3-26-1957

Staff of the House Committee on the Judiciary, 85th Congress, Presidential Inability: An Analysis of Replies to a Questionnaire and Testimony at a Hearing on Presidential Inability

Staff of the Committee on the Judiciary. House of Representatives. United States.

85th Congress
1st Session } HOUSE COMMITTEE PRINT

PRESIDENTIAL INABILITY

AN ANALYSIS OF REPLIES TO A QUESTIONNAIRE AND TESTIMONY AT A HEARING ON PRESIDENTIAL INABILITY

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

MARCH 26, 1957

UNITED STATES
GOVERNMENT PRINTING OFFICE
89959 WASHINGTON : 1957

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LETTER OF TRANSMITTAL

MARCH 26, 1957.

To Members of the Committee on the Judiciary:

During the 84th Congress, a number of replies were received to a questionnaire on Presidential Inability which had been distributed to numerous jurists, political scientists, and public officials. In addition, the subcommittee held a hearing on various proposals which had been submitted to it on the different aspects of the problem of presidential inability. I have had the Legislative Reference Service of the Library of Congress prepare an analysis of the material and testimony contained in House committee print "Presidential Inability," Committee on the Judiciary, House of Representatives, January 31, 1956, and the hearings on Presidential Inability held on April 11 and 12, 1956, before a Special Subcommittee, Serial No. 20, 84th Congress, 2d session.

I hope that you will find this analysis informative and useful. It does not contain any conclusions on the part of members of the subcommittee.

EMANUEL CELLER, *Chairman.*

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D. C., February 11, 1957.

MEMORANDUM

To: Representative Emanuel Celler
From: Dorothy Schaffter, Senior Specialist in American Government
Subject: Analysis of (1) House Committee Print "Presidential Inability," Committee on the Judiciary, House of Representatives, January 31, 1956. 74 pages and (2) "Presidential Inability," Hearings before Special Subcommittee to Study Presidential Inability of the Committee on the Judiciary. House of Representatives. 84th Congress, 2d session, on Problem of Presidential Inability. April 11 and 12, 1956. Serial No. 20. 124 pages. This analysis was discussed by the Director of Legislative Reference Service and Mrs. Bess E. Dick, staff director of the committee in December 1956, and a deadline of early in the 1957 session was set.

Two members of the Legislative Reference Service staff, Dr. Dorothy Schaffter, senior specialist in American Government and her research assistant, Miss Dorothy M. Mathews, were assigned to prepare this report.

After consideration of several forms of presenting such an analysis, it appeared that the most useful would be to base it on the questionnaire which the Committee on the Judiciary had sent to numerous eminent jurists, political scientists, and public officials. Seventeen

replies to this questionnaire were included in the committee print of January 31, 1956, and the replies of four more persons were published in the hearings of April 11 and 12, 1956. At the hearings 6 persons who had previously submitted replies testified, and 5 persons who had not submitted replies appeared as witnesses. A total of 26 persons either replied to the questionnaire or discussed the principal questions in it.

The information and the expressions of judgment of these 26 authorities constitute a most valuable source for the use of Members of Congress and all interested citizens. Presentation in the form contained in the committee print and the published hearings, however, makes it almost impossible for one to determine the answers of all the authorities to any 1 of the 11 questions in the questionnaire. The attached summary prepared by Legislative Reference Service remedies this difficulty. In the eleven sections of the report very brief statements of the views of each authority are preceded by a brief summary. Page references to the committee print (P) and to the hearings (H) are included in the individual statement to enable the reader to get the brief quoted statement in its context.

Following the analysis is a copy of the text of the questionnaire.

PRESIDENTIAL INABILITY

An analysis of replies to a questionnaire of the Committee on the Judiciary, House of Representatives, contained in their committee print of January 31, 1956; and of testimony of witnesses at hearings of the committee's special subcommittee to study presidential inability, held on April 11 and 12, 1956.

[See preceding memorandum of February 11, 1957, for explanation of materials used and form of analysis.]

DOROTHY SCHAFFTER,
Senior Specialist in American Government.
DOROTHY M. MATHEWS,
Research Assistant in American Government.

February 11, 1957.

I. (a) What was intended by the term "inability" as used in article 2, section 1, clause 6, of the Constitution?

Less than half the persons who answered the questionnaires or who appeared before the Committee expressed an opinion concerning the intended meaning of the term "inability." A number of these prefaced their remarks with expressions of doubt concerning the meaning of the term as intended by the drafters of the Constitution. A few expressed a belief that the failure to further define "inability" in the Constitution had been deliberate, in order that cases might be decided in the future in the light of circumstances prevailing at the time. A number said frankly that they did not know what the intended meaning of "inability" was or had been. The remainder did not answer the question or express an opinion on the matter.

Although various concepts were included in the several statements concerning the intended meaning of inability, the central theme and the concepts upon which a number of those who replied agreed, appeared to be as follows: (1) Inability might be either of a temporary or permanent nature; (2) inability and disability as used in the clause are synonymous; (3) inability covers every instance in which a President is unable, for any reason, to discharge the powers and duties of his office.

A summary of the replies to the questionnaire and of comments made in testimony at hearings on the subject is given below, under the following headings:

A. Expressions of opinion concerning the intended meaning of "inability".

B. Replies expressing belief that failure to define "inability" was deliberate.

C. Replies indicating opinion that the definition of "inability" is not known.

D. Replies in which there was no answer to the question.

A. EXPRESSIONS OF OPINION CONCERNING THE INTENDED MEANING OF "INABILITY"

Aikin (H119-21): [Aikin regarded the "inability" of a President to perform the burdens of his office which have been brought about by the demands of modern Government, and because of which Congress has set up staff aids for the President, as a part of the "inability" referred to in article 2, section 1, clause 6 of the Constitution. He did not, however, offer a comprehensive statement on the intended meaning of the term.]

Brown (P13): "There is an abundance of conflicting opinion on the meaning of the term, but none is authoritative. The records of the Federal Convention and the commentators on the Constitution throw no light on the question. Since there are no authorities to whom one can turn for a definition of 'inability', the term must be defined on the bases of general principles of law and rules governing constitutional interpretation."

Crosskey (H106): "The term 'inability,' * * * is general: it covers every instance in which a President is unable, for any reason whatsoever, 'to discharge the Powers and Duties of [his] Office'; or, I should suppose, any important part of them. * * * Cases of temporary 'Inability', as well as permanent 'Inability', must * * * have been intended to be covered, and the language of the Constitution is fully adequate to cover them."

Fairman (P18): "I have not undertaken extended research to uncover what may have been said about the construction of 'inability' in the course of our constitutional development. I doubt whether such research would lend much aid to understanding. Here the question is not of finding the meaning in 1787 of some old term of law, but rather of applying the constitutional provision in any future eventuality. The words, it seems to me, aptly express the essential thought; the difficulty lies rather in the application. It is 'inability' to discharge the 'powers' and 'duties' of the 'office': these words contemplate a factual situation wherein the incumbent has become unable effectively to discharge the tasks a President must discharge. * * *"

Fellman (P23): "I do not know what the authors of the Constitution intended by the term 'inability,' except that they obviously intended to have the Vice President serve as Acting President during a period of Presidential disability. Disability was never defined, and was mentioned only once in the debates of the Constitutional Convention * * *"

Hart (P30): "The term 'inability' is clarified by the later use in the same clause of the term 'disability' as a synonym. The reasonable meaning is clear in general; * * *"

Hart (H92): "* * * the terms 'inability' and 'disability' are in this context synonymous; * * * inability means inability from whatever cause, and hence includes everything from physical or mental inability to capture by a public enemy; * * * therefore the scope of inability is the same as the scope of section 2 of the British Regency Act of 1937 as quoted by Mr. Fellman; * * * absence from the country does not in itself constitute inability,

and would not ordinarily do so in fact, but might conceivably produce consequences which constituted de facto inability."

Kallenbach (P44): "The term 'inability' as used in article II, section 1, clause 6 of the Constitution was intended to cover any contingency which might render the President incapable of intelligently, responsibly, and effectively discharging the powers and duties of his office. Whether absence of the President from the seat of government or his leaving the territory of the United States were meant to be covered by the term 'inability' is debatable; but precedent and usage have established that these circumstances do not, in themselves, give rise to an inability requiring devolution of executive powers and duties upon the succeeding officer. * * * It is conceivable, however, that a circumstance may arise in which the fact that the President is under a compulsion for some reason or other to be absent from the seat of government for an indefinitely long period of time may be a factor to be weighed in making a determination on whether he is unable to discharge the powers and duties of his office."

Kallenbach (H84–91): [Testimony contains no additional information on this point.]

Peltason (P48–49): "The framers left us no clue as to how they intended the word ['inability'] to be interpreted and no Federal court has had occasion to define it. * * * The dictionary distinguishes inability from disability by saying that the former 'suggests inherent lack of power to perform something' and the latter 'now commonly implies some loss of needed competency or qualifications.' But when the framers substituted inability for disability in later drafts of the Constitution, they did so for stylistic reasons and * * * intended no substantive change."

Pennock (P52): "I doubt if the framers of the Constitution had a precisely formulated definition of the word 'inability' in mind, although I should have thought that there was little doubt that they meant to include mental as well as physical disability."

Peters (H122): "The term 'inability' as used in article 2, section 1, clause 6, of the Constitution was intended in all likelihood to mean a condition of time, place, or circumstance whereby the President became unable to discharge the duties laid upon him by the terms of the Constitution."

Pritchett (P52): [Question not answered directly. Pritchett's opening statement referred to] "The present uncertainty as to the meaning of the term 'inability' as applied to the President in article II, section 1 of the Constitution. * * *"

Pritchett (H70): "It seems obvious that inability must be interpreted broadly enough to guarantee that the Vice President will be able to act when an emergency requires action and the President is for whatever reason unable to act. The present language of clau 6 should need no elaboration to make this point clear."

Romani (P55–56): "It appears reasonably clear from a reading of the section of the Constitution in point, and the debates in the 1787 Convention, that the term, 'inability', comprehends both temporary and permanent inability on the part of the President to discharge the duties and functions of his office."

Romani (H40–46): [No additional information was presented in his testimony.]

B. REPLIES EXPRESSING BELIEF THAT FAILURE TO DEFINE "INABILITY" WAS DELIBERATE

Finletter (P27): "I believe that the Philadelphia Convention deliberately did not define the word 'inability.' The quality of the debates in the Convention was so high that I cannot believe it was an oversight that they failed to be more specific than they were. Indeed, even in hindsight . . . it seems to me wise not to attempt a definition."

Holcombe (P33): "The omission of a definition of the term 'inability,' as used in article II, section I, clause 6, was deliberate. The framers, conscious of their inability to anticipate all the different circumstances in which the President might be unable to perform the duties of his office, intended that each case should be decided as it might arise in the light of reason."

REPLIES INDICATING OPINION THAT THE DEFINITION OF "INABILITY" IS NOT KNOWN

Bailey (P4): "I do not know, and I am not sure that anyone knows, what the Founding Fathers really meant by the term 'inability.' "

Frelinghuysen (H18–40): [Question not directly answered. His testimony revealed a belief that "ambiguities surrounding Presidential disability" should be clarified.]

Howe (P35): [Question not directly answered, but Howe referred to the "vagueness of the constitutional provision" (concerning inability.)]

Hyman (H47): [Question not directly answered, but Hyman referred to] "a constitutional ambiguity on the question of disability as it has stood for the last 169 years".

Payne (H12): "While the question of just what was meant by 'inability' was raised at the Constitutional Convention, it was given very little attention and no conclusions were reached."

Sutherland (P61): "I do not know of any material which shows us just what the draftsmen had in mind, and it may be that the absence from the Constitution of any machinery for superseding the President in case of inability indicates that comparatively little thought was given to the matter."

Sutherland (H77–84): [No further information in testimony.]

Corwin (P16): [Question not directly answered.]

D. REPLIES IN WHICH THERE WAS NO ANSWER TO THE QUESTION

Herbert Hoover (P35, H1–2): [Question not directly answered.]

Huber (P36–37): [Question was not answered.]

Krock (H61–68): [Question was not discussed.]

Lien (H123): [Question not directly answered.]

Sparkman (H8–12): [Question was not discussed.]

I (b)

I (b) Shall a definition [of "inability"] be enacted into law?

A very large majority of the replies were in the negative, as in various ways the view was expressed that a definition of "inability" should not be enacted into law. Such action was termed "undesirable,"

"unwise," "unnecessary," "inadvisable," and considered of doubtful value.

Among the reasons given in support of the negative replies were the following:

(1) An attempt to define in specific terms types of situations in an area where every case is apt to be sui generis might cause trouble by failing to anticipate a future situation.

(2) An attempt to define the term in general terms would not provide any more of a guide than common understanding now furnishes.

(3) The present text accurately expresses the constitutional concept.

(4) Any attempt to define the term would serve to narrow this important provision of the Constituion; to do this by legislation would be unconstitutional.

Only five replies favored the enactment of a definition of "inability" into law. In the remainder of replies there was no answer to the question.

A summary of the replies to the questionnaire and of comments made in testimony at hearings on the subject is presented below, under the following headings:

A. Expressions of opinion that a definition of "inability" should not be enacted into law.

B. Replies which favored enactment of a definition of "inability" into law.

C. Replies in which there was no answer to the question.

A. EXPRESSIONS OF OPINION THAT A DEFINITION OF "INABILITY" SHOULD NOT BE ENACTED INTO LAW

Aikin (H121): "* * * it would be unnecessary * * * to spell out the meaning of the term 'inability' with precision [if the joint resolution which Aikin suggested were adopted, for] it is to be expected that an adequate definition of the term would grow out of statesmanlike actions of the Congress. Were the word given a narrowly conceived meaning in any single enactment, that meaning might well resolve the problems of the past while failing to meet the unpredictable ones of the future".

Bailey (P4): "I doubt that a definition should be enacted into law."

Corwin (P16): "On account of the variety of human circumstances capable of affecting such a question, I greatly doubt the possibility of framing a sure-fire definition of Presidential 'inability'. In fact, such a definition might easily operate to embarrass determination of the matter in many actual situations."

Crosskey (H106): [In view of the] "generality of the 'Presidential inability' provision of the Constitution, and the wisdom of its having been cast by the framers in these general terms, * * * I do not think Congress should attempt to define Presidential 'Inability,' either in respect to its causes or in respect to its duration. To define the conception would be to narrow this important provision of the Constitution. This would be unwise. It would also, as an act of Congress, be unconstitutional; for Congress has no power to alter this or any other provision of the

Constitution, unless power to do so be given in specific terms, as in this case, it clearly is not."

Fairman (P18): "I urge that no attempt be made to enact a definition [of inability] into law. The text accurately expresses the constitutional concept. It is not for Congress to enlarge or to contract—and in any event the Constitution's own words would remain the test. It is for Congress to provide the means for ascertaining inability in any doubtful case."

I (b)–3

Fellman (P23): "I think it would be extremely unwise to try to define the term 'inability' in legislation. Any attempted definition would, I believe, do more harm than good, and the more prolix the definition, the worse it would be. * * *"

Finletter (P27): "* * * I recommend against a definition being enacted into law. Disability is a relative term. There are, of course, rare cases where there is no doubt that a man is disabled and in every likelihood will continue to be disabled. * * * In that case a congressional definition of the term 'inability' would add nothing. The more usual case, however, would be where there would be doubt whether the President (a) was at the time incapable of performing his duties, or (b) might recover from the inability; and there are so many variations within these two possibilities, as well as so many possible variations of circumstances and of personality, that I believe it would be unwise to try to cover all the possible situations by a written definition."

Hart (P30): "The reasonable meaning [of 'inability'] is clear in general; and it may be doubted whether a definition should be spelled out in the statute. The attempt to define in specific terms types of situations in an area where every case is apt to be *sui generis* might cause trouble by failing to anticipate some future situation. On the other hand, any general language would probably have to be so very general as not to be more of a guide than common understanding now is. An agency such as that proposed below should have the opportunity to use its own best judgment unhampered by the words of a legislative definition and guided only by the general intent of the Constitution. The same objection arises with respect to writing a definition of the duration of an inability."

Hart (H92): "* * * while Congress should not undertake a definition of inability, the joint resolution [which Hart proposed] * * * should declare * * * that inability includes 'all cases in which the President is in fact unable to exercise the powers and discharge the duties of his office'."

Holcombe (P33): "* * * in my opinion, it is not desirable that a more precise definition of 'inability' be enacted into law. I believe that the framers showed sound judgment in refusing to try to anticipate all the contingencies that might arise in a distant and uncertain future. We should not be improving their work but impairing it if we should undertake to do what they so wisely refused to attempt."

Howe (P35): "* * * the unpredictable contingencies of the future * * * leads me to believe that it would be most unfortunate to

attempt by any means to define 'inability'. It seems to me that it is better to preserve the vagueness of the constitutional provision than to attempt to achieve an undesirable, and perhaps an unattainable, precision. It seems to me, for instance, that an 'inability' which might present major problems if it should occur at the beginning of a President's term of office might involve no truly significant issues for the Government if it should arise during the concluding months of his administration. To produce a single definition and to seek a single answer for problems which the accidents of time make essentially different would seem to me most unfortunate".

Hyman (H54): [Question was not directly answered. However, in discussing a proposed joint resolution Mr. Hyman remarked] "* * * the drafters of the joint resolution showed genius in not venturing to define the term 'inability' or how many degrees of it would have to prevail before the substantive provisions of the resolution would become operative. Had they acted otherwise, all that would have become operative would be a Babel of political and legal persons tossing bricks at each other that were meant for use in building a tower reaching to a constitutional heaven."

Payne (H15): [The question was not directly answered. However, Payne did state,] "* * * I do not believe that Congress should in any way play an active part in determining Presidential inability."

Peltason (P49): "Any attempt to define inability would be unwise. Inability is more than a condition, it is a judgment. It is a judgment that cannot be made in advance. It depends upon the particular demands at the particular time. Under some conditions, pneumonia might render the President unable to discharge his duties. At other times, the demands might not be so pressing; a delay in Presidential action might not result in a failure to discharge his responsibilities. Inability is as precise as any word that might be chosen. * * *"

Pennock (P52): "I doubt very much whether it would be desirable to attempt to enact a definition into law." [The definition of 'inability'] "is a matter that should be left to the discretion of whatever agency is charged with the determination of 'inability'."

Prichett (P52): "I would recommend against such an effort, [the enactment of a definition of 'inability' into law] on the grounds that it would be impossible to develop anything except a collection of truisms having no real value in arriving at a finding of inability."

Pritchett (H70): "* * * should a legislative definition of 'inability' be adopted? I doubt the necessity or wisdom of such an attempt."

Romani (P57): [The approach, that Congress might undertake a definition of the term "inability," and enact such a definition into law,] "seems unwise, not only because it is somewhat unnecessary, but also because it is impossible to work out a definition that would cover any and all contingencies. The existence of an inability statute would tend to confuse the issue when a case of Presidential inability arose not mentioned in the law, thereby creating delay, rather than promptness, in meeting the situation. Such a law, also, is no guaranty that the procedures

designed to deal with the question would be sufficiently flexible for this purpose. Moreover, any effort to define 'inability' would, no doubt, lead to a consideration of whether absence from the seat of government constituted inability, thus opening another Pandora's box. For these reasons, it is strongly recommended that Congress not attempt a definition of the term, 'inability,' as it appears in article 2, section 1, clause 6 of the Constitution."

Romani (H43): "* * * any attempt to define inability would tend to create almost as many difficulties as the ones we are trying to meet."

Sparkman (H9): "I think it would be most unwise to try to enact a definition for inability. When I consider how vastly different are the demands of the Office of President today from what they were 150 years ago—even 50 years ago—I have serious doubts that any definition would have much permanent value."

Sutherland (P61): "I should consider an attempt at legislative definition inadvisable and not helpful. The varieties and degrees of disability, physical and mental, temporary or permanent, which might render a President unable to discharge his duties, are so numerous that an inventory would be impracticable, and a definition would end up as a repetition in different words of what we already know—that inability in the constitutional sense is inability so serious that it requires that the President's duties be taken over by someone else."

