1-29-1965

Presidential Inability and Vacancies in the Office of the Vice President: Hearing before the Subcommittee on Constitutional Amendments of the Committee of the Judiciary, Sentate, 89th Congress

Subcommittee on Constitutional Amendments; Committee on the Judiciary. Senate. United States.

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

ON

S.J. Res. 1, S.J. Res. 6, S.J. Res. 15, S.J. Res. 25, S.J. Res. 28

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

JANUARY 29, 1965

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
42-688 WASHINGTON : 1965

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

OLIN D. JOHNSTON, South Carolina
JOHN L. McCLELLAN, Arkansas
SAM J. ERVIN, Jr., North Carolina
THOMAS J. DODD, Connecticut
PHILIP A. HART, Michigan
EDWARD V. LONG, Missouri
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
QUENTIN N. BURDICK, North Dakota
JOSEPH D. TYDINGS, Maryland

EVERETT McKINLEY DIRKSEN, Illinois
ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
HUGH SCOTT, Pennsylvania
JACOB K. JAVITS, New York

SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

BIRCH BAYH, Indiana, *Chairman*

JAMES O. EASTLAND, Mississippi
THOMAS J. DODD, Connecticut

EVERETT McKINLEY DIRKSEN, Illinois
HIRAM L. FONG, Hawaii

LARRY A. CONRAD, *Chief Counsel*
CLYDE FLYNN, *Minority Counsel*

CONTENTS

STATEMENTS

STATEMENTS SUBMITTED FOR THE RECORD

PRESIDENTIAL INABILITY

FRIDAY, JANUARY 29, 1965

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

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Tydings, Dirksen, Hruska, and Fong.

Also present: Larry Conrad, chief counsel, Clyde Flynn, minority counsel; and Mary Day, clerk.

Senator BAYH. I would like to call to order the hearings of the Subcommittee on Constitutional Amendments. We are here this morning to consider the various problems connected with Presidential inability and filling vacancies in the Office of Vice President.

I would like the record to show that notice of these hearings has been duly published in the Congressional Record on Tuesday, January 26, 1965. Further, I ask that the following resolutions pertaining to this hearing be made a part of the record at this point.

(S.J. Res. 1, 6, 15, 25, and 28.)

[S.J. Res. 1, 89th 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 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.

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

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

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

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

[S.J. Res. 6, 89th 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.

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

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

"SEC. 4. The Congress shall prescribe by law a procedure by which the executive branch shall determine the presence and termination of the inability of the President or Acting President.

"SEC. 5. Article II, section 1, paragraph 6 is hereby repealed."

[S.J. Res. 15, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to vacancies in the Vice Presidency

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

"SEC. 2. Whenever there is a vacancy in the office of Vice President, the President shall nominate a Vice President who shall be a member of the same political party as the President, who shall take office upon confirmation by a majority vote of both Houses of Congress sitting in joint session."

[S.J. Res. 25, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the succession of the Vice President to the office of President, and 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. If the office of President becomes vacant because of the death, removal from office, or resignation of the President, the Vice President shall become President. If 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 the Vice President or a Vice-President-elect has assumed the office 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 electors who were chosen to cast ballots in the most recent election of President and Vice President shall meet in their respective States on the Monday of the third week beginning after the date on which the office of Vice President became vacant, and shall then vote by ballot for a new Vice President. They shall name in their ballots the person so voted for as Vice President, and shall make a list of all persons voted for as Vice President and the number of votes for each, which list they shall sign and certify, and transmit to the President pro tempore of the Senate. The votes so cast shall then be counted, and a new Vice President shall be selected, in the manner prescribed by the twelfth article of amendment to this Constitution for the selection of a Vice President.

"SEC. 2. Electors for President and Vice President chosen in any State under this Constitution shall serve as such until the date on which electors are chosen for the next regular election of a President and a Vice President. Vacancies which may occur before that date in the membership of electors of any State because of death, removal from office, or resignation shall be filled by the selection of successors in the next regular election of that State in which members of the House of Representatives are chosen.

"SEC. 3. If the Congress is not in session at a time at which a new Vice President is to be selected under this article, the person discharging the powers and duties of President shall convene the Senate and the House of Representatives in joint session for that purpose.

"SEC. 4. 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. 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. 28, 89th 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 nominee 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 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 Janu-

ary 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 have 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 developed 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."

Senator BAYH. We have several distinguished witnesses appearing before the subcommittee this morning. I want to thank them in advance for giving so willingly of their time.

Prior to proceeding with the witnesses, I think it would be wise to note one or two ground rules which the subcommittee has traditionally operated under. Because of national urgency, this matter has received the attention of a great number of organizations and individuals who would like to be heard. We are going to try to emphasize in this hearing views from those who differ in part or entirely from the consensus

which has developed over the past year on this issue. We are not trying to railroad anything or gag anybody. Our first witness this morning is the new Attorney General of the United States. He is going to be followed in turn by some outstanding individuals who will express either the support or dissent. I want anyone to feel free to testify, especially those who want to oppose the proposal on which we have a broad consensus, Senate Joint Resolution 1. Senate Joint Resolution 1 has been supported by my colleagues on the subcommittee and is being supported by 75 percent of the Senate.

As of today, Congress is very close to adopting and submitting to the States a reasonable, flexible, and workable constitutional amendment to give us a Vice President at all times and to permit the Vice President to act temporarily for the President when the Chief Executive is disabled.

It may not please everyone. No law can. But it is a proposal that would safeguard the Nation against interruptions in the continuity of executive authority.

The fact that 76 Senators are cosponsoring Senate Joint Resolution 1 does not mean that all of us agree to every comma and semicolon. What it does mean is that all of us have agreed to compromise on one point or another in order to achieve a consensus.

Problems of presidential inability and filling vacancies in the office of Vice President will never be solved if we in the Congress are naive enough to believe that there is a perfect solution that meets all conceivable contingencies. If we attempt to do this, we run the grave risk of formulating a rigid and inflexible proposal that may well create more problems than it solves.

As a preface to the hearing I would point out that on 16 occasions in the history of our country where the Vice President has either died or left office or moved up to the office of the Presidency. The office of Vice President itself has developed perhaps to a greater extent than any other office in the United States. Today, the Vice President is an important cog in the executive branch of our Government. Traditionally, we have been concerned about the office of Vice President only because the man occupying it might succeed to the office of President. Now, however, today I think we have to be equally concerned that although he may not, and we hope he does not succeed to the office of President, he has full-time functions to perform as Vice President.

He sits on the National Security Council. He participates in Cabinet meetings. He heads the President's Commission on Equal Employment Opportunities. He is Chairman of the National Aeronautics and Space Council. He is the Nation's No. 1 foreign ambassador.

The related problem of inability has been a particularly trying one which, I am certain, the Attorney General can speak with great authority.

I will therefore forgo any further remarks because of the number of people who want to be heard and because of the fact that the Attorney General has a busy schedule and must leave shortly.

The first witness was previously the Assistant Attorney General in charge of the Office of Legal Counsel under President Kennedy. He became Deputy Attorney General when Mr. Justice White was named

to the Supreme Court. He became Acting Attorney General when the now Senator Kennedy resigned. Yesterday he was given the great honor which he so richly deserves of being nominated for the office of Attorney General by the President of the United States.

This introduction is not sufficient to properly portray the fine legal record of the first witness, but Mr. Attorney General, let that suffice for now, if you will. My apologies and we are happy to have you with us.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL-DESIGNATE OF THE UNITED STATES; ACCOMPANIED BY NORBERT SCHLEI, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Attorney General KATZENBACH. Thank you very much for your statement. I have a prepared statement here. It is likely to take about 15 minutes for me to read it. Would you like me to do that or would you prefer to have me answer questions?

Senator BAYH. We shall let you use your own judgment. We are most anxious to have your thoughts, because in addition to having been Assistant Attorney General, you have studied this problem in some detail and I would rely on your judgment completely as to how you want to present your testimony before the committee. You may read your statement, paraphrase it, expand upon it, however you prefer.

Attorney General KATZENBACH. Thank you, Mr. Chairman.

I would like also to note that I am accompanied by Mr. Norbert Schlei, who is the Assistant Attorney General in charge of the Office of Legal Counsel.

Senator BAYH. We are glad to have Mr. Schlei with us.

Attorney General KATZENBACH. I am privileged to appear before this subcommittee in support of Senate Joint Resolution 1, a proposal which would amend the Constitution in order to remedy two critical deficiencies. The proposed amendment would, first, clarify the situation that would exist in the event that the President should become disabled and, second, provide a means for filling vacancies in the office of Vice President.

The subcommittee may recall that in 1963, I testified on several proposed amendments to the Constitution relating to cases where the President is unable to discharge the powers and duties of his office. Last year the subcommittee continued its efforts and approved a bill identical with Senate Joint Resolution 1 which was passed by the Senate. Since the subcommittee has already made a comprehensive study of this matter, I shall do no more today than to state fairly briefly what we understand Senate Joint Resolution 1 proposes to do and what the Department's views are respecting it.

At the outset, before considering the specific provisions of Senate Joint Resolution 1, I want to reaffirm my prior position that the only satisfactory method of settling the problem of Presidential inability is by constitutional amendment, as Senate Joint Resolution 1 proposes. The same of course is true of the problem of filling vacancies in the office of Vice President. I recognize that there are distinguished scholars who are of the opinion that Congress has power to act in the matter of Presidential inability under the "necessary and proper"

clause (art. 1, sec. 8, clause 18), and that a statute would therefore suffice as a solution. There is, however, equally distinguished opinion, including that of the last three Attorneys General, for the proposition that the problem can be adequately resolved only by constitutional amendment. And as a practical matter, if what we want is to assure continuity in Executive leadership—and if what we want to avoid is uncertainty, confusion, and dissension at the very time of crisis—then in my judgment a statute would not provide a satisfactory solution. So I fully agree with the constitutional amendment route marked out by Senate Joint Resolution 1.

THE PROBLEM OF PRESIDENTIAL INABILITY

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

> In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

It is generally agreed that this provision no longer poses any legal problem in the event of the death of a President. As a matter of historical practice, first established by John Tyler and followed by seven other Vice Presidents, the Vice President becomes President in such a contingency. Section 1 of the Senate Joint Resolution 1 confirms this practice in the case of death and extends the same principle to the case of removal of, or resignation by, the President. Under section 1, therefore, the Vice President would become President and be sworn in as President in the event of the latter's removal, death, or resignation. I can see no objection whatever to section 1.

With respect to the problem of presidential inability, there is no similar settled practice because, of course, so far in our history no Vice President has ever exercised the powers and duties of the Presidency during a period of Presidential inability. It is true that the identical Eisenhower-Nixon, Kennedy-Johnson, Johnson-McCormack, and Johnson-Humphrey understandings as to these matters, supported as they are by the views of the last three Attorneys General, have gone far toward establishing a settled practice. These informal understandings, however, leave much to be desired as a means of resolving such fundamental questions, and in any case they make no provision for the situation that would exist if the President and Vice President were to disagree on the question of inability. Accordingly, it is clear that what we need at this time is a lasting and complete solution to the key questions which are apt to arise under the ambiguous language of article II, section 1, clause 6 of the Constitution when a President suffers inability. The first is whether it is the "Office" of the President, or the "Powers and Duties" of that Office, which devolve upon the Vice President in the event of presidential inability. The second is who shall raise the question of "Inability" and make the determination as to when it commences and when it terminates.

The great majority of constitutional scholars have expressed the opinion that upon a determination of Presidential inability, the Vice President succeeds only temporarily to the powers and duties of the office and does not permanently become President. This has been the unanimous view of Attorneys General of both Republican and Democratic administrations for at least the last decade. Similarly, the majority of scholars are agreed that the Vice President has constitutional authority to make the initial determination of Presidential inability, and that the President has the authority to determine when his inability is at an end. My own judgment and that of many Attorneys General is that this is so. However, enough doubt has existed on these subjects in the past that several Vice Presidents have been deterred from acting as President when the President was temporarily disabled. As you will recall, this happened most dramatically during the prolonged illnesses of Presidents Garfield and Wilson, when the country was left without leadership and decisions were made, to the extent that they were made at all, in a questionable manner.

The events of the last decade show us all too clearly how quickly disability can strike. We cannot afford to assume that our good fortune in the past will continue in the future. If a similar tragedy should occur while section 3 of Senate Joint Resolution 1 is in effect, it would not only fix beyond dispute the status of the Vice President as Acting President when he is discharging the powers and duties of a disabled President, it would also give the President a firm constitutional guarantee that he could reassume these powers and duties as soon as his inability has ended. On this basis, a President who is sick, or about to undergo an operation which will temporarily incapacitate him, will not hesitate to announce his inability, nor will a Vice President be unduly slow to act if an emergency situation of this kind demands it.

The extraordinary situations—where the President cannot or does not declare his own inability, or where a dispute exists between the President and Vice President as to whether inability exists—are covered by sections 4 and 5 of Senate Joint Resolution 1.

Section 4 provides that if the President does not declare his inability, the Vice President with the written concurrence of a majority of the heads of the executive departments (that is, the members of the Cabinet) or such other body as Congress might by law provide, may transmit to Congress his written declaration that the President is disabled, and immediately assume the powers and duties of the office as Acting President. Section 5 provides that the President can resume the powers and duties of his office by transmitting to the Congress his written declaration that his inability has ended. If, however, the Vice President does not agree that the President's inability has ended, section 5 further provides that the Vice President can, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress might by law provide, within 2 days so advise Congress. Thereupon Congress would be required immediately to decide the issue. A two-thirds vote of both Houses would be necessary to keep the President out and permit the Vice President to continue to act as Acting President. If the Vice President could not muster a two-thirds vote in each

House in favor of a determination of continuing Presidential inability, the President would resume the powers and duties of his office.

As the subcommittee knows all too well, the factual situations with which Senate Joint Resolution 1 is designed to deal are numerous and complex. Inevitably, therefore, some aspects of Senate Joint Resolution 1 will raise problems of ambiguity for some observers. As the chairman noted at the outset, it is almost impossible to please everyone with respect to every problem that can come up in this situation. In order to assist in minimizing any such ambiguity, I would like to set forth the interpretations I would make of the proposed amendment in several difficult areas so that the subcommittee may have an opportunity to consider whether clarification is needed.

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with long-standing precedent (see, that is, *Missouri Pac. Ry. Co.* v. *Kansas*, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his Office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his Office by declaring in writing that his inability has ended. The subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the

Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail. There is, however, overwhelming support for Senate Joint Resolution 1, and widespread sentiment that these procedures should be written into the Constitution. The debate has already gone on much too long. Above all, we should be concerned with substance, not form. It is to the credit of Senate Joint Resolution 1 that it provides for immediate, self-implementing procedures that are not dependent on further congressional or Presidential action. In addition, it has the advantage that the States, when called upon to ratify the proposed amendment to the Constitution, will know precisely what is intended. In view of these reasons supporting the method adopted by Senate Joint Resolution 1, I see no reason to insist upon the preference I expressed in 1963 and assert no objection on that ground.

I might add, Mr. Chairman, it would be a courageous man who would take issue with 75 Senators.

FILLING THE VACANCY IN THE OFFICE OF VICE PRESIDENT

Related to the problem of Presidential inability is the equally critical problem of a vacancy in the office of Vice President. Too often it is overlooked that the country has been without a Vice President 16 times—in almost half of the 36 administrations in the history of the Nation. In an age marked by crisis, we can no longer afford such a gap in the high command of the executive branch of the Government. Today more than ever, the working relationship between the President and Vice President has become increasingly close; the burdens of the Presidency and the exigencies of our time leave no other alternative. The need is therefore manifest for a constitutional amendment to assure that the office of Vice President will never again remain vacant.

In my opinion, Senate Joint Resolution 1 embodies a highly satisfactory solution to this problem. Section 2 would amend the Constitution to provide that whenever there is a vacancy in the office of Vice President the President shall nominated a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Permitting the President to choose the Vice President, subject to congressional approval, in the event of a vacancy in that office, will tend to insure the selection of an associate in whom the President has confidence, and with whom he can work in harmony. Participation by Congress in the procedure should help to insure that the person selected would be broadly acceptable to the people of the Nation.

At this time, I wish to pay my respects to the members of this subcommittee, whose combined effort and scholarship have resulted in this important measure. Also, I wish to commend the Special Committee on Presidential Inability of the American Bar Association, and similar committees of State and city bar associations, who have in recent years helped to focus attention and to rally public support for resolving these problems promptly.

It seems clear that Senate Joint Resolution 1 represents as formidable a consensus of considered opinion on any proposed amendment to the Constitution as one is likely to find. It may not satisfy

in every respect the views of all scholars and statesmen who have studied the problem. For that matter, I doubt that any proposal could ever fully satisfy everyone in this troublesome area. But, it seems to me evident that, as President Johnson said yesterday, Senate Joint Resolution 1 "would responsibly meet the pressing need * * * ."

I understand that 47 State legislatures will be in session this year. Given the opportunity, I believe that many of these State legislatures will be able to ratify the necessary constitutional amendment if Congress acts without delay. I earnestly recommend such action.

Senator BAYH. Thank you, very much, Mr. Attorney General, for your statement. I am sure that this will add a great deal not only to the record but to our study of this amendment as we try to go further to find imperfections which can be improved.

In my haste in trying to get the committee underway, I have breached a bit of committee etiquette by not making introductions of my colleagues, the distinguished Senators from Illinois, Nebraska, Hawaii, and Maryland. They have all made a contribution and I am sure they will all want to make a statement, but because of the press of time on the Attorney General, I have moved right ahead. We may ask a question or two based on this very enlightening testimony.

First, without objection, I would like to suggest that the very articulate message sent to Congress by the President yesterday be submitted into the record at this time.

(The statement of President Johnson, previously referred to follows:)

[Released by Office of the White House Press Secretary, Jan. 28, 1965]

THE WHITE HOUSE.

To the Congress of the United States:

In 1787, Benjamin Franklin remarked near the conclusion of the Constitutional Convention at Philadelphia, "It * * * astonishes me, sir, to find this system approaching so near to perfection as it does * * *."

One hundred seventy-eight years later the relevance of that Constitution of 1789 to our society of 1965 is remarkable. Yet it is truly astonishing that, over this span, we have neither perfected the provisions for orderly continuity in the executive direction of our system nor, as yet, paid the price our continuing inaction so clearly invites and so recklessly risks.

I refer, of course, to three conspicuous and long-recognized defects in the Constitution relating to the office of the Presidency:

1. The lack of a constitutional provision assuring the orderly discharge of the powers and duties of the President—Commander in Chief—in the event of the disability or incapacity of the incumbent.

2. The lack of a constitutional provision assuring continuity in the office of the Vice President, an office which itself is provided within our system for the primary purpose of assuring continuity.

3. The lack of a constitutional provision assuring that the votes of electors in the electoral college shall without question reflect the expressed will of the people in the actual election of their President and Vice President.

Over the years, as I have noted, we have escaped the mischief these obvious omissions invite and permit. Our escape has been more the result of Providence than of any prudence on our part. For it is not necessary to conjure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.

On at least two occasions in our history, and perhaps others, American Presidents—James Garfield and Woodrow Wilson—have, for prolonged periods, been rendered incapable of discharging their Presidential duties. On 16 occasions, in our 36 administrations, the office of Vice President has been vacant

and over the two perilous decades, since the end of the Second World War, that vital office has been vacant the equivalent of 1 year out of 4. Finally, over recent years, complex but concerted campaigns have been openly undertaken—fortunately without success, as yet—to subvert the electoral college so that it would register not the will of the people of individual States but, rather, the wishes of the electors themselves.

The potential of paralysis, implicit in these conditions, constitutes an indefensible folly for our responsible society in these times. Commonsense impels, duty requires us to act, and to act now, without further delay.

Action is in the tradition of our forebears: Since adoption of the Bill of Rights—the first 10 amendments to our Constitution—9 of the 14 subsequent amendments have related directly either to the offices of the Presidency and Vice Presidency or to assuring the responsiveness of our voting processes to the will of the people. As long ago as 1804, and as recently as 1964, Americans have amended their Constitution in striving for its greater perfection in these most sensitive and critical areas.

I believe it is the strong and overriding will of the people today that we should act now to eliminate these unhappy possibilities inherent in our system as it now exists. Likewise, I believe it is the consensus of an overwhelming majority of the Congress—without thought of partisanship—that effective action be taken promptly. I am, accordingly, addressing this communication to both Houses to ask that this prevailing will be translated into action which would permit the people, through the process of constitutional amendment, to overcome these omissions so clearly evident in our system.

I. Presidential Inability

Our Constitution clearly prescribes the order of procedure for assuring continuity in the office of the Presidency in the event of the death of the incumbent. These provisions have met their tragic tests successfully. Our system, unlike many others, has never experienced the catastrophe of disputed succession or the chaos of uncertain command.

Our stability is, nonetheless, more superficial than sure. While we are prepared for the possibility of a President's death, we are all but defenseless against the probability of a President's incapacity by injury, illness, senility, or other affliction. A nation bearing the responsibilities we are privileged to bear for our own security, and the security of the free world, cannot justify the appalling gamble of entrusting its security to the immobilized hands or uncomprehending mind of a Commander in Chief unable to command.

On September 29, 1964, the Senate passed Senate Joint Resolution 139, proposing a constitutional amendment to deal with this perplexing question of Presidential disability as well as the question, which I shall discuss below, of filling vacancies in the office of Vice President. The same measure has been introduced in this Congress as Senate Joint Resolution 1 and House Joint Resolution 1. The provisions of these measures have been carefully considered and are the product of many of our finest constitutional and legal minds. Believing, as I do, that Senate Joint Resolution 1 and House Joint Resolution 1 would responsibly meet the pressing need I have outlined, I urge the Congress to approve them forthwith for submission to ratification by the States.

II. Vacancy in the Office of the Vice President

Indelible personal experience has impressed upon me the indisputable logic and imperative necessity of assuring that the second office of our system shall, like the first office, be at all times occupied by an incumbent who is able and who is ready to assume the powers and duties of the Chief Executive and Commander in Chief.

In our history, to this point, the office of the President has never devolved below the first clearly prescribed step of constitutional succession. In moments of need, there has always been a Vice President; yet, Vice Presidents are no less mortal than Presidents. Seven men have died in the office and one has resigned, in addition to the eight who left the office vacant to succeed to the Presidency.

We recognized long ago the necessity of assuring automatic succession in the absence of a Vice President. Various statutes have been enacted at various times prescribing orders of succession from among either the presiding officers of the Houses of Congress or the heads of executive departments who, together comprise the traditional Cabinet of the President. In these times, such orders of succession are no substitute for an office of succession.

Since the last order of succession was prescribed by the Congress in 1947, the office of the Vice President has undergone the most significant transformation and enlargement of duties in its history.

Presidents Truman, Eisenhower, and Kennedy have successively expanded the role of the Vice President, even as I expect to do in this administration.

Once only an appendage, the office of Vice President is an integral part of the chain of command and its occupancy on a full-time basis is imperative.

For this reason, I most strongly endorse the objective of both Senate Joint Resolution 1 and House Joint Resolution 1 in providing that, whenever there is a vacancy in the office of Vice President, provision shall exist for that office to be filled with a person qualified to succeed to the Presidency.

III. Reform of the Electoral College System

We believe that the people should elect their President and Vice President. One of the earliest amendments to our Constitution was submitted and ratified in response to the unhappy experience of an electoral college stalemate which jeopardized this principle. Today, there lurks, in the electoral college system, the ever-present possibility that electors may substitute their own will for the will of the people. I believe that possibility should be foreclosed.

Our present system of computing and awarding electoral votes by States is an essential counterpart of our Federal system and the provisions of our Constitution which recognize and maintain our Nation as a Union of States. It supports the two-party system which has served our Nation well. I believe this system should be retained. But it is imperative that the electoral votes of a State be cast for those persons who receive the greatest number of votes for President and Vice President—and for no one else.

At the same time, I believe we should eliminate the omission in our present system which leaves the continuity of the offices of President and Vice President unprotected if the persons receiving a majority of the electoral votes for either or both of these offices should die after the election in November and before the inauguration of the President. Electors are now legally free to choose the President without regard to the outcome of the election. I believe that if the President-elect does under these circumstances, our laws should provide that the Vice President-elect should become President when the new term begins. Conversely, if death should come to the Vice-President-elect during this interim, I believe the President-elect should, upon taking office, be required to follow the procedures otherwise prescribed for filling the unexpired term of the Vice President. If both should die or become unable to serve in this interim, I believe the Congress should be made responsible for providing the method of selecting officials for both positions. I am transmitting herewith a draft amendment to the Constitution to resolve these problems.

Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly continuity in the Presidency that is imperative to the success and stability of our system. Action on these measures now will allay future anxiety among our own people, and among the peoples of the world, in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal Offices of our constitutional system. If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries.

Lyndon B. Johnson.

The White House, *January 28, 1965.*

Senator Bayh. Mr. Attorney General, as you know, the Constitution is the bedrock type of law of our land in which broad generalities are expressed and laid forth with a minimum of specifics. This was one of the difficulties which confronted us in trying to draft legislation in an area that had great need for at least some specifics. You very correctly pointed to some areas to which we had given a great deal of study. I would like to explore your thoughts in some of these areas, if I may, to see if it is possible to be more specific in your thinking as to how we should approach these possible problems.

For example, the problem of getting a majority vote or two-thirds vote. Is there specific precedent? Would more detail be needed in writing the amendment? Would this be the normal interpretation or must we put additional specifics in to get the right interpretation?

Attorney General KATZENBACH. I think the interpretation I expressed would be the normal interpretation, and I would recommend that if that is the interpretation intended, which I believe it is, that that be made clear in any report on the Constitution or any debate on it. Because it would be what would normally be interpreted and it would help to have it simply made clear in that form.

Senator BAYH. In the report?

Attorney General KATZENBACH. I would think that would be perfectly sufficient.

Senator BAYH. In our opinions, it was, and I am glad to see you support this contention.

Now, do you feel that the provision for a two-way waiting period is sufficiently clear, or do you feel that explaining the intent in the report would be sufficient and would avoid the necessity for additional language?

Attorney General KATZENBACH. I would think it probably would be sufficient simply to clarify that you are only dealing with the situation of the disagreement between the two. That is not clear from the text of Senate Joint Resolution 1, because you go right into the disagreement situation. All that is said, really, is section 3 and it says if the President does declare it in writing, the Vice President shall assume the powers and duties of the office. It does not go on to say until such time as the President declares that his inability has ceased.

I think that the practice that has grown up on the agreements that I have mentioned in my testimony is useful practice and that that might be explicitly confirmed. I think it could be done either in the text of Senate Joint Resolution 1 or it could certainly be done in the report and the legislative history, either way. I do not believe that particular point is a controversial one. I think that people would agree that if the President determines his inability has ceased and the Vice President agrees with that, there should be an immediate resumption by the President of his powers as President.

Senator BAYH. The real difficulty would arise should we have a possible disagreement between the Vice President and the majority of the Cabinet on the one hand and the President on the other.

Attorney General KATZENBACH. That is right. It might be useful, Mr. Chairman, simply to reaffirm the other practice, either in one of the forms or the other, and then get on to what the difficult problem is. In the anxiety to solve the difficult problem, we should not leave the easy problem in doubt.

Senator BAYH. In making this difficult problem easier to solve, do you feel that a time limitation on congressional action as has been suggested in some legislation and by some scholars would avoid delay? Would we have a better solution if we put a 10- or 30-day or 2-month limitation on Congress in which it would have to act?

I notice you said you thought the powers and duties of the Presidency would revert to the Chief Executive if Congress failed to act immediately.

Attorney General KATZENBACH. I would be reluctant to put a firm time in a constitutional provision. I can conceive of circumstances where it ought to be done within 24 or 48 hours. I can conceive of other circumstances where Congress might wish to have the views of medical experts, for example, and this might take a few more days. A good deal of the problems that could occur under section 5 could, I think, be resolved by Congress itself in promptly providing what it was going to do in the event of this contingency by its own rules.

Senator BAYH. By rules or by statute?

Attorney General KATZENBACH. It would be just effecting—or by general statute if it were possible, just simply to assure that they have an interpretation of the word "immediate" and that they are bound by this. Because under the provisions of section 5, you have a Vice President who is acting as President and a President who is reasserting his ability to act.

Now, normally, it would always be my predisposition to protect the Presidency from any form of usurpation or any form of politics. Our Constitution provided for a 4-year term for a President and I think we have an obligation—I would feel it personally, certainly, to protect that. Yet you have here in section 5 a situation where the Vice President presumably is continuing to act until such time as Congress acts. Congress is enjoined to act immediately. It seemed to me desirable to give some assurance that Congress would act immediately and you would not have that situation of his continuing to act. And I think even beyond that, argument could be made, Mr. Chairman, that the President simply would resume his office if Congress failed to act immediately. But you would then create a debate: Has the Congress acted soon enough or not, who is exercising the powers and duties? If the President were to say, this has gone now before the Congress, They have had it for x days, they have not voted upon it, they have not acted immediately and therefore I automatically resume powers and duties—it is subject to that possible construction and I think intent with respect to that ought to be clarified.

