives, rather than a man who gained the office by appointment.

We now come to the most critical question of all—how do we get action on this or one of the other proposals which have been made to deal with the problem of presidential succession?

The failure of the Congress to act on the equally important question of Presidential disability is a case in point. The Constitution does not set forth a procedure as to how and when the Vice President shall assume the duties of President when the President is unable to serve because of illness. Fifty years ago the country could afford to "muddle along" until the disabled President either got well or died. But today when only the President can make the decision to use atomic weapons in the defense of the Nation, there could be a critical period when "no finger is on the trigger" because of the illness of the Chief Executive.

After his heart attack in 1955, President Eisenhower asked the Congress to correct this situation. When the Congress failed to act, he took matters in his own hands and in 1958 wrote me a letter the key paragraphs of which follow:

"The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

"1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

"2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

"3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the office."

This historic document was later adopted by President Kennedy, and most recently by President Johnson. But it must be remembered that this procedure is merely a stopgap. It does not have the force of law. I strongly believe that either legislation or a constitutional amendment should be enacted to solve this problem on a permanent basis.

The time has come to give top priority to the consideration of proposals to deal with both Presidential succession and Presidential disability. The most effective way to get action is to set up a bipartisan Presidential Commission, such as the famed Hoover Commission on the Reorganization of the Executive Branch of Government. President Johnson might appoint to the commission to serve as public members our three former Presidents, Hoover, Truman and Eisenhower. The Speaker and the President pro tempore of the Senate would appoint the six other Members from the House and Senate. The recommendations of such a distinguished, blue-ribbon panel would not only be of great merit; they would, with the backing of the President, be almost sure to become the law of the land.

It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process. The murder of our President has forced us to reassess our law of succession and the office of the Vice President.

Both Presidents Eisenhower and Kennedy recognized the importance of the Vice Presidency as no other Presidents had done before them. The extensive duties assigned to Vice President Johnson and myself, at home and abroad, were unprecedented in our history. The country now feels safer and more confident because of the experience that Mr. Johnson gained while serving under President Kennedy. Clearly there can be no reversal of this trend toward greater duties and responsibilities for the Vice President.

When a President dies in office, the man in his party who has been best trained for the Presidency should succeed him. The Vice Presidency today, as a result of the way both President Eisenhower and President Kennedy upgraded the position, is the only office which provides complete on-the-job training for the duties of the Presidency.

We have swiftly and dramatically been reminded again that when we choose a man for Vice President we may also be choosing a man who will become President. This means that our Presidential nominating conventions can no longer fall back on the politically cynical formulas of "balancing the ticket"—of choosing a Western for Vice President only because the Presidential candidate is an Easterner, or a conservative because the standard-bearer is a liberal.

From now on it is absolutely essential that both political-party conventions nominate two Presidents—candidates for both national offices, President and Vice President—who have the ability and experience to lead the United States of America in these perilous times.

Mr. Nixon. With regard to the article I have written and the proposals I have made, I again emphasize that I do not insist that this is the only way to handle the problem.

In my opinion as far as succession is concerned there are several general principles that this committee, the Congress, and the Nation should have in mind.

First, the new law or the constitutional amendment, whichever the committee decides is appropriate, should be written not for the problem of the moment, but for posterity. The great difficulty in the past has been that every time the problem of succession has come up, the law has been changed because a particular administration or a particular President didn't like the situation as far as his own successor might be concerned.

Therefore, this committee, I am sure, is looking at that from the long-range standpoint.

Now, the second point I would make is the considerations that the committee should attempt to deal with in writing either a law or a constitutional amendment, are these:

First, we should be looking for the qualifications that the Nation needs in a President of the United States. Now, those qualifications sometimes may exist in a man who currently may be Speaker of the House. They may sometimes exist in a man who may be currently the Secretary of State. But other times there might be some other individual whom the President of the United States, the people of the country generally, would feel was better qualified at a particular time to be the second in the line of succession.

The second point I would make is that the man that I think who generally is best qualified to succeed to the Presidency in the event that something happens to the President is the Vice President of the United States.

I say this particularly in view of the record with regard to the transition from President Kennedy to Vice President Johnson. It was a smooth transition. This was a credit, of course, to President Johnson, and his handling of that situation. But it is also a credit to the system. The Vice President, particularly in recent years, is cut in, in effect, on all of the major decisions and, therefore, he is prepared to take over as President as no one else, not the Speaker, not the Secretary of State, no one else in the country, is prepared to take over.

Therefore, I believe that this committee should adopt a proposal which will fill the office of Vice President.

A second reason I believe this is important is that this country now, I think, needs a Vice President. This could not have been said perhaps even 25 years ago. But it can be said today, and clearly apart from the fact that the Vice President is the man that I think is best qualified to be President in the event the President became incapacitated. I think that the Vice President serves a very useful function in Government.

I think President Johnson, for example, today, could well use the services of a Vice President to handle some of the many problems that he handled as Vice President before he succeeded to the Presidency.

Now, we come, of course, to the critical point: how do we find a new Vice President, having in mind the fact that that office has been vacant not only eight times as a result of the Vice President succeeding to the Presidency, but eight other times when the Vice President either died in office and one, of course, resigned the office.

Now, on this score my proposal is that the electoral college be reconvened and that the electoral college, with the recommendation of the President, select a new Vice President.

From reading these hearings, I find that there are many who find objections to that proposal, and like any proposal it has its weaknesses.

I think its merits are, first, that the electoral college as distinguished from the Congress will always be made up of a membership a majority of which is of the President's own party.

The Congress 20 percent of the time during the history of our country has been under the control of a party other than that of the President of the United States. It seems to me then that the electoral college has that advantage over the Congress as the elective body which will select or approve the selection of the new Vice President.

A second point that I should make, however, in this respect, is that I feel that it is most important that the new Vice President come from the elective rather than the appointive process.

I do not mean by that that I would oppose or that this committee should oppose a proposal whereby the President of the United States recommends to either the electoral college or the Congress a name for approval as Vice President, but in the final analysis whoever is to hold the Executive power in this Nation should be one who represents and has come from and has been approved by the electoral process rather than the appointive process.

Now, going to the problem with regard to the selection of a Vice President and his approval by the Congress, I would say that in this instance, that it should be made clear either in the hearings or perhaps even in the law, that the President of the United States has a right to have as his Vice President a member of his own party; that he has a right also to have as Vice President a man who is compatible with his views.

Now, naturally, those objectives will be reached if the committee adopts a proposal of having the President recommend the man that he wants for Vice President, either to an electoral college or the Congress.

I feel very strongly that should be, therefore, the proper procedure.

Rather than having the Congress, if it is to be given the authority, consider several names, I think it is much better to have the President of the United States make the recommendation of one name and the Congress either accept it or reject it.

This is the way, of course, in practice that our Vice Presidents are selected now, and I believe that that way, while it has some weaknesses, is the best way in view of the factors that I have mentioned.

Now, turning from the question of succession and turning to the question of disability, I mentioned a moment ago that I considered the question of disability more important, more urgent at the present time than the question of succession.

Looking at the problem of succession, I would like to say I think it has been most unfortunate that so much of the discussion with regard to succession has been with regard to personalities; the article downgrading Speaker McCormack, for example, I heartily disapprove of.

The articles suggesting, well, a Secretary of State is always better qualified to be President than a Speaker or vice versa, I think those

articles make no sense at all, and those arguments I do not think are appropriate ones.

I think the moment that you get into the personalities you are writing for the moment rather than writing law for the ages.

Looking at disability, which is a problem that has not been dealt with, let me point up the difficulties with the present situation. There is a letter, a letter whose contents this committee, of course, is familiar with, written by the President of the United States to the next in line of succession, indicating what would happen and what procedures would go into effect in the event of disability.

But that letter has no force in law whatever, and if an argument developed, and if you will read some of the books that presently have come out with regard to those tragic last moments of Woodrow Wilson in the White House, such arguments can develop, if an argument should develop between the President's personal family and the President's official family, a letter that the President may have written to the next in line of succession wouldn't mean anything at all, in my opinion.

Therefore, it is imperative that this problem be dealt with and dealt with now. That brings me then to the one point at issue with regard to how this problem should be dealt with. Let me say that I approve generally of the proposals that have been made by former Attorney General Brownell, former Attorney General Rogers, as well as President Eisenhower, with regard to disability.

Those proposals represent, as this committee is aware, the considered conclusions of those of us who went through the Eisenhower disability periods, and I believe that those proposals are sound.

I will not elaborate on them at this time.

This is one area, however, of disagreement in which I will take a position which differs to an extent from that taken, I understand, by President Eisenhower in his letter to this committee.

The critical point arises when a Vice President has taken over the powers and duties, not the office of the Presidency, because the President has been disabled, and then at the point where the President believes he has recovered sufficiently to take the duties back, and an argument occurs as to whether he is able to do so or whether he is not able to do so.

In that particular case it is my belief that where the Vice President, together with the approval of the majority of the members of the Cabinet, determine that the President is not able to take over the powers and the duties of the office, to regain them again, and where the President declares that he is able to do so, that then that conflict should be decided by the Congress of the United States, and not by a commission.

I take a very dim view of referring major constitutional problems of this type to commissions. Commissions are not responsive, and they do not have to, of course, account to the electorate, and I believe that the Congress, with its committee system, could much better handle this situation than a commission.

Let's suppose, for example, that a commission of seven were to consider this problem, and the vote were 4 to 3 or 5 to 2 that a President was or was not able to assume the duties of the office.

Certainly whoever held the office after that kind of a commission hearing, men who were not elected by the people, certainly whoever held that office would hold it under a cloud, whereas, if that decision were made by the Congress, after a hearing set up under the proper circumstances, then at least even if the vote were close in the Congress, it would represent a vote of the people's representatives.

I think, in other words, that the commission approach should not be adopted by the committee. I think it would simply confuse the situation.

With regard to the whole problem of disability, it seems to me that we have to have in mind one fundamental new fact. The chairman recounted the history of disability, and that history itself is a warning of what can happen when we have a man in the office of the Presidency who is unable to carry on the powers and the duties.

But looking back to the period of Woodrow Wilson, I would like to say that I happen to be, despite my difference in partisan affiliation, always been one who was a great admirer of Woodrow Wilson. I think he was one of the great Presidents of this country, and yet in that critical period after he went to the Peace Conference and returned to the United States, I think it could probably be said today that the peace was lost after his leadership had helped to win the war.

For 17 months we had no President of the United States in the real sense.

Now, let's look at the situation today. Today only one man in this world, in the free world, can defend the security of the free world in the event of attack. Only one man's finger is on the trigger.

The United States and the free world can't afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a finger on the trigger, and that brings me to my last point.

I know there is argument, as there always is, between constitutional lawyers as to whether this should be handled by a constitutional amendment or by legislation.

I, personally, favor a constitutional amendment dealing with both succession and disability.

On the other hand, I would suggest that because a constitutional amendment may take 2, 3, 4 years for enactment, that this committee might well adopt legislation dealing with disability, interim legislation, the same proposal, as a matter of fact, that you might eventually include in the constitutional amendment because the legislation can then be passed and the legislation would be effective in the interim period in the event there was a disability problem.