Sutherland (H78–79): "I agree that it is futile to attempt any such definition [of inability]. Everything from hostile capture to mental disturbance is a possibility, and there is no practical way to define these many forms of inability in a few words."

B. REPLIES WHICH FAVORED ENACTMENT OF A DEFINITION OF 'INABILITY' INTO LAW

Brown (P5): "A definition of 'inability' should be enacted into law."

Frelinghuysen (H33 and 38): "* * * it would be very undesirable to try to spell out * * * [a definition of 'inability'] in a constitutional amendment." [However, in the joint resolution which Mr. Frelinghuysen presented] "Section V provides that 'the Congress may by law implement the foregoing sections of this article.' The purpose here is to enable the Congress, should it see fit, to attempt further to define 'inability,' and to establish additional and more detailed procedures for determining inability. * * *"

Kallenbach (P44): "I think that a congressional statute, in the form of a joint resolution embracing the essence of the constitutional terminology relative to devolution of presidential power in the event of presidential disability and expressive of the sense of Congress, should be enacted."

Kallenbach (H90): "I suggest that there be included in the constitutional amendment [which Kallenbach proposed] a guide as to what inability is."

Lien (H123): [Question not directly answered. By implication the reply appeared to favor a definition of "inability."]

Peters (H122): "A clarifying definition should be enacted into law."

C. REPLIES IN WHICH THERE WAS NO ANSWER TO THE QUESTION

Hoover (P35, H1–2): [Question was not answered.]
Huber (P36–37): [Question was not answered.]
Krock (H61–68): [Question was not discussed.]

I (c) If so, [if you favor the enactment of a definition of "inability" into law] will you set forth a workable definition?

I (d) Shall such a definition encompass physical and mental disability as well as the duration thereof?

Since these two questions are linked to question I (b) above, the only substantive replies to be expected are from those who favored the enactment of a definition of "inability" into law. However, a few persons who did not favor enactment of a definition did indicate what such a definition might contain.

All replies from both of these groups are summarized below.

SUBSTANTIVE COMMENTS CONCERNING A DEFINITION OF "INABILITY"

Brown (P5 and 14): "Such a law should provide for both physical and mental disability, permanent and temporary. Temporary absence from the country is not necessarily an 'inability'; however, the capture of a President in time of war could readily lead to a crisis in Government unless proper provisions were made for such an emergency . . . Even if it possesses the power Congress probably cannot define inability before its occurrence in such a way as to cover every contingency. The most Congress can do is to declare that the term 'inability' shall cover all cases in which the President is in fact unable to exercise the powers and discharge the duties of his office."

Fellman (P23): [Although Fellman did not think the term should be defined by legislation if nevertheless this is attempted, he stated that] " . . . commonsense dictates that disability may be due either to bodily or mental infirmity, and if there is any possible doubt about it, then the law should say as much. . . . Clearly the Constitution contemplates that the President may get over his disability, since it uses the phrase 'until the disability is removed.' Obviously a sick man may get well, and the law should be clear on this point, that the President resumes all of his powers when his disability is ended."

Hart (P30): [In a memorandum on Presidential inability, Hart doubted whether a definition should be spelled out in a statute.]

Hart (H92): [When he testified before the Committee, Hart stated,] ". . . while Congress should not undertake a definition of inability, the joint resolution [which he proposed] . . . should declare . . . that inability includes 'all cases in which the President is in fact unable to exercise the powers and discharge the duties of his office'."

Kallenbach (P44–45): [The statute] "should define presidential inability, but only in the broadest terms. Any definition more or less restrictive than the language of the Constitution itself is beyond the power of Congress to enact. Hence the statute should merely express congressional accord with the constitutional rule that there shall be a devolution of presidential power upon the

Vice President, or any other officer properly in the line of the succession, in the event of an inability of the President. 'Inability,' in the constitutional sense, has reference to a mental or physical condition or any other condition, which prevents the actual exercise of the powers and duties of the office of President as the public interest and necessities require. * * * 'Inability is a matter of fact. It is my belief that Congress lacks authority to circumscribe in any way the term as it is found in this clause of the Constitution. It may not delimit the causes from which inability may be deemed to arise, or prescribe a period of time during which the inability must persist before the devolution of presidential power may occur. Nor may it specify a minimum or maximum period of time during which the devolution of presidential power shall be deemed effective. The Constitution indicates that it shall be effective for the duration of the period of actual inability of the President, and Congress cannot alter the constitutional rule on this point."

Kallenbach (H90): [A guide to what inability is] "would be covered in the following section of the amendment [which he proposed]: "Sec. 2. If the President should, for any reason, become unable to discharge the powers and duties of his office in the manner which the public interest requires and necessitates, the powers and duties of the office shall devolve upon the Vice President, who shall then act as President until the disability be removed or his term of office shall expire. Congress may by law establish the procedure by which the inability of the President to discharge the powers and duties of his office shall be determined, and provide for the case of the removal, death, resignation, or inability both of the President and Vice President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

Lien (H123): "It seems to be agreed by all that the wording of any provision relating to 'inability' should be general enough to cover the unavailability of the President for the performance of his duties whatever the cause involved might be—mental or physical illness, airplane crash in some inaccessible place, kidnaping, wartime capture, etc."

Peters (H122): "The law should provide that 'inability' also includes both mental and physical disability and that 'inability' also includes circumstances under which the President is captured, imprisoned, or similarly impeded in the discharge of his constitutional functions. A period of time would not have to be specified in the definition. Brief periods of inability would appear to come within the rule of de minimis."

Pritchett (P52): [In his reply to the questionnaire, Pritchett recommended against enacting a definition of inability into law.]

Pritchett (H70): [In a prepared statement presented at the hearings, Pritchett doubted the "necessity or wisdom" of adopting a legislative definition of "inability". His statement continued:] "However, if there is a desire to make it clear beyond the shadow of a doubt, Congress might, as suggested by Ruth C. Silva . . . pass a concurrent resolution declaring that inability covers any situation which restrains a President from the actual exercise of his powers at a time when the public interest requires the exercise

of those powers. In this form it would be without legal effect, but would be a guide which might prove useful in a situation where inability might need to be determined. However, there is certainly no case for putting such a statement in the Constitution itself by way of amendment."

II. Who shall initiate the question of the President's inability to discharge the powers and duties of his office?

(a) The Congress.
(b) The Vice President.
(c) The Cabinet by majority vote.
(d) Any other group, including independent agencies.
(e) Shall (d) be of a continuing or temporary nature?

Perhaps the most remarkable characteristic of the replies to this question is the wide variety of proposals which they contained. A second characteristic is the disregard of the form of reply as indicated in the subsections of question II. In only a few cases did replies follow that form, and the large majority were in essay-type general discussions. Finally, there was considerable overlap in the replies to questions II and III, making it difficult in several instances to determine whether the act of initiation (question II) was or was not exercised by the same person or agency performing the act of determination (question III).

(A) THE CONGRESS

This agency of initiation was proposed by only five persons, one of whom made special provision for a smaller group to act if Congress was not in session. Other persons proposed action by either Congress or the Cabinet (F (1) below); by either the Vice President, or the Cabinet, or the Congress (F (2) below); and by either the Vice President, or Congress, and a special body (F (5) below).

B. THE VICE PRESIDENT

Six persons proposed that the Vice President alone initiate action, and two others proposed his initiating action after purely advisory notice from the Cabinet or Congress, or from the Cabinet or some member of the President's staff. In one of the six cases above, the person first proposed initiation by the Cabinet (in his reply to the questionnaire), but changed his recommendation to initiation by the Vice President, after securing the advice of the Cabinet (in his testimony at the hearings). Two persons proposed that the power of initiation be given to either the Vice President or the Cabinet or Congress (F (2) below); one proposed the Vice President and the Cabinet (F (3) below); one proposed either the Vice President or a special body F (4) below); and one proposed either the Vice President or Congress, and a special body (F (5) below).

C. THE CABINET

President Hoover did not answer this question directly but, by implication, he approved initiation by the Cabinet. He did not state whether Cabinet action should be by majority vote. One other person (Pritchett) advocated this method (in his reply to the question-

naire), but changed his recommendation to initiation by the Vice President, after securing the advice of the Cabinet (in his testimony at the hearing). (See B, above.) A third person (Sutherland) proposed initiation by the Cabinet (in his reply to the questionnaire), but changed his recommendation to initiation by a special body (in his testimony at the hearing) (D, below). Other persons proposed action by the Cabinet and the Vice President (F (3) below); by Congress or the Cabinet (F (1) below); and by the Vice President, or Congress, or the Cabinet (F (2) below).

(D) ANY OTHER GROUP, INCLUDING INDEPENDENT AGENCIES; AND (E) SHALL (D) BE OF A CONTINUING OR TEMPORARY NATURE?

Five persons (one of whom had proposed initiation by the Cabinet in his reply to the questionnaire, but who changed his proposal in his testimony at the hearings) proposed that the power of initiation be given to (1) a special continuing committee with membership as provided by statute; (2) a permanent commission of civilians appointed by the Supreme Court; or (3) a council consisting of members of the Cabinet and Congressional leaders. A sixth person suggested either the Vice President, or any body created by Congress for the purpose of determining disability (F (4) below). A seventh person recommended joint action by either the Vice President or Congress, and a special body consisting of members of the Cabinet and Congressional leaders (see F (5) below).

(F) COMBINATIONS OF THE CONGRESS, THE VICE PRESIDENT, THE CABINET, OR A SPECIAL COMMISSION OR OTHER BODY

(1) Either Congress or the Cabinet (1 person).
(2) Either the Vice President, or the Cabinet, or Congress (2 persons).
(3) The Cabinet and the Vice President (1 person).
(4) Either the Vice President or a special body (1 person).
(5) Either the Vice President or Congress, and a special body (1 person).

G. PROPOSAL BY WILLIAM W. CROSSKEY

Crosskey's proposal: That the remedy in cases under the Presidential-inability clause shall be by proceedings in the nature of quo warranto in the national courts—did not follow the suggestions made in section II of the questionnaire, and may properly be considered as an alternative to the type of proposal which was assumed in that, and several of the other questions in the questionnaire.

A summary of the replies to the questionnaire and of comments made in testimony at hearings on the subject is presented below, under the following headings:

A. The Congress.
B. The Vice President.
C. The Cabinet.
D. Any other group, including independent agencies; and
E. Shall (D) be of a continuing or temporary nature?
F. Combinations of the Congress, the Vice President, the Cabinet, and a special commission or other body.
G. Proposal by William W. Crosskey.

II (a)-(c)-5

A. THE CONGRESS

Aikin (H121): [Aikin did not specifically recommend a process of initiation of determination of inability but, by implication, it would be vested in Congress which he recommended as the body to make the determination. See III, below.]

Bailey (P4): "* * * should come from a concurrent resolution of the United States Congress."

Frelinghuysen (H25–29, 34–35, 37): "* * * to argue that a Vice President himself should act * * * asks too much of human nature. [Much of this discussion concerned determination, rather than the initiation of consideration, of disability. By implication, it appears that the witness did not favor initiation by the Cabinet or by the Congress or by an unofficial committee. In discussing his own alternative joint resolution, H. J. Res. 442, (H 34–35) the witness stated–] Section II states that 'if the President announces he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President.' * * * Section III provides that the Congress, by a concurrent resolution approved by two-thirds of each House, may 'suggest' that the President is unable to discharge the powers and duties of his office. For the purpose of considering such a resolution the Vice President may convene the Senate, and the Speaker the House of Representatives."

Howe (P35): [Howe answered II and III together: see III below. He stated his belief] "* * * that the power to inquire and ultimately to decide whether 'inability', temporary or permanent, exists, is to be exercised by the Congress. * * * I should see no reason why the Cabinet might not initiate congressional action, but I take it that no statute or resolution need assert that right."

Peltason (P51): [Initiation of a determination of Presidential inability could be] "upon petition [to the Supreme Court] of either chamber of Congress or during Congress' adjournment upon petition of any 2 or 3 of the following: Vice President, Speaker, President pro tempore of the Senate, congressional majority and minority party leaders."

II (a)-(c)-6

B. THE VICE PRESIDENT

Finletter (P 27–28): [Finletter replied to II and III together, and his reply is summarized in III below. He stated that the President might initiate action if he were capable of making the decision but, since it is likely that he would not be able, the responsibility should fall on the Vice President] "I should not think that any other person or body should initiate the question or make the decision."

Holcombe (P 34): "* * * the Vice President. He might be prompted to raise this question by a request from the Cabinet or a resolution of the Congress, but in my opinoon that is not necessary since it is the duty of the Vice President to act in case of the President's inability".

Huber (P 35–36): [Huber discussed II and III together: see III below. By implication, either the President to the Vice President might initiate the question of Presidential inability to act.]

Hyman (H50–60): [In his testimony, Hyman did not specifically discuss the proper agency to initiate a determination of Presidential inability, but rather the agency to make the determination. He expressed his approval of the draft measure prepared by the counsel and the staff director of the Committee (H53–54) providing that the President may declare his disability if he is in a position to do so (sec. 2); and that the Vice President or the person next in line of succession to the Presidency, if he is satisfied that the President or the person discharging the powers and duties of that office, as the case may be, is unable to discharge those powers and duties, shall convene both houses of Congress and announce that the powers and duties have devolved upon him (sec. 3). Hyman specifically stated that he would not have the Cabinet (H50) nor Congress (H50–51) nor the Supreme Court (H51) take any part in the process of initiating or determining disability.]

Payne (H14, 16): "In this event [just plain physical inability] the President, himself, should make the determination and notify the Congress. * * * On the other hand inability could be of such a nature that the President could not make the decision. * * * In this event * * * to my mind there is only one logical person to do this. He is the Vice President. * * * * * * it would appear that the Vice President should only raise the question and that the determination should be made by some other agency." (H14) [In this bill, S. 2763 (briefly described at P16) Payne provided] "that the President notify the Congress in writing of his inability, if able to do so, * * * [if the disability prevented the President from acting, and if] * * * the Vice President had good cause to believe that such an inability existed he would notify the Chief Justice."

Peters (H122): "In the case of serious illness of the President, the President himeself might properly raise the question of his own inability. * * * In case of mental incapacity of the President it would appear to be the duty of the Vice President to raise the question of the President's inability. In the case of capture or imprisonment of the President it is also clear that it would be the duty of the Vice President to raise the question of the President's inability."

Pritchett (P52–54): [Pritchett did not specifically discuss the process of intiation as separate from the process of final determination (see III, below). (1) In case the President was able to act, Pritchett recommended that he initiate the process. (2) In case he was unable, Pritchett recommended that the Cabinet initiate it.]

Pritchett (H74–75): [Pritchett expressed his objections to initiation by the Supreme Court or Congress] "Originally I had thought when I submitted my first proposal that the Cabinet was a superior body to have this power because the Vice President was so directly and personally involved. On further reflection, I have come to conclude that the Vice President probably is already granted, by the Constitution, authority to make this

determination and, consequently, I would propose simply spelling out the principle which would recognize the role of the Vice President and perhaps try to associate some restraints in connection with exercise of that power. [The wording of Pritchett's proposal was as follows—] If the President is suffering from a constitutional disability, and fails or is unable to notify the Congress of his inability, the Vice President, after having secured the advice of the President's Cabinet, shall make the finding of inability and notify the Congress in writing of that finding. * * *"

Romani (P57–59, 60): [The details of Romani's proposals for the inititation of action and the actual decision are summarized in III below. If the disabled President is able to do so he should announce his inability to carry out his powers and duties. If he is unable to make such an announcement, the Vice President should be authorized to do so.] [Romani repeated the proposals summarized above, and added—] "* * * I would be willing, as a second choice, to recommend the establishment of some procedure by which the facts of a President's inability be certified to the Vice President. The natural body here would be the notification by the Cabinet, or some other member of the President's staff, to the Vice President that the President is disabled. The decision as to what should be done, however, would rest with the Vice President."

C. THE CABINET

Hoover (P35, H1–2): [Question was not directly answered: by implication, the Cabinet.]

D. ANY OTHER GROUP, INCLUDING INDEPENDENT AGENCIES; AND E. SHALL (D) BE OF A CONTINUING OR TEMPORARY NATURE?

Fellman (P23): "* * * any member of the group or committee which would be authorized by law to determine the question * * * should be eligible to initiate the question. I do not believe that Congress should undertake to perform this function [because it might not be in session and because its membership is too numerous]. I should think it highly improper to entrust the Vice President with the initiative, since his personal stake in the decision precludes general confidence in the objectivity of any affirmative step he may take. Since the Cabinet is made up of personal appointees of the President who serve at his pleasure, I would regard the Cabinet as wholly unsuitable to make a decision of the sort under discussion."

Hart (P31–32): "At first glance it might seem desirable to have one body initiate and another determine. But in this matter the question of when to raise the question should be handled with the same judicial discretion as the question of how to decide it. The commissioners [see III below for description of the Commissioners on Presidential Inability] should be authorized to investigate upon their own motion with or without the formal or informal suggestion of others and to make findings." [In his sketch from which a draft bill might be prepared, Hart included the above provision in section (2)].

Hart (H97): [Hart did not specifically discuss this point, but his revised draft of proposed legislation made no change in the allocation of both powers (initiation and determination) to the Commissioners on Presidential Inability.]

Krock (H62–68): "* * * some kind of modus operandi is possible. From this the Vice President and Supreme Court should be firmly omitted. * * * There shall be created a body of limited function known as the Inability Council * * * which shall include members of the Cabinet (which the statute should define) or, as an alternative, the heads of Federal departments, the Speaker and majority and minority leaders of the House of Representatives, and the President pro tempore, the majority leader and the minority leader of the Senate. On the written request of any two members of the Inability Council, provided they are not members of the same political party, filed with the Secretary of State, he (the Secretary of State) shall convene the Council * * * to consider the desirability of instituting a formal determination of the inability of the President. * * * Upon an affirmative vote of a majority of the Council, the Surgeon General of the Public Health Service * * * shall designate an advisory panel of five leaders of the medical profession, from the heads of the medical departments of voluntary hospitals in various sections of the United States. It will be the function of this advisory panel to examine the facts and report, by majority finding, on the inability of the President * * *, the panel having authority to call upon special consultants for advice. Such report shall be made public. On a majority finding of inability by the advisory panel * * * the Council shall vote on adoption of the finding, a majority controlling the decision. [The witness believed that the Constitution provides for the President's declaring his own inability and that the new provisions should] cover a situation when the President is unable or unwilling to announce his inability."

Lien (H123): [Apparently Lien recommended initiation of the question of inability by the special commission, described in III below, which he proposed as the body for determining the existence of inability.]

Sutherland (P61): "If the question of inability were to be raised by the House of Representatives, with open discussion (by analogy to impeachment) these ends might be attained, though in case of a House bitterly opposed to a President, suspicion of politics would inevitably attach. Furthermore the House might not be in session. * * * One of the committees might have this duty delegated to it by previous legislation. The Cabinet * * * would be free of the suggestion of hostile partisanship, though they would tend to a slow action out of loyalty, unless the disability were obvious and the need critical. Perhaps this is a good thing. Some special body * * * could be set up to be always in existence. I incline to favor leaving this matter with the Cabinet."

Sutherland (H78, 80–83): [The witness did not distinguish clearly between the initiation of a process of determination, and actual determination. He stated that originally, when he replied to the questionnaire, he had thought of the Cabinet only, but that he had been weaned away to Krock's point of view. His pro-

posal at the hearing was as follows:—] "* * * a special body could be created * * * to consist of the Chief Justice, the two Secretaries of State and Defense, and the leaders of the President's party in the Senate and House. * * * Naturally this Presidential Commission * * * would inform itself by medical or other expert opinion concerning the inability in question. Appropriate provision could be made for its call by the Chief Justice, or by any two members."

F. COMBINATIONS OF THE CONGRESS, THE VICE PRESIDENT, THE CABINET, OR A SPECIAL COMMISSION OR OTHER BODY

(1) Either Congress or the Cabinet

Pennock (P52): "* * * both Congress and the Cabinet should be empowered to initiate the question * * * by majority vote. Either body should be able to do this without the concurrence of the other."