Senator BAYH. Is there any way we can get around this possibility? What we are trying to prescribe is for continuity—someone who would always have charge. And if the Vice President is prohibited from acting unless he gets a majority of the Cabinet, which, of course, is appointed by the President he seeks to replace, would this be a sufficient safeguard to the President? And if the Vice President could not have two-thirds of the Congress to support him in addition to the Cabinet, the President should resume——

Attorney General KATZENBACH. I think it certainly could be done by rules of the House or legislation that in this event, Congress would reconvene, that they would decide this, there would be, for example, the possibility of limitation on debate. There has to be a vote on this. A certain period of time, I think, would serve to clarify the problem of what "immediately" means and still leave some flexibility to take care of the sorts of situations that I discussed.

I assume also you would want to clarify by way or intent, perhaps, Mr. Chairman, what you have just said, that this is the majority of the Cabinet that the President has nominated. Conceivably, a Vice President exercising the duties could remove all Members of the Cabinet if Congress is not in session and he could then exercise the powers and duties to give recess appointments to his own people.

I think the intent of this, if I understand it correctly, is that of the Congress that was sitting and the Cabinet that was sitting at the time the inability existed.

Senator BAYH. We would not want to have any purge by the Vice President during a President's inability of the ill President's Cabinet. By the same token, we would not want it so that if one of the members of the Cabinet died, he could not be replaced.

Attorney General KATZENBACH. Congress could, of course, by law provide for that problem.

Senator BAYH. Let me ask one other question and I am sure my colleagues have some of their own.

You referred to the possibility, the necessity of protecting any President from usurpation of his office. The President, by the very nature of his office, must deal with very difficult problems, very controversial problems. Have we given him sufficient protection so that he will be able to stand up and make unpopular decisions that he feels are in the best interest of the country?

Attorney General KATZENBACH. I think this is a responsible resolution of that problem here, if, in particular, it is further clarified in the rules so that there must be quick action with respect to this so that immediately he is given hands and feet in an appropriate legislative resolution form.

There are, of course, two ways of dealing with section 5 and I am sure that the committee has considered both. One is to have the President—one is the one that is proposed here, where the Vice President continues to act and the Cabinet supports him until, in effect, Congress declines to support him by two-thirds. The other solution would be to have the, which I am sure you have considered at length, would be to have the President resume the office merely upon his declaration unless a majority of the Cabinet supported the Vice President and two-thirds of each House supported him. When that had finished occurring, the Vice President would resume. Those are the two alternative ways of handling it.

Now, I suppose the two problems that one is dealing with are the risk to the country of a period, however short, where a President who really is unable, nonetheless declares ability, and the problem, how quick the congressional action could be gotten in that situation and the risk to the country in that period of time, as against the problem that you raised, Mr. Chairman, of the usurper, which is the traditional fear of Vice Presidents in exercising their power, that they would be so regarded.

Senator BAYH. We have two things we are striving toward.

Attorney General KATZENBACH. We have to balance those two considerations.

Senator BAYH. One is to make sure that there was not, even for a short period of time, a disabled President acting as President; and two, in the transfer of the power from the Vice President back to the President, even under the most controversial situations, to keep the procedure as simple as possible.

Even if it would mean the Vice President would act for an extra month, to have it be an original transfer from the President to the Vice President and then back to the President, if Congress should so decide is preferable to a situation where it is from the President to

the Vice President and then the President makes the declaration and the power is his again, then the Vice President disputes this and the Congress moves in and it goes back to the Vice President, which would be very disconcerting. Not only to this country but to others, who actually do react to the shocks.

We thought that this way, we have only a minimum of two transfers, one from the President to the Vice President and then, when Congress refused to support his stand, immediately back to the President.

Mr. Minority Leader, as a constitutional expert, I am sure you will have some questions to ask.

Senator DIRKSEN. Thank you, Mr. Chairman. I will defer to my colleagues because when the clock moves up, I must get over to the floor. I did have one question with respect to section 1, where the President shall select a Vice President on confirmation by a majority vote of the Congress. I wonder if it would not be advisable to think a little about a limitation on that choice and to limit it to Members of the House and Senate and to the heads of the departments of Government? Then if the President says he is ill and the Vice President becomes President, he cannot select just anybody to become Vice President.

Then secondly is the question whether it ought to be done by a majority vote or a two-thirds vote. We rely on two-thirds in the most critical matters such as treaties and vetoes and so forth and this is a highly important one when it comes to the selection of a Vice President, because he may even possibly succeed the President because of disability or death, resignation or retirement. Then you have this question whether or not the President could actually select a Vice President from his own State.

Now, the electors, of course, as we modified it, cannot select two people from the same State. That was amendment No. 12:

> The electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves.

Now, I would think there is an implication there that they would not want to have both come from the same State. Yet in the matter that is before us there is no such interdiction and I would gather that if this were approved in that fashion, it would make it possible for anybody who came from the same State, if he felt it was good, to get confirmation from the Congress. I just advance that and I think it can be pursued, Mr. Chairman, a little later.

Senator BAYH. It is certainly a very specific question, Senator. I am sorry that the minority leader has to leave quickly.

Mr. Attorney General, do you care to give your opinion on those questions by the minority leader?

Attorney General KATZENBACH. I would think if the choice of the President were so limited, it would still be a very broad choice. But I do not think I am persuaded that it should be limited to the Cabinet or to Members of the House or Senate. I think customarily, throughout our history, at least the presidential candidate of one or the other party has normally had free hand to choose who his running mate will be. That free hand may be governed by a variety of considerations within the party, but his choice within those is normally respected. I would see no reason not to recognize that practice here.

I would be reluctant also to support a two-thirds vote in the House and Senate. I think by and large, what the President under those circumstances would be counting on would be the support of his own party within the Senate and the House, and I think it would be unfortunate for the country if the opposition party should be able to exercise a very considerable power in determining who the President wished as his Vice President. Normally, the opposition party does not. It is the people in an election who determine that. There would be a possibility, I would think, in those circumstances, of an undesirable delay in filling the office. Suppose that the President were to submit a name and failed to muster the two-thirds. I could imagine a President at that point, rather than submitting another name, saying "That is my choice for the job and that is whom I am going to leave there and there will not be any Vice President unless this man is selected."

Senator BAYH. Of course, if limitations were put on, this would immediately preclude one source from whence many of our Presidents and Vice Presidents come, the Governors of States.

Attorney General KATZENBACH. I would think it would be in the interest of ratification not to eliminate the Governors.

Senator BAYH. That is a very good point.

The Senator from Nebraska has been a longtime student of the problem and active member of the full committee. I am certain he has several questions he would like to ask.

Senator HRUSKA. Before I do ask any questions or make any observations, I want to join our chairman in extending the congratulations to our present witness for the preferment that was visited upon him yesterday. In due time, we shall officially consider that nomination, but I can predict in advance, Mr. Chairman, that there is every indication that the reception on that occasion will be very, very favorable and certainly a very receptive one.

Attorney General KATZENBACH. Thank you, very much, Senator.

Senator HRUSKA. Before I do ask questions, I want to make some comments and I shall submit a statement later in greater detail, Mr. Chairman.

There are two principles in which the Senator from Nebraska is very interested in regard to the amendment that we are considering. One of them concerns the idea that the Attorney General has already touched upon, namely, not to clutter the Constitution with procedure detail. That is a sound constitutional principle. It has, in the main, been followed and unless there is some very pressing and persuasive reason why it should be abandoned at this time, it is my purpose and intention to urge that it be abided by.

The second principle is separation of powers. In section 5 of Senate Joint Resolution 1 which confers upon the Congress the matter of approval of the Vice President's contention that the President is not able to resume duties or the President's contention that he is able to resume duties, we have a transgression and a violation of that doctrine of separation of powers. There are several objections to this section on that basis, some which I shall mention later and some which I would like to propound to our witness.

I should like, Mr. Attorney General, to direct your attention to section 3 of Senate Joint Resolution 1, which reads:

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

I am wondering, Mr. Attorney General, if, in your opinion, there is merit to the proposal advanced at previous hearings that the President should be able to designate the Vice President as an Acting President for a specific limited time. This would cover such occasion as when the President might be en route to a foreign country, or otherwise outside of reliable communications? The basis for those proposals, of course, is that there are many decisions that conceivably might be very, very much needed in a very short period of time. If it were possible for the President, in looking forward to an absence from the country for 2 weeks or 3 weeks, or any other specific period of time, would it be well to enable him to arm the Vice President with the powers of Acting President? Have you any observations on that suggestion which was made by former Attorney General Brownell in previous hearings?

Attorney General KATZENBACH. I would say first, Senator, that I would have read section 3, or would read section 3 as really broad enough to cover that. I would agree with you that it is possible, although not likely, that a failure of communications media or a failure of one kind or another would make it impossible for the President to participate quickly enough in a decision if he were in the position you have indicated. I would think he could so provide in writing, even under the language of section 3 as it exists, that he could empower the Vice President to do that in writing in the event that such and such occurred. Perhaps that is not clear, but I would have thought that section 3 would have permitted the President to do that if he found it desirable to do so.

Senator BAYH. Let me intervene momentarily. I am certain the Senator from Nebraska remembers that the record shows that the intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing.

Senator HRUSKA. Yes, that is true, Mr. Chairman, but that is covered under section 4. I fully agree with you that if something happened to the President, then there would be a declaration by the Vice President, substantiated by the majority of the heads of executive departments. But I am suggesting, what happens under section 3? Can the President make a 10-day designation of the Vice President as Acting President under the present language of section 3? And if we are going to say, oh, well, we talked about it in subcommittee, we talked about it in the report, we talked about it on the floor, and therefore, it is in the Constitution when this amendment is adopted, I submit to you that is a very loose way of writing constitutional law and one with which I would have very little, if any sympathy. It is section 3 to which I direct your attention, not section 4.

Senator BAYH. I just wanted to clarify, since we are talking about different kinds of disability, that we have all the freedom in the world

of putting this in the constitutional amendment if it is the opinion of the subcommittee, the committee, or of the Congress. However, I would point out that this again adds more detail, which the Senator himself is desirous, as am I, of keeping to a minimum.

Senator HRUSKA. Well, if the chairman's desire in that regard would be asserted in areas where it can be done much more fruitfully, then I would be persuaded by that argument. However, this is by way of limitation. It would not take many words. It is not a matter of procedure. It is simply an added authority to the President to act at a time when he would be absent. It would be for a definite, specific period, and its limitation would be self-executing. It seems to me that it would be something that should be very seriously considered by the committee for section 3.

Have you any further comment, Mr. Attorney General, on that particular point?

Attorney General KATZENBACH. No; I would certainly have no objection to the substance of what you are saying, that the President should be able to arrange for the Vice President to act for a limited period or in the event of a certain contingency, or something of that kind, which would be a self-executive provision. I would only reaffirm that I had thought that section 3 would be broad enough to do that. Perhaps it obviously could be clarified if that was the desire of the Congress to so clarify it.

Senator HRUSKA. Well, thank you, very much. That at least raises the point and gives us some basis for further discussion in executive session.

Now, turning to section 5—and I want to say parenthetically that this Senator certainly finds himself in agreement with the preceding sections almost without exception. But turning to section 5, I would like to ask the Attorney General to elaborate a little bit more about "immediately," as used in the sentence which says, "Thereupon, Congress will immediately decide the issue." Now, it is all right to depend or to think that one depends upon the good faith of Congress and say: "Certainly they will not be obstructionists and certainly they will turn their attention to this very important issue at once," but it has been suggested by scholars in the field that there are such things as unlimited debate in the Senate. The only limitation is subject to Rule 22, about which we will hear more next month, and the month after that perhaps. I doubt very much that our feelings of sympathy in this matter would prevent someone from saying, "let us have hearings and expert testimony. Let us have a full discussion of this subject, so that the public may be informed."

Now, do you think that "immediately" will encompass that sort of thing?

Attorney General KATZENBACH. I would suppose that it was the intention here that "immediately" would not encompass that sort of thing, that the word was used to express the sense of urgency that you expressed at the outset.

I think it is extremely difficult to know what word you put in unless you put in a specific time limitation, which I think has some difficulties to it. As I have said earlier, you might quite legislatively want medical examinations. You might even legislatively want those medical examinations, those opinions, before the Congress, before either

House, before it acted. That could take a period, at least, of a few days.

I frankly, Senator, am at somewhat of a loss to say how it could be better expressed than the word "immediately," except to repeat the suggestion that I made, that you could get rid of such things as unlimited debate by taking care of that in a legislative fashion, by saying "for this particular point, there should be no debate or the debate should be limited, or the decision shall be made within such and such a period of time." I would be reluctant to put that in the Constitution, I believe, although not violently opposed to it.

But I can see reasons why perhaps that should be left to the judgment of Congress, exercising it at a time when the problem was not before it, providing in advance for this problem and providing for the most expeditious procedure.

Senator HRUSKA. You do suggest that it would be suitable for the Congress to legislate upon this point?

Attorney General KATZENBACH. I think Congress could legislate upon when a reference is made to it under this section of the Constitution, the following should take place, and if both Houses agree that this will take place in that way, it will.

Senator HRUSKA. I am sure the words you have just uttered will be greeted with great joy and anticipation by those who will seek to define legislatively "immediately" as meaning 90 days. Because if we are going to have a situation here where we will put a word in the Constitution and then say "It is competent for the Congress to define that word anyway it wants to." I say we are making a shambles out of the Constitution. I doubt very much the Supreme Court would be apt to say that "immediately" means 90 days or approve that sort of thing. Would you have any thoughts on that?

Attorney General KATZENBACH. I believe that in probability, the Supreme Court would accept any judgment Congress made on that. I find it difficult to find any context in which this would go before the Supreme Court, and I expect they would defer to any judgment the Congress made.

Senator HRUSKA. That is possible, and then it would be for the Congress to express, as you say, "immediately" means when we get good and ready. It may mean 90 days or 60.

You refer to medical examination. Medical examination, certainly, for some physical ailments would be easy to make. From my knowledge of medicine, however, when we get into psychiatric problems, such as mental or nervous disorders, that cannot be accomplished in a day or two. In fact, it may mean that there will be a passage of considerable time before a psychiatrist or a nervous and mental specialist can gather enough observation and data upon which to predicate a judgment and render an opinion.

That is the sort of thing we run into when we do two things. When we get into procedural details in the constitutional amendment, and when we violate the separation of powers. You say that it is difficult to put in words and to put in language something that would be acceptable and workable. I have a solution for it and I shall propound upon it a little bit later. Briefly it is this: If that power is kept within the executive department where it belongs, and exercised by the heads of the executive departments, we immediately dispose of this time ele-

ment in very satisfactory fashion. If those department heads will not go along with the Vice President and say that the President is not able to proceed, then the issue is solved and the President resumes his office. We have the matter resolved from the standpoint of time.

Would you have any comment on that, Mr. Attorney General?

Attorney General KATZENBACH. The first point, it seems to me that about all that you can do in a constitutional amendment is to put in such a word as "immediately." If you leave that out entirely and indicate no sense of urgency about this, then it seems to me that whatever would be provided by legislation would take somewhat longer.

On the second point, it seems to me that those who feel that Congress should act on this are adopting a philosophy that says that the elected representatives of the people would better give the sense of the people, at least in confirming that executive decision. And it would prevent at least the possibility, although we have never faced it in our history at all, the possibility of the coup d'e tat which certainly other countries have experienced from time to time; the possibility of deposing a President when the Vice President can, through one way or another, wean away a majority of the Cabinet from supporting the President.

So I think you accentuate the problem that the chairman raised at the outset of simply an unpopular President and a Vice President who seeks to assume the office and can edge the support of the majority of the Cabinet.

On the separation of powers point, Senator, I don't believe that this procedure amounts to a violation of that principle as I understand it. It is already provided in the Constitution that Congress shall decide this procedure in the event of an inability of both the President and the Vice President, and as I said at the outset, some scholars have thought that that language would permit the solution of this problem before us now simply by legislation, since they do not read the language in a way, a conservative way, really, in which I, and I think a majority of scholars, have read it. So it is already provided that Congress get into the picture of selection processes in the Constitution.

Senator HRUSKA. Mr. Attorney General, if you will pardon the interruption, that is a different situation, is it not? That is a situation where a policy question is to be decided. There is a vacancy and the place to decide that question is in a body composed of elected representatives. In the case of disability, the situation is different. There the policy has been determined already. The policy was determined that Mr. X was elected President. That is the decisive action taken by the electorate of this country. The question is only as to fact: Is he capable of carrying on his duties?

Now, that is not a policy question. It is a factual question. I submit that the contingency to which we refer is not provided for in the Constitution and that there is a violation of the separation of powers.

Now, in the situation where there would be a coup d'etat by manipulation of the Cabinet, that is a detail that can be taken care of by legislation under Senate Joint Resolution 6, because we have provision that the Congress may legislate to see that this decision is made within the executive branch. If it is desirable to say the Vice President may not fire or discharge the members of the President's Cabinet, that he

must work with them or such of them as are still alive and capable of proceeding, Congress may do that.

It does seem to me that there still is a violation of that separation of powers doctrine when we get into this particular thing. It puts one of the branches of Government in a dominant position over the other. That, of course, is the essence of the violation of that doctrine.

Attorney General KATZENBACH. I do not quite understand which branch is dominant over the other, sir.

Senator HRUSKA. The Congress would be in a dominant position over the President when they would say, "You are not capable of carrying on the duties of President."

Attorney General KATZENBACH. I could take mild issue with that, if I could, Senator. As I read section 5, that is not possible. All that Congress can do is to affirm a decision that has already been made in the executive branch, because the majority of the Cabinet have already supported the Vice President. So that the only participation of Congress in this is to say, is really to protect, I suppose, against a coup d'etat here, to say, "These fellows have tried to take over and we do not think they ought to." So I do not think they are dominant.

Congress cannot initiate. Congress cannot get rid of the President here, except on its own process already contained in the Constitution for impeachment.

Senator HRUSKA. If they agree with the Vice President, they are disposing of a President.

Attorney General KATZENBACH. They have to agree with not only the Vice President, but a majority of the Cabinet.

Senator HRUSKA. And two-thirds of their Members. If they disagree with the Vice President, they are overturning that consensus, are they not?

Attorney General KATZENBACH. Well, you have to have the consensus in the executive branch—at least a consensus of this kind, before it even gets to Congress. Congress cannot even look at the problem unless the majority of the Cabinet supports the Vice President.

Senator BAYH. May I enter the colloquy long enough perhaps to pose a question for the consideration of the Senator from Nebraska as well as the Attorney General? What commingling powers are we giving here that are not already provided, as the Attorney General mentions, in the impeachment proceedings? It is the same type of determination that has to be made—either the man is capable of performing or he is not. It seems to me of little consequence whether you say he is incapable of performing because he is ill or whether you say he is incapable of performing because he has done something immoral or transgressed the laws of the country. It still is the same type of determination that the Congress has to make.

Senator HRUSKA. If the chairman would permit my reply to that, I would respectfully differ from him, because to judge a man guilty of acts which would be determined as treasonous or against public policy to the extent that he shall no longer serve as President, that is a policy question. It is semi- or quasi-judicial, to be sure, but that is a political and a policy question.

The fact of insufficient mental or physical powers to continue in office is not a policy question; that is a factual question. Those that are policy in nature should be decided by the Congress. That is where

they belong. And, of course, the Constitution expressly provides for impeachment. But where it is not a policy question, then it should remain within the branch of Government that is involved. We certainly would not want to divorce from the Congress the power of the Congress to deal with its own Members by giving the President or the Supreme Court a part in the decision as to whether a certain Member should stay in the House or in the Senate. That is something for us to decide. Similarly with reference to a factual determination on the physical or the mental capabilities of a serving President, it would be a question for the executive branch to decide.

Senator BAYH. We differ as to what type of determination the Congress is making in the impeachment. I think in addition to being a policy determination, it is very much a factual determination, too—did the President actually do what he is accused of doing.

Forgive me. Do you have any further questions?

Senator HRUSKA. Perhaps the Attorney General might want to comment on the observations by the chairman?

Attorney General KATZENBACH. I would think that a question of this importance, Senator, could scarcely be regarded as a purely factual question. There are all kinds of gravest considerations of policy involved in the determination that Congress would make—the whole question of the confidence of the country, the confidence of the world.

Senator BAYH. Are we talking about disability?

Attorney General KATZENBACH. Disability in that kind of a case. I would think that was a policy question, admitting the factual basis of it, but I would think that was a policy question of the highest order. I would think it would be extremely important to know, in the event that a Vice President was taking over the offices, that he had the support in that determination of two-thirds of each House of Congress. I do not see how, just from the point of view of the confidence of the people of the United States, from the point of view of the confidence of foreign governments in our constitutional processes, I find it difficult to see how you could really do away with the political necessity. I mean that in the highest term, meaning, political, of that kind of confirmation of the President's inability to act.

Senator HRUSKA. Mr. Attorney General, if this matter came to a vote in the Congress, it would take a vote of 67 Senators and then two-thirds in the House, to determine that the President is unable to discharge the powers and duties of his office. If there were only 63 Senators who would say he is unable to serve, what becomes of your consensus and backing up of the decision made in the Cabinet and by the Vice President in the eyes of the Nation and the world?

Attorney General KATZENBACH. I think it would be a most unfortunate thing if that were to occur, Senator. But I think that is inherent in the problem, not in the procedure here.

I would be very surprised at any Vice President with the political experience of Vice Presidents that I think has been true in all of our history who would even propose to do this unless he were absolutely assured that he was going to have the overwhelming support in the House and Senate. And I cannot imagine responsible Cabinet officials ever putting the country in that position. If there was that kind of doubt in the situation that you could not muster a two-thirds vote, then I do not think that the issue would ever be put. I really do not

consider that—I consider the process as a safeguard against usurpation, which is what I think it is intended to be. I think it also—I think the practice would end up, any time it is submitted, with the Vice President being supported. Because it is such a horrible situation to imagine, for him as well as for the country, that I do not think it would ever be submitted except in the clearest kind of situation, where he had in the usual processes of politics the assurance that that was going to be backed up by a majority or by two-thirds of each House.

Senator HRUSKA. Mr. Chairman, this Senator is deeply gratified at that expression of confidence in the Cabinet that has just been expressed. I agree with it even more fully than the Attorney General does, because I would repose such complete confidence in the Vice President and the Cabinet that we would stop right there with their decision. They are people, after all, who have been named by the President. They are loyal to him; they know him. They are able to observe him. They would have every sympathy for the man and with the electorate of this Nation to have that man continue in office. If he does continue in office, that would be the fulfillment of the will of the Nation. They would give every fair intendment to the President. If there was any doubt, I think they would still resolve it in favor of the President.

But I say that is the point at which it should stop and not throw it into the political arena at this end of Pennsylvania Avenue because there have been situations in our history where there have built up tremendous personal and political animosities between the leadership in the Congress and the President or the Vice President. It is in this fashion that I believe we would violate that doctrine of separation of powers and good policy.

Have you any comment on the idea of stopping right there with the Cabinet and its decision jointly with the Vice President, taking all these considerations into your thinking?

Attorney General KATZENBACH. I think that you have eloquently stated the argument, Senator. I continue to believe that it would be important that that decision would be affirmed as overwhelmingly as this contemplates by elected representatives and that we would get an additional measure of security out of that. I do not say that from any lack of confidence in the integrity of the Cabinet, or in the decision that they would make. I say it as I said before, because I do believe that in that kind of a crisis, which, thank God, we have never had in this country and I hope never will, it would be so important to join ranks on both sides of the aisle and to create that kind of confidence among the public of the United States by their elected representatives joining in this very unpleasant and terribly important determination so that as we have in the past, this country could indicate that in such a crisis, it can and will unite.

Senator HRUSKA. The Attorney General states his position well and I respect his declaration of it. I do not quite want to subscribe to it yet, Mr. Attorney General, except for this observation: I think it is fine as far as it goes. But I think there is some hazard and danger in throwing this crisis into the Congress and finding instead of 67 or 68 Senators going along with the Vice President, there would only be 64. Then we would have uncertainty, confusion, and perhaps chaos,

because more than the majority of the Senators and electorate of this Nation would be of a frame of mind that would not be effectuated.

Attorney General KATZENBACH. May I comment just very briefly on that?

Senator HRUSKA. Surely.

Attorney General KATZENBACH. If that were the situation and your proposal that simply the Cabinet acted were the law, it is incredible to me that those 36 Senators would remain silent. I think it would be well known to the public that those 36 Senators thought that the Cabinet had acted unwisely, that the President really was able to act, and that they would create exactly the same kind of situation in the country as if you had a vote.

Senator HRUSKA. But 64 would be contending, also, that they were right in saying that the President was unable to act, and they would not be silent.

Attorney General KATZENBACH. You would have exactly the same debate, Senator, whether they voted on it or whether they did not vote on it. You would have exactly the same kind of grave constitutional crisis. It almost comes when you talk two-thirds, and it is a customary figure. On this, it would be my hope that if that situation ever evolved, you would have 100 Senators who would agree. Because it simply becomes an impossible situation, and if it is a close question and a difficult one, it is in that situation where I think the Vice President would not act, the Cabinet would not support him, and they would want to know that they had the support, whether or not, whatever system it as done under, they would surely want to know they had the overhelming support of both Houses of Congress if they were determined to act in this totally unprecedented way.

So I think the problem, the difficulty you state, is inherent in the problem and not in the way in which it is resolved, and that the way it is proposed here to resolve it at least has the effect of showing how united the country would be in the event that that terrible decision had to be made.

Senator BAYH. May I interject one thought, since you indicated you were going to something else? I just wanted to state for those of us who have studied this, as the Senator from Nebraska has, that we differ with him as he very articulately expresses his point of view. But just to rephrase what the Attorney General said, it is our feeling that this business of removing the legally elected President of the United States for any cause is of such a serious nature that we do not want the Vice President or Cabinet or any other group to have the responsibility for doing it. The final determination, we feel, must be made by the representatives of the people. If there were some way we could get the people themselves to make this decision, I would say more power to this. But we have found no practical way of doing this.

Only when the Congress, as the legally representative body of the people, says, "Mr. President, you are unable to carry on the powers and duties that were given to you, this great mandate that was given to you by the people," are we willing to say that he should step down.

Now, certainly the Senator from Nebraska feels equally strong about it and I appreciate his opinion. He states it very well.

Senator HRUSKA. Thank you, Mr. Chairman.

One other point, Mr. Attorney General. We have raised here the possibilities that the Vice President might discharge the heads of the different executive departments and distort the situation to a point where then he would be in a position to control the thing with his own little white fingers. Again, I would not want to attribute to any Vice President, in all of our history, any such diabolical designs or intent. The way sections 4 and 5 are written now, where the decision of the Vice President must be supported by a majority of the cabinet, is there anything in there that would prevent him, after he became Acting President, from terminating the service of the heads of the executive departments and appointing those who might by sympathetic with him? Is there anything in this language that would prevent him from doing it?

Attorney General KATZENBACH. Certainly, if he were discharging the powers of the Presidency, he could remove a Cabinet officer. There is no question about that, Senator. He could only effectively appoint one if Congress happened to be out of session at that time. If that were true, he could do it. So exercising those powers, it would be possible, as I read this under the present language—it would be possible to construe this as permitting him to change the Cabinet and thus gain support or to change a member of the Cabinet if it were an almost evenly divided vote, under those circumstances. I think that really is an additional argument for the procedures under section 5 that would permit Congress to pass on this with a two-thirds vote. It is to prevent that kind of contingency, it seems to me, that section 5 was put in, among the other purposes that we indicated. And to an extent, the difficulty of leaving the decision purely to the Cabinet would be really to open up that possibility.

Senator BAYH. May I ask the Senator a question, because I think this is a legitimate question, one with which we had some problems—the Attorney General and myself.

Senator HRUSKA. All questions the chairman asks are legitimate.

Senator BAYH. We do not want to enable a situation to exist where the Vice President can indulge himself in a purge. But, by the same token, I do not think we want to permit a situation to exist where—over an extended period of time while the Vice President is acting—the Vice President is prohibited from replacing a Cabinet member, should the necessity arise.

Senator HRUSKA. That is one of the difficulties inherent in the situation. The Government, in its administration, must proceed—it must go on. Maybe in that time the change of one or two members of the Cabinet would make a difference, if it is a close issue. But I just wanted the Attorney General's idea. I raise it only because this horrible possibility was raised in the converse. That is why I raise it, certainly not with the thought that anyone chosen for the office of Vice President would indulge in any behavior of that kind.

Mr. Attorney General, you have been very kind, and so have you, Mr. Chairman. I thank you very much.

