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SYMPOSIUM: 50 YEARS WITH THE 25TH AMENDMENT

**THE TWENTY-FIFTH AMENDMENT: ITS CRAFTING AND
DRAFTING PROCESS**

*John D. Feerick**

In previous writings, dating back to 1963, I detailed the extensive legislative history of the Twenty-fifth Amendment.¹ This undertaking, because of the enormous current interest in the amendment, provides a brief guide to that history. When the amendment was proposed for ratification on July 6, 1965, it culminated a 10-year period of study by Congress and the Justice Department of how to deal with the problem of presidential inability. It answered one of the two questions asked at the Constitutional Convention of 1787 by John Dickinson of Delaware, who reflected that the provision on presidential succession was “too vague.” “What is the extent of the term ‘disability,’” he inquired, and “Who is to be the judge of it?”² He received no responses. The final succession provision in Article II, Section 1, Clause 6 of the Constitution provides:

In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act

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1. See JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1965); JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3d ed. 2014); John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73 (1963); John D. Feerick, *The Proposed Twenty-Fifth Amendment To the Constitution*, 34 *FORDHAM L. REV.* 173 (1965); John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907 (2010); John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 *FORDHAM L. REV.* 1075 (2017).

2. See 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 427 (Max Farrand ed., 1911).

accordingly, until the Disability be removed, or a President shall be elected.³

In 1841, upon the death of President William Harrison, Vice President John Tyler asserted that he became President under this provision for the rest of Harrison's term. He thereby created a precedent that would haunt the country when an assassin's bullet left President James Garfield hovering between life and death for 80 days in 1881⁴ and when a stroke disabled President Woodrow Wilson in 1919.⁵ The status of a Vice President in cases of inability and the issue of who determines its existence and termination came into focus as subjects for legal reform, with many different points of view expressed by scholars, legislators, academic leaders, and lawyers as to the form of such reform.⁶ The evolution of a more dangerous world requiring presidential leadership at all times kept the idea of reform alive and on the agendas of the House and Senate Judiciary Committees.

In September 1955, House Judiciary Committee Chairman Emanuel Celler of New York asked the committee's staff to study the subject. They developed and distributed a questionnaire to historians, political scientists, law professors and others, asking questions such as: What is the meaning of "inability"?⁷ Should Congress enact a definition of inability into law?⁸ Who should initiate the question of inability and determine it? Who should determine the end of a temporary inability?⁹ In the event of a temporary inability, should the Vice President succeed to the discharge of the powers and duties of President or to the office of President itself, as Tyler did for the rest of Harrison's term?¹⁰ Does Congress have the authority to enact legislation to resolve any or all of these questions, or is a constitutional amendment necessary?¹¹

Following this initiative, in the face of three disabilities of President Eisenhower, proposals were advanced as to how a President's inability

3. U.S. CONST. art. II, § 1, cl. 6.

4. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 8-10; *see generally* CANDICE MILLARD, DESTINY OF THE REPUBLIC: A TALE OF MADNESS MEDICINE AND THE MURDER OF A PRESIDENT (2011).

5. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 14-16.

6. *See* FEERICK, FROM FAILING HANDS, *supra* note 1, at 133-135.

7. Staff of H. Comm. On the Judiciary, 84th Cong., PRESIDENTIAL INABILITY: ANALYSIS OF REPLIES TO A QUESTIONNAIRE AND TESTIMONY AT A HEARING ON PRESIDENTIAL INABILITY 1 (Comm. Print 1957).

8. *Id.* at 4.

9. *Id.* at 11, 20, 37.

10. *Id.* at 49.

11. *Id.* at 58. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 50-51.

might be determined.¹² General agreement manifested itself that a constitutional amendment should codify the Tyler precedent for cases of death, resignation, and removal and provide for an Acting President in cases of inability. But there was considerable disagreement over how to determine the beginning and end of an inability.¹³ Strong leadership in dealing with these questions was given by the Attorneys General of the United States, first Herbert Brownell and then William Rogers, and by a number of members of Congress, including Representative Celler and Senators Kenneth Keating of New York and Estes Kefauver of Tennessee.