(2) Either the Vice President, or the Cabinet, or Congress

Fairman (P18–19): "* * * the 'inability' might be self-evident. Suppose, for one example, that the President were captured and held as a prisoner of the enemy. * * * In such case, surely there would be no need to initiate the question. * * * Again, it is conceivable that the President himself might authentically determine his own inability. * * * Consider the less unlikely situations, where 'inability' or no was a matter to be determined by inquiry. Here let us recur to the Constitution. * * * the provision is not permissive and optional: if in truth there is inability, then the powers and duties *shall devolve* by the Constitution's own command. So any initiating and any determining will only be the means for carrying out the peremptory provision. Evidently the Vice President should be able to set the inquiry in motion, for he is under a solemn duty to rise to the occasion if inability occurs. * * * The Cabinet, too, should be able to set the inquiry in motion. * * * Surely a mere majority of the membership should suffice. * * * Initiative should also lie within the Congress. * * * It might, however, be impracticable for the Congress to act: * * * The statute should, I believe, provide that certain designated leaders of the House of Congress would be authorized to initiate an inquiry into 'Inability'."

Sparkman (H9–10): "I agree with those who recommend a flexible method for beginning the inquiry. Initiation of the procedure for making the determination of the President's disability should not be limited to a single person or a single small group of people. The obligation should be sufficiently widespread to assure its immediate exercise once it is required. * * * I think the proposal of Harvard Law Professor Charles Fairman, that the Vice President, the Cabinet, and the Congress all be allowed to start the inquiry in addition to the President himself, is a good suggestion."

(3) The Cabinet and the Vice President

Brown (P5): "* * * should be made by the Cabinet and the Vice President. In case of physical disability only, the President himself might suggest that the Vice President act in his place."

(4) *Either the Vice President or a special body*

Corwin (P16): "* * * undoubtedly within the power of the Vice President to do this, * * * and clearly any body which might be authorized by Congress to determine whether 'inability' exists in fact ought to have the right to raise the question."

(5) *Either the Vice President or Congress, and a special body*

Kallenbach (P45–46): [A permanent act of Congress should] "make manifest the sense of Congress that a President in the event of his inability to exercise the powers and duties of his office, may so declare on his own initiative, and thus cause the powers and duties of his office to devolve upon his successor for the duration of his inability. [This was followed by a description of the formal steps to be taken in such an action.] * * * A more difficult problem is presented in case the President is actually unable to discharge the powers and duties of his office, and is at the same time unable and/or unwilling to [approve the Vice President's assuming them]. * * * As the Constitution now stands, both the right and the obligation to assume the powers and duties of the Presidency are vested in the Vice President. He cannot escape them, nor can Congress, by statute, circumscribe his authority to exercise his constitutional duty as he sees it. * * * Neither the Congress nor the Supreme Court is an appropriate body, under our system of separated powers, to officially initiate inquiry into the question of a President's inability; although it would clearly be within the province of Congress, at any time, to pass a concurrent resolution expressing its attitude in a situation giving rise to this question. * * * [Kallenbach recommended the establishment of an Advisory Council consisting of those officers in line of presidential succession (see III below).] Similarly any 1 (or perhaps it should be any 2) of the members of this Advisory Council should be authorized to initiate and present to it the question of whether the circumstances are such as to warrant and require that the officer next in line of succession to the President act as President."

Kallenbach (H85–87 and 90–91): [At the hearing Kallenbach proposed the enactment of a statute and of an amendment. He approved Sections (a) (b) and (c) of S. 2763 (Senator Payne's bill) as described by Payne at H14–16, but proposed alterations in Sections (d) and (e) of that plan (H85–87). In case the President was able to do so, he would make the determination and notify Congress (H16). Kallenbach's proposal stated] "(d) If the Vice President has sufficient cause to believe that the President is, for a specified reason or reasons, unable to discharge the powers and duties of his office and that the President is unable to so notify the Congress pursuant to subsection (a), the Vice President shall so notify [the secretaries of the ten Executive Departments] and the President pro tempore of the Senate and Speaker of the House [of Representatives], and request their opinion on whether he should assume the powers and duties of the office of President. * * * (e) The Congress may, by concurrent resolution approved by two-thirds of each House, suggest that there is sufficient cause to believe that the President is, for a specified reason or reasons, unable to discharge the powers and duties of

his office, and request that [the secretaries of the ten Executive Departments], the President pro tempore of the Senate and the Speaker of the House of Representatives, render their opinion on whether the Vice President should assume the powers and duties of the President. [The constitutional amendment proposed by Kallenbach at H90–91 was brief and provided the authority for Congress to enact legislation as described above: see sections (1) and (2).] * * * the specific grant of power to Congress to legislate conclusively on how Presidential inability shall be determined is new. It would resolve any doubts on this point and permit the legislation enacted by Congress on this matter to be regarded as mandatory. * * *"

G. PROPOSAL BY WILLIAM W. CROSSKEY

Crosskey (H99, 103, 112–119): "Briefly, my view is, that a case involving * * * alleged inability on the part of the President to discharge the powers and duties of his office * * * is essentially a controversy about the title to a public authority or office; and that the remedy in such case is what was customary in essentially similar cases when the Constitution was drawn. The remedy in such cases was traditional and had long been an action of quo warranto, * * * I think the matter is fully covered in the Constitution. * * * [The witness was asked to describe how such a case would be brought before the Supreme Court, by quo warranto. He stated that] * * * the customary way is for the Attorney General * * * to file the writ or modernly to file an information in the nature of a quo warranto. It can be done by these officials or it can be done by interested citizens if Congress so provides. The Supreme Court has said that, in the absence of legislation otherwise by Congress, quo warranto can be brought about by the Government only. * * * I don't see why the [Supreme] Court should step out. They certainly have not the personal and political interest in these cases that the Cabinet has and it seems to me * * * that the best qualified group to deal with this sort of question is the Supreme Court. * * * [Crosskey also filed a reply to the questionnaire (H105–119), Part IV of which (H112–115) dealth with the use of the writ of quo warranto, and Part V (H115–119) of which dealt with use of quo warranto and the alternative plans of determining inabillty, with the witness' criticism of the latter. Crosskey dealt with suitable Congressional legislation at H117–118, as follows—] * * * Congressional legislation, in my judgment, is very desirable for two purposes. The first purpose * * * is a clarification of the general understanding of the Constitution as it relates to this whole matter. Any legislation by Congress ought, therefore, to make clear that the remedy in cases under the Presidential-inability clause shall be by proceedings in the nature of quo warranto, in the national courts; that such cases are 'cases, in law, arising under the Constitution.' * * * The legislation ought also to indicate the opinion of Congress—and of the President, if he signed the law (as presumably he would)—that the right of the Vice President, in inability cases, is merely to 'act as President' temporarily 'until [the President's] disability be removed'. This

could be done by giving an absolute right to initiate proceedings, as a relator, not only to the Vice President in cases of Presidential inability, but to the President in cases where his 'disability [is later] removed.' * * * A second object which I think Congress ought to have in any legislation it passes is that of molding the remedy of quo warranto * * * so as to assure that * * * the intended remedy will be used when the public interest demands it. [After discussing difficulties inherent in the Supreme Court's doctrine that, in the absence of explicit legislation to the contrary by Congress, the remedy in quo warranto, as against national officers, is available only to the Government—practically speaking, only to the Administration—Crosskey proposed] giving absolute relators' rights to initiate proceedings * * * along with a right to their own separate counsel, to the opposition party in Congress. [This was explained in some detail. Crosskey then discussed the possibility of putting inability-clause cases within the original jurisdiction of the Supreme Court. Under the Court's present doctrine, Congress cannot add to its original jurisdiction but Crosskey thought that the Court might] be willing to overrule it [this doctrine] if given the opportunity. Otherwise * * * it will be necessary to amend the Constitution. It would be sufficient to say: 'The Constitution shall not hereafter be construed to forbid Congress from adding to the original jurisdiction of the Supreme Court of the United States as that is provided in the Constitution'. Such an amendment, I suppose, would be readily ratified. [In discussing the statement that the Court could not hear inability-clause cases because they would be political in character, Crosskey stated—] There would be no room for the application of this doctrine in presidential-inability cases. [Note:—Crosskey's proposal as summarized above was quite unlike the proposals of the other experts. The questions II–VII in the questionnaire were generally inapplicable to his proposal. He stated: "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99)]

III.

III. Once raised, who shall make the determination of inability?

(*a*) *The Congress.*
(*b*) *The Vice President.*
(*c*) *The Cabinet by majority vote.*
(*d*) *Any other group, including independent agencies.*
(*e*) *Shall* (*d*) *be of a continuing or temporary nature?*

As was the case with the replies to question II—"Who shall initiate the question of the President's inability?"—the replies to question III presented a wide variety of proposals; they did not in general follow the form of reply as suggested in the subsections of the question; and there was considerable overlap in the replies to questions II and III.

A. THE CONGRESS

Three persons in their replies proposed that Congress make the determination of inability; one proposed that the decision "be left to the Vice President, the members of the Cabinet, and the presiding officers of the House and Senate, after consultation with proper medical experts" (Brown, in G below); and a fifth suggested "the Congress, with the concurrence of the Vice President; or the Cabinet acting by a majority vote" (Pennock in G below).

B. THE VICE PRESIDENT

Six persons proposed that the Vice President determine Presidential inability (in one case—Pritchett—a different proposal was made in his reply to the questionnaire but he later proposed the Vice President, with the advice of the Cabinet, in testimony at the hearing). In his reply to the questionnaire Kallenbach (E (2) below) proposed that the Vice President make the determination with the advice of a special council; but he later changed this plan as a witness at the hearing. Brown (G below) proposed determination by the Vice President, the members of the Cabinet, and the presiding officers of the House and Senate, after consultation with proper medical authorities. Pennock (G below) suggested Congress, with the concurrence of the Vice President, or the Cabinet acting by majority vote.

C. THE CABINET

Former President Hoover proposed determination of inability by the Cabinet. Pritchett (B above) in his reply to the questionnaire proposed determination by the Cabinet, but later as a witness at the hearings he offered a different proposal. Corwin (G below) suggested "somebody designated by Congress * * *; e. g., the Cabinet or the National Security Council, enlarged perhaps by the Chief Justice et al." Pennock (G below) proposed determination by Congress with the concurrence of the Vice President, or the Cabinet acting by majority vote.

D. THE SUPREME COURT

Two persons advocated determination by the Supreme Court. A third (Fairman, E (2) below) suggested that an amendment might vest this power in the Court, or as an alternative Congress might provide for a special commission with Supreme Court members, inferior court members, and possibly some members of Congress. Corwin (G below) suggested "somebody designated by Congress * * *; e. g., the Cabinet or the National Security Council, enlarged perhaps by the Chief Justice et al."

E. ANY OTHER GROUP, INCLUDING INDEPENDENT AGENCIES; AND F. SHALL (E) BE OF A CONTINUING OR TEMPORARY NATURE?

(1) *Appointive groups made up of private citizens.*—Two persons proposed appointment of a permanent commission by the Supreme Court, and one proposed a panel of medical specialists appointed by the Chief Justice.

(2) *Groups made up of government officials.*—One person (Fairman) proposed an ex officio commission consisting of the Supreme Court justices, some inferior court justices, and a few members of Congress. A second (Fellman) proposed an ex officio commission consisting of the President's wife, the Chief Justice and senior Associate Justice of the Supreme Court, and the leaders of the President's party in the Senate and the House. A third person (Kallenbach) made a proposal in his reply to the questionnaire which he changed in his testimony as a witness at the hearing. The latter proposal was for an ex officio body consisting of the officers named in the line of Presidential succession (the heads of the ten Cabinet departments and the President pro tempore of the Senate and the Speaker of the House). A fourth person (Krock) proposed a council of ex officio members consisting of the ten Cabinet heads, the majority and minority leaders of the House, and the President pro tempore, the majority and minority leaders of the Senate. A fifth person (Sutherland) made a proposal in his reply to the questionnaire which he changed in his testimony as a witness at the hearing. The latter proposal was for a special ex officio body consisting of the Chief Justice, the two Secretaries of State and Defense, and the leaders of the President's party in the Senate and House.

(3) *No specific membership proposed.*—Senator Sparkman proposed final determination by "a group of persons."

G. COMBINATIONS OF THE CONGRESS, THE VICE PRESIDENT, THE SUPREME COURT AND THE CABINET

One person (Brown) proposed that determination of Presidential inability be vested in the Vice President, the members of the Cabinet, and the presiding officers of the House and Senate, after consultation with proper medical experts (latter not required in case of the President's enforced absence from the country). A second reply (from Corwin) provided for "somebody designated by Congress . . . e. g. the Cabinet or the National Security Council, enlarged perhaps by the Chief Justice et al." A third person (Pennock) suggested Congress, with the concurrence of the Vice President, or the Cabinet acting by a majority vote.

H. PROPOSAL BY WILLIAM W. CROSSKEY

Crosskey's proposal: That the remedy in cases under the Presidential-inability clause shall be by proceedings in the nature of quo warranto in the national courts—did not follow the suggestions made in section III of the questionnaire, and may properly be considered as an alternative to the type of proposal which was contained in that, and several of the other questions in the questionnaire.

A summary of the replies to the questionnaire and of comments made in testimony at hearings on the subject is presented below, under the following headings:

A. The Congress.
B. The Vice President.
C. The Cabinet.
D. The Supreme Court.
E. Any other group, including independent agencies; and
F. Shall (E) be of a continuing or temporary nature?

G. Combinations of the Congress, the Vice President, the Supreme Court and the Cabinet.
H. Proposal by William W. Crosskey.

III. Once raised, who shall make the determination of inability?
(a) The Congress.
(b) The Vice President.
(c) The Cabinet by majority vote.
(d) Any other group, including independent agencies.
(e) Shall (d) be of a continuing or temporary nature?

(A) THE CONGRESS

Aikin (H121): "* * * I would suggest * * * the adoption of a joint resolution which would authorize the Congress to act at any time by concurrent resolution (1) to declare the existence of a Presidential inability * * * and (2) to declare the prospective duration of the disability * * *. It is suggested here that the rules of the two Houses of the Congress be amended to provide that such a concurrent resolution could be introduced in the appropriate House by either the Speaker or the President pro tempore, and by none other. If further caution seemed necessary, the rules of the two Houses might be modified to require that action on a motion to recognize the existence of a Presidential inability would require an affirmative vote of a majority of the entire membership of each House, and that the vote of each member should be recorded in open meeting."

Holcombe (P34): "While the Vice President should raise the question, he certainly should not make the final determination of inability. In my opinion it is the Congress which should make the final determination. It can do so quite informally simply by consenting to recognize the Vice President as the proper person with whom it should deal in matters involving the exercise of the Executive power under the Constitution. I see no reason why either the Cabinet or any other group, including independent agencies, should be consulted except in an informal manner by way of courtesy."

Howe (P35–36): "* * * it is desirable that Congress by joint resolution or by statute, but in any case with the President's concurrence, should assert one basic principle. * * * that the power to inquire and ultimately to decide whether 'inability', temporary or permanent, exists, is to be exercised by the Congress. In my judgment the Vice President is clearly disqualified for interest from initiating * * * this issue. * * * I believe that the intimate association between the President and his Cabinet makes it an inappropriate body to decide the matter. I should see no reason why the Cabinet might not initiate congressional action, but I take it that no statute or resolution need assert that right. * * * I believe that the Congress possesses today the sole power * * * to assert an exclusive authority over the matter of a President's 'inability'. I believe that such an assertion of authority, concurred in by the President, would serve usefully to clarify an important issue and would do so without imposing unfortunate limitations on an authority which should be largely unlimited."

(B) THE VICE PRESIDENT

Finletter (P27–28): "Nor do I think the situation can be met by setting up some expert person or body to make the decision as to 'inability'. * * * I have suggested that the inability of the President should be established by public opinion and that inability should not be held to exist except when the facts were so obvious that there would be a general recognition by the people that the President was incapable of performing his duties. [Certain acts must be performed by the President and, if he is disabled, these cannot be performed.] * * * for a while such a situation might be tolerated but if it continued too long public opinion would develop rapidly * * * and would demand that 'something be done'. At this point it would seem to be the responsibility of the Vice President to move or not to move, depending upon the circumstances. Of course, if the President himself were capable of taking the decision that he was not capable of carrying out his duties it would be appropriate for him to so state and to delegate temporarily his responsibilities to the Vice President. But under most circumstances of inability it is likely that the President would not be capable of this action; and the responsibility should then fall upon the Vice President. * * * I should not think that any other person or body should initiate the question or make the decision. The Congress * * * would be barred therefrom by the principle of separation of powers. * * * Nor do I believe that the Cabinet has any constitutional status to act * * *. The same comment applies to any * * * independent agency * * *. There is one other possibility * * * that is a determination of the question by the Supreme Court * * *. This * * * might arise in the ordinary course of litigation * * *. There is the further question whether original jurisdiction might be given to the Supreme Court to decide by way of declaratory judgment whether inability existed. The question seemingly has been put to rest by *Marbury* v. *Madison* * * *. Nor, aside from obvious practical objections, may the inferior Federal courts decide upon the succession by way of a declaratory judgment" [because of constitutional limitations on their jurisdiction].

Huber (P36–37): "* * * who judges at present under the Constitution * * * is clear enough in theory, since the President * * * essentially is the only one with the power. * * * experience has shown that an ailing President is often not capable of making the decision. * * * The result is obviously unsatisfactory. * * * it seems to me, that the decision * * * should not be made either by the judicial or legislative branch of government. * * * A third possibility would involve the creation of a separate body—probably appointed by Congress. * * * Any such body, however, tends to complicate government and would seem foreign to our present government system. * * * The remaining possibility * * * is that this decision be made within the executive branch of Government itself. * * * But * * * this should not mean that certain persons close to the President should make decisions in place of the President." [This is followed by a discussion of the constitutional delegation of power and possible additional duties for the Vice President. The solution proposed does not include direct recommendations as to the source of

determination of inability.] "* * * it seems best that the President and Vice President form an administrative team, with the President in the leadership position but the Vice President able to make any or all decisions in the case of Presidential incapacity and responsible to the electorate both for the decision as to incapacity and for decisions he makes while acting on the policy level."

Hyman (H50–52, 53–54, 56–60): "First * * * I would deny to a body like the Cabinet, much less a part of such body, a right of initiation or any role whatever in a disability proceedings. * * * I would not have the Congress initiate or share directly in a disability proceedings. * * * Finally * * * I would most emphatically deny to the Supreme Court or to any portion of its membership any part whatever in a disability proceedings. [The witness expressed his approval of the draft measure prepared by the counsel and the staff director of the Committee (H53–54) providing that the President may declare his disability if he is in a position to do so (sec. 2); and that the Vice President or the person next in line of succession to the Presidency, if he is satisfied that the President or the person then discharging the powers and duties of that office, as the case may be, is unable to discharge those powers and duties, shall convene both houses of Congress and announce that the powers and duties have devolved upon him (sec. 3).] To the extent that the draft resolution * * * provides at least a moral if not a legal underpinning on which the Vice President in time of emergency can decide the fact of a Presidential disability, and then go on and serve in his place, I believe that draft resolution should be viewed as the working text for the measure" [to be enacted by Congress]. (p. 60)

Peters (H122): "In the case of serious illness of the President, the President himself should make the determination of inability. * * * In cases of insanity of the President, long periods of coma, capture, or other condition known to the entire people of the United States as constituting 'inability' it seems clear that the Vice President should determine that there is inability of the President. In the normal course of events his judgment would be confirmed by public opinion as expressed by the Congress."