That, Mr. Chairman, concludes all of the remarks that I think have not previously been covered by other witnesses before the committee, and I would simply say at the conclusion, reemphasize what I said at the beginning: Having been in many sensational hearings in this room as a Senate investigator and in the House caucus room as a House investigator, I can imagine that members of this committee sometimes wonder whether these hearings will ever produce anything, whether there is enough public interest, whether they are worthwhile.

I emphasize what I said before, the country may not be interested enough in what is going on in these hearings, but there is no decision that is more vital to the future of this country than the decision this

committee, and this Congress, will make to deal now with the problem, first, of disability, and, second, of succession.

Senator BAYH. Thank you very much, Mr. Vice President.

I would like to note at this time the presence of the senior Senator from Hawaii, Senator Fong, and if there is no objection, we will proceed to ask you a few questions, if you do not object.

Mr. NIXON. Certainly.

Senator BAYH. To close the session, I am going to ask Senator Fong, who is a coauthor of one of the proposals, to make a statement.

Mr. Vice President, one of the witnesses before the committee earlier said it was his opinion that although the informal agreement on inability that is presently in effect, which you and President Eisenhower initiated, would, in fact, with the passage of time, become common law precedent and would have the force and effect of law and would be much simpler than involving the other bodies which both you and I seem to think should be brought into this picture.

Would you care to comment, sir, as to whether you think a common-law-precedent approach would be sufficient?

Mr. NIXON. I do not believe it is sufficient, and I would suggest that for the President of the United States making decisions, decisions that affect not only the foreign policy of this country but affect business relationships of immense complexity, that I can imagine what a field day this would be for lawyers if this common-law-decision or this common-law-practice argument were to be made.

Speaking as a lawyer, and not downgrading the profession but recognizing its great skill in raising questions whenever there is any technical constitutional problem, I would urge the committee to reject that argument and, at the very least, see that that or its essence be written into law. I would prefer a constitutional amendment.

Senator BAYH. Could I ask you, sir, to compare the approach which is suggested by the two specific amendments which are presently before this committee. One has been offered by the distinguished Senator from New York, Senator Keating, from whom we read a statement in the record prior to your presence, specifying that he was very sorry he was unable to be here because of the tragic death of Mrs. Wagner which required him to be in New York.

The other approach is the approach which Senator Fong and I have espoused and which has been suggested as an approach by the American Bar Association and some other organizations. I don't want to argue about the specific proposals but rather the general approach to constitutional amendments which you would deem preferable. One approach is a very simple approach which would not spell out any specifics whatever but would merely say to the Congress, "You have the authority to act."

The other approach specifies specifically chapter and verse point by point what would be the actual law in the event of a tragedy or disability.

The feeling is, on the one hand, that only a simple solution giving no specific points at all would be adopted by the majority or three-fourths of the legislatures.

The other argument for the more complicated and specific amendment is that really the legislatures would rather have a point-by-

point specification of what would be the law rather than a blank check given to Congress to act in this area.

Could you give us your opinion as to which approach you would prefer in the constitutional amendment form?

Mr. NIXON. The approach I would prefer is the one that this committee finally concludes has the best chance to success. I think either approach insofar as workability is concerned in handling the problem would be effective.

In other words, I emphasize again that all of the nit-picking arguments as to whether it should be this way or that way make very little impression on me. What I think is—I think our major concern must be—is to find a solution that will be least controversial but will get at the major problem.

Now, as far as I personally am concerned, looking at it as a lawyer, I would say that I would prefer the simpler approach rather than the one spelling out the procedure. I find that, I am just thinking now, of what I think might get across and what would be explained to the State legislatures that have to approve a constitutional amendment?

My own evaluation of that political problem would be that the simpler approach would raise less questions.

The more you spell out the proposal, the more chance you raise for arguments and disagreements with regard to it.

The other thing I would say is this: That by not—when you are writing the Constitution, you are, of course, dealing with a document in which changes cannot be made very easily. I would say that with a simple approach then, the Congress, as it developed its procedures to deal with this particular problem might then have more flexibility to change those procedures where it found that one was too rigid.

Senator BAYH. In the simple approach which you describe would you have us write the basic fundamental of procedure? That the President would, in writing, specify his disability, that the Vice President would, in fact, be Acting President and would assume the powers and duties but not the office, that the Vice President would assume these duties if the President were unable himself to make this declaration? Would these be specifics that you would include?

Mr. NIXON. By all means. Of course, I assume that all of those particular items would be included in the constitutional amendment. But what I was referring to was the procedure that the Congress would go through in the event there were an argument between the President and the Vice President as to whether or not a President had recovered from disability.

In that respect I would not attempt to spell out the procedure that the Congress should follow.

Senator BAYH. You pointed out, if I may change directions just a bit, the importance of the Vice Presidency today. The Vice President is one heartbeat away from the Chief Executive authority of this land, and the best successor to the President is indeed the Vice President.

You pointed out also that the Vice President does have a job to do today. There has been some conflict as to whether we actually need a Vice President to perform duties to relieve the burdens presently

resting on the shoulders of the President. Could we call on your experience, sir, to give us a general idea of what these duties are? How this constitutes an active, vigorous, working office today?

Mr. NIXON. Well, it is rather difficult to summarize the duties of the Vice President because, of course, those duties vary with everyone who holds the office. I would say that the least burdensome duty is, of course, the one that is included in the Constitution, of presiding over the Senate, and breaking tie votes.

For example, in the 8 years that I was Vice President, I cast a tie vote on only eight occasions, one a year, on an average.

I think that the important duties of the Vice President are: first, his participation in the deliberations of the National Security Council; his participations in the deliberations of the Cabinet; and then the increasingly great use of the Vice President as a troubleshooter and as a representative of the President abroad in the field of foreign policy.

Apart from those duties, we, of course, have those specific commissions that the President has on occasion called upon the Vice President to perform. For example, the Committee on Government Contracts in President Johnson's case, the Space Committee and others.

What I would like to suggest here is perhaps a little different approach. I believe that now that the pattern has begun of a President giving more functions to the Vice President, I see that that pattern can be very greatly expanded in the years ahead, because the burden of the Presidency, particularly with the foreign policy problems becoming more acute than they had been previously, are so great that the Vice President can and should be used more even than he has been in either the Kennedy or the Eisenhower administration.

That brings me, of course, to the other key point: the fundamental reason why the President should in effect name or have a veto power on who holds the office of Vice President is that a Vice President can only be as useful as a President has confidence in him, and only when a Vice President is compatible with the President's views can that be the case. That is why, for example, that I oppose in these modern times, as the Vice Presidency has assumed these new proportions, the so-called ticket balancing theory in national conventions.

I would hope, for example, that both national conventions this year, both the Republican and the Democratic Conventions would think in terms of nominating two Presidents, in effect, having in mind that either of the men nominated for Vice President on either ticket could be President, but more than that, having in mind the fact that it is most essential to nominate for the second spot a man who as nearly as possible represents the views of the President, so that he can carry out the functions of the Presidency in the event he succeeds to that office, but more than that so that as Vice President the President can trust him in foreign policy and domestic policy to take very important assignments.

Let me say in that connection, I know that Senator Keating has a proposal for setting up the two Vice Presidents. I would prefer that proposal incidentally over those that would change the succession law back to the Speaker of the House or something like that. But one of the reasons I oppose that proposal, and I have great respect for Senator Keating—we came to the Congress together and I consider him one of the top constitutional lawyers in the country—but one of the

reasons I oppose it, right at this period, when the office of Vice President has come to mean something, we shouldn't downgrade it.

I had a little amusing incident on that in New York a couple of nights ago. There is an organization which is somewhat like the Gridiron Club in Washington, was giving a party in honor of a former Vice President, and the speaker or the chairman of the meeting said that this organization in previous years had honored many former Presidents of the United States and Secretaries of State but this is the first time they had ever honored a Vice President.

Everybody cheered, of course, at that particular reference and then the next speaker who was— who had the duty of getting up to introduce me, who was, of course, the guest of honor said—well, he happened to be the president of a major New York bank, and he said, "Well, I can't say that I am a bit impressed about the fact we are honoring a Vice President today."

He said, "After all, I head an organization that has 243 vice presidents. [Laughter.]

Now, I know that in traveling abroad, for example, the United Arab Republic has four Vice Presidents. Several Latin American republics have two, and the moment that you have more than one Vice President, the usefulness of the Vice President to the Nation has been greatly reduced.

Senator BAYH. May I ask you one other question in this regard? I personally share your feeling about the importance of not decreasing the significance which has been attached to the Vice Presidency.

Do you see a possibility of decreasing the significance of the Vice President? Is there a possibility, with human beings being what they are, and conflicts being what they are, of a conflict between two Vice Presidents? And is there a possibility of a conflict arising between the President and his Vice Presidents?

Mr. NIXON. Well, as a matter of fact, that is not only the reason I oppose the proposal for two Vice Presidents but I also do not approve of the proposal that I understand has been made by Governor Rockefeller for setting up the First Secretary, a position of First Secretary of the Cabinet.

The trouble with the position of First Secretary of the Cabinet who would be next in line in succession to the Vice President is that first his would be an appointive office, and I do not like the idea of an appointive office succeeding to the Presidency, but the second point that I would make is this: the moment you set up a First Secretary of Cabinet you are going to downgrade, in the field of foreign affairs particularly, the Secretary of State, and at the present time, for example, I feel strongly that the Office of Secretary of State rather than being downgraded ought to be upgraded.

A strong Secretary of State in these times is very important to the country and particularly to the President of the United States, and the moment that nations abroad, diplomats abroad, get the impression that the Secretary of State is not a strong member of the administration, and close to the President, and the President's top foreign policy adviser, his effectiveness is greatly reduced.

Senator BAYH. I don't mean to monopolize this question-and-answer session.

Senator Fong, do you have any questions to ask the Vice President?

Senator FONG. Mr. Vice President, I am very happy to get you again in Washington. I want to thank you for appearing before this committee. You have given us great prestige by your presence here this morning. You certainly have shown us the necessity for urgency of the enactment of this type of legislation.

I want to congratulate you and commend you for the very clear, positive, definite, and comprehensive statement you have made to us this morning.

I want to say that you have given to this committee a lot of prestige and honor by your presence, and you have given to this proceeding great competence.

I have no questions of you. You have given us a very clear picture and I want to thank you for coming here today. I hope your stay in Washington will be permanent.

Mr. NIXON. Thank you, Senator. I want to say I am in a very new position in this respect. This is the first time in this room I have ever been on this side of the table and I am glad that I am here voluntarily and not under subpoena. [Laughter.]

Senator BAYH. Mr. Vice President, may I hold you long enough for another question or two?

Mr. NIXON. Yes, sir.

Senator BAYH. Are we agreed that in the event of disability that the powers and duties only would fall upon the Vice President?

Mr. NIXON. Exactly. I am glad the chairman raised this point. That is the proposal that has been made as I understand it by Attorney General, former Attorney General Rogers and former Attorney General Brownell and it is my position.

The office of the Presidency cannot devolve and the powers and the duties only should. Let me give one other reason why that, I think, is vitally important. Let us suppose that at a particular time a President was not completely disabled, but that he himself felt that his illness was so serious that it would be in the best interests of the country that, for, say, a short period of time, a week or so, that the Vice President undertake the powers and duties of the Presidency.