The Eisenhower Administration's early proposal contemplated a constitutional amendment under which the President could declare his own inability in writing. The Vice President would then discharge the powers and duties of the office of President as Acting President. If the President were unable to declare his own inability, the Vice President, "if satisfied of the President's inability, and upon approval by a majority of the heads of the executive departments, who are members of the President's Cabinet," would serve as Acting President. The President would resume his powers and duties upon his written declaration of recovery.¹⁴

As subsequently modified, the proposal provided that when the President declared his inability had ended he would not resume his powers and duties for seven days unless he and the Vice President agreed to an earlier resumption. If the Vice President, with the approval of a majority of the heads of the executive departments, disagreed with the President's declaration, he could bring before Congress the disagreement as to his recovery. If a majority of the House voted that the President was disabled and the Senate concurred by a two-thirds vote, the Vice President would then discharge the powers and duties of President until the Vice President declared an end of the inability or a majority of both Houses of Congress decided that the inability had ended.¹⁵

Despite the attention given to the subject, including approval of this modified proposal by the Senate Judiciary's Subcommittee in 1958, neither House of Congress took action. There was not sufficient

12. See Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 964 (2010).

13. FEERICK, *TWENTY-FIFTH AMENDMENT*, *supra* note 1, at 53.

14. *Id.* at 51 (Under this proposal, the question of a President's inability could be raised by either the Vice President or a majority of the heads of the executive departments.).

15. See *Hearings on Presidential Inability Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 85th Cong. 1-2 (1958); FEERICK, *TWENTY-FIFTH AMENDMENT*, *supra* note 1, at 52-53.

agreement on the procedure for determining an inability and its termination to advance any proposal for floor debate.¹⁶

In the meantime, President Eisenhower developed a protocol with Vice President Richard Nixon for handling another inability that might occur during his term.¹⁷ It provided that the President could transfer his powers and duties to the Vice President as Acting President and that if the President could not communicate his inability, the Vice President would decide upon the devolution of the President's powers, with such consultation as he thought appropriate.¹⁸ In either case, the President would determine when the inability had ended and upon that determination resume his powers and duties.¹⁹ Presidents John Kennedy and Lyndon Johnson continued this protocol, in Johnson's case with Speaker John McCormack.²⁰

Despite these protocols, efforts in Congress to find a permanent solution continued. By June 1963, Senators Kefauver and Keating, putting aside their different approaches,²¹ agreed on a proposed constitutional amendment that would clarify the status of a Vice President in a case of inability and grant Congress the power to determine the method for the commencement and termination of any inability.²² Said Keating:

Senator Kefauver and I . . . agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best form among all the proposals

16. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 53.

17. See Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 77-79 (2012) [hereinafter Fordham Clinic Report].

18. *Id.* at 79.

19. *Id.* at 79.

20. *Id.* at 79-80.

21. While a member of the House of Representatives in 1956, Keating proposed a ten-member commission to judge presidential inability by majority vote. The commission would have consisted of the Vice President as a nonvoting member, the Chief Justice, the senior Associate Justice, the Speaker and minority leader of the House, the majority and minority leaders of the Senate, the Attorney General, and the Secretaries of State and of the Treasury. In 1958, the Senate Subcommittee on Constitutional Amendments, which Kefauver chaired, approved a proposed amendment that would have allowed the Vice President and majority of the Cabinet to declare the President unable. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1 at 51-53.