Senator BAYH. May I ask a question that I intended to ask before we got off this "immediately" situation?

Attorney General KATZENBACH. Certainly.

Senator BAYH. Looking at this from an interpretative standpoint, it is very difficult, as the Senator knows, and the Attorney General knows, to find language that will do just exactly what you want with-

out doing something that you do not want. We have felt, although the Senator disagrees, that "immediately" perhaps comes closer than any other word or group of words. Do we have any different interpretation of "immediately" if it is placed in the Constitution or "immediately" if it is placed in a statute? It has been suggested that maybe "immediately" in a statute would do this.

Attorney General KATZENBACH. I would think mainly the same thing.

Senator BAYH. The Court has to make the eventual determination.

Attorney General KATZENBACH. The Court might never make it. I think you have to face, frankly, the fact that it would be really Congress that would make the determination as to what "immediately" meant.

I do feel you could have the difficulty on this, Senator, of the President, who is disagreeing with the Vice President, sending it down and nothing happening for a period of time, and his saying, "Well, under this provision, it says Congress shall—will—immediately decide the issue. They have not done so, and it says, 'otherwise the President shall resume the powers and duties of the office' and so I am going to resume the powers and duties of the office." You could, in a delayed situation, have that difficulty, as I read it.

Now, I do not know that there is very much more that you can do than to urge on the Congress using "immediately" as a whip to have them decide it. The very possibility of that, it would seem to me, would help to resolve that situation in that way.

Senator BAYH. I wanted to clarify one answer you gave to a question by the Senator from Nebraska: In his question, he combined the need to get expert medical testimony and for Congress to hold hearings to hear from his aids and personal associates of the family, for example, that can compare how the President is acting now with how he acted yesterday or a month ago. He combined this with the filibuster, which is something that I think gets clear out of the "immediately" situation.

Could you state specifically whether you think, as we use the word "immediately," that this would still permit Congress to make a reasoned, intelligent judgment, and to take what time as is necessary to get this evidence—to hear this testimony?

Attorney General KATZENBACH. I would certainly think that it would, Senator, and they would have the time under the meaning of the word "immediately." I think the difficulty is going to be only if they do not act with the greatest expedition. I think that is what you are trying to tell them to do. There is no word that you can use that completely resolves that problem. I do not know what "immediately" means, except it means as soon as you can darn well do it.

Senator HRUSKA. Of course, what you have said indicates that you do think the word "immediately" would enable the Congress to inquire of members of the family and psychiatrists and physicians and so forth. Is that true?

Attorney General KATZENBACH. I would think so.

Senator HRUSKA. Would it encompass, also, the matter of the Congress debating the issue?

Attorney General KATZENBACH. I would think that it could encompass the possibility of debate.

Senator BAYH. Reasonable debate?

Senator HRUSKA. How much debate?

Attorney General KATZENBACH. I cannot answer the question how much debate would be reasonable. I would think that on this kind of an issue, the amount of debate that would be required would be really very, very limited in order to make a judgment.

Senator HRUSKA. That is what we often think here, Mr. Attorney General. But there are some people who do not agree with us on occasion.

Attorney General KATZENBACH. I have had experience with that, Senator. I might go on to add that if you, sir, are correct in saying this is largely a factual issue, then that would be an argument that would tend to cut down debate, since my experience has been that it is the policy issues which usually have extended long debate in the Senate and House.

Senator BAYH. If this terminates our questioning of the Attorney General, let us thank you very much for not only making your views known here, but for subjecting yourself to this cross-examination, which I feel has been very helpful, and I want to thank you personally for it.

Senator HRUSKA. I join in the thanks, sir.

Attorney General KATZENBACH. Thank you sir, I appreciate the opportunity to be heard.

Senator BAYH. In the effort to enable the Attorney General to resume his normal schedule, I did not ask my colleagues on the subcommittee if they had a statement that they would like to make. The able Senator from Hawaii who has long labored on this matter as a member of the subcommittee has some remarks I believe.

STATEMENT OF HON. HIRAM L. FONG, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator FONG. Mr. Chairman, I wish to make a brief statement in support of Senate Joint Resolution 1 proposing a constitutional amendment on the related problems of Presidential disability and Vice-Presidential vacancies.

Two years ago, the tragic assassination of President Kennedy pointed up once again the urgent need to resolve these two 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 our Nation demands that the office of the Vice President should never be left vacant for long, such as it was between November 22, 1963, and January 20, 1965.

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, who deter-

mines his fitness to resume his office, and who should take over during the period of disability.

In short, there is no orderly constitutional procedure to decide how the awesome and urgent responsibility of the Presidency should be carried on.

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, as a member of the subcommittee, I have studied very carefully all the various proposals submitted by other Senators during the 88th Congress and in this current session of the 89th Congress. I have considered the testimony submitted to the subcommittee in previous hearings, including those of the distinguished experts who have testified. I have read the data collected and have read the research done by the subcommittee's 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 1 best meets each of these requirements.

Senate Joint Resolution 1 deals with each of the problems of vice-presidential vacancy and presidential 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 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 1 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.

Mr. Chairman, this is the first time since 1956, when a full-scale congressional study of the problems was conducted, that wide agreement has been reached on these enormously complex constitutional problems.

Last September a measure similar to Senate Joint Resolution 1 was passed by the Senate by the overwhelming vote of 65 to 0. It was sent to the House, but Congress adjourned before any further action could be taken.

Last January, at the call of the American Bar Association, a dozen of the Nation's leading legal authorities meeting in Washington came up with a consensus. This consensus, subsequently endorsed by the ABA house of delegates, is essentially embodied in the provisions of Senate Joint Resolution 1.

Yesterday President Johnson heartily endorsed this proposal.

And earlier this month, the Research and Policy Committee of the Committee for Economic Development released an able study of these questions. Its recommendations closely parallel the provisions of Senate Joint Resolution 1.

I am most delighted and pleased to cosponsor this proposal 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. The Senator from Nebraska might have a statement he would like to make or remarks he may care to make other than the fine questions he has asked of the Attorney General.

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

Senator HRUSKA. Mr. Chairman, agreements devised by the President and his Vice President in past administrations to cope with an inability crisis are not satisfactory solutions.

It is abundantly clear that, rather than continue these informal agreements, the only sound approach is the adoption of a constitutional amendment. This amendment would distinguish the inability situation from the three other contingencies of permanent nature, death, resignation, and removal from office, and would recognize that, in the first instance, the Vice President becomes Acting President only.

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 into the Constitution those procedures 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 to authorize 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 6 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 contains dangerous pitfalls. Without any limitation upon the method, the Congress might adopt a procedure that would violate constitutional doctrines of the most essential character. Throughout our history, these principles have been proven wise and of inestimable importance.

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 to find instances in which this doctrine is threatened. Some of the pending proposals on presidential inability illustrate how seriously the doctrine can be impaired if care is not exercised.

This is the rationale behind the limitation contained in Senate Joint Resolution 6 which provides that the executive branch shall determine the presence of and termination of the inability of the President. It is essential that the method ultimately selected shall have the executive branch determine the commencement and termination of any inability. Stated another way, Congress must 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 prohibition if our efforts to resolve the problem of presidential inability are to be successful.

The determination of presidential inability and its termination 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.

To inject Congress into the factual question of inability would be to create a secondary impeachment procedure in which the conduct of the President would not be the test. Such a determination would be fraught with uncertainties. It would require no specific charge. It would not define the proof which is required. It would be a determination of facts with no guidelines against which to measure them.

The impeachment trial of President Andrew Johnson affords a clear illustration of the dangers presented when Congress is allowed to perform a judicial function. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers which exist when Congress is called upon to consider where to place the mantle of the presidential powers.

An additional compelling argument for restricting this authority to the executive branch is that this determination 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 best equipped to respond promptly as well as effectively in the face of such a crisis.

Obviously, such a decision must 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 other extraneous factors. Those 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.

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 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 briefly has 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 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 6 is offered for your subcommittee's consideration. 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. Events of the last few weeks argue against further delay.

Mr. Chairman, I appreciate the chairman's desire to confine these hearings to as reasonably a short period of time as is possible. It cannot be denied, however, that we are considering a very, very important subject. I do think that we should not throw everything to the winds just for the purpose of expediting action on this matter.

Senator BAYH. And the Senator does not care to do it.

Senator HRUSKA. I know that is not your intention. I should like to make a brief summary of the position which I had assumed and declared last year and ask permission to file a more extended statement.

Senator BAYH. May I clarify what I said a moment ago? The reason the Senator from Nebraska was not asked to make a statement earlier was because we discussed this matter, as you recall, and you suggested that in deference to the Attorney General, we forgo our statements. As I remember, what I said was not very concise and specific at all in presenting the proponents' arguments, because I thought the Attorney General should have the opportunity to make his statement. There is no desire on the part of the chairman to limit the length of this hearing. Certainly, the reason that we are trying to concentrate the time which is spent in the hearings by hearing others who might be in opposition to Senate Resolution 1 is for this very purpose. We have had a complete array of testimony supporting it and we want to make absolutely certain that everyone who objects, who has a clarifying thought or alternative solution, has a complete opportunity to be heard. This could very well be helpful to us.

Senator HRUSKA. Thank you, Mr. Chairman.

It is customary, the chairman realizes and recalls, that we always defer to members of the Cabinet first before we get into the testimony by members of the committee and then later by Members of the Senate at large.

Mr. Chairman, I should like to say that the hearings of this committee last year and this year and the wide public discussion of this subject, climaxed by the President's message which the Congress received yesterday—all of these things augur well for prompt and favorable action on a much-needed constitutional amendment. The Senator from Nebraska would like to say that by and large, he is in agreement with Senate Joint Resolution 1. Certainly I am in full agreement with sections 1 and 2.

Section 3, provides that "if the President declares in writing that he is unable to discharge the powers and duties of his office such powers and duties shall be discharged by the Vice President as acting President." In that regard, I shall just make the suggestion that the committee consider some language—it can be very concisely stated, I am sure—which would enable the President to provide for a brief and limited transfer of Presidential powers to the Vice President as acting President during periods of the President's absence from the country, or otherwise out of realiable communication. I shall not press the point any further than to make that suggestion.

It is fortified somewhat by the statement made by former Attorney General Herbert Brownell a year or two ago before this subcommittee.

Sections 4 and 5, however, are subject to two observations. The first is that section 5 violates the doctrine of separation of powers, as I understand it. Second, it details procedures in a way which is better left for legislation by Congress.

In regard to the separation of powers, section 5 provides that in disagreement between the President on the one hand and the judgment of the Vice President and a majority of the Cabinet on the other, Congress will then decide the issue by a two-thirds vote and will do it immediately. I shall not at this time go into the question of what "immediately" means and what difficulties would be encountered in regard to construing "immediately." That has been pretty well covered. But I do suggest that it is customary for the Congress to proceed by way of hearings. They would want evidence. They would be entitled to it. They would be entitled to have members of the Cabinet come before it to express their opinions and their report on observations of the President's condition, health, and so on. Certainly there would be debate in the Senate and in the House as well. When we say "debate," then of course, we might get into some difficulty as to the length of that debate.

It is my suggestion, that the Cabinet should decide the factual issue as to whether or not their appraisal of the situation is correct or whether the President, in saying "I am once again able to resume the duties of the Presidency," is right.

There are several points to be made on this question. One is, as I have already said, that it is a factual issue rather than a policy issue. The policy issue has already been decided in the preceding election. They want Mr. X as President of this country. Every fair intendment should be given to see that the continuance of that man in office should not be subverted.

Who is the best informed to resolve and decide this factual question? It would be those who are close to the President. Those who see him, talk to him, and observe him. Those who have had a chance to talk to his physicians and to members of his family.

This factual issue should be resolved by those who are loyal to the President and sympathetic to him. It should be at the hands of people who would give him every fair intendment for his continuation of service as President. If doubt exists, they should resolve it in favor of the President. But if there is a flagrant case of disability, then certainly they should act and I feel confident would act firmly.

There is one other tremendous advantage that Senate Joint Resolution 6 would have over the provisions of section 5 of Senate Joint Resolution No. 1. That is that the Cabinet could act expeditiously without being so hurried in their decision that they would sacrifice substance and merit for a decision.

If they do not act and do not support the Vice President, then, of course, the issue is automatically resolved. The President resumes the discharge of the duties of his office.

Mr. Chairman, there has been a great deal of public discussion of this amendment. I want to congratulate the chairman for the fashion in which he has held these hearings this year and last year. The hearings and the fine fashion in which he arranged them contributed greatly to the public discussion of this problem, which is so wholesome and so healthy. I should like to place in the record at this point some of the printed reactions to these proceedings.

One is a New York Times editorial of January 5, 1965, which comments on the report of the Committee for Economic Development under the chairmanship of Marion B. Folsom. That report is a splendid report. It is very thoughtful and very thorough. I quote only briefly:

> The group proposed some revisions in the Bayh amendment, most importantly a shift in the main burden of responsibility for declaring a President's disability from the Vice President to the members of the Cabinet. This would be an improvement.

That was from the New York Times article.

There was another one in the Washington Post, an editorial entitled "An Achilles Heel?" There they dwell in particular upon this matter of time:

> What does the word "immediately" mean? Would it require both Houses of Congress to vote without debating the issue? Would it permit any filibustering in the Senate?

Then they go on into the matter of saying would it be wise to prescribe a 10-day period or maybe a 15- or 30-day period, whatever it may be? In that respect this editorial is a very enlightening one.

There was another one in the Washington Post on January 8, Mr. Chairman, which I would like included. An article appeared in the Quarterly of the American Interprofessional Institute, entitled "The Year We Had No President" written by Richard H. Hansen, who is the author of a book by that same title and a great student of this problem.

I should like to ask unanimous consent that these documents be incorporated into the record at the conclusion of my remarks and

that I then be given permission to file the statement which will be more definitive and more particular as I have described before.

Senator BAYH. Without objection, the material will certainly be included.

(The documents referred to follow:)

[From the Washington Post]

PRESIDENTIAL SUCCESSION AGAIN

Improvements in the law regarding Presidential succession and Presidential disability will be one of the most urgent tasks of the present Congress. Fortunately, Senator Bayh is again pressing for action on his proposed constitutional amendment and hearings are promised in both Houses. President Johnson will have recommendations on the problem. For the first time there appears to be a consensus as to the nature of the changes to be sought.

The Research and Policy Committee of the Committee for Economic Development has released an able study of the subject which looks in the same direction as the Bayh amendment. In addition this group headed by Marion B. Folsom lays down some general principles that will help to guide the debate. There must be no break in the exercise of the Presidential power. No doubt should be permitted to arise as to who holds the office. The procedures for transfer of the power should be fast, efficient, and easily understood. No sharp shift in policy or change of party should be involved.

The heart of all the plans being currently discussed is replacement of the Vice President as soon as the office becomes vacant. The CED report notes that eight Vice Presidents have become President, seven have died in office and one resigned. The office has been vacant a total of more than 37 years since it was created. The CED report endorses the Bayh resolution passed by the Senate last year authorizing the President to nominate a Vice President whenever a vacancy occurs, although it suggests confirmation by a joint session of Congress rather than by the two Houses acting separately, as the resolution provides.

In dealing with Presidential disability, the CED favors a more extensive departure from the Bayh amendment. Like the Bayh resolution, the CED would permit the Vice President to determine that the President was disabled (if the President did not declare his own disability) with the concurrence of a majority of the Cabinet. But on the termination of disability Senator Bayh would bring the Vice President, the Cabinet and Congress into the picture, if necessary. The CED would leave the matter entirely to the Cabinet and the President.

No doubt either plan would work satisfactorily. The CED favors a decision by the Cabinet alone because of its strong belief that there should never be any question as to who holds the Presidential power. The point is vital, but the CED report seems to reflect a misreading of the plan approved by the Senate. It would permit the President to resume his powers and duties when he proclaimed an end of his disability, unless his recovery should be challenged by the Vice President and a majority of the Cabinet. In that event Congress would "immediately decide the issue." As we understand the language there would be no hiatus in which the authority would dangle somewhere between the two. Upon a challenge by the Vice President and a majority of the Cabinet, authority would remain with the Vice President until a vote in Congress had been taken.

This is a point that will need clarification beyond any possibility of confusion. When that has been done, we hope there will be very broad support for the version that emerges. The country cannot afford to risk any confusion whatever as to how the Presidential office will be filled or to allow any time lapse that might expose the country to national disaster.

[From the New York Times]

LINE OF SUCCESSION

"Only in the White House can you finally know the full weight of this office," President Johnson told Congress last week in his state of the Union message. It is a sentiment that each of his predecessors would affirm.

Because the responsibilities of the Presidency are so enormous, the rather casual, ramshackle arrangements the American people tolerate to cover Presidential death or disability are shocking. For more than 13 months, the

United States has been without a Vice President. Until Hubert H. Humphrey is sworn in on January 20, it will continue to be without a fully qualified, popularly chosen, potential successor for its highest office.

With President Johnson's backing, Senator Birch Bayh of Indiana has reintroduced his proposed constitutional amendments for correcting the deficiencies in the present machinery. It is encouraging that Chairman Emanuel Celler, after disgracefully shilly-shallying on this issue last year out of a mistaken deference to Speaker McCormack's sensibilities, has announced that he will make it the House Judiciary Committee's first order of business. The Senate unanimously adopted the Bayh amendment last September but the House took no action.

The amendment provides that whenever there is a Vice-Presidential vacancy, the President shall nominate a Vice President to take office upon confirmation by majority vote of both Houses of Congress. If the President were to become disabled and could not communicate that fact in writing, the Vice President would take over temporarily as Acting President if he notified Congress and had the concurrence of a majority of the Cabinet. The President could reclaim his powers immediately upon his recovery.

If disagreement developed over whether he had recovered, Congress would decide. Except for this final provision, the disability arrangement is identical with that worked out by President Eisenhower and Vice President Nixon in 1958 and adopted by each of their successors.

A unit of the Committee for Economic Development, under the chairmanship of Marion B. Folsom, former Secretary of Health, Education, and Welfare, has just released a thoughtful study of this succession-and-disability problem—one that merits careful congressional consideration. The group proposes some revisions in the Bayh amendment, most importantly a shift in the main burden of responsibility for declaring a President's disability from the Vice President to the members of the Cabinet. This would be an improvement.

We also strongly endorse the committee's suggestion that Congress repeal the 1947 Succession Act, which interposed the Speaker of the House and the President pro tem of the Senate ahead of the Cabinet in the line of succession. Even if the amendment is ratified, this Succession Act could still be critically important if, for example, a President and a Vice President happened to be assassinated at the same time.

The overwhelming argument against the present law lies in the simple fact that, for 8 of the 18 years since it was adopted, Congress has been controlled by the political party opposed to the President. To add to the death of a Chief Executive the further disrupting effect of a change in party control of the White House makes no sense. This is the year for Congress to put the line of succession in better order.

[From the Washington Post, Jan. 28, 1965]

An Achilles' Heel?

The proposed constitutional amendment on presidential succession and disability merits the high priority it has been given by the Senate and House Judiciary Committees. Since the Senate passed the resolution by a vote of 65 to 0 last year, Senator Bayh, its chief sponsor, hopes to conclude the new hearings in 1 day—Friday. Chairman Celler of the House Judiciary Committee will begin hearings on February 9. If action is similarly prompt on the floors of the Senate and House, the proposed amendment can be sent to the States for ratification within 2 or 3 months.

Much work has been done on the resolution sponsored by many Members of both Houses, the American Bar Association, and other groups. Some questions about its meaning remain, however, and these will doubtless be the chief points of interest in the forthcoming hearings. For example, the resolution provides that if the President should declare his disability at an end and the Acting President (the Vice President) should disagree, with the concurrence of a majority of the Cabinet, the issue should be "immediately" decided by Congress.

What does the word "immediately" mean? Would it require both Houses of Congress to vote without debating the issue? Would it permit any filibustering in the Senate? Representative McCulloch has suggested an amendment to this provision which would require Congress to vote within 10 days. But 10 days of debate on such an issue, with feeling mounting on both sides, might be calamitous.

We agree with Mr. McCulloch's feeling that the provision ought to be more specific, but his particular remedy might be worse than the current vagueness.

The chief question that arises is whether or not Senators would be permitted to filibuster the issue and thus indefinitely prevent the President from regaining his powers. This loophole ought to be closed. In our opinion, the question of restoring the President's powers ought to be made nondebatable (since the facts would doubtless be well known from the President's declaration and the Vice President's written report to Congress) or the period of debate should be specifically limited.

We do not assume that the Presidential power would be in limbo if such a dispute arose between the President and Vice President. The powers of the Presidency would be in the hands of the Vice President and would remain there, if the Vice President and the Cabinet thought the President still disabled, until a vote in Congress could be taken. But there should be no possibility of filibustering against the decision of so momentous an issue. One of the chief reasons for enactment of the proposed amendment is elimination of the uncertainty resulting from a Presidential illness. The elimination of uncertainty requires elimination of the filibuster as an instrument of obstruction in such cases.

[From the Quarterly of the American Interprofessional Institute]

THE YEAR WE HAD NO PRESIDENT

(Richard H. Hansen, Lawyer, Lincoln, Nebr.)

"Five U.S. Army warrant officers, members of the White House Army Signal Agency, have a unique assignment. They are entrusted with a large leather pouch, with a double lock. This pouch contains all the supersecret messages and codes to put the Nation's key emergency plans into effect. These are the plans which only the President can initiate.

"They are not plans for declaring war. They are plans to meet any military challenge to the security of the United States and its allies. The pouch contains the coded key to unleash our retaliatory forces, if we are attacked."

On the President's desk sits a telephone with a direct hot line to the Armed Forces Control Center. A few words by the President into the mouthpiece and the Nation's retaliatory forces are on their way.

What would have happened if Lyndon Johnson had had a disabling heart attack on November 22 and the Communists had chosen that moment to make a nuclear strike? True, Kennedy had a private agreement with Johnson to cover the contingency of Kennedy's incapacity, but there was no law on the books to cover either an incapacity by Kennedy or Johnson or both.

The majority of Americans, at least until November 22, have been too prone to subscribe to the comforting fallacy that the Vice President automatically takes over as a substitute President; we have been indifferent to the problem because it seems so basic that we have taken for granted that there is statutory provision for such contingencies. But there is no provision in the Constitution or laws of the United States for determining when a President or Vice President is disabled. President Eisenhower initiated the idea of a written informal agreement with Nixon to cover a presidential inability; John F. Kennedy made a similar agreement with Lyndon Johnson in August 1961, but we never knew whether it was oral or in writing. We do know that the present agreement on presidential inability between President Johnson and Speaker McCormack, the second in line, is purely verbal. So there has been a "regression" on even the private agreements.

American, history from 1881 to November 22, 1963, illustrates the potential for catastrophe in this dangerous gap in our law. In considering the cases of Presidents Garfield, Cleveland, and Wilson, I ask you to consider what would happen if similar incidents should occur today.

Next to John F. Kennedy and Theodore Roosevelt (who invented those damned hikes) James A. Garfield was the country's youngest President. He was barely 50 when he took office in 1881. It was one of the sad quirks of history that he had one of the shortest terms of any President—a mere 7 months, for he was shot on July 2, 1881, and died 90 days later. During this last month of his illness he had hallucinations and was completely out of his mind. The only presidential act he was able to perform was the signing of the extradition paper. For 90 days the operations of the executive branch were paralyzed. And the

Cabinet did not ask Vice President Chester Arthur to take over and act as President during this time, for reasons I will discuss in a few minutes.

Grover Cleveland was operated on for cancer of the jaw in July 1893. Only one Cabinet member knew of the impending surgery, which took place on the yacht *Oneida*, as it sailed out to sea. The President was placed in a chair, which was strapped to the mast to prevent unnecessary motion during the operation. Cleveland couldn't even sign his name for a month afterward and the public didn't know of the operation until 7 years later—and neither did Vice President Stevenson.

Woodrow Wilson was stricken in September 1919 at the height of his fight for the League of Nations. He never fully recovered. For several months he was completely bedridden and when spring came and he went for rides in a White House limousine, he had to be propped up so he wouldn't fall over when the car turned corners. Vice President Thomas R. Marshall was never asked to take the reins of government temporarily.

Why haven't the Vice Presidents temporarily assumed the office at such critical periods? There are two reasons: One is a legal argument which has been used as a smokescreen to cover up the real and more practical, political reason. The strange part about it is that the legal argument doesn't hold water when closely examined, although it has been blandly accepted since 1840.

The year 1840 was the year President William Henry Harrison died after 1 month in office. The question arose as to whether Vice President Tyler became President in his own right, or whether he merely became Acting President. The query would have been academic except for the fact that Tyler's archenemy in politics, Henry Clay, implied that "Acting President" Tyler had fewer powers than the regularly elected Harrison. Clay wanted Tyler to be another "Clay pigeon." Tyler, who was Harry Truman's great-great-granduncle was not about to take orders from anyone, especially Clay. Of course, constitutional history proves that an Acting President would have the same powers as a regularly chosen President. But as Henry Adams says, "practical politics consists in ignoring the facts." Besides, in 1840 that constitutional history wasn't readily available to Tyler. Libraries were few, the records of the convention had not been published.

Tyler, like Truman, acted quickly. He promptly asserted that he had become President on the death of Harrison. Thus he established the Tyler precedent which has been followed by seven Vice Presidents when a President died. This deviation from the original intent of the Constitution would be of theoretical interest, but for the fact that the Tyler precedent has been used, in a different situation—when the President is incapacitated—used as smokescreen to prevent the Vice President from acting as President.

Now let's look at the real reasons why Vice Presidents Arthur, Stevenson, and Marshall were not asked to step in and act as President until their Chiefs recovered.

Arthur belonged to a different faction of the Republican Party than Garfield, and Arthur was nominated for Vice President solely to placate that faction. After Garfield and Arthur were inaugurated, Garfield got into a hot political battle with two New York bosses, Conkling and Platt, and the country witnessed the strange spectacle of Arthur, the Vice President, making speeches for the bosses, in opposition to the President with whom he was supposed to serve. Is it any wonder that the reform Cabinet of Garfield refused to ask Arthur to serve? They were afraid he would scuttle Garfield's whole program, especially the passage of the Civil Service Act which Garfield had given priority. It is more than interesting to note, however, that after Garfield died, and Arthur became President, Arthur rose to the occasion, and it was he who engineered the passage of the Civil Service Act and signed it into law.

Cleveland's Vice President, Adlai Stevenson, also represented a different wing of the party. Cleveland was a New York gold standard Democrat, while Stevenson was an Illinois silverite. Stevenson became Vice President for the same reason that Arthur had been nominated, as a gesture to placate the opposition wing. Cleveland fell ill just after he had called Congress into a special session to consider repeal of the Sherman Silver Purchase Act, which Stevenson favored. Cleveland, under the circumstances, wasn't about to advise Stevenson of his illness. The vote was close anyway.

Woodrow Wilson considered his Vice President, Thomas R. Marshall, a small caliber man. The Hoosier, Marshall, was Wilson's second choice for the post.

However, Marshall was an advocate of the league and had Wilson let the man from Indiana take over the Presidency during the critical period of the fight for the league, history might well have been different. As it is, Marshall's sole bulwark against oblivion is his remark that "what this country needs is a good 5-cent cigar." What is the answer to this problem?

MEMOS ONLY A PARTIAL STOPGAP SOLUTION

Both Presidents Eisenhower and Kennedy realized this. Both Presidents realized that there were serious deficiencies in the memorandum. It was General Eisenhower who pointed out to me one of the most serious weaknesses in this type of agreement. He emphasized the point several times in an interview at Gettysburg in June 1961.

"The whole strength of the agreement," said Eisenhower, "depends upon good will between the President and Vice President." Good will—and the history just outlined shows that there is often ill will between the two officers. Good will is not the basis for the selection of a vice-presidential candidate; geography is the determinant. The marriage of our President and Vice President is one of political convenience, not compatibility.

Eisenhower might also have pointed out another very serious weakness in these memorandum agreements—they do not solve the problem of removing the veil of secrecy which traditionally surrounds Presidential illnesses. For instance, there is no legal requirement that these memoranda themselves be made public. Only a handful of people have ever seen the originals of the two memoranda on disability. Publicly, they are evidenced only by White House news releases. This is not a reflection on Eisenhower or Kennedy, since the arrangements are purely personal as the law now stands. Eisenhower tried repeatedly to get Congress to pass legislation on the subject. Nor would any intelligent person suggest that these understandings are anything other than what they purport to be. But isn't it a strange anomaly when our law requires publication in the Federal Register of a Presidential proclamation concerning the government of the tiny insular possession, Palmyra Island, but not of a document determining succession to the Presidency of the entire Nation?

These are only a few of the weaknesses of the memorandum method. Other dangerous gaps are discussed in the book, and I wouldn't want to discourage you from looking for them there.