The President then would feel free to turn over those powers and duties to the Vice-Presidency if he knew at the end of that period he would be able to come back and assume the office.

I think it would be a great mistake to have the office devolve; only the powers and duties should.

Senator BAYH. One witness we had earlier in the hearings, Mr. Vice President, was primarily in agreement with the statement you just made. He went one step further to say that in the event of a certain kind of illness, a certain severity of illness—

Mr. NIXON. Yes.

Senator BAYH (continuing). That the Vice President would no longer then be acting President but would in fact assume the duties of the President.

His argument was that foreign policy being what it is, there is some benefit to be derived from the fact that there is an ultimate authority when a decision is made, and that uncertainty would be avoided.

Do you see a time in light of your experience when the illness would be so severe that the Vice President should in fact assume the office rather than just become acting President?

Mr. NIXON. Well, let's look back, I think we can only look to history to know. I would say that in President Wilson's period had Vice President Marshall assumed the powers and duties of the Presidency at that time, that he would have been recognized, perhaps, as the President in the full sense of the word.

But I don't believe that this still changes the attitude that I feel the committee should take with regard to whether the office or the powers and duties should devolve upon the Vice President.

Because of the uncertain nature of illnesses it will always depend on each case, and I think that by precisely pointing out that only the powers and duties devolve on the Vice President that gives the flexibility in each instance to handle the situation to deal with the particular problem.

There might be, I see possibilities, for example, like this, that the degree of powers and duties that devolve might vary depending upon the nature of the illness and I think that should be left open as well.

Senator BAYH. From your testimony as to the procedure and the safeguards and the checks and balances that you feel should be attendant in any legislation such as this, I trust that you agree that this business of removing even temporarily, the President of the United States is something not to be taken lightly and this is a serious matter.

Mr. NIXON. You can't treat the relationship of the United States like the relationship between the Governor and Lieutenant Governor of a State. As the committee knows, when a Governor leaves the State the Lieutenant Governor then has the power to commute sentences and do a lot of other things of that sort and then when the Governor comes back in the situation reverts to the previous state.

I believe that where the Presidency is concerned, this power is so awesome, and particularly where foreign policy is involved so decisive and critical that you naturally cannot move lightly from the position where a Vice President steps in and steps out. It can't be musical chairs, in other words, and I would say, I would suggest, too, this, that no Vice President is going to get the approval of the members of the Cabinet for this momentous step unless it is a very serious situation, and no President, for example, is going to turn over the powers and duties of the Presidency. A man, for example, who is immersed in all the problems of our foreign relations and our domestic problems is not going to, every time he gets a stomachache, say, "Well, I am going to resign for a week," or "Resign the powers and duties and let the Vice President take over."

What I visualize here is that this proposal would only come into effect as a practical matter when the President's condition was desperately serious, and when because of that condition he honestly concluded or if he was unable to do so, the Vice President and the members of the Cabinet concluded that the country required a new hand on the wheel for a period of time.

Senator BAYH. Let me ask you one final question.

Mr. NIXON. Yes, sir.

Senator BAYH. Permit me to think out loud just a bit. On none of these questions do I take any issue with what you have said, but I think Senator Fong will agree that we are trying to get a solution when we come up with a final bill.

We would like to get more detail about some of the arguments which have been advanced.

Mr. NIXON. Yes.

Senator BAYH. You mentioned two ideas for ratifying bodies to ratify or confirm the nomination of a new Vice President.

Would you care to discuss very briefly the two main stumbling blocks that seem to be in the minds of most people as far as both of these alternatives are concerned? First, 20 percent of the time we have had a divided Congress, divided in political authority and responsibility from the President.

Do you feel that tradition has shown that even in these incidents that the Congress has not been reluctant, by and large, to confirm nominations that have been made by the Executive? That public pressure would be great and certainly it would be difficult for even a President of the United States to become involved or the Congress to become involved in political interparty play?

If you feel it would still be more desirable to use the electoral college, how would you go about upgrading the electoral college in the eyes of the people? If this were upgraded in the immediate future, would it again be downgraded if, as we hope, we did not need it for this purpose for a long time? How would you fill vacancies which might exist in the electoral college?

These are things which you might just touch on briefly. This would be the final question.

Mr. NIXON. Yes. Briefly, I would say as far as the Congress is concerned, and this is the reason that I made the electoral college suggestion, there have been 16 administrations in which a President has had an opposition Congress.

Now, being quite specific, let's think of what might have happened in 1946 when the 80th Congress, with an overwhelming Republican majority, came in, when Mr. Truman was President of the United States. It would seem that there could have been problems there particularly where the Congress and the President were at odds.

Now, I will have to, however, also take into account more recent history, I think of the very proper but also outstanding manner in which the Congress, both Republicans and Democrats, accepted the transition from President Kennedy to President Johnson.

What we have to have in mind here is that when this appointment is made, when the Presidency, when the office of Vice President, becomes vacant, it is made in one of two circumstances. It is made when a Vice President dies or when a President dies. Now, when a President dies, I would say that the feeling in the country, the immense emotional impact at the death of a President, certainly by assassination and even by normal causes, is such that his successor would probably get broad support even from an opposition Congress.

Being a lawyer, of course, what I was trying to do was to find another electoral device where there was no problem at all, and, of course, we know the electoral college is always, a majority of the electoral college is, of the President's own party.

But looking more closely at more recent events, I would say that the likelihood of a Congress bucking a President, a new President of the United States, even if it were an opposition Congress, probably is not as great as many of us would have feared. Now, the second point, however, it might be a little more difficult. Let's suppose a Vice President died in office, then there isn't the emotional impact on the country that there would be if the President dies.

In this instance, I would say that the opposition Congress factor might be a more real one, a more serious one. But going a step further, I still believe that the important thing here is not whether it is the electoral college or the Congress, but the important thing is to get one or the other, which is the consensus of the members of this committee and which this committee thinks will get the broadest public approval. Either solution is a great improvement over what we have at the present time and either, I think, over a period of time would work.

I happen to believe the electoral college system would work better.

How about vacancies in the electoral college? Those would be filled by State law, the United States Code so provides today and, for example, we have that situation today.

The members of the electoral college, of course, are selected months before the time when the electoral college convenes in the various States, and they would be filled in the event of vacancies by State law now, and if, for example, they were called upon for this extraordinary function, State law would again provide, would again prevail.

As far as what would happen on the electoral colleges' approval of the choice of a President, I have already indicated that there is a certainty in this instance, because of the very nature of the electoral college which you do not have with regard to the Congress.

But all in all, in summary, I get back to my original proposition that the electoral college, the Congress, the two Vice President proposals, all of these are before this committee. The important function of this committee, as I see it, is to get action, to consider the recommendations and the pet ideas of the many witnesses you have heard, and to seize the idea that in your opinion, is to get the best idea in your opinion, and to get the public support and go forward with it.

And speaking as one individual, whatever this committee recommends I will support because I believe the important thing is to get action and to get it fast.

Senator BAYH. Mr. Vice President, we are indeed grateful to you for taking the time to come before our committee. We have gathered, as we had anticipated and hoped, much valuable information and insight from the practical first-hand experience that you have had in this area.

Senator Fong, do you care to make closing remarks?

Senator FONG. Mr. Chairman, I wish to make a brief statement in support of Senate Joint Resolution 139 proposing a constitutional amendment on the related problems of presidential succession and presidential disability.

The tragic assassination of President Kennedy has pointed up once again the urgent need to resolve these critical gaps in the U.S. Constitution.

First, the Constitution does not say anything about what should be done when there is no Vice President. No one in America today doubts that the Vice-Presidency is an office of paramount importance. The Vice President of the United States today carries very vital functions of our Government. Besides his many duties, he is the only man who is only a heartbeat away from the world's most powerful office. Yet, on 17 different occasions in our history the Nation has been without a Vice President.

The security of the Nation demands that the office of the Vice President should never be left vacant for long, such as it is now.

Second, the Constitution does not say anything about what should be done when the President becomes disabled, how and who determines his disability, when the disability starts, when it ends, and who determines his fitness to resume his office, and who should take over during the period of disability.

Third, the Constitution also is unclear as to whether the Vice President would become President, or whether he becomes only the Acting President, if the President is unable to carry out the duties of his office.

Mr. Chairman, a problem closely related to inability is that of succession. Ever since the founding of our Republic there has been some uncertainty about who succeeds to the Presidency when there is no President and Vice President.

We have had three succession laws in our history—in 1792, in 1886, and in the present governing statute passed in 1947. The 1947 law places the Speaker of the House next in the line of succession after the Vice President. The difficulty with this provision is that it draws upon a member of the Government's legislative branch to succeed to the highest office in the executive branch of our Government. This breaches a primary tenet of the Constitution—the separation of powers.

Mr. Chairman, as a member of this subcommittee, I have studied very carefully all the various proposals submitted by other Senators. I have considered the testimony submitted to the subcommittee, including those of the distinguished experts who have testified. I have read the data collected and have read the research done by the subcommittee staff.

I believe that any measure to resolve these very complex and perplexing problems must satisfy at least four requirements:

(1) It must have the highest and most authoritative legal sanction. It must be embodied in an amendment to the Constitution.

(2) It must assure prompt action when required to meet a national crisis.

(3) It must conform to the constitutional principle of separation of powers.

(4) It must provide safeguards against usurpation of power.

I believe Senate Joint Resolution 139 best meets each of these requirements.

Senate Joint Resolution 139 deals with each of the problems of succession and inability by constitutional amendment rather than by statute.

This proposal provides for the selection of a new Vice President when the former Vice President succeeds to the Presidency within 30 days of his accession to office; the selection is to be made by the President, upon confirmation by a majority of both Houses of Congress present and voting.

This proposal establishes the line of succession in the Cabinet rather than in the Congress.

This proposal makes clear that when the President is disabled, the Vice President becomes Acting President for the period of disability. It provides that the President may himself declare his inability and

that if he does not, the declaration may be made by the Vice President with written concurrence of a majority of the Cabinet.

The President may declare his own fitness to resume his powers and duties, but if his ability is questioned, the Cabinet by majority vote and the Congress by a two-thirds vote on a concurrent resolution resolve the dispute.

These provisions of Senate Joint Resolution 139 not only achieve the goals I outlined earlier, but they are also in consonance with the most valued principles established by our Founding Fathers in the Constitution.

They observe the principle of the separation of powers in our Government. They effectively maintain the delicate balance of powers among the three branches of our Government. Most important of all, they insure that our Nation's sovereignty is preserved in the hands of the people through their elected representatives in the National Legislature.

I am most delighted and pleased to cosponsor Senate Joint Resolution 139 with the distinguished chairman of this subcommittee as sponsor, and I will commend it highly to the Senate as a meritorious measure that should be enacted promptly into law.

Senator BAYH. We thank you for being with us this morning, Senator Fong.

Mr. Vice President, we again thank you. We probably will have one brief session early in the morning, Monday, to conclude our hearings. There have been requests of the chairman to hear two or three Congressmen who wish to make their views known, and it is my feeling we should hear whomever wants to be heard. This is the final main session and, Mr. Vice President, we are again grateful to you for wrapping it up in such grand style for us.

Senator FONG. Thank you again.