22. See S.J. Res. 35, 88th Cong. (1963) (as reported by Subcomm. on Constitutional Amendments, June 11, 18, 1963).

without suffering the handicap of having to rally a two-thirds majority in each House to do it.²³

The Senate Judiciary Subcommittee on Constitutional Amendments approved this approach, embodied in S. J. Res. 35, on June 25, 1963, with the operative language being: “The commencement and termination of any inability shall be determined by such method as Congress by law provided.” The death of Senator Kefauver in August 1963 brought this momentum to a halt.²⁴

The assassination of President Kennedy in November 1963 revived the subject as media accounts speculated as to the handling of his inability had he not died but was left wounded and disabled.²⁵ The new chair of the Senate Judiciary Subcommittee on Constitutional Amendments, Birch Bayh of Indiana, and Emanuel Celler immediately took leadership steps to address the subject. Senator Bayh drafted a proposed constitutional amendment, S.J. Res 139, with concepts present in the inability proposals of the Eisenhower Administration plus provisions for filling a vacancy in the vice presidency and changing the statutory line of succession.²⁶ He shared his views with an American Bar Association conference committee of 12 lawyers,²⁷ which I was invited to join because of a recent article I had written on the subject of presidential inability.²⁸

After its meeting on January 20 and 21, 1964, the ABA’s conference committee adopted as its recommendations the concepts that were expressed in S.J. Res 139 and included in its recommendations a number of additions.²⁹ These included a provision for a joint session of Congress in filling of a vice presidential vacancy. It suggested a provision providing for the person next in line of succession to act as Vice President under the amendment if the office of Vice President were vacant. The Committee also suggested a provision empowering Congress to substitute another body to act with the Vice President if the heads of the executive departments proved unworkable.³⁰ These recommendations were not written in statutory language but rather were set forth in an ABA press

23. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1 at 54-55.

24. *Id.* at 55.

25. Arthur Krock, *Kennedy’s Death Points Up Orderly Progression in U.S. Government*, N.Y. TIMES, Nov. 24, 1963, E9.

26. See S.J. Res. 139, 88th Cong. (1st Sess. 1963).

27. See BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 45-50 (1968).

28. See Feerick, *Personal Remembrance*, *supra* note 1, at 1078-79.

29. BAYH, ONE HEARTBEAT AWAY, *supra* note 27, at 49-50.

30. See *id.* at 349.

release describing the consensus of the conference. Point 3 of the Consensus said:

The amendment should provide that in the event of inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term in office.³¹

Point 4 said:

The amendment should provide that the inability of President may be established by declaration in writing of the President. In the event the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.³²

As to presidential succession the ABA release stated: “The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.”³³

The consensus recommendations were approved by the ABA House of Delegates on February 17, 1964, and then presented to the Subcommittee on Constitutional Amendments by the President and President-elect of the ABA.³⁴ Following these hearings, the Senate Subcommittee on Constitutional Amendments amended S.J. Res. 139 to include, among other provisions, the “such other body” provision of the ABA consensus and the consensus language calling for a “concurrence” by a majority of the heads of the executive departments with respect to any action taken by the Vice President under Section 4.³⁵ Not accepted by the subcommittee from the ABA consensus was the provision that would devolve the powers and duties of the President on the person next in line of succession if there were no Vice President or the provision for holding a joint session of Congress to fill a vacancy in the Vice Presidency.³⁶

The committee dropped the requirement in the original version of S.J. Res. 139 that the President nominate a replacement Vice President

31. *Id.*

32. *Id.*

33. *Id.*

34. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 58.

35. *See id.* at 71-74. The committee also codified the Tyler Precedent that the Vice President becomes (for the rest of the term) President in the case of death, resignation, or removal of President. The committee dropped from this provision reference to serving “for the rest of the President’s unexpired term,” considering it unnecessary. *See id.* at 71-72.

36. *See id.* at 74-75.

within 30 days. However, the committee made this change with the expectation that the President would make a vice presidential nomination within a reasonable time. Also dropped were the provisions in S.J. Res. 139 for a Cabinet line of succession given that the provision for filling a vice presidential vacancy made it less likely that the statutory line of succession would be reached. As for a President who declares his own inability, there was no provision as to whom the declaration should be sent and no provision allowing the President immediately to resume his powers and duties upon his declaration of recovery. As for a provision devolving power on the person next in the statutory line of succession, as suggested by the ABA consensus, the Subcommittee thought it unnecessary, and it did not choose to deal with a vice presidential inability.³⁷ The more issues that were dealt with, the subcommittee believed, the more likely they would become a detriment to favorable action on the basic proposal of dealing with the major gaps surrounding a presidential inability.