Our Congressmen and even President Eisenhower in his proposals to the Congress, were greatly concerned over what method should be used to determine Presidential disability and there were almost as many ideas as there were people. This is the problem to which the American Bar Association conference on January 20-21 addressed itself. Strangely enough, they all overlooked a very obvious first step: before worrying about the method for Congress to enact we must make certain Congress has the power to enact any method.

The ambiguous wording of the Constitution raises a question concerning the power of Congress to pass statutes on the subject. It would be amusing, if it were not so tragic, to see legislators in the Congress arguing about the various methods for determining disability when there is considerable doubt as to whether they have the power to adopt any method at all. This is the first problem to be met nationally; a clarification, by constitutional amendment, of the power of Congress in this regard, with a qualifying safety clause limiting Congress to a method compatible with the maintenance of the three separate branches of Government, thus prohibiting the legislative branch from using a disability procedure as a handy alternative to impeachment of the President.

Then a panel would have to be established by statute to make the actual determination of when a Presidential disability exists or terminates. This is one of several suggestions that have been advanced.

On January 22, 1964, I stood at the grave of John F. Kennedy in Arlington National Cemetery. In June of 1961 I had consulted with Ted Sorensen and others on the Kennedy-Johnson memorandum and the contingency of a disability on the part of President Kennedy seemed remote indeed. At his graveside, I reflected on the fact that I held a briefcase containing the recommendations just presented to the American Bar Association's Conference on Presidential Inability. In my heart was a prayer and a dedication that President Kennedy's death must not be a meaningless event, but that one of the many ramifications might be im-

petus to the drive for a needed constitutional amendment to insure the United States of America against another year without a President.

With your help and interest we will make that prayer a reality.

Senator BAYH. I am very familiar with the editorials, as well as the article by Mr. Hansen. In fact, Mr. Hansen was a member of the American Bar Association consensus group which met for 2 full days last year at this time, doing yeoman service in arriving at the consensus of the conflicting thoughts. I would be the first to say that articles such as the fine editorials in the Post and the Times, which I have read, have made substantial contribution to discussions like those we are participating in here and will continue to participate in, where we have divergent views expressed, particularly as they are expressed as articulately as my friend from Nebraska expresses his.

Senator HRUSKA. The chairman is kind.

Senator BAYH. I would like to point out the primary obstacle this subcommittee has been faced with and the Nation has been faced with for almost 200 years now, as far as finding a solution to this problem. It is certainly something to be taken into consideration as we discuss and deliberate upon the merits of any question; that is, the problem has not been solved. We have been confronted with these shortcomings.

Why has it not been solved? The question has been asked repeatedly. The answer is not that Congress has not studied it, that Congress has not made proposals. Quite to the contrary. The answer is, as I have seen it, that we have had so many different proposals and a refusal or reluctance on the part of the proposers to sit down and work out an agreement which we admit is not perfect, but which is better than no solution at all.

That, I think, is why we have had so much discussion on Senate Joint Resolution 1. It is not because I have had anything to do with it, but because many people have taken a lot of time, have given and taken in an effort to reach a solution. We have had 13 proposals before the Senate last year, as the Senator knows. Of this, now, we have 75 Members supporting this resolution. I do not think there is one of them, certainly not myself as the primary sponsor, who will say this is perfect. But I think it is the best we are going to get and I think it is far better than no solution at all.

I know the Senator realizes the need for give and take in the legislative process, yet the goal must be gotten to in the best way we possibly can. I felt compelled to make this statement to the Senator. If he wants equal time, he may fire away.

Senator HRUSKA. I have already had equal time, Mr. Chairman. We understand the process of legislation, I am sure.

I do feel that this time the Congress will speak on the subject, make a determination among the various views and submit the amendment to the States for ratification. In loyalty to the practices I feel important, I do feel a necessity in presenting this view. I thank the chairman for his tolerance.

Senator BAYH. You present your views very well.

The Senator from Iowa has been more than patient.

Senator Miller, we are glad to have you with us as a man who has expressed a great deal of interest in this, and in fact, a man who has a measure before this subcommittee.

STATEMENT OF HON. JACK MILLER, U.S. SENATOR FROM THE STATE OF IOWA

Senator MILLER. May I say that my patience was matched by my interest in the fine colloquy between the chairman and the Senator from Nebraska.

Mr. Chairman, I share the concern of all our colleagues over the need for a Presidential succession law. It was for this reason that I supported the measure which passed the Senate last year, and I want it understood, Mr. Chairman, that if that is the choice before the Senate this year, I would propose to support it again.

Unfortunately, the problem of what to do in the case of the disability of the President also exists. That has recently been taken care of, I understand, by an arrangement between President Johnson and Vice President Humphrey. But there is considerable support for the idea that this should be taken care of by law. Just how to do it has led to a great amount of controversy, and this controversy had a bearing on the failure of the House to act on a Senate-passed measure last year. I hope that the committee will take careful note of the fact that 21 Representatives have introduced 28 different alternative proposals on this disability problem this year.

It seems to me that the first order of business is the problem of Presidential succession. I say this because the disability problem has been taken care of by the arrangement to which I have referred, granted that it only relates to the present incumbents.

So I have introduced my bill, Senate Joint Resolution 15, which relates solely to succession, believing as I do that the two Houses could readily agree on this point, whereas to couple with a succession bill, as we did last year, the disability matter might lead to further delay in acting on this important matter.

Under my bill, in the event of a vacancy in the office of Vice President, either because of the death of the Vice President or his succession to the Presidency, the President would nominate a Vice President of the same party affiliation as that of the President. The nominee would take office only upon confirmation by a majority vote of both Houses of Congress in joint session. Thus, my bill meets head on this problem of possible future controversy in the event the Congress is controlled by one party and the office of the Presidency is controlled by another party.

This problem could have arisen during the terms of both President Eisenhower and President Truman. I would hope that there would be a general agreement on this approach to the succession problem. In the event my bill is not acted on by this committee, it might see fit to fragment Senate Joint Resolution 1 into two parts or two separate bills, one dealing solely with succession, the other dealing with disability.

I think we should bear in mind that it is not going to help the country at all if the Senate passes a bill and the House does not. I think we would be better off if both Houses passed a succession bill this year and the disability problem, if it were not treated in both Houses, were taken care of at a later time.

Thank you.

Senator BAYH. I want to thank the Senator for his very good statement, as well as his interest in the matter. If I might make one or two observations and permit my colleague to comment on them, I think those of us in the Senate last year should bear at least our share of the responsibility for the House's refusal to act. As you will recall, we were involved in a little "discussion" on the matter of civil rights. It was not until the very waning hours of the session that we got the measure over to the House and the House Judiciary Committee, particularly, was involved, with respect to the other body—was involved in some rather controversial matters such as school prayer and reapportionment, as well as presidential succession.

I think the Senator should know, probably already knows, that the Speaker of the House in this session has stated his support for Senate Joint Resolution 1, and the chairman of the Judiciary Committee has introduced a similar act and the ranking minority member, Representative McCulloch, has introduced a similar measure. He has put on it a time limit, giving 10 days in which to act.

I only mention this because I think that the Senator's concern over the need not to pick up the enemies of one part and bestow them along with the enemies of the other is a very real concern. I do not share his opinion that this is going to be a roadblock this time, but I do feel that if we do run into this roadblock, we should be prepared to decide to go two separate ways.

It is my feeling that the problems are closely related and if we can get them together, we have one constitutional amendment on two similar subjects, rather than two amendments.

Senator MILLER. I might say I recognize the controversy over this succession as well as the disability treatment that prevailed in the last session of the Congress over in the House. But I think it would not do any harm if two bills came out of this committee and two bills went over to the House, one on succession and one on disability. If there is no particular controversy over there, then both of them will pass without any difficulty. I do not see that there is going to be any particular functional problem about getting these two separate bills passed in the same session of Congress, referred to the various legislatures, and acted on. They can both be relatively short.

But I invite the attention of the chairman to the fact that there are 28 different alternative proposals on this disability question. And granted that the Speaker may be inclined to support, let us say, the bill Senate Joint Resolution 1 when it comes over to the House, this certainly does not guarantee that that is what is going to happen in the House, as we witnessed just the other day in the case of the Commodity Credit Corporation deficiency appropriation. I think this problem is too deep and important to the people of the United States to run any risks. I do not see any risks at all by having two bills. But I certainly see a risk if we have just one. That is the main thesis that I am presenting here.

As I say, if this is the choice that will be before the Senate upon passage, I would propose to support this legislation, as I did last year. I share the chairman's appreciation for the tremendous amount of work that has gone into Senate Joint Resolution 1. But we have to think of the other body, and because of so many alternative proposals now pending over there, I think we could not do any harm by fragmenting this into two bills.

Senator BAYH. We certainly appreciate your thoughts. I would like to ask a question of you as an astute attorney. As you realize, we have tried to keep these constitutional amendments as short as we can. I would like to ask you a question on the need for the inclusion of the wording in your bill which says that he shall be a member of the same political party as the President. From the practical standpoint, I think that is what we want to accomplish. I think any President would nominate such a Vice President.

Senator MILLER. I certainly do, Mr. Chairman, because I think it would be most unfortunate if a President of one party genuinely wished to nominate a member of his own party, as I would be confident that most of them would do except under most unusual circumstances, and found that perhaps the Congress would object to the fact that there ought to be a President of the other party. We do not know what developments may exist. But if we have clearly nailed down in the Constitution that there is no choice in the matter, there cannot be any controversy in a joint session of Congress over whether or not this nominee shall be a member of the President's party or some other party, then there is no room for argument about it and you get on with—you may have a difficulty over the nominee himself, but the problem of which party he belongs to will be completely eliminated.

We have seen some tough times, when you have a member of one party in the Presidency and a member of the other party patrols one or both Houses of the Congress. This could particularly happen in an off year, when the party that controls the Presidency has lost the battle in the Congress. So I suggest we eliminate that problem once and for all by spelling it out clearly in the law.

Senator BAYH. I am not too certain, in all fairness, as one of the strongest supporters of Senate Joint Resolution 1, that we do eliminate it entirely.

Senator MILLER. Here, again, Mr. Chairman, this cannot do any harm. It cannot do any harm at all.

Senator BAYH. Granted. The one possibility that I can envision that could happen, in Senate Joint Resolution 1 or in Senate Joint Resolution 15, is that with one party controlling the Congress, another party having the Presidency, there is always a likelihood, even if we say, "who shall be of the same political party as the President," that they just do not get around to nominating a Vice President.

I think we are relying on a situation in which we have reasonable men, and an expression of public opinion. I think the Senator is relying on it in his amendment. We have to have public opinion that in a time of crisis is just not going to tolerate any political chicanery—good faith in the Members of Congress is what I am talking about.

Senator MILLER. May I say I agree with you that public opinion, after a certain amount of time, would not tolerate it. But I think we could make the same argument about public opinion with respect to a disability problem. Let us just not leave it to controversy or to chance. A mere phrase could avoid a knockdown between Members of the two Houses. I do not consider it quite excess when we are touching on something as deeply serious as this. If it is a foregone conclusion when the Members of the two Houses go over there for a joint session to act on a nomination, it is a foregone conclusion because it is a matter of constitutional law that that nominee simply

has to be a member of the same party as the one which controls the Presidency, at least that is one less thing to argue about.

Senator BAYH. Thank you.

Senator Hruska, do you have any comments on that?

Senator HRUSKA. No. I have not. The position of the Senator from Iowa has been very well stated and has a lot to be said for it. There are some countervailing points which I am sure will be discussed by the subcommittee.

But we are grateful for your opinions, Senator Miller. Thank you for coming.

Senator MILLER. Thank you, sir.

Senator BAYH. We shall proceed now with further witnesses of the committee, because a couple of them have planes to catch.

Senator BAYH. A staff member, Mr. Sharp, of one of the distinguished members of the subcommittee, Senator Dodd, would like to read Senator Dodd's statement. I shall ask his indulgence, since some of these witnesses have planes to catch, to allow them to proceed here and he can read the statement in later.

The next witness will be Marion Folsom.

Without objection, I shall ask Mr. Folsom to be the next witness. He is the former Secretary of Health, Education, and Welfare. At present, he is chairman of the Committee for Improvement of Management in Government, Committee for Economic Development. He has made a considerable contribution in this area.

I want to thank Mr. Folsom for his part in the committee's deliberation and compliment the committee for throwing the great influence that it has throughout the country behind the need to find a solution for this problem.

Mr. Folsom, we are appreciative of your being with us today.

STATEMENT OF HON. MARION B. FOLSOM, CHAIRMAN, COMMITTEE FOR IMPROVEMENT OF MANAGEMENT IN GOVERNMENT, COMMITTEE FOR ECONOMIC DEVELOPMENT

Mr. FOLSOM. Mr. Chairman and members of the Senate Judiciary Subcommittee on Constitutional Amendments, your invitation to testify on the vital subject of a constitutional amendment designed to solve the problem of presidential succession and inability is much appreciated, both by me personally and—I am certain—by my fellow trustees of the Committee for Economic Development, and by all members of the CED's Committee for Improvement of Management in Government.

This is the first occasion, so far as I recall, on which any representative of CED has appeared before this subcommittee of the Senate. Perhaps it is appropriate at this time to outline briefly CED's interests, activities, and composition.

The Committee for Economic Development was established in 1942. It has been actively engaged over the intervening years in the development of national policy positions best suited to encourage the economic well-being of the United States and of the free world. Policy statements on such matters as taxation, Federal expenditures, foreign trade, and monetary management have been issued frequently and distributed widely. Many of these have received a favorable reception, on their

merits, in the business community, in university faculties, and in other influential circles, leading eventually to broad public acceptance of their basic principles.

The Committee for Economic Development consists of 200 trustees representing a broad spectrum of business and university leadership in the United States. Its several subcommittees are supported in their work by advisory groups of the best scholarly minds in the Nation.

About 2 years ago, several top officials of the Kennedy administration and former officials of the Federal Government approached me and others active in CED, proposing that we apply the same approaches to improvement of our governmental institutions that have been used in formulating national economic policies in the public interest. With financial support from Carnegie Corp. and several other foundations, CED has established the Committee for Improvement of Management in Government. The 25 CED trustees with most experience in Government were appointed to it, and 10 additional members were added from outside CED to provide the broadest possible balance for our work.

Four of our thirty-five members had served as heads of Cabinet Departments, five had been Assistant or Under Secretaries, thirteen chairmen or members of Federal regulatory or advisory commissions, and thirteen were former bureau chiefs or directors, or special assistants to the President or to Cabinet members.

You might say one was a former Senator, Senator Benton.

Our committee's work has benefited greatly from the counsel of our advisory board, men with wide experience in governmental affairs, as well as in university and business circles. These 15 advisers are listed on page 6 of the document I think you have before you.

The Committee for Improvement of Management in Government regards the subject of Presidential succession and inability as one commanding highest priority. We recognize and commend the constructive work done by you, Mr. Chairman, and your colleagues of the Senate Judiciary Subcommittee on Constitutional Amendments, in drafting and gaining Senate approval for a constitutional amendment which—if finally adopted—would do much to correct serious deficiencies in our present constitutional system. The thought and effort devoted to these problems are a great service to the Nation.

The second policy statement issued by our committee deals with these matters in some depth, and I am pleased to submit copies of that statement for your examination. Our committee has deliberated at length on every facet of this complex series of issues, in consultation with our advisers.

We have also had the benefit of Mr. Brownell's Committee of the American Bar Association. They met with us and his staff met with us extensively in our discussions.

Both the Committee for Improvement of Management in Government and the CED Research and Policy Committee have approved the policy positions set forth in this document. Of some 60 members of these 2 committees, only 2 have expressed reservations and 1 has dissented, in footnotes contained in the document. The members of the two committees are listed on pages 5 and 6 of the policy statement.

I emphasize the strength of our concensus because there are some distinct differences between positions taken by CED and the provisions

of the proposed constitutional amendment as it was approved by the Senate in its last session.

We do agree, wholeheartedly, that any vacancy in the Office of Vice President should be promptly filled, through nomination by the President and with congressional confirmation.

We also concur, of course, on authority for the Vice President to act as President in situations where both President and Vice President are in agreement on the need.

We regard clarification of other situations, involving presidential inability, as an immediate imperative—as Members of the Senate do, also—but we believe that certain modifications of the proposal, as approved by the Senate last year, would prevent possible ambiguity and confusion in future situations that might conceivably arise. It may be well to identify, in quite specific terms, the points at which we depart in any substantial way from the previous thinking of this committee.

First, we believe that congressional confirmation of a Presidential nomination to fill a vacancy in the Vice-Presidency should be through a joint session of the two Houses, requiring approval by a majority of all Senators and Representatives present and voting.

I understand that was along the line that the Senator from Iowa was just suggesting in his amendment—a joint session.

We favor this method, as opposed either to confirmation by the Senate alone, or to approval by the two Houses acting separately, for three primary reasons: (1) The joint session corresponds to voting strength, State by State, in the electoral college; (2) action—pro or con—would be more expeditious than could be expected through separate consideration by the two Houses or under normal Senate procedures; and (3) the Senate and the House of Representatives might be in disagreement, with unfortunate effects. We acknowledge that formal action in joint session would require establishment of rules of procedure for that body but this would seem to be a relatively simple problem.

Second, we believe that the initiative in determination of an undeclared presidential inability should lie with the Cabinet and not with the Vice President. In other words, we feel that such determination should be by the Cabinet, the Vice President concurring, as was provided in the amendment as passed by the Senate last year. Our reasoning rests upon repeated experience; for example, during the Garfield and Wilson illnesses, showing that the Vice President is likely to be most reluctant to proclaim the Nation's need for him to assume the presidential powers and duties, no matter how urgent or obvious the necessity, so long as the President lives.

The Vice President should never be forced to accept authority under conditions permitting unfair charges of usurpation against him, nor should his natural feelings of deference and loyalty to a disabled Chief Executive be allowed to absolve him from his proper responsibility. The Committee for Improvement of Management in Government has taken a strong position on this point, perhaps because four of us were members of the Cabinet during one or more of President Eisenhower's several periods of illness.

If Members of the Congress were to visualize clearly the realities in cases of this kind, we believe they would conclude, as we have, that initiative should rest with the Cabinet, and not with the Vice President. Further, we oppose creation of any alternative group as a substitute

for the Cabinet in determination of presidential inability, on grounds fully explored in our policy statement. The Cabinet is best situated, through the intimate knowledge its members have of major issues of state and by reason of their day-to-day association with the President, both to judge presidential inability and to assess the urgencies in the national situation at any moment.

Third, we are much concerned that the Nation avoid any possibility of doubt, dispute, or delay concerning termination of any conceivable presidential inability. That is why we urge that this matter also be decided by the Cabinet, subject only to presidential concurrence. The amendment proposed last year opens—in our view—opportunity for confusion and dispute over who may hold legitimate authority to exercise the powers and duties of the Presidency in some future time of trial and trouble.

The principle of separation of powers among the three branches of government appears to us to be eminently sound. We cannot agree that it is wise to place a conceivable future difference of opinion between President and Vice President over the termination of a presidential inability before the Congress for decision, especially if the result is to depend upon two-third majorities in both Houses.

This subject deserves renewed attention and closest scrutiny. Under the language previously proposed, it would be possible for a President to terminate his own disability, against the judgment of the Vice President supported by the entire Cabinet and a unanimous vote of the Senate, if only one-third of the House of Representatives were to agree with the President. We may hope that no such disagreement would ever occur but some better arrangement than this should be made for the possibility, however remote it may now seem to be. We strongly reaffirm the merits of Cabinet decision on this delicate matter, subject only to presidential concurrence.

Finally, although corrective action would not require a constitutional amendment, our committee strongly prefers the terms of the 1886 statute on presidential succession, as opposed to those of the 1947 statute. If early provision is made for filling vice-presidential vacancies, the need for revision of the present arrangement would be lessened but it would still exist. The reasons for this position are noted in our policy statement and they bear great weight. One fact alone should be decisive here: For 8 of the past 18 years, the Speaker of the House has been of the political party in opposition to that of the President. Surely, we do not wish to permit a change in the partisan complexion of the executive branch through some accident of death or disability.

In summary, I would emphasize the criteria used by our committee in arriving at its choices among the various possible alternatives. They were: (1) Continuity in the exercise of Presidential powers and duties; (2) legitimacy and public acceptability; (3) certainty, leaving no doubt who—and who alone—may exercise these powers: (4) stability in policy; (5) speed and simplicity in procedures used to determine the issues; and (6) preservation of the separation of powers.

Above all, we hope and trust that the best and wisest remedy may be found for each defect in our present system. The Constitution is not easily amended, nor should it be. The process requires the kind of careful deliberation being given in this case.

I would conclude by quoting a key paragraph in our CED policy statement:

> The urgency of national action, to resolve the doubts and uncertainties clouding Presidential succession and inability, cannot be overly stressed. Failure to correct the deficiencies will subject the Nation to risks and hazards that are avoidable. Prompt action is imperative.

In view of the discussions between the Senator from Nebraska and the Attorney General, I would just like to call your attention to one passage from our statement, about the question of bringing Congress into the picture. It begins with the words, "The disadvantage of a Senate-approved arrangement goes too far"——

Senator BAYH. Could you tell me what page it is on?

Mr. FOLSOM. That is on page 31 in the middle of the page. It ends with the sentence:

> Given a Congres with a hostile two-thirds majority such as existed during the Presidency of Andrew Johnson, it could be used to deprive the President of his powers and duties, without resorting to the circumscribed impeachment procedures.

In summary, our main concern—I might say that if the committee finds that they get better agreement on your resolution without any change, we certainly feel that you should go ahead and pass the legislation as it is without any changes. But we do feel, as indicated in our statement, that we think it would improve with these three somewhat minor differences. In some ways, it could be very easily changed, but on the other hand, we think they are quite important.

The first is that we think to authorize Congress to decide this dispute really alters the constitutional separation of powers. By providing this to Congress, we think you are apt to get into a period of indecision and confusion where the people would not know who was going to be President. As the Senator from Nebraska indicated, this might last quite awhile.

We also think that you should lodge authority in the Vice President to declare Presidential disability.

In other words, the initiative should be, we feel, in the majority of the Cabinet to bring it up, with the Vice President concurring, rather than leave it to the initiative of the Vice President.

Now, it might be that your amendment would not forestall that, but we think it would be more clearly stated if you say, as we do in our suggestion, that it is to be brought about by the Cabinet, approved by a majority of the Cabinet, with the Vice President concurring, rather than the Vice President with the majority of the Cabinet concurring. That is a question of changing the wording. Maybe you experts can say whether it is necessary to make that change or not.

But anyhow, we feel it is very important that some action be taken in this session of Congress, and we have been very much impressed with the favorable comments which we received in the press throughout the country on this subject. We have had very wide comments in the news releases on our statement, and we have had many editorials, some of which support our position and some of which do not. But it shows that the people of the country are very much concerned about this issue right now.

Thank you very much, Mr. Chairman.

Senator BAYH. Thank you, Mr. Folsom.

May I ask a question or two, please?

Mr. FOLSOM. Surely.

Senator BAYH. In that portion dealing with disability, there seems to be a little difference between who should have the initiative. In the wording, it says:

> The authority to decide that Presidential inability exists should be placed in the hands of the Cabinet, in consultation with the Vice President or other successor. Any such decision should be by a majority vote of the Cabinet, the Vice President concurring.

Then it goes on to say:

> Upon the initiative of any member or of the Vice President.

Now, how do you reconcile that?

Mr. FOLSOM. What we meant to say there was that in the case of a question, if the Presidency, if there is some question about the Presidential ability to carry on, it would be brought before the Cabinet. The Cabinet members can bring it up or the Vice President can bring it up, but we say we ought to have a majority of the Cabinet, with the Vice President concurring. In other words, we do not want to leave the initiative entirely with the Vice President. If he wants to bring it up, fine, but we also want to have an opportunity for the Cabinet to bring it up, because we do find in past practice that the Vice President never wanted to bring it up. We do not want to put that burden on the Vice President. We think it is more apt to be done if the Cabinet member were to bring it up, because it is a very difficult position for the Vice President to be put in.

Senator BAYH. He could be very reluctant.

Mr. FOLSOM. That has been the situation in the past. We do not want him not to bring it up, but we say it the other way around, that the Cabinet ought to bring it up.

Senator BAYH. I do not think there is any further need for me to explore your opinion on the congressional activity in the disability problem.

Mr. FOLSOM. I was interested to see the Senator from Nebraska agreed pretty much with our position on this.

Senator BAYH. Not that we shall not fully consider your contentions, because I think they are well taken. I detect the fine hand of the Senator from Nebraska in some of this. He is certainly very much in agreement with you.

I would say that I do not think that Senate Joint Resolution 1 provides in the language—and if you think otherwise, I would like to know—that the language provides confusion as to who is President. This we tried to go to great extremes to provide for, who is President. The question goes to the legitimacy of the person who does have the power at that time. It is our feeling that no matter which system you use, it is possible to conjure up the situation in which the public is going to be very confused about the legitimacy of the person possessing the power.

Mr. FOLSOM. Our proposal, though, was any discussion going on in the Cabinet, where it gets before the decision is made who is going to be President. There is bound to be confusion there as to who the President is actually going to be.

Senator BAYH. I think if I know anything about my colleagues, there is liable to be a lot of discussion and debate on any activity that would be taken within the confines of the Cabinet. This would be public and very confusing. Nevertheless, I do not want to duplicate the other colloquy that we have had here.

One other item or two in explanation. The alternative group other than the Cabinet, which is included in the consensus opinion or Senate Joint Resolution 1, was arrived at after a couple of all-night, all-day sessions with the American Bar Association group. We felt that this would give us a possible safeguard if, for some inconceivable reason now, later experiences indicated the Cabinet could not deal with this matter that Congress, without going through the whole rigmarole of the constitutional change, would unquestionably have the authority to say that some other group needs to be taken into consideration.

I just wanted to explain this, not to resolve the argument.

Mr. FOLSOM. Our committee felt that the members of the Cabinet were in a better position to judge the situation than almost any other group you could pick.

Senator BAYH. As I say, I agree wholeheartedly with you, and I cannot conceive of any eventuality where any other group would be called upon. But there was some feeling that this would provide a safeguard in the event something did come up which would be a part of it.

The possibility of a joint session was considered at some length by the committee, and again, this is a matter of compromise entering into the picture. We ultimately arrived at the individual session determination of the new Vice President.

One of the deciding factors there was that there are no provisions, to our knowledge, for calling them into joint session on any particular day. We contemplated a rather vigorous, time-consuming discussion on the establishment of rules. You pass over this rather lightly and do not anticipate the problem. But if this were the first time a joint session was ever called, the establishment of rules, could be debated between the two Houses at that time, and it might be very time consuming.

Mr. FOLSON. That would be provided for ahead of time. Would you not make you're provisions ahead of time for a joint session?

Senator BAYH. We could.

Mr. FOLSOM. That would be part of our proposal, that you should make all provision for this and not wait until the emergency arises.

Senator BAYH. You would suggest now that we have legislation to establish the rules for a joint session which could be provided for in the Constitution?

Mr. FOLSOM. Yes; we feel that this is an unusual situation, and we do not see why you should not have an unusual method of handling it. Also, as we point out, we think it is a little more representative to take the two together. It would be just the same as the electoral college.

Senator BAYH. A point well taken.

Mr. FOLSOM. Also, it would be more expeditious, because you would have one vote.

Then you do have the possibility of one House voting one way, one another, in the individual session, and you would be in an awful spot.

Senator BAYH. Here again, you must rely on reasonable men and public pressure.

Mr. FOLSOM. We also feel, with all due respect to the Senate, that with the House, with the whole House having to be elected every 2 years, they are in a little closer touch with the people at that time than the Senate might be.

Senator BAYH. Then it is conceivable that the House might be of the opposing party, which would add a complicating factor. You could come up with all sorts of things.

Mr. FOLSOM. That is why we looked into—you will notice in our document, we considered the various alternatives and we finally agreed on this. Another group of people might agree on some other thing. But we do feel the important thing is to get action and we would not quarrel at all.

Seantor BAYH. I think your suggestion that they should be considered in advance is a good one and that we follow this approach, because the rule is not as simple as discussing parliamentary procedure. For instance, they could get into the question of requiring the Members of Congress to vote en bloc, as they are required to under the electoral system?

Mr. FOLSON. Our point was—just take the majority of the joint session.

Senator BAYH. Senator Hruska?

Senator HRUSKA. Mr. Folsom, we are grateful for your coming here. Needless to say, the Senator from Nebraska thinks your report is of high quality and of great merit. I would suggest there has not been direction by the hand of this Senator in the formation of this report. I wish I had been privileged to appear before the committee in some of your discussions. But I do not know that I could have contributed much, in view of the general approach that your committee eventually adopted.

