

2-7-1965

## John D. Feerick to Richard Poff

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### Recommended Citation

Feerick, John D., "John D. Feerick to Richard Poff" (1965). *Correspondence*. 30.  
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T. J. D. K.

February 7, 1965

AIR MAIL -- SPECIAL DELIVERY

Honorable Richard Poff  
United States House of Representatives  
Washington 25, D. C.

Dear Mr. Poff:

Pursuant to your request, I am setting forth my thoughts on whether it is advisable to place a time limitation on Congress in the situation where it has to decide a disagreement, between the President on the one hand, and the Vice-President and the heads of the Executive Departments on the other, relating to the President's recovery from an inability.

I do not believe that there should be any such time limitation. It seems to me that the type of case contemplated by the so-called dispute provision would be highly extraordinary, on which the eyes of the country would be sharply focused. If there were a dispute, I think there would be a great deal of uneasiness throughout the country, because the right of the country's elected leader to discharge his powers and duties would be in serious doubt. This feeling, I believe, would be of such intensity that the Congress would be made readily aware of the great decision it had to make and of the need to make it with all due haste. In view of this, I find it difficult to believe that any Congress would or could, for that matter, do otherwise than reach a decision as soon as possible. I believe that the word "immediately" would place a constitutional mandate on Congress to do so. (You will note the use of such word in the Twelfth Amendment.)

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One difficulty with specifying a definite time is determining the length of the period itself. A certain period might be reasonable under one set of circumstances and not under another. Moreover, it might be reasonable if Congress were in session but not if Congress were out of session. Also, ten days might very well be too short a period to require Congress to make the major decision expected of it, particularly if it wishes (as it should) to give the President every opportunity to prove his ability to discharge the powers and duties of his office.

Invariably, whenever a time limitation is placed in a statute, questions are raised as to the beginning and ending of such period, and as to the consequences if the period should expire without any action having been taken. If a time limitation were placed in a constitutional amendment regarding congressional action, the wording thereof might cause problems.

Needless to say, I think the approach embodied in your proposal and H. J. Res. 1 as a permanent solution to the problems of presidential inability and the vice-presidential vacancy is just excellent. However, I sincerely feel that there is some need for improvement in the language now used in Section 5. I have felt for some months that Section 5 is not clear as to who is entitled to exercise presidential power in the period after the President declares his ability and before the Vice-President brings the matter before Congress. The Vice-President is intended to act in the period, I am sure, but it can be forceably argued that the language does not and will not permit him to do so. Since Section 5 is designed to meet an extraordinary case such as that of an insane President, it would be extremely dangerous to leave a gap here as such a President might declare himself able and immediately discharge the heads of the Executive Departments, thus preventing the Vice-President from taking the necessary steps to get the matter before Congress. I present this problem because I am only too mindful of what the words "the same" did.

In addition to the above, I think the House Judiciary Committee has a wonderful opportunity to make some necessary legislative history. First, it should be made clear in the legislative history as to whether the

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clause "or such other body as Congress may by law provide" would permit Congress to exclude the Vice-President. My view has been that the intent of the American Bar Association consensus was to limit Congress to changing only the heads of the Executive Departments if it should exercise this power.

Second, the legislative history should state what is meant by "vacancy" in Section 2. It means, of course, death, resignation or removal, having no application whatever to inability. However, it has been argued from time to time that "permanent inability" may constitute a vacancy. It is for this reason that I believe there should be some legislative history on the point.

Third, the legislative history should be clear that when there is a disagreement and Congress is out of session, the Vice-President shall be required to call a special session.

Fourth, I presume that there are in existence congressional rules dealing with the question of when a matter is referred "to Congress." I think the legislative history should spell out these rules in view of the language used in Sections 4 and 5 regarding transmittal of a writing "to the Congress."

Fifth, the legislative history should address itself to the question of whether the Vice-President is required to take the presidential oath before he becomes Acting President. My own opinion is that he should be so required. The practice in most states regarding the lieutenant governor acting in the absence of the governor is to this effect.

Sixth, the history should cover the question of whether a Vice-President acting as President can preside over the Senate. I think not. The Constitution says that the President pro tempore so presides when the Vice-President exercises the office of President, implying that he is not to preside over the Senate in such case.

Seventh, the history should address itself to a Vice-President's salary during the period he acts as President. I think this question can be handled in the

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statute dealing with the Vice-President's salary. My view is that it should provide for "presidential wages" during this period. The succession law of 1947 so provides with respect to officers appointed by Congress. Of course, the President would continue to receive his pay as the Constitution says it can neither be increased nor decreased during his four-year term.

You asked if I could suggest some language which would cover the case of simultaneous inability of the President and Vice-President. As I see it, you have basically three situations in mind: (1) the inability of a Vice-President at a time when the President is disabled, (2) the inability of an Acting President, and (3) the inability of a President when there is no Vice-President. If it should be determined essential to have provisions covering these cases, I would suggest adding two sections to the basic proposal. These sections might read as follows:

"6. The inability of the Vice-President shall be determined in the same manner as that of the President except that the Vice-President shall have no right to participate in such determination."

"7. In case of the death, resignation, removal or inability of the Vice-President, the person next in line of succession shall act in lieu of the Vice-President under Sections 4 and 5 with the heads of the Executive Departments or such other body as Congress may by law provide."  
(Please note that the American Bar Association concensus had a provision of this kind.)

I am sure that the language in the above provisions can be improved but, I believe, that they cover the case you proposed. I am working on a detailed analysis of your proposal and H. J. Res. 1 which I hope to have an opportunity to present to the House Judiciary Committee.

I am simply delighted that Congress is finally going to act on the problem of presidential inability. The House Judiciary Committee can truly render a great public service to the country.

With very best wishes,

Sincerely yours,

John D. Feerick