The Subcommittee also added detail to what eventually became Section 4 of the amendment, then expressed in two sections of S. J. Res. 139, sections 4 and 5. These sections dealt with an involuntary declaration of inability and provided for a two-day wait period before the President could resume his powers and duties in order that the President's declaration of recovery could be considered by the Vice President and the heads of the executive departments. If they disagreed with the President, Congress would have to "immediately decide" the issue, with the Vice President continuing to serve until Congress decided the issue. The President would resume his powers and duties unless two thirds of each House of Congress sided with the Vice President and the heads of the executive departments. These recovery provisions operated irrespective of whether the inability declaration was voluntary or involuntary.³⁸ Final action in the Senate on the Judiciary's committee report in support of S.J. Res 139 occurred on September 29, 1964, when the Senate approved it, 65 to 0.³⁹

In January 1965, S.J. Res. 139, as approved on September 29th, was introduced in the new Congress as S.J. Res 1 in the Senate and as H. R. J. Res. 1 in the House, popularly known as the Bayh-Celler amendment.⁴⁰ President Johnson embraced its approach in a special message to Congress on January 28, 1965, in which he stated,

37. *See id.* at 71-75.

38. *See id.* at 72-73.

39. *See* 110 CONG. REC. 23,061 (1964).

40. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 79-80.

Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly continuity in the Presidency that is imperative to the success and stability of our system. Action on these measures now will allay future anxiety among our own people, and among peoples of the world, in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal Offices of our constitutional system. If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries.⁴¹

A year earlier, former President Dwight Eisenhower, who also embraced the Bayh-Celler approach, had expressed similar comments at an ABA forum:

I believe that we can solve this thing, not next year, or in two or three years, but now. I do not believe that it's quite as intricate as we make it. But it does mean . . . that we do believe that all of us, of all parties and of all levels of government, have as our first thought and concern, the United States of America.⁴²

In throwing his support behind the proposal, Eisenhower also warned that no statute or constitutional amendment could account for all contingencies. Instead, the nation had to put faith in the people responding to a future crisis. He said it was important to assume that those people would be “men of honor, men of integrity, men whose concern is the welfare of their own country and not of their own personal ambitions.”⁴³

In February 1965, S.J. Res. 1 was reported out favorably by the Senate Judiciary Committee, but with amendments.⁴⁴ Among the amendments was the specification in Section 3 of a requirement that a declaration of inability by the President be sent to the Speaker of the House and the President of the Senate. Similarly, the sections of the proposals dealing with an involuntary determination of inability by the President were also amended to identify the Speaker of the House and the President of the Senate as the recipients of the declarations instead of just “Congress” as in the then versions of S.J. Res. 139 and S. J. Res. 1. It was assumed that if out of session, the presiding officers of Congress would

41. *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong. 14 (1965).

42. BAYH, ONE HEARTBEAT AWAY, *supra* note 27, at 123.

43. *See id.*

44. *See* S. REP. NO. 89-66 (1965).

have the power to convene a special session, but there was no provision in the proposed amendment on that subject.⁴⁵

Another amendment made by the Committee was to change the expression in S. J. Res. 1 of “heads of the executive departments” to “principal officers of the executive departments,” tying it to the language in Article II, Section 2 involving the President’s power to require the opinion in writing of the principal officer in each executive department.⁴⁶ The legislative history made clear that the “principal officers of the executive departments” terminology referred to the heads of the then 10 executive departments,⁴⁷ which might grow in the future, as they did to 15.⁴⁸ In House floor debates, Congressman Celler expressed again his view that the intended reference was to the heads of the executive departments listed in Title V, Section 2 of the US Code.⁴⁹