Pritchett (P52–54): "Serious objections can be entered against any plan which has been proposed to accomplish these purposes. While Congress might initiate the question, it is certainly too large a body and without training for making such a decision; moreover, action of any kind which it might take would be subject to attack as influenced by partisan politics. The Supreme Court could not be given such a responsibility without a constitutional amendment, and in any case the judiciary should not be involved in such a decision. The Vice President has such a direct personal interest in the matter that any decision he would make would be highly suspect. The Cabinet would have the advantage of close acquaintance and contact with the President on which to base a judgment, but their personal loyalty to him and their stake in continuance in office would probably prejudice them against a finding of disability if it could be at all avoided. Certainly no independent, ad hoc, or expert board * * * should be given final authority to make a decision which could remove a

President from office. Clearly the person best fitted to declare the President's inability is the President himself. * * * the case for transferring this decision out of the President's hands has not, in my opinion, been established. [In a draft of a bill (P. 54) Pritchett provided the following:] Section 1. (a) If the President of the United States shall determine that he is unable to discharge the powers and duties of his office he shall notify the Congress of that fact in writing. * * * (b) If the President is, by reason of his inability, unable to notify the Congress of his inability, the President's Cabinet shall make the finding of inability and notify the Congress in writing of that finding. * * *"

Pritchett (H70–72, 74–76): [In a draft of a bill (H71) the witness offered a version differing from that which he had earlier included in his reply to the questionnaire, as quoted above] "Sec. 1. If the President of the United States shall determine that he is unable to discharge the powers and duties of his office, he shall notify the Congress of that fact in writing. * * * Sec. 2. If the President is suffering from a constitutional inability and fails or is unable to notify the Congress of his inability, the Vice President, after having secured the advice of the President's Cabinet, shall make the finding of inability and notify the Congress in writing of that finding. * * * In my earlier draft, I provided that if Congress was not in session the notification went to the Speaker of the House and the President pro tempore of the Senate or either of them, and that would probably safeguard it."

Romani (P57–59, 60): "The central issue is whether the same agency or individual should initiate and determine the question of a President's disability, or whether this right should be shared. * * * [The following discussion covered the two situations in which the necessity for action might arise.] In the first contingency [in which the disabled President is capable of taking limited action] the President should announce that he is, or will be, unable to act. * * * The situation in which a President is completely disabled without warning * * * is, perhaps, the crucial issue. * * * In keeping with constitutional principle, it seems that the decision, both as to the initiation and determination of the inability, should be vested in some area of the executive branch, and the most logical place is in the Vice Presidency. * * * It has been proposed by others * * * that Congress initiate the action, and the Supreme Court or some other independent agency, make the determination of Presidential inability. This approach seems unwise for several reasons. [Romani prepared a draft joint resolution proposing a constitutional amendment. It included the following provisions—] Sec. 2. If the President announces that he is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President. Sec. 3. If the President is unable to make such an announcement, the Vice President shall announce that the President is unable to discharge the powers and duties of the President, and said powers and duties shall thereupon devolve upon the Vice President."

Romani (H41–43): [At the hearings Romani repeated his recommendation, stated above, concerning initiation by the President. In the second contingency (in which the President because of

disability is unable to act) he favored the following—] "if the Vice President or person next in line is satisfied that the President is unable to act, he shall then assume the powers, * * *" [He again rejected proposals suggesting that the Supreme Court, a special inability Commission, or Congress either initiate or determine the question of inability.]

(C) THE CABINET

Hoover (P35 and H1–2): "* * * the determination of disability * * * should rest with the Cabinet * * *." (P35) [This was repeated with further explanation and this additional comment—] "If the determination of inability * * * were in the hands of the Congress, it could, in case of a congressional majority of the opposing party, result in nullification of the will of the people." (H1–2)

(D) THE SUPREME COURT

Bailey (P4): "* * * I should recommend that the Chief Justice of the United States Supreme Court be empowered by the concurrent resolution initiating the issue of Presidential inability to appoint an ad hoc body of 7 private citizens, not more than 3 from any one party and including at least 2 men of outstanding reputation in medicine and psychiatry. At least 5 members of said body after deliberation and investigation should agree on the President's inability, and even their certification of inability should be finally decided upon by the Supreme Court of the United States."

Frelinghuysen (H29–30, 31–32, 35–36, 37): "* * * I do not believe that Congress is the appropriate body to make the final decision * * *. Joint participation in the disability procedure by Congress and the Supreme Court will make it more likely that the final decision will be readily accepted by the Nation * * *. I believe that responsibility for determining Presidential inability should be placed elsewhere than the Cabinet * * *. [Although Frelinghuysen approved the use of medical advice as to disability, he did not favor leaving the final determination to a body of medical experts. If the Congress makes such a suggestion of Presidential disability [as provided in Sec. III of Frelinghuysen's bill, H. J. Res. 442; see II above] Sec. III [of H. J. Res. 442] continues, the Supreme Court 'shall determine whether or not the President is able to discharge such powers and duties.' If they so find, these powers and duties shall devolve upon the Vice President."

Peltason (P51): [Upon Congressional petition as described in II, above] "The Supreme Court could be authorized to investigate, appointing whatever assistance the justices consider necessary, and to make a determination. * * *"

(E) ANY OTHER GROUP, INCLUDING INDEPENDENT AGENCIES; AND (F) SHALL (E) BE OF A CONTINUING OR TEMPORARY NATURE?

(1) Appointive groups made up of private citizens

Hart (P30–33): [The reply opened with a justification for the provision of an orderly procedure prescribed in advance by an act of

Congress.] "The important function of a permanent statute is to vest in some particular body responsibility for investigation and factfinding. To whom should this responsibility be given? [Not to Congress, the Vice President, the Cabinet nor the courts, for reasons stated.] No existing agency appearing to be suitable, it would be for Congress to create one by law. It might be called the Commissioners on Presidential Inability. [In his sketch from which a draft bill might be prepared, Hart included the following—] (1) * * * three commissioners, to be known as the Commissioners on Presidential Inability, shall be appointed by the Supreme Court of the United States from among those private citizens of the United States whose character and judgment shall have won for them the respect of the Nation. The term of the commissioners shall be for life, unless they be sooner removed by the Supreme Court for inability or other cause. (2) The Commissioners are hereby charged with the responsibility and competence of investigating, upon their own motion with or without the formal or informal suggestions of others, whether there exists a case of (a) inability under the Constitution of the President of the United States to discharge the powers and duties of his office, or of (b) permanent disability under the Constitution of the President of the United States, and, if they conclude after such investigation that such inability or permanent disability exists, of so finding. (3) Upon a finding by the commissioners of inability, the Vice President shall forthwith exercise the office of President. * * * (4) After a finding * * * of inability [the commissioners are empowered to determine] whether the said inability has been removed, and [if they so conclude] the Vice President shall forthwith cease to be pro tempore President * * * and the President shall resume his office. * * * (5) A finding by the commissioners of inability may not be questioned in any other place but may be superseded by [a finding that inability has been removed or by a finding of permanent disability] but not otherwise. (6) A finding of permanent disability may be made by the commissioners in the first instance or by way of superseding a prior finding by them of inability. * * * (7) Upon [such a finding] the Vice President * * * shall become President * * * and shall remain President for the remainder of the unexpired term. * * * (8) A finding by the commissioners of permanent disability may not be questioned in any other place, nor shall it be reversed or modified by the commissioners, but shall stand until the end of the unexpired term." [The more detailed provisions of Hart's proposal have been ommitted in the above summary.]

Hart (H92–98): [In his testimony the witness made certain changes in the membership of the Commissioners as provided in his reply to the questionnaire (P32). He proposed the following draft of a joint resolution (H97)-] "That three (five) Commissioners to be known as the Commissioners on Presidential Inability shall be appointed by the Supreme Court of the United States from among those private citizens of the United States who are active in some full-time capacity and whose character and judgment shall have won for them the respect of the Nation. The term of each Commissioner shall last until his retirement

from full-time activity or his acceptance of public office unless he be sooner removed by the Supreme Court for cause. Sec. 2. If the Commissioners on Presidential Inability or any two (three) or more of them, giving all reasonable weight to the opinion of the President, declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the President of the United States is by reason of infirmity of mind or body unable for the time being to discharge the powers and duties of his office or that they are satisfied by evidence that the President is unable to discharge those powers and duties because he is for some definite cause not available for their discharge, then * * * those powers and duties shall be discharged by the Vice President * * *."

Lien (H123): [Lien expressed his disapproval of determination of inability by Congress or the Cabinet.] "A better plan would seem to be the creation of a Special Board or Commission of 5 or 7 members appointed by the Supreme Court for long and possibly staggered terms—but not for life or even good behavior. The board or commission would need authority to employ specialists and experts. The members should be removable by the Court. As a safeguard against any arbitrary or corrupt action by the Cabinet or Board or Commission, authority might be given to Congress or to the Supreme Court to take action on the petition of the President (1) to declare null and void an order declaring a state of inability * * *."

Payne (H14–16): [Payne stated his reasons for believing that neither the Vice President, Congress, a select committee of Congress nor the Cabinet is a suitable agency for determining whether Presidential inability exists (P14–15). He expressed disapproval of the proposal that the Supreme Court should make the decision on a petition for a writ of mandamus to order the Vice President to exercise the functions of the President (P15). In his own bill (S. 2763) Payne provided] "that the President notify the Congress in writing of his inability, if able to do so, and such notification would automatically give the Vice President the responsibility of exercising the powers and duties of the President, but would not give him the title. * * * With regard to disability of a nature that prevented the President from notifying Congress, the bill provides that if the Vice President had good cause to believe that such an inability existed he would notify the Chief Justice. The Chief Justice would then appoint a panel of qualified, civilian, medical specialists who would examine the President. Each member would individually submit a report of his findings, stating the physical condition of the President, and his conclusion of whether the President was able to exercise the powers and duties of his office. If all the members of the panel agreed in the conclusion that the President was suffering an inability, the Chief Justice would notify the Congress in writing. Such notification would have the effect of placing the powers and duties, but not the title of President, on the Vice President."

(2) *Groups made up of government officials*

Fairman (P19–20): [Fairman stated his reasons for objecting to the vesting of this function in Congress.] "If it seemed good to

Congress to propose an amendment to make provisions for the incidents of an atomic war, then one provision might well make the Supreme Court the judge of Presidential 'Inability.' If an amendment is not to be sought, then a satisfactory alternative is next to be considered. Congress might provide that the question of 'Inability,' when properly raised, would be determined by an extraordinary Commission * * * [including] the Chief Justice—(who might well be designated as the one to call the Commissioners together)—and the Associate Justices. It might be provided that, for want of the requisite number, active judges of the inferior courts be summoned, in order of seniority, as was found practicable. If Congress thought it desirable to include some of its own members in the extraordinary Commission, that might be done. For example, the two available senior members, majority and minority, of each Committee on the Judiciary. (It seems evident that the Speaker and the President pro tempore of the Senate should be excluded from serving as judges of Presidential inability, inasmuch as they themselves stand high in the order of succession.)"

Fellman (P23–24): "I suggest the creation by statute of a special continuing committee which would be empowered to make the critical decision of inability. * * * I would tentatively suggest, as a basis for further discussion * * * a committee of five. The members of the committee could very well be the following:

(*a*) The President's spouse, or if there is none, the next of kin, providing he or she is an adult.

(*b*) The Chief Justice of the United States.

(*c*) The senior Associate Justice of the Supreme Court of the United States.

(*d*) The leader of the President's party in the Senate.

(*e*) The leader of the President's political party in the House of Representatives. * * *

"I would insist that members of the political party in opposition to the President should not be put in the position of participating in the decision. * * * [A finding of disability] should be made in writing, on the basis of evidence, including the evidence of physicians."

Kallenbach (P45–46): [Kallenbach proposed a declaratory statute providing] "that a President in the event of his inability to exercise the powers and duties of his office, may so declare on his own initiative, and thus cause the powers and duties of his office to devolve upon his constitutional successor for the duration of his inability. * * * the statute might well direct that the President's intent to recognize such a devolvement of powers shall be formulated in writing and signed by him; that it be directed to the officer upon whom the duty of acting in his place falls, normally the Vice President; and that copies of it be sent also to the heads of the other coordinate branches of the Government, [Congress and the Supreme Court] * * * as an official notification * * * that the devolution of powers has occurred, and has his sanction. * * * A more difficult problem is presented in case the President is actually unable to discharge the powers and duties of his office, and is at the same time unable and/or unwilling to express acquiescence in the Vice President's

assuming [them]. As the Constitution now stands, both the right and the obligation to assume [these powers and duties] are vested in the Vice President. He cannot escape them, nor can Congress, by statute circumscribe his authority to exercise his constitutional duty as he sees it. In my opinion, however, this does not foreclose Congress from * * * setting up a procedure by which the Vice President may seek, or be given, advice and political support in making a determination of what his course of action should be in [such a situation.] [The advisory body proposed by Kallenbach included as members] the other officers in the line of succession. * * * For that purpose [the Vice President] should be authorized to assemble these officers as a special Advisory Council. * * * [This Council should be authorized to examine all relevant facts and to consult expert medical opinion] and by majority action, to make findings. * * * If it finds that the President is unable to exercise the powers and duties of his office in the constitutional sense, it may by majority action, advise and recommend that the officer upon whom the duty of acting as President would devolve under the Constitution or laws, should assume forthwith the powers of the Chief Executive. * * * The statute should provide further that the succeeding officer should notify in writing the heads of the other branches of his intent to assume the constitutional powers and duties of the Presidency during continuance of the President's inability. His notification should set forth the findings and recommendations of the factfinding group as evidence of the basis of his action, if he is acting upon the basis of such a recommendation."

Kallenbach (H85–87 and 90–91): [At the hearings Kallenbach proposed the enactment of a statute and of an amendment. He approved Sections (a) (b) and (c) of S. 2763 (Senator Payne's bill) as described by Payne at H14–16, but proposed alterations in Sections (d) and (e) of that plan (H85–87). In case the President was able to do so, he would make the determination and notify Congress (H16). In II, above, Kallenbach's proposal in Section (d) for the initiation of action by the Vice President is quoted. After the procedure thus established, Section (d) continued as follows—] "If two-thirds of the officers so notified find and determine that the President is unable to discharge such powers and duties, they shall devolve upon the Vice President. * * * [In II, above, Kallenbach's proposal in Section (e) for initiation of action by concurrent resolution of Congress is quoted. After the procedure thus established, Section (e) continued as follows—] "If two-thirds of the officers to whom the request is directed find and determine that the President is unable to discharge such powers and duties, they shall devolve upon the Vice President as provided in subsection (d). [The constitutional amendment proposed by Kallenbach at H90–91 was brief and provided the authority for Congress to enact legislation as described above: See sections (1) and (2).] * * * the specific grant of power to Congress to legislate conclusively on how Presidential inability shall be determined is new. It would resolve any doubts on this point and permit the legislation enacted by Congress on this matter to be regarded as mandatory * * *"

Krock (62–68): [Krock advocated the establishment of an Inability Council consisting of the Cabinet and Congressional leaders (as described in II above), and he set forth the procedures for calling it into action and for the naming of an advisory panel of physicians.] "It will be the function of this [medical] advisory committee to examine the facts and report, by majority finding, on the inability of the President * * *, the panel having authority to call upon special consultants for advice. Such report shall be made public. On a majority finding of inability by the advisory panel * * * the Council shall vote on adoption of the finding, a majority controlling the decision. [The witness believed that the Constitution provides for the President's declaring his own inability and that the new provisions should] cover a situation when the President is unable or unwilling to announce his inability."

Sutherland (P61): "Of course the Supreme Court has detachment, and profound respect is given to it by the people of the country; but by the Constitution it is limited to judicial functions, which would seem to exclude matters such as [determination of Presidential inability]. A standing 'Commission on Presidential Disability' could be set up by statute to be ready at all times. Either House could make the decision, if authorized by statute, but the Congress might not be in session. On the whole I come back to the idea that the Cabinet would be an appropriate body to perform this task."

Sutherland (H78–83): "Perhaps a compromise would be desirable; a special body could be created by the amendment, to consist of the Chief Justice, the two Secretaries of State and Defense, and the leaders of the President's party in the Senate and House. Such a body would represent all three branches of the Government and would thus, if unanimous, gain wide popular support." (H78) [Discussion of this plan at H81–83.]

(3) No specific membership proposed

Sparkman (H10–11): "The final determination should be made by a group of persons. * * * While a unanimous decision would be preferred, I think an extraordinary majority ruling should be allowed." [He spoke with approval of recent proposals for such an agency, but did not make any specific recommendation.]

(G.) COMBINATIONS OF THE CONGRESS, THE VICE PRESIDENT, THE SUPREME COURT, AND THE CABINET

Brown (P5): "Determination of Presidential physical and mental inability might well be left to the Vice President, the members of the Cabinet, and the presiding officers of the House and Senate, after consultation with proper medical experts. The latter need not be required in case of enforced absence of the President from the country."

Corwin (P16): "Somebody designated by Congress whose determination of the matter may be fairly expected to be accepted as conclusive; e. g. the Cabinet or the National Security Council, enlarged perhaps by the Chief Justice et al."

Pennock (P52): "* * * I would suggest that the power to make the determination of inability should be vested in two bodies: the

Congress, with the concurrence of the Vice President; or the Cabinet acting by a majority vote."

(H.) PROPOSAL BY WILLIAM W. CROSSKEY

Crosskey (H99–119): [The witness in his testimony (H99–105) and in his reply to the questionnaire (H105–119) stated and supported a proposal for dealing with cases of Presidential inability which was quite unlike the proposals of the other experts. The questions II–VII in the questionnaire were generally inapplicable to Crosskey's proposal: see II above for a summarization of this proposal.] "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99)

IV. Are there any constitutional prohibitions relative to questions II and III?

In 12 cases the replies to the questionnaire and the testimony of witnesses at the hearing did not contain a specific answer to question IV (see A below). Since questions IV and XI were overlapping in part, the general position of each of these 12 persons can be found under question XI below. Three persons indicated, more or less clearly, that they believed constitutional amendment to be necessary relative to questions II and III (see B below), and 10 indicated that they did not believe amendment necessary (see C below). Obviously each of these opinions was based upon the individual proposals which had been made in questions II and III. One witness (Crosskey) made proposals to which questions II–VII were generally inapplicable.

A summary of the replies to the questionnaire and of comments made in testimony at the hearing on the subject is presented below, under the following headings:

A. Persons who did not specifically answer question IV.

B. Persons who indicated that constitutional amendment was necessary, relative to questions II and III.

C. Persons who indicated that constitutional amendment was not necessary, relative to questions II and III.

D. Reply by William W. Crosskey.

A. PERSONS WHO DID NOT SPECIFICALLY ANSWER QUESTION IV

Aikin (H121): [In his reply Aikin did not specifically answer this question: see "Aikin" in XI below for his general position].

Frelinghuysen (H33–35, 38–39): [In his testimony at the hearing Frelinghuysen did not specifically answer this question: see "Frelinghuysen" in XI below for his general position].

Hoover (P35): [In his reply Hoover did not specifically answer this question: see "Hoover" in XI below for his general position].

Hoover (H1–2): [Question was not answered].

Howe (P35–36): [In his reply Howe did not specifically answer this question: see "Howe" in XI below for his general position].

Huber (P36–37): [In his reply Huber did not specifically answer this question: see "Huber" in XI below for his general position].

Hyman (H52–54): [In his testimony at the hearing Hyman did not specifically answer this question: see "Hyman" in XI below for his general position].

Krock (H62 and 64): [In his testimony at the hearing Krock did not specifically discuss this question: see "Krock" in XI below for his general position].

Lien (H123–124): [In his reply Lien did not answer this question. He referred to "any law enacted to deal with the 'inability' problem" and made no reference to constitutional amendment].

Payne (H12–17): [In his testimony at the hearing Payne did not specifically discuss this question: see "Payne" in XI below for his general position].

Peltason (H48–51): [In his reply Peltason did not specifically answer this question: see "Peltason" in XI below for his general position].

Pritchett (P52–54): [In his reply Pritchett did not specifically answer this question: see "Pritchett" in XI below for his general position].

Pritchett (H68–77): [In his testimony at the hearing Pritchett did not specifically answer this question: see "Pritchett" in XI below for his general position].

Sparkman (H8–12): [In his testimony at the hearing Sparkman did not specifically discuss this question: see "Sparkman" in XI below for his general position].

B. PERSONS WHO INDICATED THAT CONSTITUTIONAL AMENDMENT WAS NECESSARY, RELATIVE TO QUESTIONS II AND III

Baily (P4): "These procedures [as described in II and III above] would necessarily involve constitutional change."

Finletter (P28): [Under article 2, section 1, clause 6 of the Constitution] "Congress * * * is given the power to act in the case of the disability of both officials [President and Vice President] but nothing is said about Congress in the case where it is the President alone who is disabled. From this I think it may be argued that there was an intent on the part of the Philadelphia Convention that Congress should act [in the first case but not in the second. Congressional definition of word "inability" might violate principle of separation of powers. A Supreme Court decision in an actual case might be influenced by circumstances at the time]. Nevertheless, I do think that the constitutional argument is an important one against any attempt to define the term 'inability'."