Senator BAYH. I would like to ask that at this point the texts of four resolutions be included in the record of the hearings. These resolutions, Senate Joint Resolution 148, Senate Joint Resolution 149, Senate Joint Resolution 155, and Senate Joint Resolution 157, were introduced after the initial hearings by this subcommittee and deal with the problems of Presidential inability and the filling of vacancies in the office of the Vice President.

I note that Senator Ervin has submitted a few remarks in support of his resolution. They will be printed with his resolution.

[S. J. Res. 148, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to a vacancy in the office of Vice President

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—

“Whenever there shall be a vacancy in the office of Vice President, the President, by and with the advice and consent of the Senate, shall nominate not more than five nor fewer than two persons qualified for the office. The House of Representatives shall immediately, by ballot, choose one of these persons to be Vice President. A quorum for this purpose shall consist of two-thirds of the whole number of Representatives, and a majority of the whole number shall be necessary to a choice.”

[S.J. Res. 149, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the filling of a vacancy in the office of Vice President

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. Within sixty days after the date upon which the office of Vice President becomes vacant, at any time not later than one hundred and twenty days before the expiration of the term for which the Vice President was elected, because of death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall nominate, and by and with the consent of the Senate, shall appoint a person to be Vice President. If the Congress is then in adjournment, the person discharging the powers and duties of President shall convene the Senate to consider such nomination.

"SEC. 2. Within a period of thirty days after receipt of a nomination of any person under this article to be Vice President, the Senate shall proceed to vote thereon. If the Senate does not within that period consent to such nomination by majority vote of the Senators present and voting, and more than ninety days of the term for which the Vice President was elected remain, the person discharging the powers and duties of President shall transmit to the Senate within thirty days after such vote the nomination of another person to be Vice President.

"SEC. 3. A Vice President chosen under this article shall serve as such until the end of the term for which the Vice President or Vice-President-elect whom he succeeds was elected.

"SEC. 4. Nothing contained in this article shall prevent the Congress from providing by law, consistently with the provisions of this article, for the designation of an officer who shall act as President at any time at which vacancies exist in the offices of both President and Vice President.

"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 States within seven years from the date of its submission to the States by the Congress."

[S.J. Res. 155, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States on Presidential power and succession

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. The President may delegate in writing such of his powers and duties as he deems appropriate to the Vice President, whose discharge of powers and duties so delegated shall have the same effect as if those powers and duties were discharged by the President.

"SEC. 2. In case of the removal of the President from office, or his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability of the President to discharge the powers and duties of his office, those powers and duties shall be discharged by the Vice President until the end of the term for which the President was elected, or until the earlier removal of the inability or disability of the President.

"SEC. 3. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine all questions concerning the inability of the President or Vice President to discharge the powers and duties of his office, the probable duration of any such inability, and the removal of any such inability. Each such determination shall require the concurrence of two-thirds of the members of the Commission present and voting.

"SEC. 4. Whenever at a time more than six months before the end of the term of the President the Vice President becomes President, or the Vice President undertakes to discharge the powers and duties of President because of an inability of the President the probable duration of which has been determined by the Commission on Prevention of Lapse of Executive Power to exceed six months, or there is no Vice President, or the Vice President has suffered an inability to discharge the powers and duties of his office the probable duration of which has been determined by the Commission to exceed six months, a Second Vice President shall be elected by the Congress from not fewer than three persons who are qualified to serve as President and who are recommended for election as Second Vice President by the national committee of the political party of which the President is a member.

"SEC. 5. Whenever there is no Vice President, and a Second Vice President has been elected under this article, the Second Vice President shall become Vice President. Whenever the Vice President is discharging the powers and duties of President, or the Vice President has suffered an inability to discharge the powers and duties of his office, and a Second Vice President has been elected under this article, the Second Vice President shall discharge the powers and duties of Vice President until the end of the term for which the Vice President was elected, or the earlier resumption by the Vice President of the discharge of the powers and duties of his office. The Congress may by law provide for any case in which there is no person who has qualified as President, Vice President, or Second Vice President, declaring what person shall then discharge the powers and duties of President or the manner in which such person shall be selected, and such person shall discharge those powers and duties until a person chosen under this Constitution has qualified as President, Vice President, or Second Vice President.

"SEC. 6. Neither the Vice President nor a Second Vice President shall preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

"SEC. 7. The Congress shall have power to carry this article into effect by appropriate legislation.

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

REMARKS BY SENATOR SAM ERVIN, JR., IN SUPPORT OF SENATE JOINT
RESOLUTION 157

Mr. Chairman, on February 20, 1964, I introduced Senate Joint Resolution 157 which deals with Presidential disability. I think that this resolution, which follows precedent laid down in the Constitution, provides a system for determining disability which is consistent with our form of government.

While the country has had three different laws relating to succession, none of which we have had to utilize, we have never promulgated a law relating to disability and there have been at least two situations when such a law was needed. Perhaps this deficiency is due to the fact that disability raises thornier and touchier problems than does succession. For solving the problem of Presidential succession involves deciding who can best fill a vacant office. Providing for Presidential disability necessitates selection of those who must make the awesome judgment to remove from office our highest executive officer.

I think that we must look to the Constitution to solve this difficult problem. The Constitution provides a method of impeachment for cause. I see no reason why this same method cannot be invoked to render decision on physical or mental disability. The fifth clause of article I, section 2, of the Constitution gives to the House sole power of impeachment. To the Senate is given the power to try

all impeachments in article I, section 3, clause 6. This clause further provides that a two-thirds majority is necessary for removal. The Chief Justice presides over the deliberations.

My resolution follows this system to the extent that that is possible. Under it the House must declare its belief that the President is disabled, and the Senate, presided over by the Chief Justice, must so find by the vote of two-thirds of the Members present.

Impeachment proceedings, of course, contemplate permanent removal from office. Disability, it is always hoped, will be a temporary affliction. Therefore, I have added a second section to provide a mechanism to determine when disability has terminated. The section provides that whenever the President declares in writing that he is no longer disabled, the Senate, sitting as before, shall determine by majority vote whether this is the case.

I know that many will say that this system is unwieldy. But make no mistake, removing a President from office, even temporarily and without blame, is serious business. It is not work for a small group of men, operating out of the searching light of public scrutiny. It is nothing that should be done hastily and without serious deliberation. While its consequences for the individual involved are not so serious as successful impeachment, its consequences for the country are every bit as serious.

Therefore, I oppose all plans for deciding when a President is disabled which place on the Cabinet or on any small group of men this awful burden.

Let us not delude ourselves, either, in a belief that Cabinet members are always united as one behind their Chief. The fact that Edwin Stanton, Secretary of War, in Andrew Johnson's Cabinet actively conspired against the President, while feigning loyalty to him, is well known. One authority on Johnson's impeachment has referred to Stanton as "Iago in the War Department." Johnson's inauspicious inauguration as Vice President perhaps laid the groundwork for the machinations which followed his tenacity as President in maintaining convictions, which he believed in accord with constitutional government and his conscience.

Again, a lesson from the period of President Wilson's disability is instructive. It was well known that the President felt that Secretary of State Lansing was not supporting his policies. If the Cabinet had had the power to remove Woodrow Wilson, there would always be nagging suspicions that their action was motivated out of personal disagreement with the President's policies. This is because the Cabinet, unlike the Congress, does not deliberate in public; it does not marshal the facts openly nor are its conclusions open to public scrutiny.

Therefore, I feel that removal of the President should only be made by a deliberative body whose actions are subject to public scrutiny. The Senate is such a body and such procedure is in keeping with the constitutional precedent for removal from office.

Thank you, Mr. Chairman.

[S.J. Res. 157, 88th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide a means for determination of 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. Whenever the House of Representatives, by proceedings taken as in the case of an impeachment, declares its belief that the President has suffered an inability to discharge the powers and duties of his office, the Senate shall determine whether such inability exists. When the Senate is sitting for that purpose, Members thereof shall be on oath or affirmation, and the Chief Justice shall preside. No determination that such disability exists may be made without the concurrence of two-thirds of the Members of the Senate present.

“SEC. 2. Whenever a President as to whom any such determination has been made makes written declaration to the Senate and to the House of Representatives, before the end of the term for which he was elected, that his inability

has been removed, the Senate shall determine whether said inability has been removed. Any such determination shall be made in the manner provided by section 1, except that a determination to the effect that the inability of the President has been removed shall be made upon the concurrence of a majority of the Members of the Senate present. Upon the making of any such determination by the Senate, the President shall resume the discharge of the powers and duties of President unless the term for which he was elected shall have expired.

"SEC. 3. 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 States within seven years from the date of its submission to the States by the Congress."

Senator BAYH. The record of this committee will be kept open for a short time in order that other material may be placed in the record of these hearings.

As there are no more witnesses scheduled to appear today, we shall recess subject to call of the Chair.

(The following material was received by the subcommittee and is included in the record at this point:)

THE REAL PROBLEM: VICE PRESIDENTIAL SUCCESSION

(By Senator Frank Church)

When President Johnson assumed his new duties on that day of tragedy last November, it was the 16th time in American history that the country had been without a Vice President. The fact that no President has died while the Vice Presidency was vacant, each having thus far lived out his term, would seem to vindicate Bismarck's famous observation that, "God looks after fools, drunkards, and the United States of America."

Indeed, we have been lucky. During 40 of the country's 195 years, the Vice Presidency has been vacant. Nevertheless, the country has not yet had to test the highly delicate operation of succession beyond the Vice Presidency, the laws concerning which tend to reflect short-term and often fickle considerations on Capitol Hill.

Never before has the real problem been faced—how to fill the Vice Presidency itself whenever the office becomes vacant between elections. The Constitution is silent on this. The framers did not go beyond providing that:

"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 * * *"

They then empowered the Congress to provide by law:

"* * * 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."

That is all.

Now, once again, the question of statutory succession is beclouded by controversy. Some advocate a return to the former practice of placing the Cabinet in line, and others defend the present law under which the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, would precede members of the Cabinet in the order of succession. Since the death of President Kennedy, it has become obvious that more is needed than simply another statute to determine succession beyond the Vice Presidency.

In response to the present interregnum, some 12 bills have been introduced in the Senate and another dozen in the House to amend the Constitution. A good number of the proposals extend to such divergent problems as succession beyond the Vice Presidency, or in the event of Presidential disability. However, all reflect two emerging realities.

First, it is now recognized that a serious effort is called for to guarantee that the momentum built up to find a solution be not dissipated. Lawmakers are aware that a start must be made in this session of Congress so that after the November election, real progress may be made. After all, repairs to our constitutional roof are rarely undertaken when the Republic enjoys unobstructed

sunshine; it is likely that they will be made, if at all, at a time like the present when recent tragedy has dramatized the need.

Second, it is recognized that the gap in the Constitution—which fails to provide for the filling of a vacant Vice Presidency—can be remedied only through a constitutional amendment. Why tamper with the Constitution? Because it is necessary to fashion a formula based not on short-term political considerations, but on long-term governmental principles. The country must get away from its historic tendency to change the succession system on the basis of contemporary personalities or transient political situations.

For example, the order of succession contained in the 1792 Succession Act—passed by the Second Congress with little discussion of possible constitutional objections—was influenced by the personal animosity that existed between Hamilton and Jefferson. The act provided that the President pro tempore and the Speaker of the House of Representatives should follow the Vice President in succession to the Presidency. Legislative officers were named ahead of the Secretary of State for one reason. Both President Washington and Hamilton, dominant figures of the Federalist Party, were hostile to Jefferson, who was Secretary of State.

