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# The Twenty-Fifth Amendment: A Personal Remembrance

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## Erratum

Law; Constitutional Law; Law and Politics; Legal Biography; Legal History; President/Executive Department; Legislation

# THE TWENTY-FIFTH AMENDMENT: A PERSONAL REMEMBRANCE

*John D. Feerick**

> And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country.
>
> —John F. Kennedy, January 20, 1961

When I left law school, I did not realize that I would have a unique opportunity to apply the learning I received on the Constitution. It all started with a newspaper item I saw describing a constitutional problem involving the disability of a President. I mentioned the subject to my college classmate, Louis Viola, who said he had a file of newspaper clippings that dealt with the disabilities of President Eisenhower. Upon reading it, I became fascinated by the subject and decided to research the issue and offer my ideas as to a solution.

By early 1963, I had written a rather long article entitled "The Problem of Presidential Inability—Will Congress Ever Solve It?" and submitted it to the *Fordham Law Review* for consideration.[1] In its opening section, it stated that the presence in the White House of a "young, able and healthy President" made it timely to consider the subject, since there could be no reflection on the current occupant of the office.[2] I offered my solution, influenced by Eisenhower's 1958 letter agreement with Vice President Nixon.[3] The article appeared in the October 1963 issue of the *Law Review*. I followed up its publication with a letter to the *New York Times*, published on November 17, 1963, stating,

> Presidents are mortal.

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* Norris Professor of Law, Founder and Senior Counsel of the Feerick Center for Social Justice, Fordham University School of Law. He served as Dean of the law school from 1982 to 2002. This Article is an excerpt from Dean Feerick's forthcoming memoir. He wrote this chapter in response to inquiries over the years as to how he became involved in the cause of reforming the succession system and what his work consisted of. This Article is published as part of the symposium entitled *Continuity in the Presidency: Gaps and Solutions* held at Fordham University School of Law. For an overview of the symposium, see Matthew Diller, *Foreword: Continuity in the Presidency: Gaps and Solutions*, 86 FORDHAM L. REV. 911 (2017).

1. *See* John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 73 (1963).
2. *Id.* at 76.
3. *Id.* at 112–13, 126–28.

> President Garfield's shooting, President Wilson's stroke, and President Eisenhower's heart attack rendered each temporarily unable to exercise the powers and duties of his office. Despite this, Congress has consistently failed the American people by not acting to eliminate the possibility of a gap in the executive because of the confusion existing over the meaning of the succession provision of the Constitution.[4]

To drum up support for a change in the Constitution, I sent reprints of my article to individuals who might have an interest in the subject. Not until recent years did I realize that I had stored away in boxes, dating back more than fifty years, the acknowledgements I received. Some examples follow.

By letter dated November 13, 1963, President Kennedy's assistant, Ralph A. Dungan, said, "The President has received your letter and asked me to thank you for sending him the accompanying copy of your article on the subject of 'Presidential Inability.'"[5] By letter dated November 13, 1963, Attorney General Robert F. Kennedy did the same but added, "I appreciate your bringing it to my attention as this is a subject which we have been studying here in the Department for some time."[6] By letter dated November 5, 1963, Senator Edward M. Kennedy said, "I look forward to reading your discussion of this complex subject."[7] George E. Reedy, Press Secretary to Vice President Johnson, said in his letter dated November 6, 1963, "I know he would be greatly interested in your study which will be called to his attention promptly upon his return."[8] Former Vice President Nixon said in a letter dated two days before President Kennedy's assassination:

> This is a subject in which I am most interested, but due to the heavy pressures of my legal practice at this time I would not be able to do justice to a letter commenting on the article. If my schedule should lighten up in the period ahead, I will have the article in my reading file and will try to drop you a note.[9]

Former Vice President Henry A. Wallace had a short but interesting response, dated November 12, 1963: "It was most kind of you to send me the article on the situation in case of the President's Inability to discharge his office. Curiously enough I gave this problem no thought while I was Vice President."[10] Arthur Krock of the *New York Times*, in a letter dated November 7, 1963, said, "I wish Congress were as much interested [in the

4. John D. Feerick, Letter to the Editor, *Fixing Presidential Succession*, N.Y. TIMES, Nov. 17, 1963, at E8.

5. Letter from Ralph A. Dungan, Special Assistant to the President, to author (Nov. 13, 1963) (on file with the Fordham University School of Law Maloney Library).

6. Letter from Robert F. Kennedy, Attorney Gen., to author (Nov. 13, 1963) (on file with the Fordham University School of Law Maloney Library).

7. Letter from Edward M. Kennedy, U.S. Senator, to author (Nov. 5, 1963) (on file with the Fordham University School of Law Maloney Library).

8. Letter from George E. Reedy, Special Assistant to the Vice President, to author (Nov. 6, 1963) (on file with the Fordham University School of Law Maloney Library).