Sutherland (P62): "Your fourth question * * * raises the most serious problem. 'Inability' is so ill-provided for in the Constitution that the success of any system of supersession of the President, if made only by act of Congress, will depend on its acceptance by the officers of Government and the people. [One faction might favor the President's continuance in his functions, while another opposed it, and] the Constitution gives the President a 4-year term. Might not his supporters assert with much force that a nonconstitutional body was without constitutional power to displace the President?"

Sutherland (H77–78): [In his testimony at the hearing Sutherland did not specifically discuss this question: see "Sutherland" in XI below for his general position].

C. PERSONS WHO INDICATED THAT CONSTITUTIONAL AMENDMENT WAS NOT NECESSARY, RELATIVE TO QUESTIONS II AND III

Brown (P5): "I fail to see any insurmountable constitutional prohibitions relative to questions II and III."

Corwin (P16): "No constitutional prohibitions are pertinent to questions 2 and 3 so long as it is kept in mind that it is the Vice President and nobody else upon whom the duty falls to take over the powers and duties of a disabled President."

Fairman (P20): "The limitation on the Supreme Court, drawn from Article III [would make it necessary to amend the Constitution if the Court's jurisdiction were to be extended to include the determination of Presidential inability]. If it seemed good to Congress to propose an amendment to make provisions for the incidents of an atomic war, then one provision might well make the Supreme Court the judge of Presidential 'Inability'. If an amendment is not to be sought," [Fairman proposed the establishment by act of Congress of an extraordinary Commission, as described in III above].

Fellman (P24): "I think a statute of the sort I have discussed in II and III is perfectly constitutional. * * * [under] Article II, section 1, clause 6 of the United States Constitution."

Hart (P30–33): [In his reply Hart did not specifically answer this question; see "Hart" under XI below for his general position].

Hart (H93–95, 97): [In his testimony at the hearing Hart discussed the method of determining disability. He stated five assumptions, including] "* * * (3) that it is in the public interest that there now be provided a definite method for determining presidential inability and its removal; (4) that Congress has within limits the power to provide such a method under the 'necessary and proper' clause; * * *" [In discussing the proposal for establishment of a special body to perform these functions, with members to be appointed by the Supreme Court, Hart supported Congress' power to enact such legislation under its constitutional power as provided in article II, section 2, clause 2—relating to the appointment of "inferior officers" (H94–95). At H97 Hart included a draft of a proposed joint resolution incorporating his proposals].

Holcombe (P34): "I do not know of any constitutional prohibition relative to questions no. 2 and no. 3 except those implied in the basic principles of the separation of powers." [The question seemed to Holcombe to be a political question and consequently there would be no reason for appealing to the Supreme Court from Congress' decision. This decision would seem to him to be final].

Kallenbach (P44–45): "I think that a congressional statute, in the form of a joint resolution embracing the essence of the constitutional terminology relative to devolution of presidential power in the event of presidential inability and expressive of the sense of Congress, should be enacted. It should be permanent, rather than ad hoc, in nature. * * * It is my opinion that Congress has authority under the necessary and proper clause to reinforce the constitutional provision on this point by legislation of this nature. * * * It is my belief that Congress lacks authority to

circumscribe in any way the term [inability] as it is found in this clause of the Constitution. It may not delimit the causes from which inability may be deemed to arise, or prescribe a period of time during which the inability must persist before the devolution of presidential power may occur. Nor may it specify a minimum or maximum period of time during which the devolution of presidential power shall be deemed effective. * * * a statute of Congress can be directive and declatory of the sense of Congress, as well as mandatory. * * * it would clearly be within the province of Congress, at any time, to pass a concurrent resolution expressing its attitude in a situation giving rise to this question."

Kallenbach (H84 and 90–91): [In his testimony at the hearing Kallenbach did not specifically discuss this question: see "Kallenbach" in XI below for his general position].

Pennock (P52): "I find no constitutional prohibitions relative to questions II and III."

Peters (H122): "There would appear to be ample authority under the Constitution for Congress to enact legislation of the character indicated above [see replies to I, II, and III (H122)]. However, serious constitutional doubts would arise if legislation were to provide for the determination of inability by an ad hoc body or permanent commission."

Romani (P57–58): [In discussing a situation in which the President is able to announce his disability, Romani recommended that the powers and duties should devolve upon the Vice President or the next person in line of succession]. "There appears to be no constitutional prohibition against such a procedure. * * * At the same time, it does not seem that any action by Congress is necessary before a President could act in this manner. It may be desirable, however, to have this procedure outlined either in law or in constitutional amendment. Since it has been recommended that an amendment be proposed to clarify the status of successors during a period of Presidential inability, this procedure could be contained in the same amendment. [Romani recommended that the Vice President initiate and make the determination as to his own succession in a case in which the President was unable to do so]. * * * it seems that the Constitution, now, gives this power of decision to the Vice President. * * * It also seems that no legislation is necessary to recognize that such a power does already rest with the Vice President. Yet, as noted above, this procedure might, for clarification, be incorporated into the general amendment concerning Presidential inability."

Romani (H42): [Of the various proposals before the Committee for consideration Romani favored adoption of the passage of (1) a joint resolution, (2) an inability statute, or (3) a constitutional amendment with provisions like those described above in his reply to the questionnaire]. "Following the general line of reasoning that I have stated * * * I would not think a constitutional amendment necessary."

D. REPLY BY WILLIAM W. CROSSKEY

Crosskey (H99–119): [The witness in his testimony (H99–105) and in his reply to the questionnaire (H105–119) stated and sup-

ported a proposal for dealing with cases of Presidential inability which was quite unlike the proposals of the other experts. The questions II–VIII in the questionnaire were generally inapplicable to Crosskey's proposal: see II above for a summarization of this proposal]. "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99).

V. Shall dual authority, both to initiate the question and to determine the question, be vested in the same body?

Many persons who replied to the questionnaire or who appeared as witnesses at the hearing did not answer this question directly, but in most of such cases comparison of replies to questions II and III yields the answer.

Thirteen persons, either specifically or by implication, took the position that the same individual or body should initiate action and make the determination. Twelve persons took the opposite view. In one case (Crosskey) question V was not relevant, in view of the particular proposals in II and III.

A summary of the replies to the questionnaire and of comments made in the testimony at hearings on the subject is presented below, under the following headings:

A. Same individual or body initiates and determines the question.

B. Different individuals or bodies initiate and determine the question.

C. Proposal by William W. Crosskey.

A. SAME INDIVIDUAL OR BODY INITIATES AND DETERMINES THE QUESTION

Aikin (H121): [Aiken did not specifically separate the two duties—to initiate a determination of inability and to make such a determination but, by implication, both would be vested in Congress. See III above.]

Corwin (P16): "There is no reason why not, one purpose of such an enquiry being to enlighten the Vice President as to his constitutional duty and to protect him from imputations of overambition and rashness."

Fellman (P24): "* * * I believe that the same body ought to have authority both to initiate the question and determine its merits * * *. It might be wise to authorize the Chief Justice to take the initiative of setting the machinery in motion, but I do not see why any one of the five important people * * * on the committee could not request a meeting of the committee for the purpose of making a decision."

Hart (P31–32): "At first glance it might seem desirable to have one body initiate and another determine. But in this matter the question of when to raise the question should be handled with the same judicial discretion as the question of how to decide it. The commissioners [see III above for description of the Commissioners on Presidential Inability] should be authorized to investigate upon their own motion with or without the formal or informal suggestion of others and to make findings." [In his sketch from

which a draft bill might be prepared, Hart included the above provision in section (2)].

Hart (H97): [Hart did not specifically discuss this point, but his revised draft of proposed legislation made no change in the allocation of both powers (initiation and determination) to the Commissioners on Presidential Inability.]

Holcombe (P34): "I see no reason why the Congress should not initiate the question as well as make the final determination if the Vice President fails to act in good season."

Hoover (P35–H1–2): [Question not directly answered: by implication, "Yes"—the Cabinet.]

Howe (P35): [Question not directly answered: by implication, Congress would both initiate and make the determination, but Howe stated that he saw "no reason why the Cabinet might not initiate congressional action."]

Huber (P36–37): [This question was not answered, nor was it entirely relevant in view of Huber's proposals in III. In so far as it was applicable, the answer would be "Yes".]

Hyman (H50–60): [This question was not specifically answered, but based upon his concrete proposals the answer was "Yes".]

Lien (H123): [Lien did not describe any separate process for initiation of the determination of inability. Consequently, by implication, it would be vested in the special commission, described in III above, which he proposed as the body for determining the existence of inability.]

Peters (H122): "If some body or commission is to be provided for I see no good reason for not having it both to initiate the question question and to determine it." [Peters did not, however, favor such a body.] [Based on II and III above, Peters' answer would be "Yes".]

Pritchett (P53–54): [Pritchett did not discuss the initiation and the actual determination processes separately. (1) If the President was able to do so, he would himself take action, as described in II and III, above. (2) If he were unable to take action, the Cabinet would do so, as described in II and III, above. In each case, the same individual and agency would take the initial action and make the determination.]

Pritchett (H74–75): [Pritchett offered one change in the proposal, summarized above, which he included in his reply to the questionnaire. (1) Above was unchanged. (2) Instead of action by the Cabinet, Pritchett proposed action by the Vice President, after securing the advice of the Cabinet. In each case, the same individual takes the initial action and makes the determination.]

Romani (P60): [This question was not discussed, but Romani provided a very simple procedure involving announcement that the President was unable to exercise his powers and duties, such announcement to be made by the President if he was able to do so, or by the Vice President if the President were unable. In either case, the powers and duties devolved upon the Vice President.]

Romani (H41–43, 45): [Romani repeated the proposals summarized above, and indicated willingness to recommend a procedure for certifying Presidential inability to the Vice President, without depriving the latter of his constitutional authority to make the final determination. See II above.]

B. DIFFERENT INDIVIDUALS OR BODIES INITIATE AND DETERMINE THE QUESTION

Bailey (P4): "No" [see II and III].

Brown (P5): [See II and III above. He recommended (1) initiation by the Cabinet and Vice President, or in case of physical disability only, the President; and (2) determination by the Vice President, members of the Cabinet, and the presiding officers of the House and Senate.]

Fairman (P20): "Even supposing that to be objectionable, it has been avoided by the method proposed above." [See II and III above.]

Finletter (P28): "I have suggested above [III at P27–28] that neither authority be vested in any body."

Frelinghuysen (H34–35): [The plan proposed by Frelinghuysen—H. J. Res. 442—contained provision in Sec. III for Congress to initiate the inquiry into the President's disability, and Sec. IV provided for determination of the question by the Supreme Court. See II and III, above.]

Kallenbach (P45–46): [In the plan proposed by Kallenbach (1) if the President is able to do so he announces that, because of his inability to exercise the powers and duties of his office, those functions shall devolve upon his constitutional or legal successor; (2) if the President is unable to take such action, the Vice President (or other successor) with the advice of an Advisory Council, announces his assumption of the Presidential powers and duties. One (or two) members of the Advisory Council would also be authorized to initiate action by the Council, and Congress at any time could pass a concurrent resolution expressing its attitude. In any case, the actual determination would be made by the Vice President. (See II and III above for details)].

Kallenbach (H85–87): [In the statute which Kallenbach proposed at the hearings there were alternative plans as follows:—(1) same as (1) in the plan in his reply to the questionnaire; (2) if the President is unable to take action as thus provided, the Vice President shall notify a body consisting of the secretaries of the ten Executive Departments, the President pro tempore of the Senate and the Speaker of the House and, if this body by a 2/3rds vote finds that the President is unable to act, the presidential powers and duties shall devolve on the Vice President; and (3) if the President is unable to take action as provided in (1), Congress by a 2/3rds vote may pass a concurrent resolution notifying the body described in (2) above, with action following as described in (2). (For full explanation, see II and III, above.]

Krock (H62–68): [In the procedure advocated by Krock, initiation of the determination of Presidential inability would be vested in any two members (of different political parties) of a special Inability Council; and determination of inability would be made by majority vote of all members of the Council. (Detailed procedures for both steps are described in II and III, above.)]

Payne (H16): [In Payne's bill (S. 2763) initiation by the President, with notification to Congress, would result automatically in succession by the Vice President: if the Vice President was the initiating agency, determination of inability would be made by action of the Chief Justice and a medical panel, with notification to Congress.]

Peltason (P51): [Peltason proposed to vest initiation of determination of Presidential inability in Congress or in certain Congressional leaders (see II above); and actual determination of inability in the Supreme Court (see III above).]

Pennock (P52): [Pennock proposed initiation of the determination of Presidential inability by either Congress or the Cabinet; and actual determination either by the Congress with the concurrence of the Vice President, or by the Cabinet.]

Sparkman (H9–11): [Sparkman proposed that] "the Vice President, [illegible], the Cabinet, and the Congress all be allowed to start the inquiry [illegible] in addition to the President himself. * * * "The final determination should be made by a group of persons" [not specifically described.]

Sutherland (P62): "On the whole I think the Cabinet should perform both functions."

Sutherland (H78): [See II and III above: Sutherland proposed the creation of a special body consisting of the Chief Justice, the Secretaries of State and Defense, and the leaders of the President's party in the Senate and House. This body would be called into action by the Chief Justice or by any two members.]

C. PROPOSAL BY WILLIAM W. CROSSKEY

Crosskey (H99–119): [The witness in his testimony (H99–105) and in his reply to the questionnaire (H105–119) stated and supported a proposal for dealing with cases of Presidential inability which was quite unlike the proposals of the other experts. The questions II–VII in the questionnaire were generally inapplicable to Crosskey's proposal: see II above for a summarization of this proposal.] "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99)

VI. Shall the determination of disability set forth the—

(a) Permanent nature of the disability?
(b) Temporary nature of the disability?
(c) If temporary, extent of?

In few cases did the persons who replied to the questionnaire or who appeared as witnesses at the hearing give definite "Yes," or "No" answers to these questions, and in eleven cases there was no reply and/or no discussion at the hearing. Eight persons expressed the judgment that the permanent or temporary nature of the disability should not be specified, in general because it would not usually be possible to make such a determination. Six persons gave replies which indicated the possibility and desirability of specifying the nature or probable duration of the inability. In one case the solution to the problem of disability which was proposed was a type which made question VI irrelevant.

A summary of the replies to the questionnaire and of comments made in testimony at the hearing on the subject is presented below, under the following headings:

A. Replies emphasizing the impossibility or undesirability of indicating the permanent or temporary nature of Presidential inability.

B. Replies emphasizing the possibility or desirability of indicating the permanent or temporary nature of Presidential inability.

C. Replies which did not contain an answer to this question, and testimony in which it was not discussed.

D. Proposal of William W. Crosskey.

VI. Shall the determination of disability set forth the—

(a) Permanent nature of the disability?
(b) Temporary nature of the disability?
(c) If temporary, extent of?

A. REPLIES EMPHASIZING THE IMPOSSIBILITY OR UNDESIRABILITY OF INDICATING THE PERMANENT OR TEMPORARY NATURE OF PRESIDENTIAL INABILITY

Fairman (P20): "Evidently the sorts of disability that would give trouble are such as could not at the moment be determined to be more than temporary."

Finletter (P28): "If the President or the Vice President were to assert that an inability existed it should be recognized that the disability, no matter how serious it might appear at the moment, might prove to be temporary."

Hart (P30) [In discussing question I Hart concluded that no definition of "inability" should be included in the statute which he recommended because the reasonable meaning is clear in general, it would be difficult to anticipate every possible future situation, and a definition in general terms would add so little as to be of small use.] "The same objection arises with respect to writing a definition of the duration of an inability." [Hart discussed the two kinds of findings provided in his proposed legislation—a simple finding of "inability", a finding of "permanent disability" (but none of "temporary disability"), and a finding that "inability" had been removed ("permanent disability" could not be removed.) (P31)]

Hart (H97) [Hart made changes in his original proposal, as summarized above, as stated in his reply to the questionnaire. In his revised plan the Commissioners] "* * * giving all reasonable weight to the opinion of the President, [may] declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the President * * * is by reason of infirmity of mind or body unable for the time being to discharge the powers and duties of his office or that they are satisfied by evidence that the President is unable to discharge these powers and duties because he is for some definite cause not available for their discharge * * * until it is declared in like manner that the disability has been removed because the President has so far recovered his health as to warrant the resumption of the discharge of his powers and duties or because he has become available for the discharge thereof, as the case may be, or until the term for which the President was elected expires" [the Vice President shall serve as Acting President].

Holcombe (P34): "I see no reason for recognizing any disability in advance as permanent, except in the case of death. In other

cases, it is a fair presumption at the outset that the disability may happily be only temporary."

Kallenbach (P46): [Kallenbach provided for an Advisory Council (see III above) which was authorized to] "go only so far as to make a finding that, in its judgment, circumstances have arisen justifying the operation of the constitutional rule. It cannot be invested with authority to pass upon the 'permanent' or 'temporary' nature of the inability; and it can find inability to exist only if there is inability in the constitutional sense * * *. The devolution of powers in such a situation must be complete; hence the Advisory Council could not recommend a partial devolution * * * in order to accommodate a partial disability of the President. * * * the impeachment procedure, by implication, is the sole and exclusive provision of the Constitution on the point of removal of a President. Furthermore, to authorize a body of this character to make a determinative finding on the permanent or temporary character of a President's inability would amount to a restriction upon the judgment of the succeeding officer regarding what he alone has final authority to decide, i. e., his constitutional duty to exercise the powers and functions of the President only during that time in which the President is actually unable to exercise them."

Kallenbach (H87): [Kallenbach did not discuss this question at the hearings. His draft statute (d) and (e) provided that; if the Vice President or the Congress request the opinion of the advisory body provided in those sections, it must be for] "sufficient cause to believe that the President is, for a specified reason or reasons, unable to discharge the powers and duties of his office."

Krock (H63): [Krock proposed a complete procedure, as described in II and III, above. This included the use of an advisory medical panel, designated by the Surgeon General of the United States, which reported its majority findings to the special Inability Council as a basis for its determination of Presidential inability. The panel's report was to be made public.]

Peters (H122): "When the President determines his own inability he should not have to state the nature or extent of disability. When the Vice President determines that there is inability, the fact in the usual case would be a matter of public knowledge, but it would appear advisable for him to declare in a public manner to be specified by law what the nature of the disability appears to be."

Sutherland (P62): "I think the answer is in the negative."

Sutherland (H177–84): [This question was not discussed.]

B. REPLIES EMPHASIZING THE POSSIBILITY OR DESIRABILITY OF INDICATING THE PERMANENT OR TEMPORARY NATURE OF PRESIDENTIAL INABILITY

Aikin (H121): [Aikin proposed a joint resolution authorizing Congress to act at any time by concurrent resolution (1) to declare the existence of inability, and] "(2) to declare the prospective duration of the disability."

Bailey (P4): "The determination should set forth (a), (b) and (c)."

Brown (P5): "I think it would be advisable to set forth the nature of the disability in all instances."

Corwin (P16): "Yes, if Congress so desires, its power under 'the necessary and proper' clause to inquire or to authorize inquiries into situations which involve a widespread public interest being practically unlimited."

Fellman (P24): "The committee should be free to declare that the President is permanently disabled, if the facts warrant such a finding. * * * If the disability is temporary, the committee should be authorized by the same procedure utilized to make a finding of disability [action by a special committee: see III above], to make a finding that the President is sufficiently well to resume his duties and functions."

Peltason (P51): "The Supreme Court [see III above] could be authorized to stipulate whether the disability is of a permanent or temporary nature. * * *"

C. REPLIES WHICH DID NOT CONTAIN AN ANSWER TO THIS QUESTION, AND TESTIMONY IN WHICH IT WAS NOT DISCUSSED

Frelinghuysen (H33–35, 38–39): [The plan proposed by Frelinghuysen—H. J. Res. 442—contained no provisions concerning the setting forth of the nature of the disability.]