In 1886, after the death of Grover Cleveland's Vice President, Thomas A. Hendricks, Congress passed a new statute. This act provided that, after the Vice President, succession to the Presidency should be vested in the Secretary of State, followed by other members of the Cabinet. For 60 years this law went unchallenged, largely because the country's Secretaries of State were men of sufficient stature. Yet, in 1945, the law again came under attack, partly due to concern over Secretary of State Stettinius, who, according to his critics, "was not schooled in politics."

But President Truman, in urging the 1886 law be changed, was moved by other considerations as well. He insisted that it was "undemocratic" for a Vice President who had succeeded to the Presidency to be able to appoint the man who could become his own successor. He contended that the person next in succession, after the Vice President, should be an elected official, and observed "that the Speaker is the official in the Federal Government, whose selection, next to that of the President and Vice President, can be most accurately said to stem from the people themselves."

Truman, of course, had in mind Speaker Sam Rayburn, one of the most respected men in the country. However, it was not until 2 years later, after Republicans had won control of both Houses in the 1946 mid-term elections, that Truman's proposal was acted upon. The 1947 Succession Act made two Republicans, Joseph W. Martin, Speaker of the House, and Arthur S. Vandenberg, President pro tempore of the Senate, next in line. Had Truman fallen victim to assassination that year, the Republicans would have taken over the White House without a vote of the people.

Today—lacking a Vice President—the country once again is in a delicate position. To provide a remedy, several different suggestions have been made. The most publicized proposal is that of Senator Birch Bayh (Democrat, of Indiana), chairman of the Judiciary Subcommittee now studying the problem. Bayh's plan, which is supported by the American Bar Association, would have the President name a new Vice President, subject to congressional confirmation. An ABA report points out, correctly, I think, that "It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence." The question I would raise is whether mere congressional ratification is an adequate safeguard against the danger President Truman alluded to in 1945—the concentration of too much power in the President's hands, by permitting him, in effect, to choose his own potential successor.

Former Vice President Richard Nixon wants to upgrade the electoral college and have it choose a new Vice President in the event of a vacancy. While Nixon acknowledges that the college at present is a constitutional anachronism, he thinks it could be made into the proper instrument for selecting a new Vice President. His reasoning is that the electoral college, unlike the Congress, always reflects the will of the people as of the last presidential election. First, however, he would want more responsible people to serve on the college.

Senator Kenneth Keating, Republican, of New York, suggests that there be two Vice Presidents—an Executive Vice President to be followed in line by a Legislative Vice President. Senator Keating argues that this would insure, first, that potential successors to the Presidency were men of the same party, and secondly, that the successors would be acceptable to the President.

These proposals, while differing in method, all reach to the heart of our constitutional deficiency—the need to establish a procedure to insure that the office of the Vice President, when vacated for any reason, will be promptly filled. This would render moot most of the argument about statutory succession beyond the Vice Presidency. For this need would arise only in the unlikely event, against which careful precautions are taken, that both the President and Vice President should perish at the same time.

To be sure, this leaves aside the problem of what to do in cases of Presidential disability. But the question of devising procedures to cover all contingencies involving disability is a very different one from that of filling vacancies in the office of Vice President. Indeed, tying the two together most likely will make harder the solution of either. After careful study, lawmakers may decide the problem of disability also requires constitutional revision. But I think the question of disability should be divorced from the question of replacing a Vice President. The simpler an amendment dealing with the latter problem can be made, the better its chances for ratification by the legislatures of three-fourths of the States.

As regards the choosing of a new Vice President, I have made the following proposal:

Let the President, with the advice and consent of the Senate, nominate not less than two, nor more than five, persons qualified for the office. Then, let the House proceed at once, by majority vote, to choose one of these nominees to be Vice President.

The best guiding principle, it seems to me, is to make maximum use of the provisions already in the Constitution and of the customs which have developed under them. It is in this context that the other proposals seem to me to be wanting. For example, as I have already indicated, the ABA amendment would give to the President too much power—the power to choose his own potential successor. While it is true that the President, or candidate for President, often selects his running mate at nominating conventions, the two remain candidates who must then be elected by the people. The ABA plan does not bring into play any equivalent democratic procedure. If adopted, this plan would make it most difficult, if not impossible, for Congress—with only one choice—to turn down the President. The confirmation would become pure formality, suggestive of the role often assigned to sham parliaments in authoritarian countries.

Selection of a new Vice President by the electoral college seems plausible only at first glance. But it is not really in accord with our present political practice. The members of the electoral college are not in fact chosen to be representative of the people, or for the wisdom needed to make so momentous a judgment. They are chosen to perform a ministerial function, limited to the formality of casting their votes for a previously selected party candidate.

Senator Keating's idea also involves a number of difficulties, not the least of which is that it misses the real need, which is to fill one vacated seat, not to split it in two.

Let me repeat. I believe the best approach to selecting an interim Vice President should conform as closely as possible to existing constitutional patterns. A practicable analogy, it seems to me, is the procedure we follow for choosing the highest nonelective offices of the Government, such as Cabinet ministers, ambassadors, and justices. In such cases, the President nominates, and "by and with the advice and consent of the Senate," appoints. I would utilize the same procedure.

My proposal furnishes the President, the Senate, and the House of Representatives with a role in the selection for which each is best suited. The President would exercise his responsibility in such a way as to insure that the new Vice President would be acceptable to him, reflecting the actuality of our present nominating procedures at party conventions, and guaranteeing that continuity of party and policy would be maintained.

The plan has the added strength of preserving for the Senate its separate integrity. The Senate would scrutinize the qualifications of each nominee, free from the pressures to which a President may sometimes be subjected, to insure that each is fully qualified for the second highest office in the land. The House, most representative of the people, would then make the final choice of the candidate it believes to be best endowed with the qualities of leadership and popularity without which no President can realize the full potential of the office.

There are, of course, objections that can be made to the plan I have offered. The soundest criticism, I think, is that the three-step election process, given the

present Senate rules, could prove a source of undue delay. After sifting all the evidence, the Senate Subcommittee on Constitutional Amendments might be well-advised to strengthen the ABA plan by upgrading the congressional role. Such a modified plan might well require the President to nominate not one, but a slate of candidates, from which a joint session of the Congress would then select the Vice President.

The election of a new Vice President by Congress has gained the approval of such newspapers as the New York Times, and such scholars as Paul Freund, professor of law at Harvard. Freund recently told Senator Bayh's subcommittee that, "Of the several methods which have been suggested for selection of an interim Vice President, the most satisfactory, in my judgment, would be election by Congress with the approval of the President."

He added that, "This would be done by the President's submission of one or more nominees to the Congress. The Vice Presidency should have a popular base and at the same time be in harmony with the Presidency. These objectives can best be achieved by associating the Congress and the President in the selection, with the opportunity for informal consultation to be expected in such a process."

Other objections have been raised to those amendments so far discussed. Some, for example, argue that Congress, with its somewhat more conservative political base, is not the proper body to choose a Vice President. This view overlooks the fact that Congress changes, too. The present coloration of Congress is a transient one. Besides, as important as it is to fill the Vice Presidency in an emergency, it is equally important to do so in a genuinely democratic manner.

Yet another group has argued that, in the event of a vacancy in the Vice Presidency, a special election should be held. However, the difficulties in the way of holding a special election seem very formidable. At the very least, it would involve delay and a radical departure from our historic system of quadrennial presidential elections. Moreover, how the candidates could be chosen for such an election, whether it would or could be confined to the party in power, and what confusion might result if it were not, all combine to suggest the advisability of allowing Congress to play the interim electoral role.

We can no longer afford to laugh off the Vice President's office, as John Nance Garner once did, when he said it wasn't worth "a pitcher of warm spit." Clearly, an amendment to the Constitution is called for, because, as the American Bar Association has recognized, "It is highly desirable that the office of Vice President be filled at all times." The challenge is to choose a method which will stand the test of the ages.

STATEMENT BY SENATOR CLAIBORNE PELL REGARDING SENATE JOINT RESOLUTION
139 RELATING TO SUCCESSION TO THE PRESIDENCY AND TO THE VICE-PRESIDENCY

Mr. Chairman, I am indeed pleased at this opportunity to present my testimony in support of Senate Joint Resolution 139 relating to succession to the office of President or to that of the Vice President. It is a sound and forward-looking legislative proposal, and one which I am proud to cosponsor.

The resolution is clear in its intent, so rather than belabor the point with a lengthy and detailed explanation of it, I shall confine my remarks to the purpose it is intended to serve.

Since that tragic day when this Nation lost its leader, a loss felt throughout the world, we have had to face up to the fact that our laws regarding presidential succession are inadequate. We are perhaps more fortunate than most countries in that our Government continued to function and that no attempt was made to erode our democratic institutions. But certainly the wisest course of action is to prepare for future contingencies, rather than to depend on their not being of a serious or destructive nature. Essentially our approach here is that of the ounce of prevention.

The need for a constitutional amendment then is obvious. I believe the resolution introduced by the distinguished and very able chairman of this subcommittee, Senator Bayh, meets and solves the problem of vacancy in the executive and presidential succession.

In addition to my comments, Mr. Chairman, I would like to introduce into the hearing record an article which appeared in the January 22, 1964, edition of the Washington Post, entitled "Filling Vice President Vacancy Recommended." It is indicative of the wide support for this legislation and lends the prestigious support of the legal profession to its adoption.

[From the Washington Post, Jan. 22, 1964]

FILLING VICE PRESIDENT VACANCY RECOMMENDED

(By James E. Clayton, staff reporter)

A group of leading lawyers recommended yesterday that a new Vice President be promptly nominated by the President and confirmed by Congress any time a vacancy occurs in that office.

The group, meeting here at the request of the American Bar Association, called for a constitutional amendment to clarify both the problems of presidential succession and disability. It reached its recommendation on the eve of Senate committee hearings into those problems.

The group urged the amendment provide that any vacancy in the office of Vice President be filled through Presidential nomination and election by a vote of a majority of the Members of Congress meeting in joint session.

Because of the reputation of many members of the group of lawyers, its recommendations are expected to carry heavy weight with Congress.

It members were Walter E. Craig, president of the American Bar Association; former Attorney General Herbert Brownell; John D. Feerick, of New York City; Prof. Paul A. Freund, of Harvard; Jonathan C. Gibson, of Chicago; Richard H. Hansen, of Lincoln, Neb.; Prof. James C. Kirby, Jr., of Vanderbilt University; former Deputy Attorney General Ross L. Malone; Dean Charles B. Nutting, of the National Law Center; Lewis F. Powell, Jr., of Richmond; Sylvester C. Smith, Jr., of Newark, N.J.; Martin Taylor, of New York; and Edward L. Wright, of Little Rock, Ark.

They said that the kind of agreement now existing between President Johnson and Speaker John McCormack on what would happen in case Mr. Johnson were disabled is "not an acceptable permanent solution."

They said a constitutional amendment should provide that if a President is disabled, the power and duties of his office should devolve on the Vice President. Disability, they urged, should be established by declaration in writing by the President, or, if he were unable to do that, by action of the Vice President with the concurrence of a majority of the Cabinet or some other body designated by Congress.

