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John D. Feerick to Nathan Siegal

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December 13, 1963

Nathan Siegal, Esq.
Department of Justice
Room 5142
9th and Pennsylvania Avenue, N.W.
Washington 25, D. C.

Dear Mr. Siegal:

Thank you for your kind letter of November 19 and your comments on my approach to the solution of the problem of presidential inability. Permit me to argue my case a little more.

With reference to the "stalemate" case, under my approach there could really be no "stalemate" since the President's decision as to his ability to re-assume the powers and duties of his office would be final. The principal reason for my support of a so-called President-Vice President solution is that no individual or body (other than Congress through impeachment) should be able to deprive the President of either his office or the powers and duties thereof. This was the intention of our Founding Fathers when they wrote our great Constitution.

A President-Vice President approach does, of course, assume a responsible President but impeachment lies as the remedy for an irresponsible President. It is not my view that a President can or should be impeached for inability but rather that he should be impeached for neglect of duties and irresponsible behavior. The possibility of impeachment for this kind of "misdemeanor" (and it must be noted that James Madison, who was responsible for the language used in the impeachment provision, favored a broad interpretation of it (reference is made to footnote 285 of my article)) would encourage a President to make a determination of his own inability or accept a determination made by the Vice President.

December 13, 1963

It would likewise discourage a disabled President from determining a cessation of inability before he is really ready to re-assume his duties. It is submitted that a President-Vice President approach would encourage the President to act responsibly, as he always would have the power to say when he was able. Moreover, it would deter abuses by the Vice President since if he were wrong, the President would deny inability and that would be final unless, of course, the President was irresponsible, in which case it would be the responsibility of Congress to act to prevent the President from abusing his office. This final recourse would not, of course, be taken except in extreme cases, which is as it should be.

A solution which would take the determination of inability outside the Executive Branch poses a problem, either of interference with the Executive by other branches of government or of the possibility of a body of non-elected officials removing one of the two officers elected by the whole nation, or of political manipulation of the Presidency by Congress or bodies or individuals other than Congress.

It is true that the giving to Congress of a broad power to establish a method for determining the commencement and termination of inability has a good deal of flexibility since Congress can legislate and re-legislate, subject to presidential veto, as the circumstances may require. It is also true that a Constitution normally should contain general principles. However, I would say to all this that our Founding Fathers never would have sanctioned a broad inability power in the hands of Congress. They were careful to provide only one way for a President to be deprived of the prerogatives of his office, i.e., impeachment, and were quite specific about how this would work. Since a determination of inability would deprive the President of his prerogatives -- at least temporarily, if not, practically speaking, permanently - the method of determining the same should be no less specific and should be written into the Constitution itself. The fact that a President can veto any solution proposed by Congress may lessen, but it certainly does not eliminate, the separation of powers objection.

Nathan Siegal, Esq.
Page Three

December 13, 1963

Quite frankly and quite obviously, I am opposed to any solution which would divert the inability determination outside of the Executive Branch. I believe that the inability problem would be solved for all practical purposes if the procedures embraced in the agreement established by President Eisenhower were written into the Constitution. Such an agreement would carry with it all the necessary safeguards, namely:

1. No individual or body, except Congress, by impeachment, could deprive the President of either his office or his powers and duties without his consent.
2. Should an immediate decision be required during an inability, the Vice President would be authorized to act in place of the President.
3. An ambitious Vice President could not usurp the office of the Presidency because the President's decision would be final, unless Congress should deem it irresponsible and impeach him. And, the Vice President would only act as President.
4. No new power over the Executive not inherent in the original Constitution is given to any individual, body or Branch of Government.

In any event, I do hope that Congress will act to solve this important problem.

Thank you for allowing me to reiterate my views.
With every good wish,

Sincerely,

John D. Feerick

JDF:sg
Office