Hoover (P35 and H1–2): [Question was not answered]

Howe (P35–36): [Question was not answered]

Huber (P36–37): [Question was not answered, nor was it particularly relevant in view of Huber's proposals in III.]

Hyman (H47–60): [Question was not discussed at the hearing.]

Lien (H123–124): [Question was not answered]

Payne (H12–17): [Question was not discussed at the hearing]

Pennock (P52): [Question was not answered]

Prichett (P52–54): [Question was not answered]

Prichett (H68–77): [Question was not discussed at the hearing]

Romani (P54–61): [Question was not answered]

Romani (H40–46): [Question was not discussed at the hearing]

Sparkman (H8–12): [Question was not discussed at the hearing]

D. PROPOSAL OF WILLIAM W. CROSSKEY

Crosskey (H99–119): [The witness in his testimony (H99–105) and in his reply to the questionnaire (H105–119) stated and supported a proposal for dealing with cases of Presidential inability which was quite unlike the proposals of the other experts. The questions II–VII in the questionnaire were generally inapplicable to Crosskey's proposal: see II above for summarization of this proposal.] "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99)

VII. If temporary, who raises the question that the disability has ceased to exist? Once raised, who shall make the determination of cessation?

The 26 answers to this question contained such a wide variety of proposals that analysis does not yield particularly significant results. The following tabulation serves to clarify the situation to some extent:

(*a*) In 16 cases, persons proposed that the same individual or body should raise the question and make the determination.

(1) The President (Finletter, Hyman, Kallenbach, Payne, Peters, Pritchett, and Romani).
(2) A special body (Fellman, Hart, Krock, and Sutherland).
(3) Congress (Aikin and Howe).
(4) Cabinet (Hoover).
(5) Supreme Court (Peltason).
(6) President and Vice President (Huber).

(*b*) In eight cases, persons proposed that different individuals or bodies should raise the question and make the determination (Bailey, Brown, Corwin, Fairman, Frelinghuysen, Holcombe, Lien, and Pennock).

(*c*) Sparkman did not discuss this question as a witness at the hearing, and Crosskey's proposal was of a type which made this question inapplicable.

(*d*) Analysis of the nine different methods proposed for initiation.

(1) The President (Corwin, Fairman, Finletter, Frelinghuysen, Hyman, Kallenbach, Lien, Payne, Peters, Pritchett, and Romani).
(2) Special body (Bailey, Fellman, Krock, and Sutherland).
(3) Congress (Aikin and Howe).
(4) Cabinet (Hoover).
(5) Supreme Court (Peltason).
(6) President and Vice President (Huber).
(7) President or Vice President (Holcombe).
(8) President or Cabinet (Pennock).
(9) Cabinet and Vice President (Brown).

(e) Analysis of the eight different methods proposed for determination.

(1) The President (Finletter, Hyman, Kallenbach, Payne, Peters, Pritchett, and Romani).
(2) Special body (Brown, Corwin, Fairman, Fellman, Hart, Krock, and Sutherland).
(3) Congress (Aikin, Holcombe, Howe).
(4) Supreme Court (Bailey, Frelinghuysen, Peltason).
(5) Cabinet (Hoover).
(6) Congress and Cabinet (Pennock).
(7) President and Vice President (Huber).
(8) Congress or Supreme Court (Lien).

Brief summaries of the proposals of persons who replied to the questionnaire and/or appeared as witnesses at the hearing appear below, in alphabetical order.

Aikin (H121): "The joint resolution [see III above] would similarly provide for the adoption of a * * * concurrent resolution which would declare the disability at an end or, in an appropriate case, extend the effective period of the earlier resolution." [For details concerning such a concurrent resolution see III above].

Bailey (P4): "The Supreme Court, again acting upon the recommendation of the ad hoc body referred to above in III."

Brown (P5): "If temporary, the question of cessation of disability should be raised by [the Cabinet and the Vice President]. * * * Determination of cessation of temporary disability should be made by" [the Vice President, the Cabinet, and the presiding officers of the House and Senate].

Corwin (P17): "The President may undoubtedly raise the question, which should be determined by the same body as found him previously to be disabled."

Crosskey (H99–119): [The witness in his testimony (H99–105) and in his reply to the questionnaire (H105–119) stated and supported a proposal for dealing with cases of Presidential inability which was quite unlike the proposals of the other experts. The questions II–VII in the questionnaire were generally inapplicable to Crosskey's proposal: see II above for a summarization of this proposal]. "I seem to be in a minority of one in thinking that some provision was made in reference to this matter in the Constitution of the United States, especially with respect to the determining of Presidential inability." (H99).

Fairman (P20): "The President seeks to resume the powers and duties of his office. If the temporary place-holder steps aside, that is the end of the matter. [But if a determination of the matter is necessary] the body selected to make the determination [see III above] would be the appropriate body to determine whether the disability was at an end."

Fellman (P24): "If the disability is temporary * * * any member of the committee [see III above] should be authorized to raise the question that the disability has ceased to exist. Once the question has been raised, it should be determined by a majority vote. * * * * * * a finding that the disability has ended should be made in writing, on the basis of evidence, including the evidence of physicians."

Finletter (P28): "The proper person * * * should be the President."

Frelinghuysen (H38): [Sec. IV—Frelinghuysen's bill—H. J. Res. 442] "provides that if the powers and duties of the President devolve on the Vice President, pursuant to sections II and III, the exercise of these powers and duties shall not be resumed by the President until the Supreme Court, on the request of the President, 'determines that the President is able to discharge the powers and duties of his office.' "

Hart (P31–33): "The phrase * * * 'until the disability be removed,' refers grammatically to the further succession beyond the Vice President; but the intent seems reasonably to apply it back also to the succession of the Vice President. If an inability turns out to be genuinely temporary the President should by a finding of the commissioners be restored to his authority." [The commissioners referred to were a special body to be appointed by the Supreme Court. In the legislation proposed by Hart (P32–33) sections (4)–(8) contained detailed provision for action by the Commissioners in cases of "inability" and "temporary disability."]

Hart (H97): [In the joint resolution which Hart proposed as a witness at the hearing, he continued to support a provision for a special body appointed by the Supreme Court. This body was authorized to act, in the same manner provided for determining that inability exists, to determine that the disability had been removed].

Holcombe (P34): "* * * same as answers to no. 2 and no. 3. The Vice President may raise the question whether disability has ceased to exist, but, whether he does or not, in my opinion it is

the Congress which should make the determination of cessation. Of course, there is the possibility that the President himself may raise the question. In that case, also, if there should be a difference of opinion between him and the Vice President, it would be the Congress that would eventually have to decide whether the disability had ceased to exist. I draw this conclusion from article I, section 8, clause 18.

Hoover (P35): "In my view the determination of disability and its termination should rest with the Cabinet."

Hoover (H1–2): [Question was not answered].

Howe (P35–36): [This question was not directly answered: Howe stated his belief "that the Congress possesses today the sole power * * * to assert an exclusive authority over the matter of a President's 'inability' " which implies Congressional power to declare that the "inability" has ceased to exist].

Huber (P35–36): [This question was not answered, but judging from Huber's proposals in III the "administrative team" of President and Vice President would make the decision].

Hyman (H53–56): [In his testimony Hyman expressed his approval of the draft measure prepared by the counsel and the staff director of the Committee (H53–54) providing that] "Sec. 4. If the powers and duties of the Predisent devolve upon any person pursuant to sections 2 and 3 of this resolution, the exercise of such powers and duties shall be resumed by the President upon the President's announcement of his ability and intention thereupon to resume * * *. I was speaking a moment ago about the problem of a Vice President's refusing to yield to a President who had recovered from his disability. One solution, of course, might lie in a suit brought by a private person who claimed he was injured because the Vice President exercised unlawful powers. The question of the President's recovery might then be decided as an incident to the suit. Yet this does not cover the real ground for concern; namely, in the field, say, of foreign affairs, where no private person can put his finger on a specific personal injury, but where the Vice President, clinging overly long to Presidential powers might injure the national interest as a whole. Perhaps, * * * the fact that the President had the vigor to press his demands against the Vice President would in itself be conclusive proof to the people, to his party, and above all to Congress with the impeachment weapon at hand, that the President had recovered."

Kallenbach (P46–47): " * * * every inability in the constitutional sense should be treated alike, as one which in the course of events may disappear by reason of removal of its cause or causes. In providing for determination of when a Presidential inability has ceased and the temporarily displaced President may reassume his role as President, the officers most immediately concerned, viz, the President and the officer who has temporarily assumed the powers and duties of the Presidency, must be recognized as the ones empowered by the Constitution to make the decision. If these officers [cannot reach a decision] there is nothing that Congress can do, by statute, to provide for an authoritative and immediate resolution of the issue. Eventually it might fall to the courts to pass upon this question. * * * [for their decision]

judicially in a concrete case which turns upon a question of which claimant's acts shall be recognized as those of the lawful Chief Executive. I see no reason, however, why Congress may not, by statute, provide by way of directive, that the President or any other officer in the line of the Presidential succession who assumes Presidential powers under the succession rule may refer the question of the removal or cessation of his disability to the above-described Advisory Council in order to obtain its recommendation and political sanction for the President's resumption of his official powers and duties. The obtaining of such advice cannot be made mandatory upon him, nor can the findings and recommendation of the Advisory Council be made finally determinative of his right to resume the powers and duties of the office of President."

Kallenbach (H87): [In the draft statute which Kallenbach presented at the hearings, Section (d) provided that, after the presidential powers have devolved upon the Vice President, he] "shall discharge them until the President notifies the Congress, by written communication made to the Speaker of the House and to the President pro tempore of the Senate, of his ability to reassume the powers and duties of his office, or until a new President is inaugurated."

Krock (H63): [Krock proposed a complete procedure, as described in II and III, above. At H63 he proposed that, if the powers and duties of the Presidency devolved on the Vice President, the latter should exercise them] "until, on a reversal of the procedure, a suggestion by two members of the Inability Council (provided they are of different political parties) that the Presidential inability has been removed shall be adopted by a majority vote of the Council on the finding of a new panel of leaders of the medical profession * * *"

Lien (H123): "As a safeguard against any arbitrary or corrupt action by the Cabinet or Board or Commission, authority might be given either to Congress or to the Supreme Court to take action on the petition of the President (1) to declare null and void an order declaring a state of inability or (2) to terminate the period of inability."

Payne (H16): "It is my feeling that this should be accomplished simply by the President notifying the Congress in writing that he was resuming the responsibilities of his office."

Peltason (P51): "The Supreme Court [see III above] could be authorized * * * on its own motion to restore the President to office when the disability has disappeared."

Pennock (P52): "I think that any determination of disability should be reviewable at the instance either of the President or the Cabinet; and that when review is called for, the determination of cessation should be made by the Congress and the Cabinet, requiring a majority of each."

Peters (H122–123): "The President in most cases should himself determine when the disability ceases to exist. If, however, he is in the power of enemies of the United States at the time he purports to make such a determination, the statute should provide that such purported determination is not to be considered his act or determination since made under duress." [Peters did not answer

the question with respect to the situation in which the Vice President would have made the determination of inability].

Pritchett (P53–54): "In accordance with the point of view already expressed, this decision should be made by the President himself. Whenever, on the basis of medical advice and his own judgment and knowledge of his capacities, he determined that he was able to resume the burdens of the Presidency, he should by written statement terminate the Vice President's temporary status and himself resume the powers and duties of the Presidency * * * [This was incorporated as Sec. 3 of the draft bill proposed by Pritchett]. When the President determines that his inability has been terminated, and that he is capable of exercising the powers and duties of the office, he shall so notify the Congress in writing, and the powers and duties of the office shall immediately revert from the Vice President, serving as Acting President, to the President."

Pritchett (H69–71): "* * * I suggest that there is one principle on which everyone is agreed; namely, that a President who is forced to give up his office by inability should be able to reclaim it when and if the inability passes away * * * The Constitution specifically recognizes that a constitutional disability may be removed * * * [In the draft legislation proposed by Pritchett, section 3 provided as follows—] 'When the President determines that his inability has been terminated, and that he is capable of exercising the powers and duties of the office, he shall so notify Congress in writing, and the powers and duties of the office shall immediately revert from the Vice President, acting as President, to the President.'" (H71–72).

Romani (P59–60): [This question] "can be handled simply by providing that the President shall make this decision. When he is able, after consultation with whomever he desires, he shall announce his resumption of the Presidential prerogatives, and this, in itself, shall end the role of the Vice President acting as President. In the event, however, that the President is permanently disabled, the Vice President shall continue to function in an acting capacity until a new President is elected * * * [Romani proposed a constitutional amendment, section 4 of which provided—] If the powers and duties of the President devolve upon the Vice President pursuant to section 2 or 3 of this article, the exercise of such powers and duties shall be resumed by the President upon his announcement of his ability and intention thereupon to resume them."

Romani (H44): "To the objection that the President might be unable to act rationally, and that either he or the Vice President would dispute the other's right to exercise the powers, the answer is that this type of situation presents a justiciable issue which may be decided by the courts in the normal manner. *. * * It would be a justiciable issue and would not be political."

Sparkman (H8–12): [This question was not discussed at the hearing].

Sutherland (P62): "I think I would leave termination of disability for determination by the Cabinet. * * * But here again one has to assume acceptance by all concerned of the decision with reasonable cooperation, in the absence of a constitutional amendment."

Sutherland (H78): "The procedure for determining the end of inability could be the same as for determining its existence." [See

III above: Sutherland recommended at H78 the creation of a special body consisting of the Chief Justice, the Secretaries of State and Defense, and the leaders of the President's party in the Senate and House].

VIII. In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

The majority opinion was that in the event of a finding of temporary disability, the Vice President succeeds only to the powers and duties of the office. One person favored the view that the Vice President succeeds only to the powers and duties, but pointed out that precedent has established the alternative view. Another regard the President and the Vice President as an administrative team, with the latter being able to make any or all decisions in the case of presidential inability. Two thought that the matter should be left to be determined by the particular situation, and two others did not answer the question directly.

A summary of the replies appears below under the following headings:

A. Replies expressing the view that the Vice President succeeds only to the powers and duties of the office.

B. Replies expressing other concepts.

C. Replies which oppose taking action on the question at the present time.

D. Replies in which there was no answer to the question.

A. REPLIES EXPRESSING THE VIEW THAT THE VICE PRESIDENT SUCCEEDS ONLY TO THE POWERS AND DUTIES OF THE OFFICE

Bailey (P4): "* * * only to the powers and duties of the office."

Brown (P5): "* * * to the powers and duties of the office."

Corwin (P17): "* * * succession on account of the temporary 'inability' of the President is obviously something different [from succession in consequence of death] and would not, necessarily, signify succession to the office of President and hence could, and to my mind should, terminate with the disability which gave rise to it."

Crosskey (H110): "* * * I think the answer to your question VIII ought to be that, in any case of temporary Presidential inability, the Vice President is intended by the Constitution merely 'to act as President' until the President's inability terminates; he is not intended 'to succeed to the Presidency.' "

Fairman (P20–21): "It seems to me that a Vice President acting in the Presidential Office during the temporary 'Inability' of the President would be only the Acting President."

Fellman (P25): "The language of the Constitution, that the Vice President succeeds to the powers and duties of the President, or acts as President, or exercises the office of President, supports the view that it was not intended that he should become President."

Finletter (P29): "I should think there would be ground for arguing [that the Vice President succeeds] only to the powers and duties rather than to the office."

Frelinghuysen (H33) "The powers and duties [of the office of President] * * * would devolve on the Vice President, and not the office itself" [in the case of temporary or permanent inability].

Hart (P31): "* * * Vice President should exercise the office of President under the title of President pro tempore (or Acting President * * *)."

Hart (97): [Later, in testimony at hearings before the committee, Hart presented a revised Joint Resolution which did not distinguish between "permanent" and "temporary" disability. It provided that for the period during which the President was unable to discharge the powers and duties of his office] "* * * those powers and duties shall be discharged by the Vice President of the United States under the title of the Acting President of the United States of America."

Holcombe (P34): "* * * to the powers and duties of the office and not to the office itself."

Hoover (P35, H1–2): "* * * the executive powers should be executed by the Vice President during any such period" [of inability of the President to serve—whether temporary or permanent]. (H1).

Hyman (H53): "* * * section 3 of the 20th amendment in the Constitution clearly separates the powers and office of the Presidency. In this section, the amendment provides that if a President shall not have been chosen before the time fixed for the beginning of his term or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified. None of this would have any meaning if the powers and office of the Presidency, on the Webster theory, were inseparable. It has meaning only if the Vice President, acting as President until a duly elected President shall have been chosen or shall have qualified, exercised the powers but not the office of the President." [Under this view, the duration of the inability would not affect the procedure.]

Kallenbach (P47): "Any succession by the Vice President to the Presidency, as I read the Constitution, is only to the powers and duties of the office of President."

Kallenbach (H90): [The Constitutional amendment which Kallenbach proposed stated that] "If the President should, for any reason, become unable to discharge the powers and duties of his office in the manner which the public interest requires and necessitates, the powers and duties of the office shall devolve upon the Vice President, who shall then act as President until the disability be removed or his term of office shall expire."

Krock (H63): "* * * the powers and duties of the Presidency shall devolve on the Vice President" [until a finding is made that the Presidential inability has been removed].

Payne (H13): "* * * it seems to me that the arguments holding that the framers of the Constitution did not, in the event of Presidential inability, [whether permanent or temporary was not specified] intend the Vice President to succeed to the title of President, but only to exercise the powers and duties is the most compelling. * * *"

Pennock (P52): "* * * only to the powers and duties of the office."

Peters (H123): "* * * to the powers and duties of the office and not to the office itself."

Pritchett (P53): "It should be possible for the President to devolve his powers and duties on the Vice President in the complete, constitutional sense, for such a temporary period, and then to resume them when his disability had passed."

Ptitchett (H68–77): [No distinction was made between "temporary" and "permanent" disability. In any finding of inability, the powers and duties of the President shall devolve upon the Vice President.]

Sparkman (H9): "Once the question [of judging whether the President is disabled—either permanently or temporarily] is affirmatively determined, it seems quite clear that the Vice President is obligated by the Constitution to assume the powers and duties of the Office of President for the duration of the disability, not extending, of course, beyond the term to which elected."

Sutherland (P32): "In case of disability the Vice President should merely perform the duties, because the disability may be removed."

Sutherland (H79): [Sutherland referred to the problem concerning the temporary or permanent superseding of the President, and expressed approval of a stipulation that] "* * * only while the President is sick or otherwise unable to act the Vice President acts; and when the President becomes well or is otherwise restored, the Vice President steps down."

B. REPLIES EXPRESSING OTHER CONCEPTS

Romani (56): "It is suggested, then, that a first step in resolving this issue should be action to declare explicitly that any officer temporarily assuming the duties of the Presidency does so only in an acting capacity, and that the President, after recovery, resumes these powers."

Romani (H40): "A second matter is the status of the Vice President (or any other officer in line of succession) who assumes the powers and duties of the presidency for a temporary period. A proper reading of the Constitution leads me to believe that the Vice President only acts as President and is displaced when the President resumes his powers and duties. Constitutional precedent, however, has confused and complicated the issue. * * * The assumption of the Office by Tyler established a procedure which has been followed in later instances of presidential death. From this has developed the attitude that the Vice President cannot temporarily discharge the President's powers when the latter is unable to do so. * * * It appears that no legislation establishing a procedure for meeting this problem can be effective until either the original intent of the framers is restored and made clear, or there is, at least, a clarification of the Vice President's status when he acts for the Chief Executive during the latter's inability."

Huber (P37): "Consequently, it seems best that the President and Vice President form an administrative team, with the President in the leadership position but the Vice President able to make any or all decisions in the case of Presidential incapacity and responsible to the electorate both for the decision as to incapacity and for the decisions he makes while acting on the policy level."

C. REPLIES WHICH OPPOSE TAKING ACTION ON THE QUESTION AT THE PRESENT TIME

Aikin (H121): "* * * whether a Vice President succeeds to the office of the President or merely to the duties of that office is one of no great moment * * * Congress would be advised to use the language of Article II, section I, clause 6 of the Constitution and permit experience to supply the meaning."