The end of such a period of disability would be determined by the President under the group's recommendation. If the Vice President and a majority of the Cabinet did not agree that the President was able to resume his duties, his continued disability could be declared by a vote of two-thirds of the Members of each House of Congress.

STATEMENT OF SENATOR JAMES B. PEARSON (REPUBLICAN, OF KANSAS)

Mr. Chairman, I appreciate the opportunity to submit this statement for the official record of proceedings before this Subcommittee on Constitutional Amendments, because I feel, as I am sure everyone does, the question of presidential succession and disability is of paramount importance to this country.

Certainly the dramatic events of this last year, which catapulted the Vice President into the Presidency in less than 4 hours will direct national attention to the Vice Presidential nominees in this election year. Voters in November 1964, under the shadow of events of 1963, will take a second—and a third—look at the qualifications of each Vice Presidential candidate. But this, as history reveals and as the electrifying pace of current events dictates, is not enough. As a nation we face two key problems: (1) dare we leave the office of Vice President unfilled, and, if not, how should it be filled, and (2) in what manner and upon whose judgment should rest the final determination of the extent of a President's disability and the degree to which he can perform his duties?

History substantiates the seriousness of the problem which faces us. Eight of the 36 Presidents of the United States have died in office. Eight Vice Presidents have either died or resigned. The office of the Vice President has been vacant for 37 of our country's 188 years. For 80 days of the Garfield administration and 2 years of the Wilson administration the office of the President was occupied by a man unable to perform his duties because of physical disability.

In this century, Presidents McKinley and Kennedy were victims of assassination. McKinley's successor, Theodore Roosevelt, was the subject of an assassina-

tion attempt, as were Presidents Franklin Roosevelt and Harry Truman. Presidents Harding and Franklin Roosevelt died in office and were succeeded by their Vice President, Coolidge and Truman. President Taft's Vice President, James Sherman, died in office. President Eisenhower suffered three serious illnesses during his administration, although he was never incapacitated to the extent of Garfield and Wilson.

These events prompt us to make a thorough examination of presidential succession and disability. In an era when defense of the entire free world, through the use of our nuclear deterrents, rests on the spoken word of one man—the President of the United States—we cannot leave any doubt about the fact of succession or the capabilities of the President's successor.

Mr. Chairman, I am most concerned with our present machinery for providing succession and a further review of historical occurrences indicates that this problem has been recurrent throughout the history of our country.

The Constitution provides that the Vice President shall succeed the President in case of death, resignation, or disability. Congress has the authority to provide for a line of succession after the Vice President, however, three different succession laws have been enacted in the last 172 years and I would like to review them here:

The Succession Act of 1792 stated the Vice President was to be succeeded by the President pro tempore of the Senate and then the Speaker of the House. If both these offices were vacant, the electoral college would be convened to elect a new President.

Dissatisfaction with the act of 1792 was expressed during the impeachment proceedings against President Andrew Johnson because it combined in the Senate both the power to impeach and the right to succeed a President. It was also criticized because of the possible shift in executive continuity from one political party to another. For example, a Republican President pro tempore could become President in a Democratic administration.

The Succession Act of 1886 attempted to correct these problems. It provided for a line of succession in the Cabinet beginning with the Secretary of State. Since the President chooses his Cabinet, the Presidency would remain in one political party. A popular check on the quality of Cabinet members was maintained by Senate confirmation.

The Succession Act of 1947 provided that the Vice President be succeeded by the Speaker of the House and then the President pro tempore of the Senate. President Truman sponsored this act. He believed the 1886 act was undemocratic because the President appointed a potential successor.

The Succession Act of 1947 has been criticized recently for several reasons. A change of political continuity in the Executive is possible. During President Eisenhower's 8 years, for example, a Democrat was Speaker of the House. None of the succession acts have provided for the replacement of the Vice President. That office remains vacant in case of presidential death, resignation, or disability. With the Vice President's functions increasing in importance, the office can hardly remain vacant.

Proposals being considered by this subcommittee include suggestions which would empower the Vice President, upon becoming President to nominate a new Vice President. Confirmation of the nomination by both the House and the Senate would be necessary. If both the President and Vice President were disposed simultaneously, a Cabinet member, beginning with the Secretary of State would become President.

There are several arguments in favor of this proposal. The Vice Presidency would not stand vacant. Succession would remain in the same political party. Confirmation by the House and Senate subjects the Vice Presidential appointment to approval of a popularly elected Congress.

Critics of this proposal maintain the President is given too much leeway concerning his choice. He may, if he wishes, go completely outside Government circles to choose his possible successor. In a time of crisis this might break the sense of continuity necessary to sustain national confidence in the orderly transferral of power.

Numerous proposals recommend election of a Vice President by either the House, the Senate, or both, from nominees suggested by the President. This would place the selection in a popularly elected Congress or of one body of that Congress. Opponents of these proposals contend Congress and the Executive may be controlled by different political parties which might create difficulties.

Another proposal suggests a constitutional amendment which would radically alter the office of the Vice President. In place of one Vice President, future na-

tional elections would include two Vice Presidents on the ticket—one an Executive Vice President, the other a Legislative Vice President. In case of death, resignation, or disability, the Executive Vice President would assume the Presidency followed in line by the Legislative Vice President. The normal functions of the Legislative Vice President would be those of serving as President of the Senate.

Opponents of this proposal contend that it solves nothing. The Legislative Vice Presidency would remain vacant in case of a presidential crisis. In addition, two Vice Presidents occupying the same general office would dilute the effectiveness and the stature of that office.

Of great importance also, Mr. Chairman, in any discussions of presidential succession, we must consider the disability of a living President since it poses more difficult problems than that of succession. For example, under existing constitutional provisions, may the President lawfully proclaim his own disability? If the President will not declare himself disabled, is there any process short of impeachment whereby the Vice President may assume office? If the President were then to recover from his disability, would he be able to return to his office and duties?

President Eisenhower attempted to solve the problem by an agreement with Vice President Nixon. President Kennedy and Johnson followed this precedent. However, there is some question of the legality of these agreements. They are generally considered an inadequate solution.

This subcommittee has heard several recommendations concerning disability, one of which would provide that the President could declare his own disability in writing. The Vice President would become Acting President. If the President does not, or cannot, do so, the Vice President, with the written approval of the majority of the Cabinet, may do so and assume the duties of Acting President.

The President, upon recovery, would declare his disability terminated and resume office. If the Vice President and the majority of the Cabinet disagree, the controversy would be submitted to the Congress.

Supporters of that proposal emphasize that disability can be quickly determined in this manner. The decision would be made by either the President or those closest to him. During disability, the status of the Vice President as Acting President is clear. The President's return to office upon recovery would be easily and quickly effected.

Other proposals call for the establishment of a permanent Congressional Commission to determine all questions on presidential disability. Theoretically, this proposal finds support on the grounds that such a Commission would avoid potential power struggles within the executive between a questionably disabled President and an ambitious Vice President. However, it is contended that a Commission of this sort would be viewing the situation from a distance. Its decision may be neither objective nor wise under the circumstances.

Mr. Chairman, we all recognize that a better plan than that now in effect is needed to deal with presidential succession and disability and is essential to the Nation's security and tranquillity. I favor a solution whereby the office of Vice President will always be filled. The President should name a new Vice President subject to confirmation by Congress. In case of death of both the President and Vice President, succession should be in the Cabinet in an order set by Congress. In case of disability, the President, or his Cabinet, should be able to declare him disabled. The Vice President would then serve as Acting President for the duration of disability.

I wish to thank the chairman again for permitting me to insert my statement into the official record of the proceedings of this important subcommittee.

NEW YORK, N.Y., *February 27, 1964.*

Senator BIRCH BAYH,
*Chairman, Subcommittee on Constitutional Amendments,
Senate Office Building, Washington, D.C.:*

Correction of minutes of testimony of Mr. Brownell, page 272. Quote as chairman of New York State Bar Association, Committee on Constitutional Law I testified not only as its chairman but in pursuance express authorization of executive committee. See page 20, hearing of June 11.

MARTIN TAYLOR.

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, March 20, 1964.

Hon. BIRCH BAYH,
Member of Senate,
Washington, D.C.

MY DEAR SENATOR: This is to lend my support to proposals for resolving one of the most critical problems of our time—that of Presidential succession and Presidential inability.

On 17 different occasions in our history, we have been without a Vice President. Eight times a President has died in office and has been succeeded by the Vice President. Two American Presidents—Garfield and Wilson—became disabled in office, creating a virtual void in executive leadership. And, since November 22 of last year, the Nation has been without a Vice President.

We will be derelict in our duties if we do not now heed the urgent messages of history. I believe the Presidential succession and Presidential inability situation must be resolved now, by this Congress.

We are dealing with the single most powerful position in the world. It would be tragic, in this day of nuclear weapons when foreign policy decisions literally can mean life or death, not to provide the machinery in all contingencies for a sure and smooth transition of Executive power.

To achieve this transition, I believe we must accomplish the following:

1. There should be a Vice President at all times. When a vacancy occurs in the office of the Vice President, the President shall nominate a person who, upon approval by a majority vote of Congress, shall then become Vice President for the unexpired term.

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

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

4. The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and Cabinet (or other body designated by Congress) do not concur in the President's declaration, the continuing disability of the President may then be determined by a two-thirds vote of Congress.

5. In the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

6. These policies and procedures should be established by amendment of the Constitution.

Your committee, of course, has received numerous proposals for dealing with this matter. I believe that all have some merit and that none are completely without objection.

However, the proposal outlined above and previously by you and others seems to me to be the soundest, the most practical and the most consistent with the broad intent of the framers of the Constitution.

It affords these advantages:

We would have a Vice President at all times, a person selected by the President and confirmed by the Congress, a person sympathetic to the President's program, and one chosen and trained to succeed to the Presidency.

It is consistent with the constitutional pattern of separation of powers and would virtually insure continuity of executive policy. The present procedure calls for a chief legislator, when there is no Vice President, to act as Chief Executive, even though he may have no executive experience and may be of the opposing political party.

It embodies sound checks and balances involving the President, the Vice President, the Cabinet, and the Congress.

Sincerely,

EDMUND G. BROWN, *Governor.*

REPUBLICAN NATIONAL COMMITTEE,
Washington, D.C., March 10, 1964.

HON. BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR BAYH: Thank you for the opportunity to present my views on the matters of Presidential succession and inability. Both subjects are extremely important to the functioning of our constitutional system and I believe that Congress should act at the earliest possible time to eliminate existing uncertainties.

On the matter of Presidential succession, the proposal of Senator Keating as formulated in Senate Joint Resolution 143 has great merit. By providing in effect for an extra Vice President, the American people are given the additional insurance that the Presidency will almost always be filled by an individual who has received a mandate from the Nation at large.

Aside from the value of permitting the entire electorate to have a voice in selecting the men who stand in line for the Presidency should it fall vacant (only a slight expansion of the principle behind the present system with a single Vice President), Senator Keating's proposal maintains the doctrine of separation of power among the three branches of the Federal Government. I feel that the Congress should not have the power to determine who the President shall be in case of untimely vacancy. There is some danger that the Presidency might be bargained away for some legislative favor. There is also the hazard that a Congress might refuse to elect a potential President nominated by a Presidential incumbent of a different political persuasion than the Congress.