It seems to me this discussion of a joint session and rules for it lends added strength to the approach that is used in Senate Joint Resolution No. 6, which says that all these procedural matters—this matter of what rule and what parliamentary procedure should be used—are left to legislation by Congress. The merit in this case is, that if actual practice would show that the separate sessions of each House would be an impracticable situation, then we could change it by statute.

On the other hand, if we try a joint session and find it to be unworkable, then we could legislate and not go through this process of amending the Constitution.

Do you see some merit to that suggestion, Mr. Folsom?

Mr. FOLSOM. Yes; I do see some merit in it.

Senator HRUSKA. Had the committee considered at all the exact language of Senate Joint Resolution No. 6 or its predecessor?

Mr. FOLSOM. We studied it, of course, read it, but it is not within our province, we think, to get into the actual wording of this. We were concerned only with policy questions, and we did not want to get involved in detailed language of legislation. We do not think we are competent to do that.

Senator HRUSKA. I appreciate that, and you did make these general recommendations. They, as well as the arguments you make, are very helpful.

I was particularly impressed by the suggestion that the initiative should be taken by other than the Vice President. He is in a very delicate situation.

Mr. FOLSOM. Those of us who went through the Eisenhower experience, I think, would all agree to that. I just cannot imagine a position where a Vice President would want to come right out and say he

will take over, any more than I would in a business concern. In fact, one of the arguments one of our businessmen made—most of our people are business people who have had quite a lot of experience in Government, so they have experience from both angles. One of them said that he could not imagine a situation in a corporation where, if a president became disabled, one of the vice presidents would step up and say, "I ought to take over." It would not be done, and we think the Vice President would be in the same situation.

I know in our experience in the Eisenhower administration, it would be very, very difficult to expect. You cannot imagine the Vice President coming up and saying, "I do not think the President can carry on and I do not think he should be President."

Senator HRUSKA. Certainly, if the consensus of the Cabinet members was, that the Vice President should be in charge, the edge would be taken off that delicate situation.

Mr. FOLSOM. What would happen would be that two or three of the Cabinet members would go to the Vice President and say, "We do not think the President should carry on; we do not think he is in shape; we are going to take a vote, and if the majority of us vote that way, you are going to take over."

Senator HRUSKA. Thank you, Mr. Folsom.

I have no further questions, Mr. Chairman.

Senator BAYH. I would like to make one reference to the conference held here last spring, again under the auspices of the American Bar Association. I was very interested to learn President Eisenhower's opinion of this business of who should take the issue. He came out with the flat statement that he thought the Vice President could not escape this authority, that constitutionally it was his, that he thought no one else should have it, it was his and he should have to exercise it. But if we thought someone else should be, we thought we ought to go along and give the Cabinet ratifying or confirming authority. I do not think I am misinterpreting his statement.

Mr. FOLSOM. History does not bear it out. We have had plenty of cases where the Vice President should have taken it and did not.

Senator BAYH. I am not saying that I disagree with you, understand, but I wanted to get President Eisenhower's statement in the record. I think perhaps history might have been different if Congress had prescribed a constitutional formula by which the Vice President could do this, so that it was clear that such a step was not a figment of his own contriving.

Mr. FOLSOM. We bring that out in our statement, that it would make quite a difference.

Senator BAYH. Mr. Folsom, I appreciate very much your joining us and again want to reiterate what I said earlier, that I think your study has made a great contribution in this area.

Mr. FOLSOM. I was very glad to have the opportunity to present my views.

Senator HRUSKA. I should like to add to that that I would like to congratulate and commend the Committee on Economic Development for making the effort in this field. I think it would be helpful to us in Congress if that practice were not only continued, but in selected cases, expanded and given greater depth.

Mr. FOLSOM. Our first statement we issued was on the improvement of executive management in Federal Government. I think you

have probably seen that statement. We are now working on a statement on the budgetary process, which is going to keep us busy for quite a while.

Thank you.

Senator BAYH. Thank you very much.

I ask that the conclusions reached by the Committee on Economic Development relating to a solution to this matter and two pertinent charts regarding the replacement provisions be included in the record.

(The conclusion and charts follow:)

6. CONCLUSIONS

The urgency of national action to resolve the doubts and uncertainties clouding Presidential succession and inability cannot be overly stressed. Failure to correct the deficiencies will subject the Nation to risks and hazards that are avoidable. Prompt action is imperative.

This Committee has carefully measured the various alternatives for solution against certain criteria—continuity, legitimacy, certainty, stability, speed, simplicity, and preservation of the separation of powers fundamental to our constitutional system.

The United States of America must have one person wielding the powers and duties of the Presidency at all times. Conversely, it cannot tolerate any period of confusion in which two men compete for the exercise of Presidential authority.

Our first major recommendation, therefore, is that the Constitution be amended to provide that any vacancy in the office of Vice President be filled. We suggest giving the President authority to nominate a Vice President, subject to approval by joint session of Congress.

Those persons in line of succession after the Vice President must be familiar with day-to-day Presidential activities. No other officers can match the preparation of the Vice President and leading Cabinet members for sudden elevation to the Presidency. This Committee, therefore, recommends that the line of succession beyond the Vice President be revised, placing the chief Cabinet officers next in line, as under the statute of 1886.

We recognize that solution of the problem of Presidential "inability" poses problems, but there is one point on which accepted interpretations of the present Constitution should remain unchallenged. The word "inability" should continue to be understood to include every situation where the President, for whatever reason, is unable to exercise the powers and duties of his office. The preponderance of legal authority now holds that the President would retain his title and "office" in case of an established disability, while the Vice President (or whoever may be first in line of succession) would automatically assume his powers and duties. Clear language on this should be placed in the Constitution.

We would not change these basic concepts as applicable to situations where the President, recognizing his own inability, calls upon the Vice President to exercise the Presidential powers and duties. Similarly, they apply to those situations where the President is unable to communicate his own obvious inability and where there may be need for instantaneous action in the national interest. Beyond these situations, however, there is need for clarification.

This Committee's second major recommendation is that authority to decide that Presidential inability exists should be placed in the hands of the Cabinet in consultation with the Vice President or other successor. Any such decision should be by majority vote of the Cabinet, the Vice President concurring, upon the initiative of any member or of the Vice President. Termination of Presidential inability would follow the same procedure, except that Presidential—rather than Vice-Presidential—concurrence would be required. This proposal would also require constitutional revision; but a single amendment might include this provision with the other changes recommended.

When these two major proposals are adopted, the United States will always have one person—and only one person—exercising the powers and duties of the Presidency.

We regard these as the best choices among all proposed alternatives. We concede that some variations on these solutions would improve our present situation; but we are confident that no other alterations would meet the Nation's basic needs as well.

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	Years	Months	Day	President
George Clinton	Died Apr. 20, 1812	Mar 4, 1809—Mar. 3, 1813	Apr. 20, 1812—Mar. 3, 1813	0	10	12	James Madison.
Elbridge Gerry	Died Nov. 23, 1814	Mar. 4, 1813—Mar. 3, 1817	Nov. 23, 1814—Mar. 3, 1817	2	3	9	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	0	2	4	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	3	11	0	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	2	7	23	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	3	10	14	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	3	10	17	Abraham Lincoln, died Apr. 15, 1865.
Henry Wilson	Died Nov. 22, 1875	Mar. 4, 1873—Mar. 3, 1875	Nov. 22, 1875—Mar. 3, 1877	1	3	10	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	3	5	13	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	3	3	7	Grover Cleveland.
Garret A. Hobart	Died Nov. 21, 1899	Mar. 4, 1897—Mar. 3, 1901	Nov. 21, 1899—Mar. 3, 1901	1	3	11	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	3	5	18	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	0	4	5	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	1	7	2	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	3	9	8	Franklin D. Roosevelt, died Apr. 12, 1945.
Lyndon B. Johnson	Took oath of office as President, Nov. 22, 1963.	Jan. 20, 1961—Jan. 20, 1965	Nov. 22, 1963—Jan. 20, 1965	1	1	29	John F. Kennedy, died Nov. 22, 1963.
Total period of vacancy				37	3	12	

Source: Adapted from table prepared by History and General Research Division, Library of Congress.

Occasions on which the President and the Speaker of the House of Representatives or the President pro tempore of the Senate were of opposite parties, 1864–1964

	President and party	Speaker and party	President pro tempore and party
44th Cong., 1875–77	Ulysses S. Grant, Republican.	Michael C. Kerr, Democrat. Samuel J. Randall, Democrat.	Thomas W. Ferry, Republican.
45th Cong., 1877–79	Rutherford B. Hayes, Republican.	do	Do.
46th Cong., 1879–81	do	do	Allen G. Thurman, Democrat.
48th Cong., 1883–85	Chester A. Arthur, Republican.	John G. Carlisle, Democrat.	George F. Edmunds, Republican.
49th Cong., 1885–87	Grover Cleveland, Democrat.	do	John Sherman, Republican.
50th Cong., 1887–89	do	do	John J. Ingalls, Republican.
52d Cong., 1891–93	Benjamin Harrison, Relican.	Charles F. Crisp, Democrat.	Charles F. Monderson, Republican.
54th Cong., 1895–97	Grover Cleveland, Democrat.	Thomas B. Reed, Republican.	William P. Frye, Republican.
62d Cong., 1911–13	William H. Taft Republican.	Champ Clark, Democrat	Do. Charles Curtis, Republican. Augustus O. Bacon, Republican. Jacob H. Gallinger, Republican. Henry Cabot Lodge, Republican. Frank B. Brandegee, Republican.
66th Cong., 1919–21	Woodrow Wilson, Democrat.	Frederick H. Gillett, Republican.	Albert B. Cummins, Republican.
72d Cong., 1931–33	Herbert C. Hoover, Republican.	John Nance Garner, Democrat.	George H. Moses, Republican.
80th Cong., 1947–49	Harry S. Truman, Democrat.	Joseph Martin, Jr., Republican.	Arthur Vandenberg, Republican.
84th Cong., 1955–57	Dwight D. Eisenhower, Republican.	Sam Rayburn, Democrat	Walter F. George, Democrat.
85th Cong., 1957–59	do	do	Carl Hayden, Democrat.
86th Cong., 1959–61	do	do	Do.

Source: Encyclopaedia Britannica. Compiled from Biographical Directory of the American Congress, 1774–1961.

Senator BAYH. I would like now to call Herbert Brownell, former Attorney General of the United States, leading member of the bar of New York. I understand that he is presently president of the New York City bar.

May I say he has made a great contribution in this give-and-take situation which has resulted in coming very close to the solution of this problem and awakening the awareness of the need for this type of legislation all over the country.

Mr. Brownell, it is a privilege to have you before this committee.

STATEMENT OF HERBERT BROWNELL, AMERICAN BAR ASSOCIATION

Mr. BROWNELL. Thank you, Mr. Chairman, Senator Hruska. I am appearing this morning as the chairman of the American Bar Association's Committee on Presidential Inability and Vice-Presidential Vacancy. I wonder if I might have the approval of the subcommittee to hand up, without reading it, a statement of Lewis F. Powell, Jr., who is the president of the American Bar Association, in support of Senate Joint Resolution 1?

Senator BAYH. Without objection, that will be admitted at this time. Mr. Powell has been extremely useful in helping solve this problem.

Mr. BROWNELL. He is very unhappy that he could not be here this morning to represent the American Bar Association, but he was unavoidably detained elsewhere.

(The prepared statement of Mr. Powell referred to follow:)

STATEMENT BY LEWIS F. POWELL, JR. PRESIDENT OF THE AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.

Mr. Chairman and members of the subcommittee, my name is Lewis F. Powell, Jr. I am president of the American Bar Association and practice law in Richmond, Va. I had the privilege on June 11, 1963, and on February 24, 1964, of testifying before this distinguished subcommittee on the subject of Presidential inability, and I appreciate your invitation to appear here today—again as a representative of the American Bar Association—to discuss further the inability problem and also the related question of filling the vacancy in the office of Vice President.

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 Journal 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 understoood. It would have solved the constitutional question arising in the event of the President's inability to discharge the powers and duties of his office. It would have left 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 statute as a stop-gap measure.

In 1963, under the chairmanship of the late Senator Kefauver, hearings were held on Presidential inability by this subcommittee. Senate Joint Resolution 35 was reported favorably that year by the 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, 1964.

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; 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; Walter E. Craig, president, American Bar Association; Sylvester C. Smith, Jr., past president, American Bar Association; Martin Taylor, chairman, Committee on Federal Constitution, New York State Bar Association; Edward L. Wright, 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. Al-

though 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 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. 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.

As the problems of Presidential inability and succession have already been the subject of extensive hearings and study by this subcommittee, and as you will have further testimony from eminent scholars and experts, it is unnecessary for me to make any comprehensive statement on the history of these problems or on the manifest need for appropriate solutions.

My purpose will be merely to present some of the reasons which led to the principal conclusions in the consensus report.

PRESIDENTIAL INABILITY

The first five sections of the consensus, relating to Presidential inability, are as follows:

"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 first conclusion in the consensus requires no comment. It makes the obvious point that agreements between the President and Vice President, while desirable under the circumstances, are not an acceptable permanent solution of the inability problems.

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 (3, 4, and 5) deal in principle with the provisions of such an amendment to the Constitution. 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, and 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. An examination of the sixth clause of section 1 of article II of the Constitution (set forth in the footnote below [1]) will indicate why such a provision is necessary. Certain of the ambiguities of this clause have always been a source of difficulty and doubt. When John 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 notable instances of inability, with which this subcommittee is fully familiar, were in the cases of Presidents Garfield and Wilson. For some 80 days preceding Garfield's death, and for perhaps a year during Wilson's illness, there was a virtual void in executive leadership. The Vice Presidents then in office were unwilling to assume the powers and duties of the President because of grave questions both as to their rights and as to the consequences of such assumption.

It hardly need be said that in the current age, in which our country's responsibilities and danger are incomparably greater, we cannot afford to run the risk of another 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.

---

[1] "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."

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 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.[2]

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 carefully 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 proposed.

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 which are involved.[3]

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 now 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."

---

[2] It is believed that this particular proposal is similar to that specified in S.J. Res. 1 pending before this subcommittee and is also an approach previously endorsed by Attorneys General Brownell and Rogers.

[3] 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 first recommendation merely confirms long-established precedent, namely, that in the event of the 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 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, 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 were 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 would 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 1964 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."

CONCLUSION

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 conferees agreed, that we find a solution free from all reasonable objection. 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; such as, Senate Joint Resolution 1. We believe that Senate Joint Resolution 1, which is supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field—including more than two-thirds of the Members of the Senate—contains provisions which are sound and reasonable and consistent with the basic framework of our Government.

We respectfully commend this proposal to this subcommittee and urge that the Congress act promptly so that it may reach the State legislatures as soon as possible. Most State legislatures meet this year but many adjourn before summer. If a proposed amendment is sent to the States for ratification this spring, it is possible that the amendment could be ratified this year. We encourage early action, for that reason.

Mr. BROWNELL. I have been appearing before this committee and the House Judiciary Committee on this subject for the last 10 years so I have not prepared any written statement of views because I think they are already recorded in the record.

I do want to express my great satisfaction, though, at the able way in which this subcommittee and the corresponding group in the House have alerted the Nation to the dangers that are inherent in the present situation, leaving this critical constitutional problem unsolved. I think that the constructive work that has been done here in the development of a concise plan for amending the Constitution has been outstanding.

I would like to report that, as the result of our work in the American Bar Association, we have seen, over the past few months, an increasing public support for this solution. I think it is evidenced here by the testimony of my colleague in the Eisenhower Cabinet—Marion Folsom here—as showing the attitude of a nonlegal group, the Committee for Economic Development, in support of the principles which are embodied in this resolution. I think I can say that that interest and anxiety is nationwide.

I would like to call attention—I am sure members of the subcommittee are already familiar with the fact that time is of the essence in this matter because, in the odd-numbered years, such as 1965, practically all of the State legislatures are in session and, in the even-numbered years, only limited sessions are held in a number of States. So if the time schedule which is envisioned by these prompt hearings in the Senate and the House, starting next week, can result in action early in the session, it might save several months, if not more than a year, in getting this constitutional amendment actually enacted. Because I feel quite sure, from the response we have had from our State bar associations, that there is enough sentiment throughout the country for a solution of this problem that, once it is submitted to the States by the Congress, there will be very prompt action in the State capitals.

If there are any questions that the chairman or members of this subcommittee would like to pose, I shall be glad to try to answer them.

Senator BAYH. There have been several suggestions made already this morning that I would like to get your opinion on.

The preference for a joint session, compared to an individual session, with the problems of rules and one thing or another. The American Bar Association, as I understand it, is in support of the

individual Houses acting on this. After hearing Mr. Folsom, would you care to comment on this?

Mr. BROWNELL. You are correct in your statement that the American Bar Associatioon prefers the present language of the Senate Joint Resolution 1 in this regard, which would call for the separate meetings of the House and the Senate. We did that in the belief that it would speed the consideration of the matter and eliminate some procedural difficulties that might arise. That, I think, was the main thought that we had in mind in preferring this method. It is more usual and would be a little more orthodox, I think, when you look back over our constitutional history.

Senator BAYH. I certainly do not want to put words in your mouth at all but would you say it is fair to feel that public opinion, plus the good faith of the Members of the Congress, would prevent the possibility of a Senate filibuster, for example, or one House being in control of the opposite political party to the President?

Mr. BROWNELL. I listened to some of the questions and answers earlier in the session this morning, any number of which seem to revolve around that question, that Congress, with any participation at all, might be counted on to drag its feet. But I think that that is perhaps unrealistic because we must picture the kind of a situation that would be involved if this question ever arose. It would be a national crisis and not only the eyes of the United States but of the world would be focused on this particular thing.

I think our public officials always rise to their best heights at a time of crisis of that kind and, therefore, I would think with the overwhelming backing of public opinion for a solution of any crisis to having an orderly government, the Congress could be counted upon, without any question, to do its part.

Senator BAYH. Would the same thing apply as far as Senator Miller's feeling that we need to specify that the appointment of the eventual successor to the office of Vice President must be a member of the political party of the President?

Mr. BROWNELL. I am sure of that; yes. I think the same thing would apply. I think that public opinion would not only demand quick action, but the commonsense of the Members of the Congress would make them realize that they could not perform their constitutional functions unless they had a strong executive branch prepared to meet all emergencies.

Senator BAYH. In Senator Hruska's very persuasive discussion and analysis of Senate Joint Resolution 1, in section 1, it was his feeling that perhaps there should be some reference to a temporary disposition of this power to the Vice President.

Mr. BROWNELL. In section 3 is that?

Senator HRUSKA. Section 3.

Senator BAYH. Yes, section 3. Do you see any great objection to this? The Attorney General seemed to think that this was taken for granted. I just wanted your feeling about what you thought.

Mr. BROWNELL. I did testify in favor of making it clear, as I think you mentioned this morning, Senator Hruska, that I thought that kind of disability should be considered in the language of the amendment. In my opinion, the present language does cover that kind of a situation,

and it would give the President the authority to have the limited period for the type of situation that Senator Hruska envisions there.

For example, when the President is going to, maybe, undergo an operation or something of that sort and he does not know how long he will be under the ether, or he is on his way to a foreign country and his communications with the White House and the Capitol are very uncertain—something of that sort—I think the present language is adequate to cover that type of emergency. In my judgment, that was taken into consideration when the language was formulated.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. Yes.

Senator HRUSKA. Mr. Brownell, would you consider, therefore, if the President was undertaking a trip or proposed to undertake one, he would declare his inability to discharge the powers or duties of his office for 10 days—he could do that with the safe assumption that there would be an automatic termination in 10 days under the language as it presently exists?

Mr. BROWNELL. It is my opinion he could do so. I doubt that he would want to do it in quite that way because of all the uncertainties that would be involved and the full power that you give him in the amendment to state that he is now ready to come back and assume the powers and duties of the office. So it would not be necessary for him to put that time limit on, but if he chose to do so, I think the present language of sections 3 and 4 is broad enough to allow him to do so.

Senator HRUSKA. If something should happen to extend the necessity beyond the 10 days, one of two things would happen. If he were capable of extending it, he would do so; if not, section 4 would come into play.

I do recall your testimony last year, and I felt with this assurance, there would be a great deal of comfort given to members of the committee and Congress. Thank you, sir.

Senator BAYH. As a member of the Cabinet, I would like to have your opinion on the problem of who should take the initiative. This seemed to be a note of difference, in which the Committee on Economic Development report varies from the senatorial resolution and the one of the American bar consensus.

Mr. BROWNELL. In my opinion, the Committee on Economic Development point of view, as expressed here this morning, is based on a misapprehension. I have testified before, and I still believe that either the Cabinet members or the Vice President could take the initiative here, so long as the constitutional requirements of joint action are met.

Senator BAYH. Do you have any feeling concerning the history, as Mr. Folsom pointed out, of showing great reluctance? Do you feel the statement I made is right or wrong? I may be in error so far as what the establishment in the Constitution by an amendment of the formula would do to future action.

Mr. BROWNELL. Well, I think that you expressed yourself very well on that. The reluctance of the Vice President to act in the past has been due to the fact that he was afraid that he would be considered by the public to be usurping the office. There was no guidance from the Congress in the matter. There was nothing in the Constitution and there was substantial belief throughout the country and among legal

scholars that if the Vice President took over, he would in fact displace the President for the balance of the term, that he would be the President, and that the President could not come back, even though he entirely recovered. You have, of course, cured that difficulty in the language of Senate Joint Resolution 1, where you provide that the Vice President would come in only as Acting President for the period of disability. So that roadblock which was shown at the time of the Garfield-Arthur incident and the Wilson-Marshall situation, and the participation of Lansing, that would disappear. That would be cured under this constitutional amendment.

I believe that with that roadblock cured, this language is adequate and sufficient, but that as a matter of practice, either the Vice President or the members of the Cabinet could take the initiative in bringing about the situation which this amendment envisions.

Senator BAYH. Is there anything more that could be done to walk that narrow line? Indeed it is a fine one, in which I think the Senator from Nebraska and myself find agreement. On one side of which we want to prevent the Vice President, upon assuming the powers and duties, from purging the members of the Cabinet. On the other hand, we want him, if there is an extended illness, to carry out the powers and duties; namely, to replace a Cabinet member if there is one who, for some reason or other, needs to be replaced.

Is there language that can guarantee this?

Mr. BROWNELL. Insofar as language can do so. I know, and I am sure both of you do know that the men who are involved here, both in the executive branch and the congressional branch, in time of crisis will act not as rogues and rascals, but as patriotic Americans, as they always do and have done in time of crisis, that this will be an orderly procedure, and, so far as language allows, it is entirely adequate.

Senator BAYH. One other question, and I am sure the distinguished Senator from Nebraska would like to ask you several. We have gone into some depth in trying to explore the possible weakness of the many approaches; namely, the time limitation and the need to act quickly in the time of disability, and yet the need to act judiciously. The American Bar Association has supported the use of "immediately," as the best word we could find. Would you care to explore that with us in your thinking? You heard the colloquy that transpired here.

Mr. BROWNELL. I would be glad to try that. I would like to try, by way of preface, perhaps, to paint the picture that would be involved there.

You have very wisely provided, it seems to me, that the President can resume the powers and duties of his office at any time that he so certifies that he is able to do so. This will take care of well over 90 percent of the situation, so we are talking about here, in section 5, where the congressional participation comes in, the most unusual situation. Nevertheless, I think you are wise in tackling the problem and providing for a solution. But it would be a most extraordinary situation.

Now the President, under those circumstances, would not be likely to try to resume the duties of the office unless he was pretty sure that he had public support, that he had congressional support, that he had the support of a majority or practically all the members of his Cabinet. It would be such a reckless thing for him otherwise. It would only

be in a situation of this type where he was mentally unbalanced, or something of that sort, which would be very obvious to everyone when you consider the white heat of publicity that beats upon the White House. In that kind of a situation, it follows almost automatically that there would be strong insistence on the part of the public and the leaders in the Congress to see that he did not come back. Therefore, I do not visualize long hassles involved in this, even if this, unusual situation did arise.

I think that there would be overwhelming opinion one way or the other that would demand immediate action.

For a particular solution that is in here, the language, "immediate," we in the American Bar Association do support the language of the present Senate Joint Resolution 1, and we believe that this principle should be kept in mind.

The reason we believe it is because there is a principle that has stood us in good stead throughout our history, that when you are writing a Constitution, as Senator Hruska has said, I think, you should keep out the details, keep out the administrative procedures, look for the long future, rely on the stability and patriotism of your public officials.

So with all those principles in mind, I think this is an admirable solution of the problem.

Senator BAYH. I would like at this time to ask consent to have the statement of the American Bar Association put into the record.

(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:

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 the 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.

(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."

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 Presidnets 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 consittutional 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 declartion 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 full responsibilities with a minimum of interruption of the conduct of affairs in 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 tem-

porarily 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.

Senator BAYH. Senator Hruska, do you have any questions to ask?

Senator HRUSKA. Not too many, Mr. Chairman, but thank you very much.

In the situation of a joint session or separate sessions of the Houses—there are two situations presented. One would be under section 2, where they elect a Vice President. The other would be a vote on the issue of termination of disability. Do you think that it might be feasible to have a joint session for the first purpose, inasmuch as that would require no debate, but simply a vote. This would allow in one session the true electoral voting strength of each State to be expressed instead of having the operation split into two parts?

Mr. BROWNELL. I can envision that situation. I think mechanically, it could easily be done.

Senator HRUSKA (presiding). There would be no rules to adopt, would there, if they were prescribed in advance?

Mr. BROWNELL. Well, I suppose you could adopt special rules, but you would not necessarily do so. I think that the determining factor there, probably, in our thinking is this, that when the Constitution was originally adopted, the separate Houses of Congress, based upon the differing methods of representation, one basically representing population, the other basically representing the States, was meant to be a very genuine factor in our national thinking. So that any proposals that are submitted to the Congress, I think it is almost inherent in our system that that differing basis on which the two Houses of Congress are elected should be kept in mind. I think that supports the idea of the separate sessions. I think that those factors should be considered in voting upon this question as well as others.

Senator HRUSKA. Pursuing just a little further the matter of what "immediately" means, it has been suggested that if they do not do it immediately, the President will step in any say, "aha, they did not do it immediately, let me take charge."

Is there that possibility, Mr. Brownell? Might he not have some different idea as to what "immediately" means than Congress in its judgment?

Mr. BROWNELL. My reading of the amendment would lead to a different conclusion. Let me call your attention to the language there of the last sentence:

If the Congress determines by a two-thirds vote of both Houses, that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President. Otherwise, the President shall resume the powers and duties of his office.

I think that contemplates quite clearly that the Vice President would continue during that debate.

Senator HRUSKA. It says "otherwise." What does "otherwise" mean? Does it mean that the vote has come and it is not of the required two-thirds majority, or does it mean that they have not done it immediately?

Mr. BROWNELL. I do not quarrel with the fact that that "immediately" raises the question which you very properly raised this morning. I rely not on a lawyer's interpretation of the word "immediately," but on the force of public opinion to see that this difficult question of orderly government is settled within a very prompt time period.

Senator HRUSKA. Of course, we can assume, and I think properly so, that the normal procedure would be for all Members of Congress to be possessed of good faith. But I call your attention respectfully to the situation—where it is a world crisis, and therefore, you assume we shall act thus and so. Well, we had a crisis here that resulted in over 200,000 people gathering on the Mall of this Nation's Capital, notwithstanding the fact that there was deliberate discussion, extending over several months, of the issue.

Mr. BROWNELL. I see your point.

Am I not correct, however, in saying that the Senate rules will allow limitation of debate with two-thirds vote, so that if you get the two-thirds vote that is called for here in the section, you get the two-thirds vote for limitation of the debate? Is that not correct?

Senator HRUSKA. That is correct. If you had two-thirds vote for that purpose, it would be, but not without some preliminary. And of course, you get into the question of whether the preliminary maneuvers leading to that would come within the definition of "immediately." Because you make a motion to take up a report, or make a motion to take up this matter; then you have to have cloture on that. Then you go to the next step and so on. So we do get into some ramifications.

Mr. BROWNELL. My own experience, Senator, personal experience in this matter, grew out of the crisis that was involved in President Eisenhower's heart attack. Of course, like anyone else, I followed the critical situation which developed at the time of President Kennedy's assassination. In both of these instances—the one, as I say, I can speak from personal experience on—the public was insistent that there be immediate orderly transfer of power and the Members of Congress overwhelmingly took that same position.

I believe on the basis of that recent experience with which we are all familiar, we can count on a repetition of that kind of public opinion and that patriotic spirit among the Members of both Houses.

Senator HRUSKA. What is your judgment or comment on the doctrine of separation of powers being violated by reference of the matter to Congress, Mr. Brownell?