The “immediately decide” language for Congress’s handling of a case of disagreement about a President’s inability was changed to “immediately proceed to decide the issue” in order to allow time for Congress to gather information concerning the disagreement before taking a vote.⁵⁰ The Senate Judiciary Committee opposed a specific time limitation for congressional action and also rejected the use of a two-thirds vote requirement for action by the heads of the executive departments—retaining the majority vote provision.⁵¹ During the Senate floor debates of February 19, 1965, Senator Bayh accepted a suggestion by Senator Roman Hruska that there be a seven-day interval for consideration of a Presidential declaration of recovery instead of two days, as then contained in S.J. 1 and H.J. Res. 1.⁵²

In the course of the hearings, Senator Bayh and others made clear the intent behind S.J. Res. 1 in a number of areas. In the House Judiciary Committee hearings held in February 1965, Senator Bayh said, in response to a question as to whether the Cabinet loses its ability to participate in an inability declaration once Congress creates another body:

45. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 86.

46. See *id.*

47. See *id.* at 117.

48. See 5 U.S.C. § 101.

49. See 111 CONG. REC. 7944 (1965) (statement of Representative Celler). The legislative history contains conflicting statements on whether acting secretaries could participate in an inability determination. But the House Judiciary Committee and Senator Robert Kennedy indicated that acting secretaries could participate, which I believe is the correct view. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 117-18.

50. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 87.

51. See *id.* at 86-87.

52. *Id.* at 89.

[Yes.] The Congress has a choice of either providing another body or permitting the Cabinet to continue to function. This is abundantly clear in the language as I read it. If Congress finds that the Cabinet cannot adequately fill this role, then it provides an alternative body which will function. This is the way we intended it. This is the way most all of us look at it and the way I would like it to read in the record.⁵³

Herbert Brownell, who played a major role in the development of the amendment as the Attorney General said, in response to a question of whether, if Congress designated another body, unanimity would be required, or only a majority: “I think in such a case the Congress could by law provide for it either way.”⁵⁴ The ABA consensus recommendation, in my view, did not intend the requirement of a majority of the Cabinet to limit the power of Congress in devising rules for another body, as Brownell reflected.⁵⁵ As to the other body, if the Cabinet proved to be unworkable for its role, Senate minority leader Everett Dirksen said it could consist of ordinary citizens, medical experts, and those who have the ability to answer the question regarding inability.⁵⁶ Congressmen Celler said that the “body could be one of experts or expertise needed to determine the issue of inability.”⁵⁷ Senator Bayh offered that the other body could consist of five psychiatrists and five members of the House and Senate to act with the Vice President in making the determination.⁵⁸ Chairman Celler also spoke of the other body possibly consisting of physicians or the Supreme Court.⁵⁹

As the Senate was considering S.J. Res. 1, the House Judiciary Committee was doing the same with its twin, H.R. Res. 1, which resulted in the House having significant differences with the language contained in S.J. Res. 1 as it passed the Senate on February 19, 1965.⁶⁰ The changes focused on Sections 3 and 4 of the proposed amendment. The House committee did not accept the Senate change of a 7-day wait period for consideration of a presidential declaration of recovery, preserving the two-day time period; nor did it accept a check on the President if he

53. *Presidential Inability: Hearings Before the House Comm. on the Judiciary*, 89 Cong. 93 (1965).

54. *See id.* at 254.

55. *See id.*

56. *See* 111 CONG. REC. 15,592 (1965).

57. *See* 111 CONG. REC. 7,965 (1965).

58. *See Presidential Inability: Hearings before House Comm. on the Judiciary*, 89th Cong. 58 (1965).

59. *See id.* at 56.

60. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 299-305 (describing the Twenty-fifth Amendment’s evolution).

declared his own inability (hence the House language “until he transmits a declaration to the contrary”); and it did not accept the “immediately proceed to decide” language of S.J. Res. 1, favoring instead a 10-day limitation on Congress in considering a disagreement issue. It measured the 10 days from the date of receipt by Congress of the disagreement declaration from the Vice President and a majority of the principal officers (or heads) of the executive departments. It also changed the recipients of any declarations to the Speaker and President pro tempore, rather than to the President of the Senate. In the case of a disagreement with the President, it was reasoned, the Vice President and the heads of executive departments should not be transmitting a declaration to the President of the Senate, who would be the Vice President himself. The Senate version contained no provision for the convening of Congress if not in session when a disagreement arose.⁶¹ The legislative history indicates that declarations of inability and cessation of inability would be effective when transmitted, not when received.⁶²