By the same token, on the matter of Presidential inability, I believe that determinations of inability should lie solely with the executive branch. The Congress and the judiciary should not have a voice in this as Senator Hruska has properly pointed out. I agree with the point in all the major proposals that the President should have the right to declare his own inability and also to declare when that inability has ended. The sticking point, of course, arises in the event that the nature of the President's illness is such that he is unable to declare his inability to serve, or even to recognize that an inability exists.

Here the proposal put forth by Prof. Paul Freund, of Harvard University, is worth considering. I find the concept of a Presidential Commission on Inability, appointed by the Chief Executive at the beginning of his term, especially appealing. The Commission would have the authority to declare when an inability commences and when it terminates, and would of necessity have the power to overrule the President on this matter by a large majority; i.e., two-thirds or three-fourths of its members.

Regardless of who declared the inability, the powers of the Presidency (but not, of course, the office itself) would devolve upon the Executive Vice President.

I would differ with Professor Freund only about the composition of the Presidential Commission. He suggested that Members of Congress should be among those appointed to the Commission. Again I would maintain that this should be a prerogative of the executive branch and that members of no other branch should participate in its work. Officials of the executive branch should constitute the main portion of the Commission's membership, supplemented by public representatives among whom should be distinguished physicians. Former Presidents, as Professor Freund recommended, should also be members.

I commend the subcommittee for the valuable work it is doing in exploring the alternative solutions to the difficult problems of succession and inability and for bringing the need for action on these subjects before the public view. I hope that Congress will act shortly to eliminate the uncertainties that now exist. The time when grave doubt might occur about the legitimacy of the line of succession to the Presidency or the right of a Vice President to assume the powers of the Presidential office when the Chief Executive is unable to perform his duties should never be permitted to arise.

Thank you again for this opportunity to make my views known.

Sincerely,

WILLIAM E. MILLER.

RESOLUTIONS OF THE INDIANA STATE BAR ASSOCIATION ON PRESIDENTIAL
INABILITY AND SUCCESSION

Be it resolved, That the Indiana State Bar Association joins with the American Bar Association in recommending that the Constitution of the United States be

amended in accordance with the principles set forth in the consensus of the special conference convened by the American Bar Association in Washington, D.C., January 21, 1964, as follows:

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

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

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress.

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

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

Resolved, That the Indiana State Bar Association joins with the American Bar Association in affirming, in principle, the need for interim statutory clarification of the problem after the constitutional proposals have been submitted by Congress for action by the State legislatures, such legislation to provide a remedy while the constitutional proposals are under consideration; be it further

Resolved, That, in view of the manifest need for a prompt solution by constitutional amendment of the problems of Presidential succession and inability, the Indiana State Bar Association urges that Indiana county and city bar associations, and all other interested citizen groups of the State of Indiana, support, by all appropriate means, an amendment to the Constitution of the United States in accordance with the principles set forth in these resolutions; be it finally

Resolved, That copies of these resolutions be disseminated to—

(a) The Washington office of the American Bar Association for further dissemination to the President of the United States, the President of the Senate of the United States, other appropriate Members of the Senate of the United States, the Speaker of the House of Representatives of the United States, other appropriate Members of the Congress of the United States, and the Attorney General of the United States; and

(b) The U.S. Senators and the Members of the House of Representatives of the United States, serving for the State of Indiana; and

(c) The Governor, Lieutenant Governor, attorney general and secretary of state of the State of Indiana; and,

(d) The members of the Senate of the State of Indiana and the members of the House of Representatives of the State of Indiana; and,

(e) The president, the president-elect, the chairman of the house of delegates, and the president-elect-nominee of the American Bar Association; and,

(f) All county and city bar associations of the State of Indiana; and,

(g) Various interested citizen groups of the State of Indiana; and,

(h) The representatives of all news media serving the State of Indiana, including the press, radio, and television.

Approved February 29, 1964.

HOUSE OF DELEGATES.

THE INDIANA STATE BAR ASSOCIATION,

NEWTON M. GOUDY, *Executive Secretary*.

[SEAL.]

STATEMENT OF RUTH MINER, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE AND BUSINESS LAW, WISCONSIN STATE COLLEGE, WHITEWATER, WIS.

My name is Ruth Miner; I live at 915 Highland Street, Whitewater, Wis.; I am an associate professor of political science and business law at Wisconsin

State College, Whitewater, Wis.; in the political science area I teach or have taught courses generally referred to as American Government, Constitutional Law, and Comparative Government; I have a master's degree in political science from the University of Illinois and a J.D. degree from the law school of the University of Chicago; I was admitted to the practice of law in the State of Illinois in 1953; and to the practice of law in the Federal district courts in 1955.

I feel that no constitutional amendment is needed in order for the Congress to act in the area of Presidential succession. Article II of the Constitution 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, 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."

Article (amendment) XX reads:

"* * * and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."

History bears out this interpretation that the Congress has the power to act. I have located the texts of the act of January 19, 1886, passed by the 49th Congress, and the act of July 18, 1947, passed by the 80th Congress.

The only reference which I found to the President-elect and the Vice-President-elect situation, other than the 20th amendment to the Constitution which has already been quoted, was in the 1947 act, subsection C (title 3, sec. 19, subsec. (c) of the United States Code, 1958 ed.), which reads:

"(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

"(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

"(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals."

Since either a law or a constitutional amendment could be used to create a new Presidential succession, I recommend that the changes be made by legislative enactment. It will be fully effective; it can be done faster than by a constitutional amendment; if later as a nation we should change our minds, a new succession plan could be instituted without wiping a constitutional amendment off the books. The problem as I see it, then, is the problem of obtaining a legislative enactment with a wise content.

The general objections to the Presidential Succession Acts of 1886, and of 1947, are well known. The use of Cabinet officers is open to the criticism that if death came to the President-elect and to the Vice-President-elect, there would be no new Cabinet appointments to reflect the most recent election. Also, Cabinet officers are not elected officials, and we as a nation have the feeling that the holder of the Presidential office should have had the maturing experience of presenting his views to the public and being elected to office on the basis of a successful presentation of those views. In addition, Cabinet officers are specialists—the Secretary of State in international affairs; the Secretary of Agriculture in agricultural affairs; the Secretary of Labor in labor affairs, etc. There is no guarantee that the Secretary of State will be equally competent in domestic policy, the Secretary of Agriculture in foreign affairs, and so on. In fact, the extensive knowledge of a specialty might get in the way—might weaken an individual's skills and aptitude for the Presidency. The Succession Act of 1947 uses the Speaker of the House and the President pro tempore of the Senate for the persons next in line. These individuals will have run for public office, it is true, as a practical matter will have been elected from several to many times. The inner workings of our Congress tends to put into these positions persons from one-party districts—the so-called safe districts—rather than from bipartisan areas more representative of the country as a whole. The individuals are usually

well along in years. The most sobering fact of all is that the use of this line of succession might place, and during 6 years of President Eisenhower's administration would have placed, in the Presidential Office the opposition party.

The circumstance in everyone's mind is that twice in 20 years this Nation has been left without a Vice President through the death of the duly-elected President. In the earlier of these situations 3 years and 9 months remained; in the present emergency 14 months will elapse before the post will be filled. The fact that this subcommittee is holding hearings on the subject is somewhat indicative of the seriousness of the problem, the concern of the public, and the fact that people are seeking new solutions.

The solution which I advocate needs action by two bodies in order to be effective: (a) The political parties in their conventions should provide for such an emergency by naming a Second Vice President, a person who would succeed to the Presidency in case both the President and the Vice President come under the calamities described in the Constitution as "removal, death, resignation, or inability. * * *" (b) The Congress should make this office official by enacting a law stating in substance that "The person designated by the political party as its second vice presidential candidate shall, if that party wins at the polls, be next in Presidential succession after the Vice President, shall serve as Vice President if that office becomes vacant, and shall serve as President if both the duly elected President and Vice President are unable to complete the term."

If both the Congress and the political parties acted promptly, this plan could be put into operation this year.

My thinking has been drawn to this solution very slowly. A major factor influencing me has been the inadequacies of some of the other proposals. Many of my friends have said, "Let the President nominate, and the Congress choose from among the nominees after the emergency has arisen." I oppose this. It could be genuinely divisive at a time when the Nation needs unity most. No matter how harmless, even reasonable debate might in the eyes of the world make us look divided, and the new President weak. This Nation has elicited the admiration of the world by its swift, smooth transition from one leadership to another on November 22; but I do not think that President Johnson would be in as good a position today, if the Congress immediately had been plunged into a debate over who shall be President Johnson's successor. To use a homely adage, I believe in locking the barn before the horse is stolen. The political party convention is not the only way that a presidential and vice-presidential candidate could be chosen; but it is the way we do use; and since we entrust the two highest offices to it, I find no reason for not entrusting it with the task of supplying a Presidential successor.

This proposal fills only one position beyond the Vice Presidency. If it is the desire of the public to have a longer list, I suggest as a supplement the use of the Cabinet officers in their present order, or the use of the Governors of the States in the order of the States' population, or both. This latter proposal has been brought to the foreground in the atom-hydrogen period and reflects the fear that an atom bomb could wipe out all of our Presidential successors at one time by merely choosing the moment when Government officials were in Washington, and the Congress in session.

Going back to the proposal of the use of a Second Vice President, many things can be said in its favor. It retains the separation of powers theory on which our Constitution is based. It allows an understudy to be known to the public and to be kept informed on Governmental happenings. It provides a third individual in case the President and the Vice President should get killed in the same parade. A scheme dependent on nominations after an emergency has happened might fail for want of an individual legally able to nominate. Businesses have found the concept of several vice presidents workable; why not Government?

Some of my colleagues have advocated the use of the electoral college for presidential succession. If the electoral college is conceived of as acting only after the emergency has happened, all that I have said regarding locking the barn after the horse is stolen applies here—to me this is the wrong time. Second, using the electoral college is, in my humble opinion, using the wrong people. Let me explain by citing the situation in my own State of Wisconsin. Wisconsin is a "short presidential ballot" State, as are about 20 other States. We, the ordinary citizens, do not even know who the presidential electors (electoral college members) are, unless we happen to read the names as an item in a news story in the newspapers. The names never appear on the ballot. They

receive their positions by the names of the proper number of individuals being certified by the political party to the secretary of state of Wisconsin; the general public never votes on them or partakes in their selection; if on the appointed day at the hour of noon all of these individuals do not show up in Madison, the State capitol, those who do show have the authority to fill vacancies by, if need be, stopping any passer-by in the corridor and asking him to help them out. We pay these individuals, I might add, the magnificent sum of \$2.50, mileage, and the honor of participating in a constitutional process. With all due respect to those who serve, these are hardly the individuals and this is hardly the procedure I want used for the filling of the office of President or Vice President of the United States.