Mr. BROWNELL. I, as you perhaps you may recall, struggled with this particular item in the proposed constitutional amendment for a considerable period of time. At one time, I even proposed, when this unusual situation arose, that we should rely on the power of Congress under the impeachment procedure. But in the ensuing debate over the years, and the very splendid analyses that appeared in the law journals from time to time by constitutional experts, I came to the

conclusion that in this one area, there would be greater confidence on the part of the public that the right solution had been reached if Congress had this limited authority, not to initiate but to pass upon a severe dispute within the executive branch. It provides safeguards against cabals, against charges, however ridiculous they might be, that certain public officials within the executive branch were acting for personal selfish gains rather than for the public interest. Some scholars have recalled in our history the Hayes-Tilden situation, not a disability situation but one of equal critical nature so far as the orderly function of the Government was concerned, and there it was necessary for the Congress to step in as a last resort.

So I have come to the conclusion that this limited function for Congress in this one particular case is not the kind of violation of the doctrine of separation of powers, which should give us great concern.

I am a great believer, as I think my public statements will show, that this is one of the most important pillars of our Government, this separation of powers into three branches. It is only in an unusual situation, with well-defined limitations, as are contained in this proposal, that I would want to see any trespassing, even on the edges, of the support of that principle of Government.

Senator HRUSKA. Did your committee consider the possibility—not perhaps the greater likelihood or lesser likelihood by far—of having the Senate vote not by a 68 vote in favor and 32 against the proposition that the President is unable to resume his duties? Suppose it was only 64 or 65? We would have one view here and another view there by such a narrow margin that confusion, chaos, and uncertainty would be built into the minds of the public. Was that discussed and considered, and if so, have you any comment on it?

Mr. BROWNELL. It was discussed and considered at great length. I think you are quite right in bringing it into full discussion here this morning.

Our opinion is that if there is that much dissension and uncertainty and chaos, it will be reflected throughout the country at large. It would be an absolutely unprecedented situation, and it would arise even though the vote was not taken in the Congress, that the crisis would be there before the vote was taken, that the vote itself would not add to it.

Do I make myself clear on that?

Senator HRUSKA. Yes, you do, and it is a matter of taking the thing in balance.

Again, as you very rightly point out, perhaps in 90 percent of the cases, as we go through the next 500 years or so, very likely it will never reach the point we consider. It is only in that extreme use. Yet we put this thing into the basic document of our Government, so we do like to inquire into it.

Thank you, Mr. Brownell, for coming.

Mr. BROWNELL. Thank you, Mr. Chairman, for your patience.

Senator BAYH. It certainly does not require patience to listen to this colloquy at all. It is a very fine contribution.

Mr. Brownell, I want to thank you again. Again I want to make it very clear that we are deeply grateful, not only to you, but also to the American Bar Association, for what they have done to move us

further along the road to what we hope is finding in the near future the best possible solution to these problems.

Thank you very much.

Senator HRUSKA. Mr. Chairman, Representative Curtin, of Pennsylvania, has sent word that he is desirous of introducing a statement into the record of these proceedings. I ask unanimous consent that leave be granted him for that purpose.

Senator BAYH. It is certainly what we shall do.

I thought for the benefit of those who might be interested in the rest of the proceedings, those of you who have been with us so long, it is the intention of the Chair to go ahead as long as there is a witness who desires to discuss and present his views on this matter.

I hope the delay of your lunch hours will not be a problem.

Mr. Sharp, counsel with Senator Dodd, has asked for leave to incorporate the statement of Senator Dodd into the record.

I would then, following Mr. Sharp, ask Chief Justice Musmanno if he would give us his views.

It is my understanding that Mr. Martin Taylor is, was, and I think will be here.

Also, I would like to ask any of the witnesses who might be next in line when Congressman Curtin arrives if they will be so kind as to let him make his brief statement so that he may return to the House.

Mr. Sharp, we shall hear Senator Dodd's views at this time.

STATEMENT OF HON. THOMAS J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT, AS PRESENTED BY DEAN SHARP

Mr. SHARP. Thank you, Mr. Chairman.

Senator Dodd would have liked very much to be here this morning, and he expresses his regrets that he could not, but he was unexpectedly called out of town. This is his statement that he would like submitted:

Mr. Chairman, first, I want to congratulate you for your able leadership in our search for a solution to the problems of presidential inability and filling vacancies in the office of Vice President.

I am pleased to be one of the cosponsors of this resolution as I was of the same proposal passed by the Senate last year.

The language contained in article II, section 1, clause 5 of the Constitution does not clearly define presidential inability, nor does it say who shall decide whether or not such inability exists.

It is also vague regarding whether the office of the President or only his powers are to be assumed by the Vice President.

These constitutional problems demand constitutional solutions, and I am of the opinion that Senate Joint Resolution 1 is a sound constitutional solution.

I do not believe it is necessary to dwell on the details or mechanics of the proposed constitutional amendment, but I would like to describe briefly what it will do.

It would permit the Vice President and a majority of the Cabinet to determine the inability of a President, if, and I want to emphasize the word "if," the President refused or was unable to affirm his inability. It would permit the President to choose a Vice President subject to approval by a majority of Congress.

These provisions reflect a broad consensus of opinion as to what is needed. Over the years much study and deliberation have been devoted to a large and varied number of proposed solutions to the questions of Presidential inability and succession.

I feel that the time for study is long past. Of course, there may be technical changes in the proposed amendment. Nevertheless, it is now time for prompt action, as an impressive majority of my colleagues, and fellow Americans will agree.

None of us need to be reminded of the serious illnesses of President Eisenhower, or the tragic death of President Kennedy with the resulting vacancy in the Vice-Presidency, to realize our Nation's welfare and security demand action now.

We do have a President and a Vice President now, and they are both healthy, active men. But I hope the present favorable situation will not encourage Congress and the States to put off a decision on this any longer.

The security and welfare of this Nation is not the only thing that is involved here. The entire free world looks to us for that leadership which only a fully functioning President and Vice President can give.

Let each one of us act to help make this proposed amendment a part of the Constitution as quickly as it can be done.

Thank you, Mr. Chairman.

Senator BAYH. Thank you very much, Mr. Sharp. We appreciate Senator Dodd's longtime interest in and able assistance in this matter.

Senator BAYH. I see that Congressman Curtin has arrived.

Congressman Curtin, will you come forward, please?

STATEMENT OF HON. WILLARD S. CURTIN, A REPRESENTATIVE IN CONGRESS FROM THE EIGHTH CONGRESSIONAL DISTRICT OF PENNSYLVANIA

Representative CURTIN. Mr. Chairman and members of the subcommittee, I very much appreciate this opportunity you have given me to appear this afternoon. I shall not take much of your time except to say that I have, for a very long period, been interested in this disability problem. As a matter of fact, when I first came to the Congress, I introduced a resolution. I think 1958 was my first one, and I have reintroduced such a resolution in subsequent Congresses. The last one was introduced by me on January 6 of this year, House Resolution 129.

Without further ado, I have a statement prepared which I should like to have introduced into the record in full.

Senator BAYH. That will be so ordered.

(The statement referred to follows:)

STATEMENT OF HON. WILLARD S. CURTIN

Mr. Chairman and members of the subcommittee, I much appreciate this opportunity to be heard in reference to this very serious question of Presidential disability, on which congressional action is long overdue.

Numerous authorities who have devoted a great deal of time to analyses of the processes under which our Government operates have been struck by the fact that our Constitution is silent on specific procedures to be followed in the event of a President's becoming gravely incapacitated during his term of office. This is a matter of longstanding interest to distinguished scholars who have undertaken studies of our unique kind of representative democracy. People in and out of

Government, and notably Members of the Congress, over the years have questioned this apparent flaw in our Republic's structure.

Of course, the law does spell out the line of succession to a Chief Executive in the event of death. But it is mute with respect to a manner and method of determining the ability or inability of a President of the United States to discharge the powers and duties of his office in instances where a critical illness or a disability of possible long-term duration may arise. Indeed, a President confronted by such misfortune of circumstance has no clear-cut instructions to which he can look for guidance under the language of our Constitution or of existing laws.

Article II, section 1, of the Constitution provides that the Vice President shall exercise the powers and duties of the President in event of the death, resignation, or disability of the Chief Executive, or his removal from office. To take care of further contingencies, a series of so-called succession acts were enacted by the Congress. The act of 1886 established a line of succession starting with the Secretary of State and going through the order of executive departments. On July 18, 1947, a new law was enacted to bring the Speaker of the House and the President pro tempore of the Senate in line of succession ahead of the Cabinet members. The philosophy behind this action of 1947 changing the line of succession was that the spirit of the Constitution intended clearly that the Chief Executive should be an elected official rather than an appointive one. With this conclusion of reasoning, I fully concur.

But the knotty question remains: "Who is vested with certain, sure authority to arrive at a determination of when is a President not able to discharge the powers and duties of his office?" The answer is: "No one, under existing processes."

I became interested in this problem soon after becoming a Member of the Congress, and pursuant thereto, I introduced a resolution for a constitutional amendment in the 85th Congress, and I have reintroduced the measure, with certain modifications, in each succeeding Congress. The last resolution that I so introduced was on January 6, 1965, and is House Joint Resolution 129.

This resolution would establish a unit to be known as the Presidential Inability Commission. The Commission would have the responsibility and authority to relieve the President or Acting President of the United States "upon a determination that he is not able to discharge properly the powers and duties of the office of President, and after any such action, to restore the President or Acting President to the assumption of such powers and duties upon a determination within the same term of office that he is able to discharge properly the powers and duties of the office of President."

The aforementioned Presidential Inability Commission would be composed of eight members, as follows: First, the Chief Justice of the United States, who would serve as Chairman of the Commission, and who would have no vote in the proceedings of the Commission except in the case of a tie; second, the senior Associate Justice of the Supreme Court of the United States; third, the Secretary of State; fourth, the Secretary of the Treasury; fifth, the Speaker of the House of Representatives; sixth, the minority leader in the House of Representatives; seventh, the majority leader in the Senate; eighth, the minority leader in the Senate.

Five members of the Commission would constitute a quorum. Members of the Commission would serve as such without compensation. Any two members of the Commission could cause the Chairman to convene the group without delay by communicating in writing to him, stating that they have sufficient cause to believe that the President is unable to discharge properly the powers and duties of the office. The Commission is then directed to seek competent medical advice as to the condition of the President and his ability to discharge properly said powers and duties. Should the Commission subsequently determine presidential inability, it is bound to then notify the House of Representatives and the Senate—if Congress is then in session—the President and the individual next in line of succession to the Presidency. Thereupon, the Presidential powers and duties would devolve upon the individual next in line of succession. The same series of steps is established for the President's reassuming the powers and duties of the office if the Commission determines that the disability no longer exists.

I have examined with much interest various other resolutions which have been introduced on this same subject. They provide various methods of handling the problem, and they all have much merit. Any one of the methods proposed by the various Members of the Senate or of the House would serve to remedy an imperfection that for most of our national life has distressed authorities and scholars of American Government. In this day of challenge and stress, it is strongly

advisable that the Congress clarify beyond any doubt or uncertainty the provision of the Constitution with respect to the execution of the duties of the President in the event of disability.

Senator BAYH. We appreciate your interest, Congressman Curtin. The interest of the House, of course, is of equal importance to that of the Senate and I want to compliment you on your interest and the interest of the chairman and the ranking minority member on the House Judiciary Committee. They are going to hold hearings in the future, and I trust you will have opportunity then to express your views to them.

Representative CURTIN. I certainly shall. I think this is a matter that is long overdue in legislation, and I am delighted to be able to do something about it at this time.

Thank you very much.

Senator BAYH. Our next witness will be Justice Musmanno of the Pennsylvania Supreme Court. Justice Musmanno has had a very distinguished and illustrious career. He was a member of the War Crimes Court in Nuremberg. He has written a book, "Proposed Amendments to the Constitution," and was appointed by President Kennedy to the Commission on International Rules of Judicial Procedure.

Justice Musmanno, we are very happy to have you with us.

STATEMENT OF JUSTICE MICHAEL MUSMANNO, OF THE SUPREME COURT OF PENNSYLVANIA

Justice MUSMANNO. Thank you, Mr. Chairman.

I subscribe to what was stated by our Attorney General Katzenbach in his formal statement this morning. What I have to say, Mr. Chairman, will be in the spirit which you have many times indicated that you would like to get the views of those who have given specific study to this problem.

I have lived with the subject of proposed amendments to the Constitution practically all my adult life. With that kind of a background, I would say that the Senate Joint Resolution 1 is an exceptionally well-drawn amendment on one of the most vital subjects in our whole structure of Government. If it is adopted by Congress and ratified by three-fourths of the States, it will be a strengthening, revitalizing addition to the dignity, power, and democracy-assurance provisions of the organic law of our land.

I have proposed a constitutional amendment on this subject. It bears the designations Senate Joint Resolution 34, House Joint Resolution 118, House Joint Resolution 154, and House Joint Resolution 220.

My proposed plan provided—I am changing the tense, Mr. Chairman. When I wrote out my statement, I had it in the present tense, "provides." In an instant I shall tell why I changed the tense.

My proposed plan provided that the House and Senate Judiciary will form a permanent commission which will, on a two-thirds vote, decide Presidential disability and recovery when the President's health or circumstantial capacity to conduct his office is called into question. I did not know until 5 minutes ago of the President's view on this sub-

ject, and I have now here the statement which he sent to Congress, and naturally and most enthusiastically I accept what the President says, namely—

believing, as I do, that Senate Joint Resolution 1 and House Joint Resolution 1 would responsibly meet the pressing need I have outlined, I urge the Congress to approve them forthwith for submission to ratification by the States.

I therefore withdraw from my proposed amendment the plan that Presidential inability be decided by the combined Judiciary Committees of the House and Senate of the Congress.

I do have another feature to which I shall address myself if the chairman will permit me.

I could not help but note in the statement of the President the use of a word which might answer the problem which the Senator from Nebraska posed, namely, whether "immediately" indicates sufficient celerity. The word "immediately," if I may humbly expound on that for just a moment, always depends upon surrounding circumstances. But the word "forthwith," which the President uses, means almost instantaneously. Therefore, I would respectfully suggest that in section 5, the word "immediately" be changed to "forthwith."

I do not think that anyone could possibly misunderstand what is the intent of that constitutional amendment; namely, that Congress must proceed without any delay whatsoever to decide the issue—that is to say, forthwith.

The Senator from Nebraska also suggested that possibly section 3 might be clarified a little bit more. He feared that this would be confining the contingency indicated to illness of the President. And of course, as the Chairman recalls, he spoke of the possibility and, I presume, probability that the President would be making many trips abroad and that some provision should be made in the event it became necessary for someone to discharge the duties of his office while he was away.

May I suggest that section 3 could be amended to read, and I have three suggestions and I shall give them in order. "If the President declares in writing that because of illness or any exceptional circumstance, to be determined solely by the President, he is unable to discharge the powers and duties of his office," and so on. However, since brevity should be the cardinal rule of constitutional language, we can make that shorter, because "exceptional circumstances" would certainly include illness. Therefore, I would have it read:

"If the President declares in writing that because of exceptional circumstances, to be determined solely by the President, he is unable to discharge the powers and duties," and so on.

That would cover every possible, conceivable, contingency where the Presidential power would need to be delegated to the Vice President. Since, however, section 3 is now written in the present tense alone, and it indicates or suggests it is only when the President is presently unable to discharge his duties, thereby inferring or implying he is already ill—he is already under the effects of an operation—I think we should have it the future tense as well. So that eventually, this is the way I would humbly suggest that section 3 might read:

If the President declares in writing that he is or will be unable because of exceptional circumstances, to be determined solely by the President, to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Mr. Chairman, the Cabinet determination of alleged presidential inability is excellent because the men who compose the Cabinet will unquestionably always be men of noteworthy ability, patriotic devotion, and supreme loyalty to the President. Their fidelity to the Commander in Chief would never permit them to treat other than with the utmost conscientious gravity the concept of depriving their leader, even temporarily, of the powers solemnly entrusted to him by the people. At the same time, their profound sense of responsibility to the welfare of the country would not allow them to treat lightly a situation which might suggest or indicate that the hand at the helm has temporarily lost its strength to wisely guide the Ship of State.

Now, if you have my prepared statement, the following two paragraphs on page 2 I am eliminating, because, as I indicated before, I am withdrawing from my proposal the proposition that the question of disability be decided by the combined House and Senate Judiciary Committees of the Congress. But my proposed constitutional amendment, Mr. Chairman, does have a particular feature which is not included in any of the measures which I have studied have and so far been submitted in the present session of Congress.

The Senator from Iowa indicated that there are 28 different measures before the House on this subject and, of course, we know there are several before the Senate. None of them treats of the powers of the Vice President.

I believe that the time has come to bestow, on the Vice President of the United States, duties, powers, and functions in consonance with the majesty, dignity, and vital character of his office. We, of course, know that Presidents Eisenhower and Kennedy conferred, on their Vice Presidents, assignments of moment so that the Vice Presidents attended Cabinet meetings, became members of various executive councils, and embarked on long journeys in behalf of the United States. But all these activities, impressive and undoubtedly beneficial to the Nation as they were, were performed without constitutional authority. Under the Constitution, the Vice President has only one duty to discharge before tragedy of one kind or another calls him to the Presidential chair itself. That duty is to preside over the Senate, where he can neither speak nor vote except in a tie—a rarity so exceptional as to be practically de minimis. In 8 years, Vice President Nixon voted only eight times; that is, on the average of only once a year.

The vast potentialities of a Vice President, trained, equipped, and prepared at all times, to take over the most important civil office in the world, should not be confined to a task which needs fulfillment no more often than on the average of once a year. Nor is this type of utilization of power and ability in keeping with what is expected of a substitute chief officer in any other field of endeavor. In no sphere of activity—military, civil, commercial, industrial, or fraternal—is a substitute chief officer held in comparative nonactivity until the momentous event which transforms him into the supreme leader of the enterprise.

I have served in both the Army and the Navy and I know from personal experience and observation that the vice commander of an army, division, or regiment has duties which are indispensable to the success of a military offensive or defensive, entirely apart from his

availability for supreme command, should the fortunes of war project him into that position. The vice commander renders continuous and unceasing assistance to his superior and is so intimately associated with what his chief is doing that, in the event of emergency, he assumes command without a break in the continuity of operation.

The executive officer of a ship has momentous duties indispensably utilized in the navigation, maintenance, and aggressive and defensive operation of the vessel, entirely apart from taking over command should the captain be stricken.

The vice president of an industrial corporation is not a stranger to the office and plants of the company until he is summoned to direct the destinies of the entire industrial enterprise. He works by the side of the president of the railroad or steel company or the automobile firm at all times and thus is qualified, at every and any moment, to undertake, with up-to-date competence, the responsibilities of the president, should he be called upon to do so.

We, of course, know that the present Vice President is too much of an activist, too dedicated to the great humanitarian, peace-assuring program of his Commander in Chief, too absorbed in all the problems of the Nation, too determined to use the boundless energies with which providence has supplied him, to spend considerable time inertly anchored in a nonvoting operation to which he may not contribute the encyclopedic knowledge always at his command where he may not utilize the mastery of expression which is his and where his wisdom may not be energetically employed in attacking the vast problems which face the Nation. The present Vice President is too vital a man, mentally and physically, to lose time marking time. Newspaper accounts indicate he will have many important jobs to perform beyond the Senate Chamber but they are not suggested in the Constitution, they are not authorized by the Constitution, and the Constitution will not breathe legally binding force into those worthy acts when accomplished, as they will, of course, be accomplished, with all the great skill and sincerity the world knows he processes.

I know that your committee, Mr. Chairman, is primarily concerned at this time, with Presidential inability and filling of vacancies in the office of Vice President but, since the Vice-Presidency is the very office around which your constitutional amendment revolves, I would like to suggest that this is the ideal time to consider and reevaluate the entire office of the Vice Presidency of the United States.

Amending the Constitution is a very serious matter and the number of amendments should be held down to an irreducible minimum. Sooner or later, I am positive, and I was never more certain of a future event than in this, Congress will need to take up the matter of extending greater powers to the Vice President, providing him with an establishment of his own, and making provision for an official residence. Why not do this now, instead of returning to its consideration a year or two from now, thus increasing the number of constitutional amendments and at the same time losing the advantage of the constitutional achievements of which the Vice President is capable?

Under my proposed constitutional amendment, the Vice-Presidency is transferred from the legislative department of the Government to

the executive. His duties shall be those which the President assigns to him. It is all summed up in one sentence—section 1, which reads:

> The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

The Senate, of course, as I provide in section 5, shall elect its own President and President pro tempore from the Senate. The President of the Senate will retain all his senatorial powers, relinquishing the chair to the President pro tempore when he participates in debate.

We all know that the office of Vice President, which was once a mere appendage to the Government, is now an office of colossal significance, merit, and honor. When the present Vice President was sworn in as Vice President, the entire Senate applauded his promotion from the ranks of the Senate. Yet, John C. Calhoun resigned the Vice-Presidency to become a candidate for Senator. Aaron Burr, while Vice President, became a candidate for Governor of New York. John Adams, while Vice President, said:

> Gentlemen, I do not know whether the framers of the Constitution had in view the two kings of Sparta or the two consuls of Rome when they formed it; one to have all the power while he held it, and the other to be nothing * * *. I feel great difficulty how to act. I am possessed of two separate powers; the one in esse and the other in posse. I am Vice President. In this I am nothing, but I may be everything.

Regardless of the slight merit assigned to the Vice-Presidential office during the first 50 or 60 years of our Nation's life, we all know how it looms agains the horizon of our national greatness today. John Adams' allusion to the two consuls of Rome was interesting, but it must be remembered that the Roman consul second in rank, instead of being nothing, had extensive powers.

We have here the extraordinary case where the office has outgrown the temple of the Constitution, so that the occupant must work outside in the cold and the wet of unconstitutional authority.

I respectfully submit that the roof and the walls of the Constitution be extended to fully enclose the powers which we know should and must be inherent in the Vice-Presidency. Thus the Vice President will be enabled to toil untrammeledly, with all his wonderful energies and talents, in projecting forward at all times, at the side of the President, the beautiful destiny of this beloved and great Nation of ours.

Senator BAYH. Mr. Justice, thank you very much for your profound statement. As you know, getting two-thirds of the Senate, plus two-thirds of the House, in support of anything, let alone a constitutional amendment, is not easy.

Justice MUSMANNO. I know.

Senator BAYH. For this reason, it might be the judgment of the subcommittee that the ultimate solution to all executive weaknesses or imperfections cannot be accomplished in one constitutional amendment. In your discussion of disability, you feel that "forthwith" would be better terminology than "immediately"?

Justice MUSMANNO. Yes.

Senator BAYH. You seem to indicate that "forthwith" would indicate congressional action almost in the blinking of an eye.

Justice MUSMANNO. I believe that, the action must be fast, Mr. Chairman. I know that in the military they very rarely use the word "immediately." You are supposed to be acting forthwith, as soon as the order is given.

Senator BAYH. We got into the colloquy this morning—I think you heard most of it—in which we were discussing "immediately." In the use of "forthwith," let us assume the need for Congress to make this determination. Upon the need arising, what activities would be permitted as you, in your judicial knowledge, interpret the word "forthwith"?

Justice MUSMANNO. It would mean that the Congress should forthwith be convened and forthwith consider the subject at hand—not long deliberations as to when they should meet; not the long list of committees to be appointed, but without any delay whatsoever—with celerity that is demanding.

Senator BAYH. Would this permit the calling of medical witnesses, the consultation with members of the Cabinet, close personal associates, and with staff members of the President?

Justice MUSMANNO. We would assume that by this time, Mr. Chairman, there would have been medical examinations, medical reports, and the Cabinet members would have undoubtedly have expressed themselves.

Senator BAYH. They would have had to support this move or the President could not have brought it to pass. The only way section 5 could ever be brought into use is for a majority of the Cabinet to have agreed with the Vice President that the President is unable to perform and that the President does in fact wish to contest this joint decision by the Vice President and the Cabinet.

Justice MUSMANNO. That is right.

Senator BAYH. You would say "forthwith" would still permit a compilation of sufficient evidence upon which Congress could make a determination?

Justice MUSMANNO. Oh, yes.

Senator BAYH. And a reasonable amount of discussion, debate on the subject in the Congress?

Justice MUSMANNO. Yes. The word "immediately" is always interpreted in view of surrounding circumstances, and it is more flexible. It would allow the individual who is commanding the operation to call a meeting next week or 2 weeks from now for the sake of convenience of the Members of Congress. "Forthwith," I think, would exclude that kind of consideration of convenience.

We have before us in the word "forthwith" the ringing of a bell, of an alarm bell, that something must be done at once. "Forthwith" is a synonym of "at once." I do not think that "at once" could be placed in the category of "immediately." I think "at once" commands a celerity of attention which you do not get in the word "immediately."

On the subject, Mr. Chairman, with regard to the possibility of a coup d'etat by a Vice President, because that was mentioned, it occurred to me that that could never happen. The suggestion was made, the fear was voiced that the Vice President could, by dismissing members of the Cabinet, thereby mold the situation to satisfy his own will.

Well, the Vice President has no power to act as a President until the Cabinet would already have acted.

It is only after the Cabinet, by a majority vote, has decided that he should act as President, that he has any power whatsoever.

Senator BAYH. I think the thing we are concerned about, Justice Musmanno, is suppose the Cabinet should vote and not be unanimous, then the Vice President, upon assuming the powers and duties of the Office, should promptly, for one reason or another, replace those who did not vote with the majority. So, even if his position should change, his position would be more solid with the new Cabinet than when he took over.

Justice MUSMANNO. I would think in a situation like that, Mr. Chairman, constitutional morality would be the compass of the conscientious discharge of the duties on the part of the Vice President and the members of the Cabinet. I have enough faith in our system of government, and in the men that would be appointed, that the interest of the people would not be jettisoned for political expediency.

Senator BAYH. I agree. I am not concerned that the Cabinet and the Vice President would act for a coup d'etat because the Vice President, unless he is new, is going to be looking into the future and he is going to be very reluctant to act out of bounds.

Thank you very much, sir, for your contribution to the subcommittee. We appreciate your taking the time.

Justice MUSMANNO. I do want to express the hope that it will be clear that I have withdrawn from the statement my espousal of the plan to have the disability question sent to the Judiciary Committees, and this, in no way, suggests any lessening of faith in and admiration for the Judiciary Committees of the Senate and the House.

Senator BAYH. I am certain neither committee will interpret it that way and the record is abundantly clear that you have amended your original proposal.

Thank you.

Justice MUSMANNO. Thank you, sir.

Senator BAYH. The next witness will be Prof. Robert Deasy, who is an associate professor at Providence College, who comes highly recommended by my colleague, Senator Claiborne Pell, of Rhode Island, who has been very interested in this whole subject. We appreciate Professor Deasy's willingness to appear here, as well as Senator Pell's interest in the subject.

Without objection, I shall ask that this transcript of the very fine background of Professor Deasy be made a part of the record at this point.

(The document referred to follows:)

EDUCATIONAL BACKGROUND OF ROBERT L. DEASY

Providence College, 1949–53, A.B.: President, Theta Chapter Delta Epsilon Sigma, 1953; graduated Summa cum Laude (scholastic average 4.0).

Fordham University, 1953–54, M.A.: Completed all requirements in 1 year (scholastic average 3.4); degree conferred in absentia February 1955 (returned, took three courses summer 1956).

U.S. Army, 1954–56: Instructor, Ordnance School, Aberdeen Proving Ground, Md., 1955–56; awarded Certificate for Noteworthy Service (first time granted), June 1956.

Providence College, 1956–64: Instructor, 1956–59; assistant professor, 1959–63; associate professor, 1963.

Courses taught: "Survey of Western European History, Survey of U.S. History, Modern American History, History of Presidential Elections, Diplomatic History of the United States, English History" (undergraduate division, evening division, summer session, and one semester University of Rhode Island-Newport Division).

Committees and societies: Theta Chapter, Delta Epsilon Sigma, secretary-treasurer, 1957; Johannine Society, moderator, 1957; Committee on Studies, 1960–61: Student-Faculty Committee, 1963; assistant coach, Lacordaire Debating Union, 1958.

Rhode Island Civil War Centennial Committee, 1960; chairman, subcommittee on education.

Rhode Island Social Studies Association, 1960–61.

Providence Visitor Vatican Council Essay Contest Committee.

Other activities: "Operation Schoolhouse," WJAR–TV, 1956–60; "The World Around Us," WJAR–TV, 1960–61; "Operation Learning," WPRO–TV, 1964.

Publications: Book review, "Men To Match My Mountains," Providence Visitor, January 1957. Editorial, "The Electoral College Has Functioned Well and Continues To Do So," Providence Evening Bulletin, March 1962.

Guest lectures: Holy Name Societies: Communion breakfasts, 1957, 1958, 1959, and 1963; monthly meetings, 1960, 1962, and 1963.