Howe (P36): "It is far wiser to leave some questions unsettled for in doing so we preserve for later generations the power to resolve their own problems in accordance with their own needs. * * * I therefor believe it unwise to seek a present resolution of" [this question].

D. REPLIES IN WHICH THERE WAS NO ANSWER TO THE QUESTION

Lien (H123–124): [Question not directly answered]

Peltason (P48–51): [Question not directly answered]

IX. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

Whereas in the event o a finding of temporary disability, a strong majority favored the the view that the Vice President succeeds only to the powers and duties of the office (see VIII above), with respect to a finding of permanent disability, only a bare majority adhered to this view. Six persons believed that in this case, the Vice President succeeded to the office of President. One other person was of this opinion when he replied to the questionnaire, but revised his opinion at the hearings, in favor of the majority view. Again, one person regarded the President and the Vice President as an administrative team, with the letter being able to make any or all decisions in the case of presidential inability, and two others thought the matter should be left for future determination. In two cases the question was not directly answered.

A summary of the replies appears below:

A. Replies expressing the view that the Vice President succeeds only to the powers and duties of the office.

B. Replies expressing the view that the Vice President succeeds to the office of the President itself.

C. Replies expressing other concepts.

D. Replies which believe the matter should be left for future determination.

E. Replies in which there was no answer to the question.

A. REPLIES EXPRESSING THE VIEW THAT THE VICE PRESIDENT SUCCEEDS ONLY TO THE POWERS AND DUTIES OF THE OFFICE

Brown (P5): "* * * to the powers and duties of the office."

Finletter (P29): "I would incline to the same view [to the powers and duties, rather than the office] in the case of a permanent disability. There is always the possibility that a disability which seems to be permanent would prove in fact not to be so."

Frelinghuysen (H33): "The powers and duties [of the office of President] * * * would devolve on the Vice President, and not the office itself" [in the case of temporary or permanent inability].

Hart (P31) (H97): [In his reply to the questionnaire, Hart stated that in the event of a finding of permanent disability] "the Vice President would become President, the Vice Presidency would become vacant, and the person found to be permanently disabled would cease to be President. Nor could this finding be reversed or modified during the remainder of the term." (P31). [Later, in testimony at hearings before the committee, he pointed out the defects of his earlier proposal. The revised Joint Resolution presented at this time did not distinguish between "permanent" and "temporary" disability. It provided that for the period during which the President was unable to discharge the powers and duties of his office] "* * * those powers and duties shall be discharged by the Vice President of the United States under the title of the Acting President of the United States of America." (H97).

Hoover (P35, H1–2): "* * * the executive powers should be executed by the Vice President during any such period" [of inability of the President to serve, presumably, either temporarily or permanently]

Hyman (H53): "* * * section 3 of the 20th amendment in the Constitution clearly separates the powers and office of the Presidency. In this section, the amendment provides that if a President shall not have been chosen before the time fixed for the beginning of his term or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified. None of this would have any meaning if the powers and office of the Presidency, on the Webster theory, were inseparable. It has meaning only if the Vice President, acting as President until a duly elected President shall have been chosen or shall have qualified, exercised the powers but not the office of the President."

Kallenbach (P47): "* * * in no case should the Vice President be deemed to have become President by reason of either a permanent or temporary inability of the President * * *"

Kallenbach (H90): [The constitutional amendment which Kallenbach presented at the hearings provided that] "If the President should for any reason, become unable to discharge the powers and duties of his office in the manner which the public interest requires and necessitates, the powers and duties of the office shall devolve upon the Vice President, who shall then act as President until the disability be removed or his term of office shall expire."

Krock (H63): "* * * the powers and duties of the Presidency shall devolve on the Vice President" [until a finding is made that the Presidential inability has been removed].

Payne (H13): "* * *. it seems to me that the arguments holding that the framers of the Constitution did not, in the event of Presidential inability, [whether permanent or temporary was not specified] intend the Vice President to succeed to the title of President, but only to exercise the powers and duties is the most compelling. * * *"

Pennock (P52): "* * * only to the powers and duties of the office."

Peters (H123): "* * * to the powers and duties of the office and not to the office itself."

Pritchett (P53–54) (H68–77): [Pritchett's reply to the questionnaire did not differentiate clearly between the situations of "temporary" and "permanent" disability, but it was implied that the Vice President succeeds only to the powers and duties, and not the office, of the President so long as the latter is alive. (P53–54). He made no further distinction between the two situations when he testified at hearings later. His view appeared to be that in any finding of inability, the powers and duties of the President shall devolve upon the Vice President. (H68–77)].

Romani (P59): "In the event * * * that the President is permanently disabled, the Vice President shall continue in an acting capacity until a new President is elected."

Romani (H45): "* * * there is a need to clarify the status of any officer assuming the powers and duties of the President when the latter is disabled, [presumably either temporarily or permanently] indicating that such officer only acts as the President."

Sparkman (H9): "Once the question [of judging whether the Presidnet is disabled—either permanently or temporarily] is affirmatively determined, it seems quite clear that the Vice President is obligated by the Constitution to assume the powers and duties of the Office of President for the duration of the disability, not extending, of course, beyond the term to which elected."

Sutherland (P62): "* * * the Vice President should only become President in case of death, resignation, or removal. In case of disability the Vice President should merely perform the duties, because the disability may be removed."

Sutherland (H79): [At the hearings, Sutherland referred to the problem concerning the temporary or permanent superseding of the President, and expressed approval of a stipulation that] "* * * only while the President is sick or otherwise unable to act the Vice President acts; and when the President becomes well or is otherwise restored, the Vice President steps down."

B. REPLIES EXPRESSING THE VIEW THAT THE VICE PRESIDENT SUCEEDS TO THE OFFICE OF PRESIDENT ITSELF

Bailey (P4): "* * * to the office itself."

Corwin (P17): "On account of the fact that hitherto all Vice Presidents have succeeded to 'the powers and duties' of the Presidency in consequence of the death of the President, they have also succeeded to the office itself."

Crosskey (H110): "* * * I find it hard to conceive how, looking to the future, any Presidential inability can be found to be permanent, except in the case of death. * * * However, assuming there can be such a case, I think the Vice President was intended, in such a case, to act as President until the end of the particular Presidential term concerned * * *"

Fairman (P21): "Yes" [Vice President succeeds to the Office].

Fellman (P25–26): "If a finding of permanent disability is made, I should think the Vice President would succeed to the office itself, and not merely to its powers and duties. * * *"

Holcombe (P34): "* * * question has been settled at least by implication by the precedent established by John Tyler" [upon Harrison's death, Tyler assumed the office of the President].

C. REPLY EXPRESSING ANOTHER CONCEPT

Huber (P37): "* * * it seems best that the President and Vice President form an administrative team, with the President in the leadership position but the Vice President able to make any or all decisions in the case of Presidential incapacity and responsible to the electorate both for the decision as to incapacity and for the decisions he makes while acting on the policy level."

D. REPLIES WHICH BELIEVE THE MATTER SHOULD BE LEFT FOR FUTURE DETERMINATION

Aikin (H121): "* * * whether a Vice President succeeds to the office of the President or merely to the duties of that office is one of no great moment. * * * Congress would be advised to use the language of article II, section I, clause 6 of the Constitution and and permit experience to supply the meaning."

Howe (P36): "It is far wiser to leave some questions unsettled for in doing so we preserve for later generations the power to resolve their own problems in accordance with their own needs. * * * I therefore believe it unwise to seek a present resolution of" [this question].

E. REPLIES IN WHICH THERE WAS NO ANSWER TO THE QUESTION

Lien (H123–124): [Question not directly answered.]

Peltason (P48–51): [Question not directly answered.]

X. (a) In the event of a finding of a permanent disability, does the language of the Constitution, namely, "or a President shall be elected—" demand the immediate election of a new President?

X. (b) If so, would the election be for a 4-year term or for the unexpired term of the disabled President?

Replies of a majority of those who answered the questionnaire or who gave testimony at hearings were, either specifically or by implication, that the Constitution does not "demand" the immediate election of a new President in the event of a finding of permanent disability. One person believed it unwise to seek a resolution of this question. The remainder of the replies which were analyzed either did not answer the question specifically or did not discuss the subject.

Although no one expressed the opinion that an immediate election was demanded upon the finding of a permanent disability, a number of persons expressed opinions concerning such an election, in the event one was held. The consensus was that the election would be for the unexpired term of the disabled President.

Summaries of replies appear below under the following headings:

A. Replies which expressed the view that in the circumstance described, the Constitution does not "demand" an immediate election.

B. Reply which expressed the view that it would be unwise to seek a resolution of the question.

C. Replies in which there was no answer to the question.
D. Replies which expressed views concerning an election, if one were held.

A. REPLIES WHICH EXPRESSED THE VIEW THAT IN THE CIRCUMSTANCE DESCRIBED, THE CONSTITUTION DOES NOT "DEMAND" AN IMMEDIATE ELECTION

Bailey (P4): [Question not answered directly. By implication, the reply would be negative, for Bailey stated his belief that] "a new election should be called only if less than 2 years of a President's term had been served."

Brown (P6): "I do not think an immediate election is required."

Corwin (P17): "The clause of section 6 beginning 'and the Congress' deals with the situation which exists when there is neither a functioning President nor a functioning Vice President. It has been dealt with in a series of so-called succession acts, the one now in force having been enacted in 1947."

Crosskey (H112): "* * * I think the answer to your 10th question ought to be (1) that Congress has no power to call an irregular presidential election in cases of the permanent disablement of the President only; the constitutional rights of the Vice President preclude it; (2) that Congress does have power to call irregular Presidential elections in all cases of the permanent 'inability' (assuming such a case can properly be found), 'death,' 'resignation,' or 'removal,' of both President and Vice President, but is under no absolute duty to do so."

Crosskey (H99–105): [No additional comments on the subject were found.]

Fairman (P21): "* * * the language of the Constitution does not demand an immediate election, but does recognize the power of Congress to provide for the choice of a President to fill out the term. * * *"

Fellman (P26): "I believe the language of the Constitution * * * does not require but only authorizes the immediate election of a new President." [Fellman was inclined to the belief that American institutions are not geared to handle all the problems which a special presidential election would raise.]

Finletter (P29): "* * * it seems that even in the case of a permanent disability of the President the Constitution does not call for the immediate election of a new President. There are two reasons for this. One, that I think the words 'or President shall be elected,' may be interpreted as permissive and not mandatory; and two, I should think that this whole second part of clause 6 applies only to the case where there is a disability both of the President and Vice President. Section 3 of article 20 seems to support this view."

Hart (P32): "In the event of a finding of permanent disability, this language would not demand the immediate election of a new President. It has not led to an immediate election in the case of the death of the President. * * *"

Hart (H91–99): [No additional comments on the subject were found.]

Holcombe (P34): "I do not think the Constitution requires the immediate election of a new President under the indicated

circumstances. My belief is that the Congress has power to provide by law for this contingency."

Kallenbach (P48): "* * * Congress may, if it chooses, provide for election of a succeeding officer for the remainder of the regular Presidential term in the event that the succession, by reason of the death, resignation, or removal of both the President and the Vice President, should fall upon any officer named by law to the line of succession. * * *"

Kallenbach (H84–91): [No additional comments on the subject were found.]

Peters (H123): "I do not believe that in the event of a finding of permanent disability the Constitution demands the immediate election of a new President. * * *"

Pennock (P52): "I do not believe, in the event of the finding of permanent disability, the language of the Constitution demands the immediate election of a new President."

Sparkman (H9): "Some question exists as to whether an election should be held to fill the Office of President upon the determination of his disability. I would rather not go into the matter of whether Congress should provide for such an interim election. It is a rather technical point. I believe it highly unlikely that the Congress would not seat the Vice President."

Sutherland (P62): "The Constitution does not provide for an election to replace the President; in my opinion. I think the phrase * * * refers to the next regular election."

Sutherland (H79): "Another uncertainty that was mentioned was the question of the 4-year term, whether it continues in case of Presidential inability or whether there should be a new election. I have no especial wisdom from heaven on this subject. It seems to me offhand that the 4-year term continues to its end without a special election. If the Vice President takes over, even during the permanent illness of the President, it seems to me we wait for another ordinary 4-year election."

B. REPLY WHICH EXPRESSED THE VIEW THAT IT WOULD BE UNWISE TO SEEK A RESOLUTION OF THE QUESTION

Howe (P36): "It is far wiser to leave some questions unsettled for in doing so we preserve for later generations the power to resolve their own problems in accordance with their own needs. * * * I therefore believe it unwise to seek a present resolution of the * * * 10th question * * *."

C. REPLIES IN WHICH THERE WAS NO ANSWER TO THE QUESTION

Aikin (H119–21): [Question not answered specifically.]
Frelinghuysen (H–18–40): [Question was not discussed.]
Hoover (P35, H1–2): [Question not answered specifically.]
Huber (P36–37): [Question not answered specifically.]
Hyman (H47–60): [Question was not discussed.]
Lien (H123–24): [Question not answered specifically.]
Krock (H61–68): [Question was not discussed.]
Payne (H12–17): [Question was not discussed.]
Peltason (P48–51): [Question not answered specifically.]

Pritchett (P52–54) (H68–77): [Question not answered specifically.] [Question was not discussed at hearing.]
Romani (P–54–61): [Question not answered specifically.]
Romani (H40–46): [Question was not discussed at hearing.]

D. REPLIES WHICH EXPRESSED VIEWS CONCERNING AN ELECTION, IF ONE WERE HELD

Bailey (P4): "* * * the election should be for the unexpired term of the disabled President."
Brown (P6): "If [an immediate election] were provided for, it would be preferable to have it for the unexpired term."
Corwin (P17): "The election referred to is undoubtedly the next regular presidential election, Congress never having been empowered to provide for any other."
Crosskey (H112): "* * * (3) that, if Congress does call such an election, the 4-year term provisions seem logically to apply to such elections, but that perhaps the calling of an election 'for the unexpired term of the disabled President [or Vice President]' might be held to be within the discretion of Congress. I see no way of answering this last question with any certainty."
Crosskey (H99–105): [No additional comments on the subject were found.]
Fairman (P21): "* * * the synchronization of Presidential and congressional terms should not be broken."
Fellman (P26): "But if there should be a special election, I should think that it would be merely for the unexpired term of the disabled President, for otherwise, the sequence of events upon which the Constitution operates would be disturbed."
Hart (P32): "Even if Congress provided for a special election * * * it could not give the person elected a 4-year term; for that would upset the time schedule clearly intended by the Constitution to produce a fixed relationship between the terms of Presidents, Senators, and Representatives." [Any special election would be to fill out the unexpired term.]
Hart (H91–99): [No additional comments on the subject were found.]
Kallenbach (P48): "* * * I see no constitutional obstacle to his being chosen for less than full 4-year term for which a President is elected."
Kallenbach (H84–91): [No additional comments on the subject were found.]
Peters (H123): "* * * but if it does, the election should be for the unexpired term of the disabled President."

XI. Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?

The 26 persons who returned replies to the questionnaire and/or who testified at the hearing made a wide variety of proposals for solving the problem of presidential disability. Their replies to question XI depended upon their respective recommendations in large part, as well as upon their respective basic ideas as to the nature of the Constitution and the system of government which it established. In some cases they stated that amendment was (or was not) necessary for the particular proposals which they respectively advocated, but they offered

the opposite judgment with respect to other proposals which they did not advocate. Nine persons presented proposals which, in their opinion, required constitutional amendment; fifteen presented proposals which could be made effective without amendment; one presented a proposal requiring neither amendment nor congressional action; and in one case the question was not answered. In the classification below, each person's judgment concerning the proposal which he supported was the factor determining inclusion in section A, B, C, or D.

A. Replies expressing belief that proposed plans required constitutional amendment.

B. Replies expressing belief that proposed plans could be carried out by statute, without constitutional amendment.

C. Replies expressing belief that proposed plans required neither Congressional action nor constitutional amendment.

D. Replies in which this question was not answered.

A. REPLIES EXPRESSING BELIEF THAT PROPOSED PLANS REQUIRED CONSTITUTIONAL AMENDMENT

Bailey (P4): "I believe a constitutional amendment would be necessary to enact the above procedure."

Frelinghuysen (H29, 32, 33–35, 38–39): "Has Congress the power to make provision for the disability of a President? I believe it has. Article I, section 8 of the Constitution [the necessary-and-proper clause] provides [this authority]. Furthermore, since the Constitution specifically authorizes Congress to take action to name a successor if both the President and Vice President are not available—article II, section 1, clause 6—it can be argued that Congress has equal authority to remedy the problem under discussion. * * * The question here, it seems to me, is one of wisdom not of law. Is it wise to have Congress alone make the inability determination? I do not believe it is (H29). * * * In considering the various proposals to vest the Cabinet with authority to determine disability it is well to keep in mind the fact that the Cabinet is not a constitutional branch of the Government. From this standpoint it should not, perhaps, be given the same status in your considerations as constitutionally established bodies (H32). * * * [Frelinghuysen stated that it would be "very undesirable" to spell out a definition of inability in a constitutional amendment (H33). At H33–35 and 38–39 is the text of Frelinghuysen's proposed joint resolution for a constitutional amendment, H. J. Res. 442 of the 84th Congress. The section H–33–39 contains discussion of various constitutional points. In conclusion (H39) he stated:] Some persons, in their desire to achieve a quick solution to the disability problem, have opposed the idea of a constitutional amendment. They feel that it would take too long to secure its passage. There is little doubt but that it would take at least 2 or 3 years before such an amendment could be passed, although the value of the support which a proposed amendment probably would receive from President Eisenhower might shorten this period. The question, however, is essentially whether the problem could be handled effectively by ordinary legislation. I do not believe it could. An effective solution to

the problem requires the formality of a constitutional amendment. * * * I do not contend that the adoption of this proposal as a constitutional amendment will solve all the problems associated with Presidential disability. Nor do I think it wise to attempt to incorporate in a constitutional amendment solutions to all aspects of the problem. I do believe, however, that my proposal attempts to meet the basic issues which must be resolved."

Huber (P36–37): [This question was not directly answered, although Huber stated the general proposition that] "Quite probably the solution of the problem of the incapacitated President must be solved by constitutional amendment, if a pattern of solution is desired. Any amendment, however, should first of all consider the separation of powers within the Federal Government. This means, it seems to me, that the decision * * * should not be made either by the judicial or legislative branch of government." [He did not state specifically that his proposal for an administrative team consisting of the President and Vice President would require constitutional amendment, but, since it would involve removing the Vice President from his duties as presiding officer of the Senate, by implication an amendment would be needed].

Kallenbach (P48): " * * * * I believe that Congress can, and should, by law act to resolve some of the doubts and confusions about what should be done with reference to situations involving Presidential inability. The statute, permanent in character, and following lines I have suggested, should be directive or declaratory in character, and not mandatory. * * * If Congress desires to set up a procedure which will be mandatory, one in which findings and determinations that are legally binding upon the officers directly involved can be made, I believe, resort to a constitutional amendment would be necessary."

Kallenbach (H84 and 90–91): "It is my opinion that the Congress can act on this subject under authority already conferred by the provisions of article II and by the necessary and proper clause, and that it should proceed to do so. However, there is some uncertainty as to the extent of its authority to implement, by statute, the inability clause. There is also need for clarification of the position of the Vice President in the various circumstances under which he may assume the powers and duties of the presidential office. Consequently, I believe that it would also be advisable for Congress to initiate a constitutional amendment to resolve any doubts that might exist with reference to these aspects of presidential succession arrangements. * * * The constitutional amendment which Congress should submit * * * need not be a lengthy one nor should it alter existing provisions and usages any more than necessary to resolve existing uncertainties. Its provisions need not deal in detail with the procedure for determining Presidential inability, but should make clear the authority of Congress to legislate conclusively on the subject. It should also clarify the question of the status of the succeeding officer under the various circumstances which can arise." [At H90–91 Kallenbach gave the text of his proposed amendment.]

Krock (H62 and 64): [Krock proposed a complete procedure]. "This modus operandi can and should be provided by an act of Con-

gress, subject, of course, to the usual presidential veto. * * * No statutory approach is worth making without the full cooperation of the President. As a practical matter, no constitutional amendment could probably be adopted without this cooperation. * * * [Krock stated that] what I suggest as a stopgap statute with a certain lack of authority, * * * obviously would be fortified by a constitutional amendment. That would have a very binding effect. * * * If a statute to the effect outlined above can be drafted to the satisfaction of Congress and the Executive, it would be desirable to supplement this with a constitutional amendment to the same effect."