There is a third reason why suggestions for using the electoral college disturb me. As every schoolchild knows, the popular election of the Presidency rests on a very fragile thread; it rests on custom and not law. The Founding Fathers created an indirect method of selecting the President. They did the same thing for the U.S. Senator, but that we changed by constitutional amendment. We have never bothered to amend the Constitution with regard to the Presidency because the electoral system worked so well—and by well I mean negated its judgment, abrogated its functions, abandoned its discretionary leeway, and became mechanical. All this, I repeat, by custom alone. To ask it to start using its judgment again is like opening a Pandora's box—loosening a veritable swarm of troubles which might eventually send us in the direction of a constitutional amendment in order to preserve popular democracy over the Presidency.

Most of the dire things our imaginations conceive of don't actually happen and therefore the above paragraph may have been overstated; nevertheless, I will sum up my arguments against the use of the electoral college to fill a vacancy after the vacancy has occurred by saying: The wrong time; the wrong people; and it tampers radically with a delicate constitutional mechanism.

Having made the best case I can for the political parties to name three persons for executive office, rather than two persons as they now do, the question will undoubtedly be asked, Do we need a further line of succession or not, if so, who shall it be, or by what formula shall the people be chosen? A century and three-quarters of history tells us that as a practical matter three is enough. On the other hand, psychology—at least the lay brand of psychology which mine is—dictates another answer. The man on the street and I in my ivory tower gain a sense of security from a longer line. Furthermore the long list speaks by indirection, communicates a principle of democracy that I would not like to forget. What it says to me is, "In case of serious emergency, keep your panic down; act rationally; I am your symbol of orderly government."

If the above psychological reasoning establishes the need for a longer list, as for me it does, the content of that list still is to be decided. Because of the importance of international matters in our national life, I favor, after a second Vice President named by our political parties, to return to our old Cabinet sequence, beginning with the Secretary of State. Beyond that, I would use the Governors, beginning with the Governor of the most populous State. This makes a long sequence, but an eminently satisfactory one.

I appreciate the courtesy extended by the subcommittee in allowing me to express my views.

MARCH 6, 1964.

HON. BIRCH E. BAYH,
Chairman, Judiciary Subcommittee on Constitutional Amendments,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I would like to have this letter made a part of the record in your subcommittee's hearings on the question of Presidential succession.

First, the President and Vice President should be elected directly by the voters. There should be a national primary and general elections set up where no vote is final until one candidate has received a majority of the votes cast.

Second, Congress shall have the power to exercise exclusive legislation in the matter of lowering voting requirements for national elections. Subject to the consent of the State legislatures and the people involved, Congress may revise U.S. senatorial districts so that no possible combination of Senate seats will give control of that House to less than 25 percent of the total population. Congress may change the day of national elections.

Third, the District of Columbia shall be considered an independent State for purposes of congressional representation.

Fourth, with the consent of two-thirds of the total membership of Congress, the Vice President may temporarily assume the Presidency when the latter is temporarily disabled. Congress may reverse this action at any time by simple majority consent of total Members voting.

Fifth, when the Vice President assumes the Presidency because of permanent disability of the President, Congress shall vote as one body and elect a temporary Vice President, by a simple majority vote of those voting. If the temporary Vice President is a Member of Congress, he shall have the right to name his own temporary congressional substitute. If the newly succeeded President becomes permanently disabled, Congress shall call a national election and elect a second President and Vice President. The newly elected President shall take office as soon as the election results are official.

Sixth, the temporary Vice President will succeed to the Presidency on a temporary basis under the same rules as applied to his predecessor when the President was temporarily disabled. In case of permanent disability, the temporary Vice President will serve as President until he is relieved by the newly elected President. When relieved under these circumstances, the temporary Vice President, if chosen originally from the membership of Congress, shall be restored to his original congressional office to complete the remainder of his elected term.

Seventh, the voting membership of the Senate shall be expanded to give the Vice President and most recently displaced elected President each a full voting Senate seat. The Vice President shall also have a voting delegate seat in the General Assembly of the United Nations Organization. These voting seats in the national and international legislative bodies shall be coterminous with each elected President's term of office.

Eighth, when Congress is not in session, a temporary Vice President may be elected immediately under such emergency rules as Congress deems expedient.

Although I believe these eight provisions leave considerable room for improvement in their terminology and fail to give Congress as much flexibility as I would like, they do serve as a rough guide for closing the Presidential temporary disability gap now in the Constitution.

Very sincerely yours,

WILLIAM A. ALBAUGH,
Republican Candidate for U.S. Senator from Maryland

RESOLUTION ADOPTED BY THE BOARD OF COMMISSIONERS, STATE BAR OF MICHIGAN,
FEBRUARY 23, 1964

I

Be it resolved, That the State Bar of Michigan recommend that the Constitution of the United States be amended in accordance with the principles set forth in the consensus of the special conference convened by the American Bar Association in Washington, D.C., January 21, 1964, as follows:

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

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

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress;

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

(5) When a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected

Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

II

Be it further resolved, That the State Bar of Michigan reaffirm in principle the support of the need for interim statutory clarification of the problem after the constitutional proposals have been submitted by Congress for action by the State legislatures, such legislation to provide a remedy while the constitutional proposals are under consideration.

III

Be it further resolved, That, in view of the manifest need for a prompt solution by constitutional amendment of the problems of Presidential succession and inability, the State Bar of Michigan urge that State and local bar organizations support by all appropriate means an amendment to the Constitution of the United States in accordance with the principles set forth in the recommendations of the committee on jurisprudence and law reform.

PUBLIC UTILITIES COMMISSION,
STATE OF CALIFORNIA,
San Francisco, Calif., February 28, 1964.

Hon. BIRCH BAYH,
*Chairman, Senate Judiciary Subcommittee on Constitutional Amendments,
Senate Office Building, Washington, D.C.*

MY DEAR SENATOR: I understand that the American Bar Association, of which I am a member, has presented to you a proposed constitutional amendment which relates to action to be taken in the case of the death or inability of the President to perform the duties of his office.

In my opinion, the first paragraph of this proposed constitutional amendment requires clarification. Said paragraph reads as follows:

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

The clause "or until expiration of his term of office" needs to be made more specific. This clause could be construed to refer either to the term of office of the President or to the term of office of the person who is performing the duties of the office of President. I will assume that the clause refers to the term of office of the President. If my assumption is correct, the clause still would require clarification. Therefore, I suggest that this clause be modified to read as follows: "or until expiration of his (President's) term of office where the inability of the President continues throughout the remainder of said term."

As amended, the meaning would be made crystal clear. You and I know that many of the general and unclear provisions of the Federal Constitution have given rise to much difficulty in their interpretation, either by the Supreme Court or by the Congress or the Executive.

Throughout the proposed amendment, the word "inability" has been used with one exception. In paragraph (3), the word "disability" is used. While it is obvious that the word "disability" is intended to mean the same thing as the word "inability," nevertheless, in the interest of consistency and clarity, the word "disability" appearing in paragraph (3) should be changed to "inability."

I might add that I think this proposed constitutional amendment is very meritorious and should be submitted to the several State legislatures by the Congress.

A copy of this letter has been furnished the American Bar Association.

Sincerely yours,

EVERETT C. McKEAGE.

SUPREME COURT OF THE STATE OF NEW YORK,
NEW YORK COUNTY COURTHOUSE,
New York, N.Y., March 14, 1964.

Hon. BIRCH BAYH,
*Judiciary Subcommittee on Constitutional Amendments, Senate Building,
Washington, D.C.*

DEAR SENATOR BAYH: Our interest in and rather extensive study of the problem of Presidential inability prompts us to submit the following for the consideration of your committee:

Proposals to fill the void in the Constitution on the subject of Presidential inability generally suffer from two common failures: The lack of adequate safeguards against usurpation of power by the Vice President, and the omission of a workable mechanism which would insure the President's recovery from a disability before he resumes the functions of his office. The informal agreement between President Eisenhower and Vice President Nixon, adopted by their successors, suffers from these weaknesses. To be acceptable, a solution must assure a tribunal friendly to the President, yet be objective and representative of our triune Federal Government.

We offer a simple formula which, we believe, obviates the foreseeable difficulties and protects both President and Nation:

1. Within 10 days after his inauguration, the President shall appoint a Commission on Inability, consisting of nine persons to serve at his pleasure: three from the Cabinet, two from the Senate, two from the House, and two from the Supreme Court.

2. The Commission would be invoked to certify the President's inability, by the Vice President, Secretary of State, or joint resolution of Congress. A finding of inability would require six votes, including those of at least two of the Cabinet members, and one each of the members of the Senate, House, and Judiciary.

3. Upon the President's request, the Commission will determine his recovery and ability to resume office, by majority vote.

4. The President may declare his own inability. In such case, he may determine the end of the inability. If his determination is questioned, the commission would be called into play in the manner above outlined.

Our suggestion differs from other proposals in that all members of the commission would be chosen by the President by name. Potential bias is minimized by fixing the term of the members at the President's pleasure. The Vice President is spared the burden of announcing his own succession, and usurpation of authority is not a threat.

In this matter so vital to the orderly functioning of our Government, it is eminently right that all its branches should participate. The Constitution bears clear and compelling internal evidence that the Founding Fathers contemplated that all branches mesh in effective action when dictated by the general welfare. The imperative of national necessity qualifies the principle of separation of power.

While the matter may be within the competence of Congress, we concur in the apprehension of many that legislation might be subjected to attack on constitutional grounds at the very time when it would become necessary to invoke it. Hence, we favor a self-implementing constitutional amendment. The anxieties and perils of our time demand its prompt adoption.

A more extended discussion of the proposal is contained in the enclosed copy of our article published in the January 1964, issue of the American Bar Association Journal (vol. 50, No. 1).

Very truly yours,

SAMUEL H. HOFSTADTER.

JACOB M. DINNES.

Member of the New York Bar.

STATEMENT OF JOSEPH H. CROWN, NEW YORK, N.Y.

The 1947 statute which places the Speaker of the House and the President pro tempore of the Senate into the line of succession after the Vice President requires immediate revision. The theory of the 1947 statute was that the man who becomes President should owe his place in the line of succession to an election, rather than to an appointment. However, the 1947 statute does not consistently adhere even to that principle, for after naming the two Members of Congress, the statute reverts to the earlier tradition of having the Secretary of State become the successor. The statute's basic defect is that a successor may become President who may be unprepared and unqualified to succeed.

There is another serious defect in the present law. One or both of the Houses of Congress may be controlled by the opposition party. Hence, under the 1947 statute, the entire administration of the Government may be transferred from one party to the other if the President and Vice President should no longer be able to serve as the Chief Executive. Thus, while both President Truman and President Eisenhower held office, Congress was controlled by the opposition

party. Hence, the 1947 statute could sacrifice the sovereign principle of continuity.

As an interim measure, it is more desirable that the Secretary of State and other members of the Cabinet be the successors to the Vice President, rather than the line of succession presently provided.

In deference to the principle of election, it would be desirable to provide that when the line of succession reaches the Secretary of State or the other Cabinet officers, the individual taking over the office of the President should serve only as the Acting President until a new election can be held at midterm or at the end of the 4-year term. It is historically significant that James Madison noted that the authors of the Constitution meant to leave to Congress "a supply of the vacancy (in the office of the President) by an intermediate election of the President." The Founding Fathers intended that Congress should decide whether to call an intermediate election. The recommendation here made would reinforce the democratic principle of having a Chief Executive truly represented by the will of the people.

Revision of the law in line with the proposals here made would be in line with our democratic tradition and preserve the sovereign principle of continuity.