School history clubs: 1961, 1962, 1963, and 1964.

Providence College: Johannine Society, 1957, 1959, and 1963; Theta Chapter, 1963 and 1964.

Present status: Sabbatical leave from Providence College.

Pursuit of studies: Doctor of philosophy in history at Boston College, Boston, Mass.

Field of concentration: The Presidency of the United States.

STATEMENT OF ROBERT L. DEASY, PROVIDENCE COLLEGE

Mr. DEASY. First of all, in lieu of the testimony of the last witness and his very astute statement, I feel somewhat embarrassed, at my age, in comparison to his, coming before you and, also, some of the things I shall say are quite different from the testimony of witnesses heretofore included in the record. However, I would like to make these statements, at the conclusion of which I shall feel free to have you ask any questions and I shall try, to the best of my ability, to answer them.

First, on behalf of myself, as a member of the History Department of Providence College, and through the courtesy of Senator Claiborne Pell, of Rhode Island, may I thank the members of this subcommittee for the honor and privilege of speaking here today.

Presently, I am on sabbatical from the college studying at Boston College. Having taught a course for 9 years on the "History of Presidential Elections," I have always been deeply interested in the problem of succession and have just completed a seminar report on the topic.

The office of Vice President was created after much debate in the waning weeks of the Constitutional Convention and was given only one specific duty—that of presiding over the Senate. The problem of succession after the Vice President, and of disability as well, were left in the hands of Congress. Three times various Congresses have established a line of succession but only after long debate and the creation of some bad feelings and various constitutional questions.

Only the act of 1792 was passed in what might be considered a political vacuum. Representative Livermore was not worried about the problem saying that the death, resignation, et cetera, of both the President and the Vice President wouldn't happen in a hundred years. In 1792, this seemed, evidently, like an alternative. Representative

Burke was even more optimistic saying such a contingency wouldn't happen more than once in 840 years.

Various proposals were made and rejected, one by one, until the President pro tempore ofthe Senate and Speaker of the House were finally chosen as the possible successors. With the caliber of men such as Alexander Hamilton and Thomas Jefferson, then in the Cabinet, it was obvious that politics did play some part in the deliberations as contemporary testimony indicates.

With all its drawbacks, however, the plan was consistent with tradition on the State and prior to that on the colonial level.

By that I mean to say there was nothing untoward in going into the legislative branch to get a successor. It had been done.

With Congress completing its term, however, or political problems arising from time to time there were occasions in our Nation's history when neither of these congressional offices was filled. The act of 1887 alleviated this problem to some extent when it declared in favor of members of the Cabinet in the order of the origin of the office. However, this tended to make the office appointive rather than elective which was the original intent of the Constitution.

Historically during the 19th and through the early years of the 20th centuries the Secretary of State had been the second most important figure in the party but with the stresses and strains of the modern age, the creation of the Department of the Interior to assume some of the heretofore Secretary of State's responsibilities, et cetera, the Secretary's position was more attuned to foreign affairs and his political stature was somewhat reduced.

It is superfluous to go into some of the personality conflicts that led to the act of 1947. We are a political people and it is impossible to completely divorce constitutional developments from actualities. Yet this is a perennial cry raised against all the acts passed thus far and one not to be taken lightly. I admit that this is a sketchy outline of the succession question and will be glad to entertain questions on this matter after completing this statement.

Examination of the records of the Constitutional Convention shows it is obvious that even less consideration was given by the 1787 Convention members to the disability question. I firmly believe this cannot be ascribed to ignorance or malice on the part of the farmers.

Surely, if their other writings are considered they were quite conversant with English and Roman history with all the examples of leaders in these areas facing mental and physical handicaps, usurpation of power, et cetera.

I believe they were wise in shunning that matter while they did speak of some sort of succession. Many of the framers also took public or private part in the deliberations of the 1792 succession measure. They may not have agreed on the particular line of succession but most were in agreement that something along that line should be done. This was in keeping with their constitutional mandate: establish the Government but don't try to accomplish too much.

To draw up a list of physical and mental points for automatic disqualification would have been foolish in 1787 as it would be at any other time. Law and medicine do not always overlap and any legal or medical cabal would be always poor policy. The only limitations of the Presidency were permanent and rudimentary; age, residence, place of

birth. To tamper with these would possibly mean a "dynastic" feud possibly between the President and the Vice President, or possibly an executive legislative impasse.

All of these would tend to diminish the most important elected official in the world, the U.S. President. I believe the present "agreement" status between the President and Vice President is sufficient. To make it permanent may at some time in the future paralyze rather than expedite an emergency. It is a historical fact that words and phrases of our Constitution have been interpreted at a later date that would have amazed the original designers. Originally the Vice President was supposed to be the second most popular and second best man in the country; his power was greatly diminished by the passage of one amendment, the 12th, and possibly you will make him all powerful by this amendment, the 25th.

Regarding the proposed legislation itself, however, may I congratulate you all for your diligent efforts and I trust that the amendment in its final form may be the most thoughtful, equitable, and permanent measures passed.

Before getting to the specifics of this present amendment may I say that the awful tragedy of the death of President John F. Kennedy on the streets of Dallas 14 months ago alerted everyone once again to the ever-present danger of such a contingency arising. The theme of the Speaker of the House being "only a heartbeat away from the White House" has been echoed and reached time and again in news media throughout the land. "Time is of the essence" is another cry, but may I fervently say that Divine Providence has been good to our land in sparing for then new President Johnson through the unexpired term of John F. Kennedy, so that now once again the two top executive positions are filled.

The urgency of legislation is still obvious but there is no longer the aura of "panic" legislation. This could well have been ascribed to any legislation passed before January 20 of this year and may I speak with some authority when I say that historians would be the first to say this in future years if anything untoward would have happened.

To examine some of the specifics of the measure may I say that section 1 is excellent. The idea that the Vice President shall become President clears up a problem originally created by the Constitution and further confused by the 12th, 20th, and 22d amendments. The idea, if I may read it, the Vice President shall become President—there is no wording here regarding "act as President," "assume office and powers," and so forth—he becomes the President. This is good.

This consistency is not maintained however throughout the length of the amendment.

Section 2 fails to give any time limit as the legislation of the last session of Congress did when they indicated a 30-day period. We may safely assume that a question of such moment Senate and House rules will assure a large if not complete turnout for the vote but can we be sure.

In such a moment of crisis it would be on the interest of the entire country prescinding from party affiliation but can we predict that there will never be party, sectional, or personal differences that may develop to frustrate the aims of this section..

It has been indicated in previous testimony here today that patriotism will rule the day. I trust that it will. But again, we do not want to be caught short. We do not want to pass legislation where, unfortunately, if patriotism does not come to the fore, we may be stuck with an embarrassing situation. There may be a time when party, sectional, or personal differences may develop to frustrate the terms of accession.

Section 3 uses the terms "powers and duties" and "Acting President" rather loosely. Supposedly this was settled by the acecssion to power of John Tuler in 1841 yet it has been reopened again and there is the ever-present argument among authorities that terms such as "The President shall assume" and so forth are not interchangeable.

Also, what if personality conflicts frustrate a fully recovered man from reasserting his rightful position. Some of these points may seem quite hypothetical but of such things are great constitutional arguments made.

Senator BAYH. May I interrupt your statement?

Mr. DEASY. Yes.

Senator BAYH. I do not have a copy of your statement before me; therefore, it is difficult for me to follow you.

I thought I would mention at this point, or I might not get it into precise context, I am wondering what you are referring to as far as a personality conflict preventing him from reassuming the powers, and how would you give him other protections than we have given him, requiring the majority of the Cabinet to support the Vice President, plus two-thirds of the Congress?

Mr. DEASY. Again, I was going to indicate here the idea of the agreement that we have. The legislation as pieced together here seems to take care of all difficulties. We must have a majority of the Cabinet, Congress will enter into the discussion, and so forth. Yet there may—I keep emphasizing that word—there may be at some time in the future, and I trust there never will be, a time when the Vice President may have quite a bit of influence or sway over the members of the Cabinet. There have been opportunities or there have been occasions, right after the Civil War, where a majority of the Congress were at least in certain instances violently opposed to what the President then was trying to do. I admit these are extremes. But the whole point under consideration here is that although you are trying specifically to alleviate a problem by a specific remedy—we must check with the Cabinet, we must check with Congress—we might create one rather than clarify an issue.

As I indicated earlier, I would prefer the agreement status to remain.

Senator BAYH. Just the agreement?

Mr. DEASY. The private agreement which again would change, possibly, with the Presidents; the agreement of Eisenhower with Vice President Nixon, the agreement now between President Johnson and Vice President Humphrey.

Senator BAYH. Of course, this deals with one of the two problems with which we are most apt to be confronted—namely, the President feels himself slipping and knows he must have relief for the sake of the country. The other would be where something happens quickly to the President and the Vice President could with very little dispute

with the concurrence of a majority of the Cabinet assume the powers and duties of the office.

The object would be the difficult situation which former Attorney General Brownell and my colleague, Senator Hruska, seem to be at least in agreement on, where this would be a situation you might have at some time. The private agreement does not cover either of the two.

Do you understand it?

Mr. DEASY. I agree.

Senator BAYH. I think it does cover one, the second one, in which the Vice President can take what action he feels is necessary under the circumstances, but it does not cover point 3. In other words, under the private agreement, the President has uncontrolled, unqualified authority to say, no matter if he is at that time a raving maniac, to say, "I am well."

Is that the way you interpret it?

Mr. DEASY. As I say, these problems, if we are tying ouselves now down to a specific, a constitutional amendment which automatically will become the supreme law of the land, there may be contingencies that we cannot envision today that may not be covered. Whereas, each administration that comes in, whether it be a Republican administration or a Democratic administration, I would prefer to leave that particular thing out, let the President and Vice President at the time work out some kind of agreement.

The question has been raised before that this might lead to some kind of a court case or a constitutional test. But if we have this particular amendment to the Constitution, then this is the supreme law of the land and we may find ourselves in a bind where the Constitution does not really settle the issue at all.

As an example, I referred a little earlier to the passage of the 12th amendment. The last witness made an excellent case for updating, more or less, the office of the Vice President. It should be expanded. He made reference to businesses who had active vice presidents. Yet in the same spirit of trying to alleviate a problem, in 1803, the framers of the 12th amendment solved a problem but created another, a larger problem. The party system had developed, so they decided to have separate votes for President and Vice President—all to the good, but in so doing, they took the office of Vice President and practically dissolved it.

And the debates, as shown in the annals, were very prophetic. I can remember one offhand, Representative Griswold saying that if this happened, the office of the Vice President would be taken into the marketplace to be sold to the highest bidder, to become a sectional thing or a large State-small State combination to try to win the Presidency. And history has shown us that throughout most of the 19th century, there is a lot of historical actuality to attest to the fact that there were balances made between the Vice President and the President.

Also, it is rather obvious that the office of Vice President was not the second most important position in the country in those days. Rare are the students who can name the Vice Presidents, let alone the ones who unsuccessfully ran for the office.

Senator BAYH. I am not disagreeing with you at all. The 12th amendment needs to be revised. Certainly, the office of Vice President is no longer what it used to be. That is one of the reasons we feel impelled to do something, to see that we always have a Vice President, not necessarily that he only succeed to the Presidency, but that if he does not, the President needs him to help carry on these duties.

But I still want to explore how you feel that a President and Vice President can, at some future time, come to an agreement. They are not going to make that agreement until a crisis descends upon them.

In other words, we are talking about health, the ability to recuperate.

Mr. DEASY. I would prefer that each—again, I do not think it needs the passage of a constitutional amendment—that each Vice President and President, upon the assumption of office, on January 20 of every fourth year, would then, assuming that no problem has immediately or forthwith developed, they would work out some sort of an agreement, that this be known to them and more or less known to the country. I would prefer—as I say, the office of President without a doubt today is the most important elected position in the world.

No. 1, I think, therefore, he should be allowed to work out some sort of a plan with his successor, the Vice President, in case of any emergency, and regarding—well, I have more to say about it in my statement.

Senator BAYH. Yes, continue with your statement, and pardon my interruption.

Mr. DEASY. I am glad you asked the questions.

Sections 4 and 5 pose two problems. We must always guard against political chicanery or personal feeling on the part of the Vice President who is so powerful under these conditions. The second problem is again one that has never been tested but can the office of President, the most powerful in the world, be put into a state of suspended animation?

Can a President who has surrendered his "powers" even though temporarily, reassert them? The Founding Fathers and the men involved in the act of 1792 were vehement in their maintenance of the idea that this was strictly a temporary move.

These problems raised may be valid or not; it is up to you to decide. Now we get to the heart of the matter; that is, the person who succeeds. Although the electoral college is an indirect approach, the President is supposed to be an elected entity. This idea was frustrated by the 1887 law but was one of the major considerations in the 1947 law. I admit that if this amendment is passed it does become the supreme law of the land yet the same thing may be said of the 12th amendment, which has caused consternation ever since.

Other proposals have been offered. The idea of reassembling the electoral college upon the death of the incumbent has all sorts of inherent difficulties. As it meets on the State level, local politics may interfere. Some of the original electors may have died and the legislature and/or Governor may no longer be of the same party in control when the electors originally met.

As early as 1881, Representative Hammond of Georgia envisioned three Vice Presidents and in 1886 Representative Dibble of South Carolina suggested two; a plan reechoed by the then Representative Mike Monroney in 1947 and more recently by former Senator Kenneth Keating of New York.

The argument that no one would be willing to run for such an office is widely mentioned, but in lieu of what the last witness said, the increase in power and responsibility now enjoyed by one Vice President has limited his time and there seems to be enough qualified men who are willing to adopt their party's mandate in this regard.

Surely if the position is made appealing there will be enough candidates. Few have been the instances of a man refusing to run for the Vice-Presidential office as it now exists. I can only list offhand approximately four.

I believe the same could be said of a second Vice President if the position were available and made important. This would make the man known to the electorate before the election and prevent the possibility of the incumbent naming a man who would be generally unacceptable to the country at large although approved by its representatives in Congress for one reason or another.

If I might digress for just a moment, I do not mean to impugn the motives or patriotism of Congress for one minute on this, but an occasion may arise where there has been a bitter internal problem or a bitter controversy between the Executive and the legislative, and there may be—there may be an impasse.

Possibly you may consider my line of reasoning out of order as this is no longer a part of this amendment but I suggest it as a substitute. There are undoubtedly good reasons why you may find my ideas unacceptable but I trust that you will give them your fullest thought. I would also prefer that the disability concept be kept as is under the "agreement" status—changed, expanded, brought up-to-date or refined with the various new administrations that will come in every 4 years.

Whatever your final decision may it be accomplished amicably and justly without any consideration of offices and people holding them at any given moment. Even the office of President has been occasionally filled by men of less than superior qualifications yet we don't consider abolishment of this office because of it.

Let us never be guilty of throwing out the baby with the bath.

Senator BAYH. May I attempt to summarize quickly, as I have understood it, your statement and we shall look to the record again, when I have more time to consider what you have said at a slower pace?

Mr. DEASY. Yes.

Senator BAYH. You feel that the problem of disability is adequately handled in the private agreement between the President and Vice President?

Mr. DEASY. I think that it is or can be—or can be—without a constitutional amendment.

Senator BAYH. You see no concern about the possibility to which you alluded, that this would be subjected to a court test only at a

time when the Nation is confronted with the crisis. This does not concern you?

Mr. DEASY. I would expect, as was mentioned by some of the witnesses before, the patriotism of the hour would acquiesce in the decision, if the President were disabled and the Vice President moved in. I think the Nation would accept that.

My only problem is it is more a matter of means than end. I think it is basically an executive problem. Therefore, I think the executive branch, and in this case, by "executive branch" I mean Vice President and President themselves, would be able to adjudicate the problem a little better. I admit the Congress is brought in directly by the electoral college and so forth, but I trust that the more separation of powers we have, the better off we may be.

As I say, 99 percent of my case is based upon hypothetical situations, suppositions of what may happen. But the more laws that we make, the more amendments that we make, when we try to tie down these to much, we may get ourselves into a very serious situation.

Senator BAYH. May I suggest that you have been thinking of hypothetical examples, but in the worst hypothetical example, you apply your own reasoning, namely, that you are relying on the good judgment and reasoning of the public of the country, as well as the implications involved. You could come up with almost impossible solutions, the Captain Queeg arrangement, for example. As President Eisenhower suggests don't you have to assume you are dealing with reasonable men.

Only then can we reach a solution. Now, part 2—you suggest then, as I understand it, the election of a second Vice President?

Mr. DEASY. Rather than the appointing, if the Vice President dies and the President is to appoint a successor, I think that this tends to frustrate the original framers of the Constitution.

Senator BAYH. Of course, as you know, you have to get the ratification of the election by the Members of Congress.

Mr. DEASY. Oh, right. As I said, that is where my plan would necessitate, one, an amendment different from your plan, but, B, the heart of your proposed amendment or the committee's I would leave as is under the Executive arrangement. I would try to alleviate the present problems, or the problems that may develop by, No. 1, the creation, and therefore, a constitutional amendment would be necessary, the creation of an automatic successor standing in the wings, elected by the people indirectly through the electoral college, who will be groomed, we would assume, for the position, whom everyone would know about beforehand.

Senator BAYH. You are aware, of course, of some of our feelings that now the office of Vice President has developed to a full-time job and is not like the description Adams and the rest gave to it; that it would take long, hard thought before you would further dissect this power. But you argued the opposite side and did it very well.

Mr. DEASY. May I just say on that, I do not think, in lieu of what some of the previous witnesses said, and because of their background and experience, and organizations which they represent, more than likely—and I would certainly acquiesce in it 100 percent—the amend-

ment as proposed here in Senate Joint Resolution 1 will pass. But my main point in my appearance here today is I would like to go on official record as my main interest being that I do not think, No. 1, we should be hasty. I think we are very fortunate in the fact that nothing happened to President Johnson between November of 1963 and November of 1964.

And also, if legislation is not absolutely, positively necessary, possibly—possibly—we can do without it.

Senator BAYH. I agree. I do not believe in legislation just to go through the activity. Some of us feel that the actuarial tables are going to catch up with us. Although what our constitutional forefathers said—we would not lose both the President and the Vice President in a hundred years—is true: we are rapidly approaching the second hundred years, and history has been trying to tell us something and we had better listen.

I appreciate very much your coming. I appreciate the thought and research that has gone into your testimony. I want to read it over again.

Mr. DEASY. May I just say, on behalf of myself and Providence College, I want to thank you for the privilege of appearing here today.

Senator BAYH. Thank you.

Our final witness today is Mr. Martin Taylor, chairman of the Committee on Constitutional Law of the New York State Bar Association, member of a distinguished New York City law firm and, as I said a moment ago, a man who has given a great deal of thought to this problem.

STATEMENT OF MARTIN TAYLOR, NEW YORK STATE BAR ASSOCIATION

Mr. TAYLOR. After what you have said, Mr. Chairman, I am embarrassed to exhibit my ignorance.

Senator BAYH. The chairman is not convinced that that will be the result.

Mr. TAYLOR. There are really two proposals in your proposed amendment. The first is to provide that there shall always be a Vice President. That is the new idea of the discussions that have taken place over the last 5 or 6 years. It is one that I think everyone approves of. I have as to that only one question—why does it not provide for the period between election and inauguration?

Senator BAYH. May I answer the question?

Mr. TAYLOR. Yes.

Senator BAYH. I am certain you have read the message that the President sent to Congress. He suggests, and I intended to pursue, I hope to consummation, that this matter be dealt with. The reason we did not include this in the present measure—in fact, I think Senator Monroney is one of those witnesses who came before us last year who suggested that we should deal with this on a comprehensive basis. We did not do so and have not done so because constitutional amendments being what they are, requiring two-thirds of each House plus three-fourths of the legislatures, are difficult to pass. For instances, I might be in favor of the part on Vice-Presidential replacement, but I am op-

posed to the disability provision. I am in favor of both the Vice-Presidential replacement and the disability provision, but I am opposed to this nomination and taking oath of office provision.

Mr. TAYLOR. Is that not true of the other provisions? There are always people who will raise issues about one thing or another, and I would think that that would pass almost unnoticed and cure that lapse.

Senator BAYH. We feel we could deal with these successfully more readily in separate resolutions. It is not in an effort to ignore the problem, because I intend to introduce in the next few days legislation dealing with the whole problem of the actual election of the President and the timespan that exists between the time that the voters say "aye," and the time he says "I do."

Mr. TAYLOR. On that point, you have authority in mind. I thought it was something that should be raised.

Senator BAYH. Yes, because this is a problem, particularly in the day of rapid flight by jet airplanes and the complicated dangers the presidential nominee and the President-elect are subject to. It is a very valid point.

Mr. TAYLOR. The second phase I do not want to take your time by reading, but if you will just note these statements in the testimony before this committee:

In the hearings of June 11 and June 18, 1963, at page 33, the now president of the American Bar Association, Mr. Powell; at page 17 or 18—and if I might quote myself, I say the same thing, that it would be better to leave the working out of the details to legislation rather than putting it in the text of the Constitution. Going back to the statement of Marshall that has been quoted over and over again, only a broad enabling power should be given in the Constitution, not implementation, not detail.

In that connection, I was very much struck with what the Senator from Nebraska said this morning, which is that you have to define "immediately," or you would have a serious constitutional question as to whether there is a power in Congress for a legislative body to make an executive decision. The answer to what he said that was made was that it was not a decision, that it was something that took place where he had to concur or disagree with the previous failure to reach a decision, if you please.

Well, it seems that is just as much a decision as any other decision. If the last thing that had to be done depended on Congress, that is an executive decision. That is deciding a fact of whether a person is able to perform the duties of his office. In my view, that is contrary to the principle that the function of Congress is legislative, not executive.

I think the Senator from Nebraska has sufficiently emphasized that, but I had it in mind before. All I am doing now is saying that I agree with him, so I shall not go further with that.

Senator BAYH. May I ask your permission to incorporate your precious statement?

Mr. TAYLOR. Yes, surely.

Senator BAYH. As I recall, you did a very excellent job in articulating the opposing view.

Mr. TAYLOR. You had better limit it, because I find I am a hardened veteran. I have been four times before this committee.

You mean 1963 and 1964?

Senator BAYH. Let me suggest that one or the other of those, both of which I am familiar with——

Mr. TAYLOR. Before it is done, let me go through with you what statements I have made.

Senator BAYH. Yes, consult with counsel on this, because you are an avid supporter of this other position, and I think you state it very well and I want the record to show your views.

(The record excerpts referred to are as follows:)

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 fundamenal 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 be-

tween 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.

Mr. TAYLOR. I come to what I think is the main point——

Senator BAYH. May I ask, before you go on to another point, on this matter of intertwining of executive and legislative power, I, for one, feel this should be avoided if at all possible. But do you not feel, Mr. Taylor, that we have sufficient precedent in the 12th amendment in which Congress itself ends up electing a President under certain circumstances if neither candidate or no candidate gets a majority of the electoral vote? Then Congress takes the determination of who the Chief Executive is going to be.

Also, in the impeachment proceedings, we not only bring in both Houses of the Congress, but bring in the Chief Justice of the Supreme Court to preside over this proceeding. Does this not act as a precedent, that there are specific times? Maybe we disagree that this is the time——

Mr. TAYLOR. Is not that the only one?

Senator BAYH. That plus the election proceeding of the 12th amendment, in which Congress is the elective body and does elect the Chief Executive.

Mr. TAYLOR. Well, that is a voting function, is it not, rather than a decision function?

Senator BAYH. It is about the greatest function the Congress can perform, deciding who is going to be President.

I am concerned about this business of bringing in the Congress but it seemed to me that with my colleagues who have joined us, this is a matter of the greatest possible moment, the removal of the President of the United States from office—temporary diability, true. But should not we allow the elected representatives of the people themselves to have the final say so in the event we got into that small percentage of circumstances where you had disagreement between the President on the one hand and the Vice President and majority of the Cabinet on the other?

Mr. TAYLOR. I would agree with you from your point of view as an expression of policy, that is a way to do it that might meet general approval. I was only being somewhat technical about it as a matter of constitutional law.

I do not think it was contemplated that Congress should have a power of that kind. As a public policy thing, as you suggest, it would probably satisfy more people than any other method. I think that is probably so.

Senator BAYH. It not only would satisfy people, but I want to try to get the best solution.

Mr. TAYLOR. Maybe they would be satisfied with the best result, I do not know.

Senator BAYH. Go ahead with point 3. I am sorry.

Mr. TAYLOR. The other thing that I missed very much this morning, particularly with the Attorney General, whom we have all congratulated in appearing in that capacity this morning. He did not mention our old friend, the written concurrence of the majority of the heads of the executive departments or such other bodies as the Congress may by law provide.

Of course, that goes back historically to the amendment that the Attorney General favored in the past, that the American Bar Association favored in the past, that I favored in the past. But it does not say in this when that is to be done. When is Congress, by law, going to enact another procedure? And if it comes before, does it not destory all the machinery that you have here? If it comes afterwards, is it not going to result in confusion?

What is contemplated that is written as to when that act should take place?

Senator BAYH. Of course, you are familiar with Senate Joint Resolution 139, which is the forerunner of most of this, which has been subjected to close scrutiny by yourself as a member of the bar committee and by the rest of us in our various capacities. Each of us had to give and take a little bit.

This is one of the areas in which my original proposal, as you recall, did not comply. But there were others who said that the Supreme Court should make this decision, that there should be a blue ribbon panel consisting of the Chief Justice of the Supreme Court, the Speaker, the majority and minority leaders of the Senate, plus the Surgeon General, and so on. Others have suggested that you should not take the whole Cabinet, you should only take a committee of five or six; that the whole Cabinet is too cumbersome, it would take too long. There have been so many proposals that we thought, "let us get agreement that the Cabinet," and as we now see it in the light of 1964 and 1965, the Cabinet is the best vehicle. Then, if history proves we

are wrong, Congress can then, without going through the rigmarole of another constitutional amendment procedure, make this determination by statute that it should be another body——

Mr. TAYLOR. In other words, what you are saying is that this contemplates an act of Congress which will afterwards scrap this machinery. Is that it?

Senator BAYH. Yes. I think, as I recall the wording, that the Cabinet or other body that Congress may by law prescribe.

Mr. TAYLOR. "Or such other body as Congress may by law provide."

When does it do that? Supposing Congress has not passed an act? Supposing the written concurrence and so forth, and then suddenly Congress passes an act? Do they stop what is going on?

Senator BAYH. Would not the reasonable interpretation of that be that the Cabinet would be the only body to act until Congress did by law provide for another? When Congress did provide another, this would immediately be implemented.

Mr. TAYLOR. Well, would the result of that be that whenever it arose after that, the machinery which is in this amendment would become obsolete? Is that right?

Senator BAYH. Only the Cabinet. Only the Cabinet as the body which would support the hand of the Vice President.

Mr. TAYLOR. In other words, it contemplates that the decision be made by the Vice President with the concurrence of a body, either the Cabinet or another one created by act of Congress.

Senator BAYH. Here is the exact wording of section 4, the same wording as in section 5:

> If the President does not so declare, then the Vice President, with the written concurrence of the majority of the heads of the executive departments—
>
> The Cabinet—
>
> or such other body as the Congress may by law provide.

It would seem to me that it says very plainly that it is the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide. Unless the Congress by law provides, there is no other body. Congress has not provided, and we do not contemplate that they will unless the executive department heads, the Cabinet, cannot judicially handle this.

Mr. TAYLOR. And the same thing would apply to the resumption of powers and duties?

Senator BAYH. Yes; in section 5. I, for one, would prefer that that were not in there.

Mr. TAYLOR. Well, it is less than our wish and more than you want.

Now, to go back to the other point——

Senator BAYH. What would you prefer? Would you prefer that we specify the body in there?

Mr. TAYLOR. No; but that is something that has been debated before. I would, as I have said many times, and it has up to now been advocated, I would think all this implementation should be in an act of Congress.

Senator BAYH. By statute?

Mr. TAYLOR. Yes.

Senator BAYH. Senate Joint Resolution 35, as Senator Keating sponsored and Martin Taylor sponsored.

Mr. TAYLOR. Not alone. But I do not think there is any use in repeating that, because you are very much committed to the other thing and it is no function of the bar association committee to oppose anything.

All we can be asked to do, I think, is to make suggestions, hoping that they will be of some help.

We have, in our last report, said that if this worked out along the general lines that you have suggested, you will have our support. I am putting it in that way rather than urging any more what is now not likely to be included.

To go back to one more thing, the final thing, the resumption of the powers and duties, regardless of the constitutional question that we have spoken of, separation of powers, this is not strictly my function; it is not a constitutional question, it is a practical one. Is not that a hazardous thing in terms of time? I mean the whole purpose of creating this machinery is to have a summary way of dealing with a crisis.