Peltason (P50–51): "Congress' right to establish disability stems from the necessary and proper clause which gives Congress the power to pass laws in order to enable the Vice President to execute his duties. Although it might be argued that this gives Congress the authority to provide procedures to determine disability rather than to decide a particular incumbent's disability, Congress could act in two steps. First, it could provide that the fact of disability is to be established by a joint or concurrent resolution of Congress, and then rule that the incumbent was disabled. Certainly such a determination would be given great weight. * * * The only three States [Mississippi, Alabama, and New Jersey] which have established procedures to determine disability have given the job to their State supreme courts. All have done so by constitutional amendment. * * * Other State courts have assumed responsibility for establishing disability through mandamus or quo warranto proceedings, even in the absence of specific constitutional provisions. Nevertheless, a constitutional amendment would be necessary in order to empower the Supreme Court to act. Without an amendment an adversary proceeding—a case of controversy—would be required to raise the question of Presidential disability and it is doubtful if the issue could be first raised in the Supreme Court. Without an amendment the constitutionality of the procedures might be left unresolved until it became necessary to put them to use. Furthermore, even if the power to decide Presidential inability were vested in others beside the Supreme Court there would be constitutional problems. [Peltason stated that the power of Congress to determine disability involved questions which] cannot conclusively be answered until a crisis is upon us, perhaps not until they arise in a legal controversy and are disposed of by the Supreme court. * * * Hence, an act of Congress would still leave some basic constitutional questions unresolved and would not decisively clarify responsibility. Only a constitutional amendment could do these things."

Prichett (P52–54): [In his reply Pritchett did not discuss problems of constitutionality at length. At P52 he stated that the Supreme Court could not be given responsibility without a constitutional amendment. In discussing temporary devolving of Presidential powers on the Vice President, he stated—] "The Constitution can reasonably be interpreted to permit such a temporary devolving of Presidential powers, and Congress would be fully justified in passing an act asserting such an interpretation and making arrangements for facilitating such a temporary transfer.

There would seem to be almost no chance that the Supreme Court would question the power of Congress to enact clarifying legislation of this sort, * * *" [Since Pritchett's draft of proposed legislation (P54) was for a congressional statute and not a constitutional amendment, it may be concluded that he saw no need for the latter].

Pritchett (H69–70, 72–77): "The most effective method would be a constitutional amendment. * * * the principles involved here can be stated simply, * * * The amendment would of necessity have to deal with succession for all four of the constitutionally recognized causes, * * * A proposed draft of the amendment follows: * * *

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

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

" 'SEC. 3. The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until disability be removed, or a President shall be elected.

" 'SEC. 4. Clause 6 of section 1 or article II of the Constitution of the United States is hereby repealed.' " (P69–70).

[In discussing the statutory amplification of his amendment (H70–72) Pritchett summarized his proposals as follows] * * * I suggest as a possible supplementary step, the adoption of legislation which will interpret the constitutional provisions on succession as meaning (a) that the President can declare his own inability; (b) that in emergencies the Vice President can declare the inability of the President, after consulting with the Cabinet; and (c) that the President can reclaim his powers after a period of inability by announcing the termination of his inability. (H72) * * * The suggestions I make * * * are the possibility of drafting a constitutional amendment which could be introduced simultaneously [with draft legislation] and which would rest any possible doubts as [to] the authority of Congress to legislate on the basic problem of the Vice President becoming President." [The counsel, Mr. Foley, stated, "Your real objective in suggesting the dual approach, I presume, is to use the statutory form for a stopgap until a constitutional amendment is adopted." Pritchett agreed, and called attention to the civil rights bill of 1866 and the 14th Amendment as furnishing a similar instance]. (H76–77).

Sparkman (H11–12): [Sparkman approved of Fairman's proposal (see III above) for an agency made up of members of the Supreme Court, acting as a special commission to determine presidential inability.] "That [method] might be a problem as far as a simple act of Congress is concerned. In order to do it would require a constitutional amendment."

Sutherland (P62): "* * * I think that legislation will depend for its effectiveness on voluntary acceptance, as any statute pur-

purting to stop the functioning of a President elected for 4 years will run into constitutional obstacles."

Sutherland (H77–78): "The problem seems to me to involve a constitutional amendment. * * * The simplest amendment would authorize the Congress to legislate for the case of Presidential inability to perform his duties. * * * To turn over provision for suspending or ending his duties to ordinary legislation would alter, in an important respect, the present distribution of governmental powers between the executive and the legislative branches. * * * It seems better that, if some new constitutional provision is to be adopted concerning presidential inability, it should provide directly for some means of determining the existence of disability and of its termination when that occurs." [At H78 the witness described the contents of such a proposed amendment].

B. REPLIES EXPRESSING BELIEF THAT PROPOSED PLANS COULD BE CARRIED OUT BY STATUTE, WITHOUT CONSTITUTIONAL AMENDMENT

Aikin (H121): "The joint resolution [see III above for Aikin's proposal for enactment of a joint resolution authorizing Congress to act by concurrent resolution in case of presidential disability] upon which such a power would be founded would be in itself a quasi-constitutional act. Whether or not it acquired the force of constitutional authority would depend on the way in which power granted by it was exercised and the consequent acceptance by the nation of such an exercise of power."

Brown (P6): "In my opinion any and all of the questions raised in the questionnaire could be settled by legislation."

Corwin (P17): "No constitutional amendment seems to me to be required to enable Congress to do anything above suggested for it to do."

Crosskey (H115–119): [In his testimony at the hearing (H99–105) and in his reply to the questionnaire (H105–119) Crosskey dealt extensively with the constitutional problems of presidential disability. His reply to question XI is at H115–119: excerpts from it follow below:]

"Whatever powers Congress has it has under its express power 'to make all laws which shall be necessary and proper for carrying into execution the * * * Powers vested by the Constitution in * * * any * * * officers * * * of [the United States].' * * * In each of these cases [arising under provisions of the presidential clause], the 'necessary-and-proper' clause vests Congress with full and express powers to make laws to carry this provision into effect. Apart from limitations growing out of other relevant provisions of the document, this is a power to do whatever seems wise and expedient in the premises. If I am right, however, that the Constitution provides for the adjudicating of 'cases' under the 'Presidential-inability' clause in the national courts, Congress cannot constitutionally put this function into any other organ of government. The language of the categories of 'the judicial power' in article III is mandatory; * * * The mandatory character of these provisions of article III has never * * * been completely observed. Nevertheless, the principle of the separation of powers is regarded as fundamental in our Government, and I

do not see how Congress could take the cases in question away from the national courts without violating this acknowledged principle. [Crosskey discussed the objections, on other than constitutional grounds, to vesting this power in the President, the Vice President, the Cabinet, Congress, or an independent body (H116–117).] * * * The courts, on the other hand, seem to me to be recommended in preference to all other possible agencies by at least two considerations. First, there is their experience: * * * In addition to their experience, they have the artificial characteristics that the Federal Convention so solicitously gave them. [They are permanently out of competitive politics, and their offices and salaries are secured to them.] * * * Accordingly, I should not think that Congress ought to take these cases away from the courts even if I thought that body possessed of constitutional power to do so. Does this mean that Congress ought not to legislate in the premises at all? By no means. Congressional legislation, in my judgment, is very desirable for two distinct purposes. The first purpose * * * is a clarification of the general understanding of the Constitution as it relates to this whole matter (H117–118). * * * A second object * * * is that of molding the remedy of quo warranto, in the light of our experience * * * so as to assure that, in such cases, in the future, the intended remedy will be used when the public interest demands it (H118). * * * I suppose nearly everyone would agree that it would be appropriate and expedient to put cases under the Presidential-inability clause within the original jurisdiction of the Supreme Court. * * * [Crosskey stated that the Court might be willing, if offered the opportunity, to overrule earlier decisions which made it impossible for Congress to add to the Court's original jurisdiction. Otherwise, if it be desired to put Presidential-inability cases within its original jurisdiction] it will be necessary to amend the Constitution."

Fairman (P20–21): [In his reply to question IV, Fairman referred to the constitutional limitation on the Supreme Court imposed in article III, section 2, clause 2 in which the Court's jurisdiction is defined. He discussed this in his reply to question III (P20). In his opinion, to vest the duty of determining disability in the Court would require constitutional amendment. He believed that Congress had power to establish a special commission as described above in II and III. In his reply to questions IX and X (P21) he stated that it is within Congress' power to provide for the choice of a new President, in case both the President and Vice President are lost, and that the language of the Constitution does not demand an immediate election, but does recognize the power of Congress to provide for the choice of a President to fill out the term. His reply to question XI was as follows:—] "The foregoing discussion has indicated throughout what can be done by statute, and what would require a change in the Constitution. The method for determining 'Inability' recommended above [see II and III above] could be provided by legislation. If, however, the more inclusive problem of providing for governmental continuity during an atomic war is to be considered, then at some points it will be found that constitutional amendment is involved. I urge that Presidential succession—and provision for

the continuity of Congress as well—be viewed in this larger perspective." (P21).

Fellman (P26): "I believe that Congress has authority to enact legislation on all the questions raised here under the Constitution as it now stands, and that constitutional amendments are not necessary. Such legislation, based upon the language and purposes of the relevant constitutional clauses, would be justified by normal canons of constitutional construction."

Hart (P30): "On this subject the Constitution is not only ambiguous about what is to happen but also incomplete in not indicating who shall decide that it is to happen. But there is no rule of construction that an ambiguous provision may not be carried out until it is clarified by amendment. Those who operate under a provision must attribute meaning to it as best they may. It must thus be assumed that the framers meant only to lay down principles and to leave it to the law to provide the details and procedures. Insofar as meaning has not been supplied by practice, it may be supplied by Congress in the exercise of its delegated power to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the President as an officer of the Government. Congress may enact a permanent statute or it may legislate for a particular case of inability after it arises. In the latter event the mental condition of the President might prevent his acting upon the bill; and even if Congress could have it technically presented to him and assume that it became law after the 10-day period, circumstances are readily conceivable in which the delay of a week and a half would be dangerous. But Congress might not be in session. * * * What if in that situation the President's mental condition prevented his signing a proclamation to call a special session? It does not follow that a permanent law is absolutely necessary. * * * On the whole, however, it would seem better to have an orderly procedure prescribed in advance by law, if it is one which could be expected to produce a finding of inability if that were necessary, but not otherwise. * * * [In discussing the method of appointment by Congress of the Commissioners on Presidential Inability, as recommended by Hart (see III above) he wrote as follows—] These commissioners should not be appointees of the President. Congress should vest their appointment in the Supreme Court of the United States, under its authority to vest the appointment of inferior officers in the courts of law. The term 'inferior officers' is not defined in the Constitution; and within the limits of reason the matter is left to Congress. It could so classify commissioners who would have no power at all except in special circumstances to make findings of fact and do other things incidental thereto. Congress is authorized to vest in the courts of law the appointment of 'such inferior officers, as they think proper.' These will normally be the officers attached to the courts; but the language is broad enough to allow Congress to include others for appropriate reasons."

Hart (H92–95): [Hart repeated and amplified the statement, summarized above, which he had previously made in his reply to the questionnaire. He stated that the form of legislation should be] " a joint resolution because it is declaratory of the Constitu-

tion. * * * Congress has the express power to make all laws which shall be necessary and proper for carrying into execution not only its own enumerated powers but also all other powers vested by the Constitution in any officer of the United States. This gives a textual basis for its power to act in this situation, though what it may do when it so acts is limited by other constitutional principles, such as the separation of powers and the President's independent tenure. It is one thing to argue that in the absence of a statute it is or may become the power and duty of the Vice President and President, respectively, to make the crucial findings of fact. It is quite another thing to deny that Congress may make mandatory an appropriate method of making such findings. For to claim that it is the absolute power and duty of these officers to make the pertinent findings is to read into the Constitution something which is not therein stated and which is kept from being a necessary inference by noting that the power of Congress comes within the terms of the 'necessary and proper' clause. Several assumptions seem proper at this stage: (1) that this is one of those cases where any arrangement which is suggested has its drawbacks; (2) that therefore there is a strong presumption against freezing any plan into the Constitution; (3) that it is in the public interest that there now be provided a definite method for determining presidential inability and its removal; (4) that Congress has within limits the power to provide such a method under the 'necessary and proper' clause; and (5) that the problem is not solved unless the method adopted promises satisfactory results in all possible cases of factual disability. * * * [In discussing Congress' power to provide for a special body, with members to be appointed by the Supreme Court, to determine inability, Hart discussed the meaning of article II, section 2, clause 2, of the Constitution, relating to the appointment of inferior officers (H94–95). He stated that—] the term 'inferior' is not defined, and hence should be liberally construed. * * * It is submitted that the Constitution may properly be taken to leave it to Congress to treat any particular officers as 'inferior,' at least within the limits of reason. It would not be unreasonable for it to treat as 'inferior' officers commissioners whose only function would be to make occasional findings of fact in two sorts of situations, however important the consequences of such findings might be. But what interior offi ers may Congress authorize the courts of law to appoint? The Constitution says such inferior officers as they think proper. This leaves it entirely to the discretion of Congress. * * * It is suggested that Congress may provide for removal of the commissioners for cause on the analogy of *United States* v. *Perkins* (116 U. S. 483), on which see *Myers* v. *United States* (272 U. S. 52, 126–127, 159–162 (1926))."

Holcombe (P34): "Congress happily possesses a general but limited authority to enact legislation necessary and proper to resolve any and all of these questions, subject to review by the Supreme Court of the necessity and propriety of such legislation as Congress might enact. I do not believe that any constitutional amendment is necessary in order to perfect the provisions of the Constitution relating to this matter as they came from the hands of the framers."

Hoover (P35): "It is my understanding that under article II, section 1 of the Constitution, the Congress has the power to determine who shall take over Executive powers in the case of the inability of the President to serve."

Hoover (H1-2): [Question was not answered].

Howe (P35-36): [Howe recommended that Congress act "by joint resolution or statute" and he expressed the opinion that no statute or resolution was needed to give the Cabinet the right to initiate congressional action]. "I believe that the Congress possesses today the sole power which it seems to me to be desirable for it to exercise. That is the power to assert an exclusive authority over the matter of a President's 'inability.'"

Hyman (H52-54): [Hyman recommended] "* * * first, an exploration of every avenue by which the spelling out of the procedures to be taken in the case of Presidential disability could take the form over a joint resolution. If for one or another reason, certain vital, and necessary grants of authority cannot be bottomed on this porous framework, then the committee might move on to consider how the spelling out could be accomplished by statute alone. * * * Only as a last, desperate, back-against-the-wall resort, would it appear advisable for the committee even to consider the need for a constitutional amendment. * * * For all of the foregoing reasons, of the printed draft measures before your committee, the one that commends itself to me as the working basis for a solution to the question of disability is the draft of a joint resolution" [prepared by the counsel and the staff director of the committee (text at H54)]. [Hyman stated that it would be superfluous to spell out in legislation that the Vice President succeeds only to the powers and duties, and not to the office, of President since the question was settled in the wording of the 20th Amendment. (H53 and 60).

Lien (H123-124): [In his reply Lien did not answer this question. He referred to "any law enacted to deal with the 'inability' problem" and made no reference to constitutional amendment].

Payne (H12-17): [This question was not discussed at the hearing. By implication, Payne did not think constitutional amendment necessary, since his bill (S. 2763) did not so provide, and he stated that the duty placed on the Chief Justice in that bill was "strictly ministerial."]

Peters (H123): "Clarifying legislation of the nature indicated above [providing that the Vice President make the determination of inability: see III above] seems to be clearly within the constitutional authority of Congress. The establishment of special bodies for the determination of inability and for the removal of the President would seem to require a constitutional amendment." [Peters did not favor such a body].

Romani (P57-61): [In several parts of his reply Romani indicated his views on the constitutionality of different proposals:—Presidential declaration of his own inability (P57), Vice Presidential declaration (P58), and Presidential declaration of removal of inability (P59) were all held to be established under present constitutional provisions. In discussing the proposal that Congress initiate action and the Supreme Court or an independent agency make the determination, he replied that it was doubtful

whether Congress, without constitutional amendment, has the authority to enact such legislation (P59). "The suggestion outlined here would require no further congressional action if this line of constitutional interpretation could receive general acceptance, but because of the confusion surrounding the problem it seems advisable to propose the adoption of an amendment simply to clarify and spell out this reading of the Constitution. This would not only restore the original intent of the framers but also set the public's mind at ease." [See draft of proposed amendment at H60–61].

Romani (H40–43): [Although Romani did not expressly state that he had changed his mind on this point, his testimony indicated such change]. "* * * as the Constitution now stands * * * the Vice President has both the right and obligation to assume the powers and duties of the President when the latter is unable to discharge those powers and duties. The Vice President cannot escape this responsibility, nor, does it seem, may Congress circumscribe this right of his to act except by constitutional amendment. * * * [Of the various proposals before the committee for consideration], I favor the adoption of any of the following: [(1) the passage of a joint resolution, (2) an inability statute, or (3) a constitutional amendment containing the same provisions as (1)]. * * * Following the general line of reasoning that I have stated * * * I would not think a constitutional amendment necessary."

C. REPLIES EXPRESSING BELIEF THAT PROPOSED PLANS REQUIRED NEITHER CONGRESSIONAL ACTION NOR CONSTITUTIONAL AMENDMENT

Finletter (P27–29): [In his reply Finletter made proposals indicating that neither congressional action nor constitutional amendment was necessary in order to carry them out. He recommended against definition of "inability" (P27) and indicated that, if definition were attempted, an important constitutional question would be raised (P28). He did not favor giving original jurisdiction to the Supreme Court to determine inability (P28). He raised constitutional objections to granting this authority to Congress, the Cabinet, an independent agency, or the inferior courts, and did not favor their exercise of it (P28). His reply to question XI was as follows:—] "I think that a constitutional amendment would be necessary to give original jurisdiction to the Supreme Court on this subject or to authorize the Congress to determine the conditions which would constitute inability of the President to discharge the powers and duties of his office." (P29).

D. REPLIES IN WHICH THIS QUESTION WAS NOT ANSWERED

Pennock (P52): [Question was not answered: see "Pennock" in IV above for his opinion concerning constitutionality in connection with II and III].

THE QUESTIONNAIRE

House of Representatives, United States, Committee on the Judiciary, Washington, D. C., 84th Congress, 1st session

QUESTIONNAIRE—PRESIDENTIAL INABILITY

I. What was intended by the term "inability" as used in article 2, section 1 clause 6, of the Constitution? Shall a definition be enacted into law? If so will you set forth a workable definition? Shall such a definition encompass physical and mental disability as well as the duration thereof?

II. Who shall initiate the question of the President's inability to discharge the powers and duties of his office?

(*a*) The Congress.
(*b*) The Vice President.
(*c*) The Cabinet by majority vote.
(*d*) Any other group, including independent agencies.
(*e*) Shall (*d*) be of a continuing or temporary nature?

III. Once raised, who shall make the determination of inability?

(*a*) The Congress.
(*b*) The Vice President.
(*c*) The Cabinet by majority vote.
(*d*) Any other group, including independent agencies.
(*e*) Shall (*d*) be of a continuing or temporary nature?

IV. Are there any constitutional prohibitions relative to questions II and III?

V. Shall dual authority, both to initiate the question and to determine the question, be vested in the same body?

VI. Shall the determination of disability set forth the—

(*a*) Permanent nature of the disability?
(*b*) Temporary nature of the disability?
(*c*) If temporary, extent of?

VII. If temporary, who raises the question that the disability has ceased to exist? Once raised, who shall make the determination of cessation?

VIII. In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

IX. In the event of a finding of permanent disability, does the Vice President succeed to the powers and duties of the office or to the office itself?

X. In the event of a finding of a permanent disability, does the language of the Constitution, namely, "—or a President shall be elected—" demand the immediate election of a new President? If so, would the election be for a 4-year term or for the unexpired term of the disabled President?

XI. Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?

○