In the House debates of April 13, 1965, on a suggestion made by Speaker McCormack,⁶³ an amendment was adopted to require Congress to assemble within 48 hours, if not in session, on receiving a challenge to a President’s declaration of recovery.⁶⁴ Upon passage of the House version, with the Speaker’s floor amendment, on April 13, 1965, by a vote of 368 to 29,⁶⁵ it became necessary for a conference committee to be established because of the differences between the House and Senate proposals. The time limitation of 10 days was central to this impasse.⁶⁶ There were also language issues to be resolved. Among these issues was from when to measure the time period if Congress was out of session. H.J. Res. 1 measured it from the date when the Vice President and principal officers sent their declaration of inability to the Speaker and President pro tempore. S.J. Res. 1 measured the time from when Congress assembled.

On June 23, 1965, the 10-member conference of the two Houses met to resolve their differences and reached a unanimous agreement. For the most part the changes reflected in the House proposed amendment were accepted.⁶⁷ Thus, the transmittal of declarations would be to the President pro tempore and Speaker, and there would be no check on the President

61. *See id.*

62. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 113.

63. *See* Feerick, *Personal Remembrance*, *supra* note 1, at 1097.

64. 111 CONG. REC. 7,966 (1965).

65. *Id.* at 7,968-69.

66. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 100.

67. *See id.* at 100-01.

resuming his powers and duties upon his declaration of recovery in the case of a voluntary declaration of inability. The House provision for the convening of Congress, if out of session, was also agreed to. The period for consideration by the Vice President and a majority⁶⁸ of the heads of the executive departments of a President's recovery declaration was compromised at four days instead of two or seven in their respective versions. After a difficult period of negotiations, the Senate accepted a 21-day limitation on deciding a disagreement issue, measuring it, if out of session, from when Congress assembled. It changed the expression in the House amendment to S.J. Res. 1 of "Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit. . ." to: "The Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide. . ."⁶⁹

According to Senator Bayh, there was no discussion of the "either/or" disjunctive expression in the committee.⁷⁰ I later learned that the expression came from Senator Roman Hruska of Nebraska who wanted to make sure that the Vice President could not be removed if Congress created another body under Section 4.

Upon seeing this report, I noted the expression "either/or" and called attention to a possible ambiguity enabling two bodies to exist at the same time. I discuss my involvement with this issue, including research I did for Senator Bayh's staff, in a *Fordham Law Review* article.⁷¹ The House accepted the report by voice vote on June 30,⁷² while the Senate debated it on both June 30 and July 6, 1965, and then, by a vote of 68 to 5, accepted it but not until after a heated debate on the meaning of the either/or expression.⁷³

68. Whether the "majority" vote requirement of Section 4 was intended as a limitation on Congress in establishing another body has a checkered history. The provision was taken from the ABA consensus which reflected what Herbert Brownell said in his testimony before the House Judiciary Committee, as to unanimity if Congress decided, because of the unworkability of the Cabinet, on another method. The House proposal placed commas before and after the other body provision, which would be supportive of this interpretation by Brownell, as would the language of the conference committee report as presented by the House Conferees. However, the introduction of "either/or" and the absence of a comma before the other body provision in the Amendment itself puts this view in question. See H.R. Rep. No. 89-564 (1965). See also YALE LAW SCHOOL RULE OF LAW CLINIC, *THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER'S GUIDE* 16-17 (2018).