Now, look at the things that have to take place. Let us suppose that kind of an emergency which we all dread may happen, wars or disturbance or whatever—look at what has happened.

First, the President has to transmit his own conviction that he is well. Then the Vice President has to say, "No, I do not agree with you, you are not well." Then the Vice President has to have a talk with a majority of the members of the Cabinet. They do not agree. Then he has to agree with this other body created by statute, and they do not agree. Meanwhile, airplanes are flying over the Potomac.

Then Congress, with no other guide as to urgency, imminence, time, has to meet and make this executive decision that three other tribunals and individuals have been unable to make.

Senator BAYH. May I follow through the specific example that I think might help to make this a bit less entangled.

One, we shall talk about the resumption of power. In the situation where the President voluntarily declares his own ability and resumes the office without objection, or is unable to do that as covered in sections 2, 3, 4, and the Vice President takes over—90 percent of the time, paragraph 5 is not going to come into play. So first of all, we start out with the President disabled. The Vice President is Acting President. Now, any time that he is Acting President and the bombers start coming over the Potomac, he can take methods that are necessary to take care of the bombers coming over the Potomac.

So the President says, "I am able to resume the powers and duties of the office," and one of two things can happen. The Vice President says, "You are right, Mr. President, you take care of the bombers coming over the Potomac." In that eventuality, there is an immediate transfer of power.

Alternative two, he says, "I am sorry, Mr. President, but the Cabinet and I still believe that you, although you are able to walk and talk, are not the President that we want or need; you are not capable of taking care of the best interests of the people." So he continues to act.

There is no transfer of power there. There may be some question as to the legitimacy of power, but he has it. He is still able to deal with national emergency.

Now, in this interim, the President says, "I am not going to take this lying down. I want the Representatives of the people to decide. Congress, tell the Vice President and the majority of my own Cabinet that they are wrong."

Then the Congress decides the matter, forthwith or immediately, as the case may be. All of this time, the Vice President is still able to deal with national emergencies, and if Congress does not deal with this, if they do not support the hand of the Vice President and the majority of the Cabinet, which quite frankly, I think the Vice President and the Cabinet would not act unless they were pretty well sure of the support of Congress—but if they did not, if Congress did not support them, then immediately the power would go back to the President and he could deal with the bombers coming in.

Mr. TAYLOR. If you think they would not do that unless Congress agreed with them, what is the necessity for putting it in?

Senator BAYH. Because we are looking for this one chance in a million, which I think quite frankly will not exist, that there might be a coup agreement between the Vice President and the majority in the Cabinet. I do not know if you were present or not during the summary I tried to make in support of the resolution after the fine presentation by Attorney General Katzenbach and the very lucid colloquy between him and Senator Hruska. This business of taking away the power of a legally elected, lawfully constituted President of the United States, power which can only be given by the people, is of such serious nature that I want to give the people and their representatives the last recourse to say that the Vice President and the Cabinet have acted erroneously. That is the only reason for Congress being in the picture.

Mr. TAYLOR. Therefore, if they have the last recourse, it must be contemplated that they might have different views about it.

Senator BAYH. Yes.

Mr. TAYLOR. Therefore, there would be delay.

Senator BAYH. Yes—well, no.

Mr. TAYLOR. I mean your theory that a Vice President's position was jeopardized by a decision of the Congress would have sufficient technical power, that is true; would it be likely that that is a satisfactory way for a government facing a crisis to have a Vice President whose position is jeopardized in that way?

Senator BAYH. You know, if you were Vice President and in a situation like that and the Cabinet supported you, despite this fact, I think you would be in a much stronger position and feel much better about this unusual and uncomfortable position in which you found yourself to be able to say, in addition to the majority of the Cabinet, "I have the vote of Congress." I think you would be in a much stronger position.

As somebody mentioned in the testimony this morning, that in the white glare of publicity which Mr. Scherer and others give to this subject, it is going to be obvious if someone is mentally ill or physically incapable of handling the powers and duties of the office. The Vice President and the Cabinet would not dare to make this decision unless it was obvious not only to the public but to the Congress.

Mr. TAYLOR. Going back to what the Senator from Nebraska said, suppose there was not the requisite number of a vote? Then what would happen?

The Senator from Nebraska suggested the possibility that there would not be a sufficient vote to make a decision. What would happen then?

Senator BAYH. In other words, there was not the necessary two-thirds majority to uphold the hand of the Vice President?

Mr. TAYLOR. Yes.

Senator BAYH. And the majority of the Cabinet?

Mr. TAYLOR. Yes.

Senator BAYH. The same thing that happened when the effort was made to impeach former President Johnson.

Mr. TAYLOR. The impeachment failed.

Senator BAYH. So would the effort to retain power on the part of the Vice President. The President would be reinstated.

Mr. TAYLOR. Then following your suggestion that it is imperative or important that the elected Members of Congress have a final say about it, would that be satisfactory if they had exercised their final say in an opposite way to what the Cabinet and the Vice President had done?

Senator BAYH. It certainly would not be satisfactory. It would not be a desirable situation. This, as I pointed out repeatedly, and will point out again, is a situation for which there is no perfect solution. This one particular case where you have a President fighting openly with a Vice President and the majority of the Cabinet is a rather unfortunate situation, undesirable to say the least.

But I must say again that whenever you have a majority of the President's own Cabinet supporting the hand of the Vice President who says, "Mr. President, we are awfully sorry, but you are not well," it is going to be an unusual Congress that does not go along with that. It would be an unusual Vice President and majority of the Cabinet that would get themselves in that position.

Mr. TAYLOR. Instead of arguing your questions, let me congratulate you on your success to this point and hope that you have further success.

Senator BAYH. I must admit the conversation I have had with you here and that we have had both privately and publicly have done a great deal, not only to stimulate my thought processes, but have helped us arrive at a decision. I appreciate your coming.

Mr. TAYLOR. Thank you, sir.

Senator BAYH. We have some additional statements I would like to include in the record, one from Senator Pearson and one from Senator Saltonstall, and, without objection, they will become a part of the record.

(The statements referred to follow:)

STATEMENT OF HON. JAMES B. PEARSON, A U.S. SENATOR FROM THE STATE OF KANSAS

Mr. Chairman, the subject of presidential succession and disability is vitally important to the stability and tranquility of this Nation. The electrifying rapidity of events which centered on November 22, 1963, rivited the attention of the Nation to the need for an effective succession and disability arrangement. That attention, moreover, has remained both fixed and constant in the ensuing 14 months.

The problems surrounding presidential succession and disability have manifested themselves all too often in the course of American history. I need only recall that 8 of the 36 Presidents of the United States have died in office. Eight

Vice Presidents, furthermore, have either died in, or resigned from office. 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 President was occupied by a man unable to perform his duties because of physical disability.

In more recent history, President Eisenhower suffered three serious illnesses during his 8 years in office. He was, fortunately, never incapacitated to the extent of Garfield and Wilson.

The number of succession acts which have been legislated in attempting to resolve the difficulties raised by either death or disability in the office of the President indicate that we have failed to find an appropriate solution to these problems. I think, however, that the joint resolution which the Senate accepted in the final days of the 88th Congress is indeed one of the most meritorious of any such proposal designed to capably deal with the subject matter at hand. As a cosponsor of that proposal, I felt that it was the best of the many that had been offered in the wake of events following the tragic death of President Kennedy.

After considerable reflection, however, I do believe that one aspect of that proposal could be effectively strengthened. For this reason, I have withheld cosponsorship of Senate Joint Resolution 1 until I should have the opportunity of presenting my remarks for consideration.

With respect to Senate Joint Resolution 1, it is possible that the office of the Vice President could, under certain circumstances, remain vacant. This, in turn, could hinder any further transition or succession should it be required.

Suppose, for example, that a President becomes disabled for one reason or another. The Vice President would then become Acting President under the provisions of Senate Joint Resolution 1. The office of the Vice President, however, would remain vacant so long as the disabled President continued to live.

Unfortunately, it is not inconceivable that an Acting President could also be removed from the discharge of the powers and duties of the office of the President by death or disability. If this should occur, provisions for succession would revert to those of the Succession Act of 1947. Senate Joint Resolution 1, as a result, would represent an improvement to the Succession Act of 1947 under most circumstances—but not in all circumstances.

To guard against the contingency which I have mentioned, I suggest that the provisions of Senate Joint Resolution 1 can be altered slightly in the form of simple additions.

First, I feel there is merit in appending to the present provisions one which states that the Vice President, upon becoming Acting President, nominates an individual to discharge the powers and duties of the office of the Vice President. This nomination, in accordance with procedures in the provisions of Senate Joint Resolution 1, would be subject to the concurrence of both Houses of Congress by majority vote. In this manner, the office of the Vice President would always be occupied and the smooth transition of power assured.

Furthermore, provisions of Senate Joint Resolution 1 which apply to the relation between the President and the Vice President would have to be repeated to apply equally to an Acting President and the person selected to temporarily execute the duties of the office of Vice President. The same procedure would be applied should the Acting President become disabled or refused to declare his disability.

The procdeure for the resumption of the duties of the Office of the President by either the President or the Acting President upon recovery would be identical to those incorporated in the present provisions of Senate Joint Resolution 1.

I feel that the suggestions which I have outlined would tend to insure a continuity of succession when the problem is one of Presidential disability. A few simple additions, as I have previously stated, would be necessary to effect what I have proposed. The intent and the structure of Senate Joint Resolution 1 would not be affected. It would only be extended.

I appreciate the fact that my remarks will be given due consideration by the subcommittee and incorporated in the final form of the resolution if sufficient merit should exist. As an expression of my confidence in the wisdom and ability of the subcommittee, I wish to request that my name be added as a cosponsor to the measure before us.

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
January 28, 1965.

HON. BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Last March I submitted a letter to this subcommittee expressing my views on the dual problems of Presidential succession and Presidential inability. I am taking this opportunity once again to urge the subcommittee to act on the proposal before it, so that our Constitution will be amended to provide for a continuing and uninterrupted executive leadership.

As a cosponsor of Senate Joint Resolution 1, I feel that this resolution offers a reasonable and workable solution to the failure of our Constitution to establish a clear policy on Presidential succession and disability. It provides for (1) a successor to the President should the office of Vice President become vacant; and (2) a formula by which the Vice President, without usurping the power or position of the President, can assume the duties of the Presidential office should the Chief Executive himself be unable to perform them.

On January 20, 1965, we inaugurated a President and Vice President for the next 4 years. It was the first time in 14 months that we had had men in both of our Nation's top offices to supervise the conduct of our domestic and international affairs. We must not allow such a potentially dangerous situation to occur again. The President of the United States is the leader of the free world, and we must insure that he has a constitutional successor at all times, someone who can step in on short notice and assume his duties should the occasion arise.

Although it is true that each time the problem of Presidential succession has been considered by the Congress different proposals have been advanced, I think it is fair to say that this resolution, Senate Joint Resolution 1, is not a solution for today alone. It has been subjected to exhaustive discussion and debate around the country as well as here in the Congress. Last year it was approved by the Senate without a dissenting vote. The proposal is carefully designed to endure as our Constitution itself endures, and to meet the eventualities of the future insofar as we can foresee them. I hope that we may now take advantage of the initial progress made last session and approve this proposed amendment to the Constitution.

Sincerely,

LEVERETT SALTONSTALL, *U.S. Senator.*

Senator BAYH. There have been people who have suggested that the record remain open temporarily while hearings are going on in the House on this subject. I would like to say, however, that the record will not remain open for an extended period of time, because this subject has been discussed at great length and I feel that there is a matter of great urgency.

Let me say that I share Professor Deasy's admonition that we should not act in panic. I do not think that any of the discussions we have had to date or intend to have will be indicative of a panic situation, but I do think that there is a sense of urgency and we shall not leave the record open more than for a very few days. I do not intend to hold additional hearings unless there is a compelling reason that I do not foresee.

If there is no further testimony, the hearings will be forthwith closed. But prior to the termination of the hearing, I would like to pay particular comment in gratitude to our recorder for the extended time which she has put in here and for the fine way in which she has made herself available today.

The hearing is closed.

(Whereupon, at 2:40 p.m., the hearing was closed.)

(The following material was received by the subcommittee and is included in the record at this point:)

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

Presidential succession and presidential disability have long needed constitutional clarification; and, I am pleased to join in cosponsoring Senate Joint Resolution 1, which, I feel, brings these problems as near to a solution as is possible. Also, I would like to express my appreciation to the chairman of this subcommittee for the fine work he has done in developing this resolution and in presenting it to the Senate. He deserves the thanks of Congress and the American people, for without his patience and understanding, the many divergent proposals to solve these problems would never have been melded into a single comprehensive measure.

I favor a system of filling a Vice Presidential vacancy that is based on the premise that Congress should choose the best man for the office at the precise time the need for selecting a successor arises. That time occurs when the Vice President dies or succeeds to the Presidency. Only then will attention be focused on the qualities necessary to make a good President. This is accomplished in Senate Joint Resolution 1, which provides that in the event of a Vice Presidential vacancy, the President's nominee to fill the vacancy shall be voted on by both Houses of Congress. This method satisfies the requirement, voiced by President Truman, that the "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"; and by having the President nominate the candidate, it will insure his compatibility with the nominee. Also, the need for continuity is met. There will always be a Vice President who can participate in the creation and execution of the policies of the existing administration.

The Constitution itself provides that the Vice President shall succeed the President in the event of the latter's death or disability. Yet, the language is not free from doubt. Controversy centers on the problem of ascertaining whether the Vice President assumes the office of President or only the "powers and duties" of that office.

When Vice President Tyler succeeded President Harrison in 1841, he assumed the office as President, not as Acting President. And every Vice President to become President through succession has similarly been designated President. However, there are some who still maintain that, constitutionally, the Vice President only serves as Acting President. Senate Joint Resolution 1 lays at rest this ghost that has troubled authorities since the death of William Henry Harrison by providing that the status of the Vice President on assuming the Presidency shall be that of President.

There is one point, which this measure fails to contemplate, that merits grave consideration: Congress at an early date should prepare for the possibility, however remote, of a simultaneous vacancy in the offices of both President and Vice President. The subcommittee eliminated my proposal dealing with this possibility not because the members felt that the proposal lacked merit, but because they felt this measure added to a joint resolution to remove defects in the Constitution might jeopardize the possibility of securing favorable action on two essential changes which everyone conceded must be made.

The section on Presidential inability is particularly desirable since twice in our country's history, with the disability of President Wilson and the lingering illness of President Garfield, situations arose in which lack of provision for Presidential disability led to indecision and confusion which could have had serious consequences for our Nation. This resolution utilizes the Vice President, Cabinet, and the Congress in the determination of Presidential inability, and, thus, represents in the finest manner the system of checks and balances which the Founding Fathers put in the Constitution to insure that neither partisanship nor tyranny could take charge of the American Government. When there is a division between the executive branch and the legislative branch, Senate Joint Resolution 1 prevents such partisanship as existed during Andrew Johnson's administration by not allowing a political party controlling Congress alone to determine whether the President is able to perform the functions of his office.

It is imperative for Congress to provide for the eventualities of Presidential inability and Vice-Presidential vacancy, and I sincerely trust that the Senate and the House of Representatives will soon approve this joint resolution by the

required two-thirds majority, and that three-fourths of the States will ratify the proposed constitutional amendment in the shortest possible time. Such action would remedy two very serious omissions in our Constitution—omissions which must be remedied if we are to insure the continuity and stability of our Government.

STATEMENT OF SENATOR JACOB K. JAVITS

I have been deeply concerned about the fact that, especially under present world conditions, the Nation for the second time in 20 years has been without a Vice President, an office whose function has grown in importance so greatly since the drafting of the Constitution. For this reason in the 88th Congress I introduced Senate Joint Resolution 138, a proposed constitutional amendment providing for the election of a Vice President by the Senate and the House of Representatives when the incumbent ascends to the Presidency, subject to the advice and consent of the new President. On December 12, 1963, I testified before this subcommittee in favor of my proposal and for the need of immediate action on this problem and on the related problem of Presidential disability.

When this subcommittee arrived at the consensus of views on both problems which was embodied in Senator Bayh's proposal, then Senate Joint Resolution 139, I felt that the need for prompt submission of a constitutional amendment to the States outweighed my own desire for a somewhat different formula on Presidential succession. I joined in sponsoring the reported measure and supported it on the Senate floor when it was adopted by the Senate on September 28, 1964. Unfortunately, sufficient time did not remain for the other body to act on it, and the joint resolution is, therefore, again before us, now as Senate Joint Resolution 1. Again I am a cosponsor of Senate Joint Resolution 1, and I strongly urge that it be reported favorably to the Senate as soon as possible. The impetus of public concern which was generated during the 13 months when the office of the Vice President was vacant must not be permitted to dissipate now that the immediate need is no longer present. And the critical need for a constitutional mechanism for dealing with Presidential disability is ever present. I commend the chairman and members of this subcommittee for giving this measure the high priority which it so much deserves. I also wish to commend very highly the American Bar Association, which was so much responsible for the creation of the consensus on this proposal which now exists.

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
February 1, 1965.

Hon. BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendments, Senate Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: I share the concern displayed by you and the other Members of the Senate who have joined with you in cosponsoring Senate Joint Resolution 1 on the problem of Presidential disability and Vice-Presidential vacancy.

We all recognize that a problem exists by virtue of the fact that during prolonged periods of time the United States has in the past been and, absent some action by Congress, most assuredly in the future will be without the services of a Vice President. The duties and responsibilities of the Vice President have been greatly expanded in recent years and our country can ill afford to be without a procedure whereby a vacancy in the office can be filled. I am pleased to join with you in seeking some feasible method to provide for filling any vacancy which might occur as soon thereafter as is practicable.

While there is obviously widespread agreement that something must be done, there is also some disagreement on the best approach to the problem. There has been criticism of the proposal for allowing the President to name a new Vice President, even though this is subject to confirmation by a majority vote of both Houses of Congress. The argument has been advanced that this method has no relationship to any procedure now existing for filling a vacancy in an elective office.

I much prefer the method set out in Senate Joint Resolution 25 to that contained in Senate Joint Resolution 1. Senate Joint Resolution 25, which I introduced on January 15 of this year, calls for the election of a new Vice

President by the very people who elected the Vice President at the most recent election for President and Vice President—the electoral college. This method has much to recommend itself in preference to the naming of a new Vice President by the President: First, it does not violate the general electoral process; second, it would allow the selection to be made by individuals closer to the populace; and third, it would create a broader base of support for the person chosen. In addition to these advantages, this method would allow filling the office without any undue delay.

It is conceivable, and even likely, that the individual chosen by either method would be the same. This does not concern me. What does concern me, however, is the method by which he is chosen. It seems very logical that a new Vice President should be elected by the electoral college which was elected at the most recent presidential election.

Sections 3, 4, and 5 of Senate Joint Resolution 1, dealing with Presidential disability, has my support. However, I ask you to give very earnest consideration to amending the first two sections of Senate Joint Resolution 1 to include the substance of Senate Joint Resolution 25.

With best wishes,

Sincerely,

STROM THURMOND.

STATEMENT OF HON. KARL E. MUNDT, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Mr. Chairman, I appreciate this opportunity to present a statement to the subcommittee regarding the problem of presidential succession and presidential disability. I congratulate the subcommittee and Chairman Bayh for the prompt scheduling of these hearings and I urge equally prompt consideration and reporting of the proposed constitutional amendment. I believe the subcommittee is engaged in a highly significant and important discussion as it considers this amendment which has focused the attention and interest not only of all Members of Congress but all thoughtful citizens of America. I am pleased to be associated as a cosponsor of this proposal.

This amendment would merely confirm long-established precedent by making a part of the body of the Constitution, the proposition that in the event of death, resignation, or removal of the President, the Vice President or the next in line of succession succeeds to the office of the President for the unexpired portion of the term in counterdistinction to succeeding only to the "powers and duties" of the office as an Acting President.

The amendment would add the new feature of providing for the prompt filling of the office of Vice President in the event it should become vacant. It would provide, quite simply, that when a vacancy occurs in the Vice-Presidency, the President will nominate a person who shall become Vice President for the remainder of the unexpired term upon the approval of a majority of both Houses of Congress. This procedure gives the President the power to choose his potential successor, someone with whom the President enjoys harmonious relations and mutual confidence. The plan has the added advantage of selecting a Vice President with a minimum delay. In an age of advanced weapons and accelerated pace in national and international affairs, we can ill afford protracted delays because the Vice-Presidency is generally recognized as carrying with it specific and important responsibilities in the executive branch of government. In addition, this procedure contains the safeguard of congressional approval and might be likened to the current nominating practice of both major political nominating conventions which is to simply ratify, by convention vote, the presidential choice for the vice-presidential nominee.

The matter of presidential disability has long been extremely difficult and perplexing. This is emphasized by the fact that it has never been the subject of legislation even though our Nation has experienced virtual constitutional crises when faced with disability of our Chief Executive. During the lingering death of President Garfield and President Wilson's disability, indecision and confusion were apparent. No one would come to grips with the question so it has never been squarely faced. Fortunately for our Republic, these disabilities occurred at times when our national and international situation was relatively serene. The lesser disability of President Eisenhower in 1955, following his heart attack, and the assassination of President Kennedy, dramatically underscored the seriousness of the matter in times of perpetual international tension.

It is my opinion, and of a number of the expert witnesses who testified before this committee last year, that the solution reached in handling this puzzling problem is a happy one. The determination of the commencement and termination of the inability of any President is simply a matter of fact. If the President is capable of notifying the Vice President of this fact in writing, then under the terms of the amendment, the Vice President would assume the "powers and duties" of the office. If the President is not capable of so declaring, then the Vice President, with the concurrence of a majority of the heads of executive departments or such other body as Congress may designate, transmits this fact to Congress and the powers and duties of the office evolve upon the Vice President.

The matter of terminating a temporary transfer of the powers and duties of the Presidency has long perplexed constitutional scholars. This amendment, I believe, has formulated a workable plan by providing that, when the President transmits to Congress his written declaration that no inability exists, he will once again assume the powers and duties of his office. However, if the Vice President, with the concurrence of a majority of the heads of the executive departments or such other body as Congress may provide for in law, transmits to Congress within 2 days his written declaration that the presidential disability continues, then Congress will decide the issue by a two-thirds vote of both Houses. The placing of Congress in the role of arbitrator is supported by ample precedent. The Constitution now provides that Congress shall elect the President and Vice President if the electoral college cannot elect and provides for the removal from office of the President and Vice President by Congress. Neither of these instances are considered a violation of the principle of maintaining the three separate branches of government.

Mr. Chairman, we have gambled much too long with the question of presidential succession and presidential disability. Providence has smiled upon us in the past. It is now imperative that we act quickly to resolve this constitutional dilemma. I urge this subcommittee to report this constitutional amendment so the Senate can approve it with dispatch.

CORINTHIAN ISLAND, BELVEDRE–TIBURON, CALIF.,
January 30, 1965.

Senator BIRCH BAYH,
Chairman, Subcommittee on Constitutional Amendments, Judiciary Committee of the Senate, Senate Office Building, Washington, D.C.

DEAR SENATOR BAYH: Please accept this letter and the supporting exhibits as a statement to your Subcommittee on Constitutional Amendments in connection with your hearings on Senate Joint Resolution 1 (the Bayh-Celler amendment).

On Thursday of this week when I was in Washington, I discussed this with Mr. Larry Conrad, chief counsel of your subcommittee. He assured me that a letter such as this would be acceptable as a statement. He instructed that I address it to you.

When I met with Mr. Conrad, I left with him a copy of the book I wrote entitled "Illegitimate Power," the history of the secret ballot we lack today; its acceptance in our country's early years; its present-day power to reform Congress, the conventions, and the parties.

I also directed Mr. Conrad's attention to a Legislative Reference Service study issued by the Library of Congress on the procedure followed by the U.S. House of Representatives in choosing the President in event no candidate has received a majority of the electoral vote. This reports on the rules the House followed in electing John Quincy Adams as President in 1825. The responsibility for the election fell upon the House under the 12th amendment.

The heart of my contention in this statement is that the word "ballot" in article II, section 1, paragraph 2 and in the 12th amendment of 1804, equate to "secret ballot" in terms of modern usage.

I believe a basic issue has been skipped in the drafting of Senate Joint Resolution 1.

In early America, the contrasting implications of voting by secret ballot and voting viva voce to a call of the roll were not treated lightly. It is not my feeling that these implications have been treated lightly by the sponsors of Senate Joint Resolution 1. Instead, I find nothing in your records that indicates the fundamental issue involved has been treated at all.

The reason for this is understandable. I discovered in writing "Illegitimate Power" that the word "ballot" has changed meaning in the United States in the past 125 years. Few know this. Fewer still appreciate its significance. Yet this simple word is a key that opens the door to understanding values, old and new, in our country's politics.

The fact that "ballot" in the 12th amendment means secret ballot is clearly illustrated by the Legislative Reference Service study I have referred to. A copy of this report is attached hereto as an exhibit.

It is also illustrated by a debate on voting method that took place in the House on January 16 and 17 of 1829. I quoted large sections of this debate, taken from Gale's and Seaton's "Register of Debates in Congress," in "Illegitimate Power." Copies of these book pages are also attached hereto as a supporting exhibit.

In full perspective, this debate treats the issue of representative voting by secret ballot on choices for leadership. The eloquent observations of Representatives Barringer and Bartlett more than support my contentions. I appreciate the opportunity of being able to insert these gems of democratic thought of 1829 in the Senate's reports of 1965.

I bring this to your attention because, in the light of these precedents, I feel a requirement for secret ballot voting legitimately belongs in the Bayh-Celler amendment.

I refer specifically to the majority vote of confirmation required by both the House and the Senate in section 2 of the Senate Joint Resolution 1 draft (pertains to filling the office of Vice President).

The office of the Vice President, and thus the succession to the Presidency, involve considerably different responsibilities and type of precedents than do the many appointments of the President which are subject to congressional confirmation.

I wish to make two practical points. These extend beyond the issue of legitimacy.

The first concerns the political situation that will exist if ever a President dies, and the then elevated Vice President is required to act under section 2.

The nomination and confirmation of a new Vice President will immediately be a power issue. Accordingly, it must be analyzed in terms of fundamental power relationships.

Two chapters of "Illegitimate Power" are attached as supporting exhibits in this respect. They state my thoughts on what I have termed the "constitutional doctrine of the secret ballot."

If the Congress should be allowed to vote as it chooses in the confirmation of the newly designated Vice President, the likelihood is that the vote would be taken viva voce to a call of the roll. Twenty percent of either body could require a journalizing of the vote in the absence of a specific voting requirement akin to that of article II or of the 12th amendment.

The continuity that so aided President Johnson's succession to the Presidency, and so stabilized a stunned nation, would be immediately jeopardized. Through viva voce voting the two parties and the subparties within them could deal among their members and enforce bloc voting. The new President would likewise have to deal for the support of his nominee. Partisanship would quickly emerge. Politically inspired coalitions could develop the objective of discrediting the new President. The result could be, not a free vote of conscience and instinctive judgment, but instead a dangerous power deal.

Contrarily, if the Bayh-Celler amendment is revised to call for secret balloting as does the 12th amendment, the influences of the voting method itself would change the political environment in which the vote would be taken. No one could be sure how anyone else was voting. Votes could not be bargained for because delivery could not be checked.

Endorsements and commitments are not here at issue. What the secret ballot does in leadership selection is free the judgment of those in the middle, those who find it hardest to choose.

This leads to my second point. The issue becomes, directly, the qualities the people of the United States seek in the Vice President (the man one heartbeat away from the most encompassing position of power in the free world).

The Constitution is a living document. It has to fit changing conditions. Its traditions and precedents should not be reversed. The Bayh-Celler amendment should not sanction the transactions of the power dealers at the expense of the secret ballot. A Vice President should be a person of superior qualities who wins the votes, freely given, of a majority of the Members of both the House and Senate.

There are other considerations in my suggestion, though they are not as basic as the points above.

They have to do with both our internal or national regard for our democracy, and the representation we give our democracy in the eyes of the rest of the world.

I do not think that the American people want to forego the protections of the secret ballot in the election of a Vice President.

I do not think that the American people want the rest of the world to think of the United States as a democracy where the secret ballot has been downgraded.

I believe the complex task of gaining passage of the Bayh-Celler amendment, both in the House and in the Senate, as well as in the required number of States, will be made easier by inserting a specific requirement of voting by secret ballot in section 2.

Consideration should be given to a like instruction in section 5. However, in this later section which pertains to a conflict between the President and Vice President on the question of the President's disability, it is clear the precedents and issues at stake are far different than those herein discussed.

In conclusion, I wish again to refer you to the remarks of Representatives Barringer and Bartlett of 1829. They present the human nature aspects of what is at issue here, far better than can I.

I appreciate the opportunity of being allowed to present these many thoughts and my specific suggestion to your subcommittee.

Respectfully,

LAURENCE G. KRAUS.

○