69. See H.R. REP. NO. 89-564 at 2 (1965).

70. See 111 CONG. REC. 15,594 (1965).

71. See BAYH, ONE HEARTBEAT AWAY, *supra* note 27, at 68-69; Feerick, *Personal Remembrance*, *supra* note 1.

72. See 111 CONG. REC. 15,212-13 (1965).

73. See 111 CONG. REC. 15,585, 87 (1965).

At the very last moment, I noted the absence of an “s” on the second use of “executive departments” in Section 4 of the amendment and immediately called the committee’s staff to pass on this omission and was told that it was too late inasmuch as the amendment was on its way to the state legislatures for ratification. I can’t describe my sadness in discovering the missing “s” but felt assured that the use of the singular would not be an issue in the future because the legislative history was so abundant concerning the use of the plural, namely, the heads of the executive departments and then the “principal officers of the executive departments.”⁷⁴

Conspicuously absent from the proposed amendment was an answer to John Dickinson’s question, “What is the extent of the term disability.” At no point in the 10-year history of the amendment did any of the proposals contain a definition of the term. This was not due to oversight. As to the absence of a definition, Eisenhower said in his memorandum of March 1958 that “it would be difficult to write any law or an Amendment in such a fashion as to take care of every contingency that might possibly occur.”⁷⁵ He added: “While the great area of uncertainty now existing could and should be drastically reduced, I am not sure that even the most carefully devised plan, objectively arrived at, could remove doubt in every instance.”⁷⁶

In his memorandum, President Eisenhower said that an inability could occur by “disease or accident that would prevent the President from making important decisions.”⁷⁷ Another form, he said, “could come about through a failure of communication between the President and Capital at any time he might be absent therefrom” or “uncertainty about the whereabouts of the President occasioned by a forced landing of the Presidential airplane.”⁷⁸ He also made reference to a disability in his case, as determined and judged by distinguished medical authorities as being permanent in nature, stating that in such circumstances he would

74. See 111 CONG. REC. 7,938 (1965); *Hearings Before House Comm. on the Judiciary*, 89th Cong. 40 (1965).

75. Fordham Clinic Report, *supra* note 17, at 77.

76. *Id.* President Eisenhower said “we decided and this was the thing that frightened me: suppose something happens to you in the turn of a stroke that might incapacitate you mentally and you wouldn’t know it, and the people around you, wanting to protect you, would probably keep this away from the public. So I decided that what we must do is make the Vice President decide when the President can no longer carry on, and then he should take over the duties, and when the President became convinced that he could take back his duties, he would be the one to decide.” *CBS Reports: The Crisis of President Succession* (CBS television broadcast Jan. 1964).

77. Fordham Clinic Report, *supra* note 17, at 77.

78. *Id.*

“promptly resign” his position as President.⁷⁹ In the Congressional debates of 1965, the principal authors of the amendment spoke of physical and mental causes, temporary and permanent, as constituting an inability where the President had become unable to discharge his powers and duties.⁸⁰

The amendment went forward to the states with issues arising from time to time about what was intended by the expression “inability”⁸¹ and also in a few states about the wisdom of Section 2, for filling a vacancy in the Vice Presidency.⁸² The amendment process was not without other surprises, such as which state was the first to ratify and which state put it into the Constitution on February 10, 1967, as two states ratified it on that day, Minnesota and Nevada.⁸³ The amendment’s ratification was followed by a glorious event in the White House on February 23, 1967, sponsored by President Johnson who wanted to celebrate, by proclamation, it having become part of the Constitution. On February 10, 2017, the amendment celebrated its 50th anniversary, having established during the intervening years why it is an important safety net for the Nation.⁸⁴

79. *Id.* at 78.

80. *See* 111 CONG. REC. 7,194 (1965) (Congressman Richard Poff explaining situations where Section 4 applies); *id.* at 3283 (Senator Bayh stating Section 4 applies to “a President who is unable to perform the powers and duties of his office” and not merely an unpopular President.).

81. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 1, at 106 (describing debates in Colorado Legislature over ratification of 25th Amendment).

82. *Id.*

83. *Id.* at 107.

84. *See* John D. Feerick, *Dedication to Senator Birch E. Bayh*, 86 FORDHAM L. REV. 907 (2017); Goldstein, *Taking From the Twenty-Fifth Amendment*, *supra* note 12, at 965-980.