9. Letter from Richard M. Nixon, Counsel, Mudge, Stern, Baldwin & Todd, to author (Nov. 20, 1963) (on file with the Fordham University School of Law Maloney Library).

10. Letter from Henry A. Wallace, Farvue Farm, to author (Nov. 12, 1963) (on file with the Fordham University School of Law Maloney Library).

subject] as you and I."[11] Professor David Fellman of the University of Wisconsin, in a thoughtful letter of November 7, 1963, said, "It may well take a constitutional amendment to solve the problem, but amendments are awfully hard to come by, and I should hope we could work something out by legislation alone."[12]

I was touched to find in one of my boxes a letter from Fordham Law's Dean Mulligan, in which he said, "The article shows scholarship and research of the highest order. Too many of our Law Review people forget about scholarly contributions to the Review after graduation and therefore I was delighted to see your very fine piece."[13] He then added:

> My only quibble with your conclusions is point 5 on Page 128 giving the right to the President to declare a cessation of the inability. Query: Do you mean the Vice President or the former President. If you mean the latter, it would seem to me that problems could be created.[14]

Dean Mulligan obviously had read the article, as had Nathan Siegel of the Department of Justice, who, in a letter of November 19, 1963, questioned the wisdom of an impeachment remedy, as discussed in the article, in a neglect-of-duty context.[15] By letter dated November 14, 1963, then-political science Professor James C. Finlay, S.J., of Fordham said, "I shall try to see that your article will be sent to [Father McKenna]. . . . We are always delighted at the success of our former students in this Department."[16] By note from Nigeria, dated April 4, 1964, my college professor, Father Joseph C. McKenna, S.J., commented favorably on my Fordham article, but he thought I "over[wrote] 'separation of powers,' . . . prefer[ring] to say they are divided but not separate."[17] He concluded with "the piece turned out to be timelier than you knew. Keep up the good work."[18]

Finally, by letter dated November 11, 1963, Lewis F. Powell Jr., president-elect of the American Bar Association (ABA), said, "The ABA is indeed interested in this question, and I am sure your article will be most helpful if we should be called upon again to testify. Quite obviously you have done an enormous amount of research and work in the field."[19]

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11. Letter from Arthur Krock, N.Y. Times, to author (Nov. 7, 1963) (on file with the Fordham University School of Law Maloney Library).

12. Letter from David Fellman, Professor, Univ. of Wis., to author (Nov. 7, 1963) (on file with author).

13. Letter from William Hughes Mulligan, Dean, Fordham Sch. of Law, to author (Oct. 31, 1963) (on file with the Fordham University School of Law Maloney Library).

14. *Id.* In my article, I had said "the [former] President." Feerick, *supra* note 1, at 128.

15. Letter from Nathan Siegel, Dep't of Justice, to author (Nov. 19, 1963) (on file with author).

16. Letter from James C. Finlay, S.J., Chairman, Fordham Univ. Dep't of Political Philosophy & Gov't, to author (Nov. 14, 1963) (on file with the Fordham University School of Law Maloney Library).

17. Letter from Joseph C. McKenna, S.J., to author (Apr. 4, 1964) (on file with the Fordham University School of Law Maloney Library).

18. *Id.*

19. Letter from Lewis F. Powell Jr., Hunton, Williams, Gay, Powell & Gibson, to author (Nov. 11, 1963) (on file with the Fordham University School of Law Maloney Library).

DEATH OF PRESIDENT KENNEDY

The academic nature of my writing changed on November 22, 1963, when people everywhere were shocked to learn of the assassination of President Kennedy. The press discussed what might have happened if Kennedy had lived but was disabled.[20] It took me weeks to process this national tragedy. He was my hero. In the meantime, unexpected attention was given to the article. On November 23, 1963, Arthur Krock discussed my views in his national column.[21] I also received a call from CBS News asking for copies of the article for a program it wanted to develop on presidential succession. Letters concerning my article arrived that required responses.[22] Lowell R. Beck, deputy director of the ABA's Washington office, later said to me that he came across the article and thought it would be a helpful tool for educating people about the problem.[23] He and other key staff urged the ABA, which already had a position, to give renewed leadership to solving these problems.[24] As a result, the ABA decided to convene a two-day conference on presidential inability and vice presidential vacancy on January 20 and 21, 1964, to which twelve lawyers were invited to participate, plus several guests.[25] I was one of the twelve because of my article. I had no sense of

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20. *See, e.g.*, Arthur Krock, *Kennedy's Death Points Up Orderly Progression in U.S. Government*, N.Y. TIMES, Nov. 23, 1963, at 9E.

21. *Id.*

22. For example, on January 28, 1964, I responded to Congressman Louis C. Wyman of New Hampshire who had shared with me a copy of a letter dated January 21, 1964, that he sent to his former professor, Paul Freund. In that letter, Wyman said that Congress could solve the problem by statute:

> The Constitution plainly provides that the Vice President shall take over when the President has an inability. It likewise plainly gives to the Legislative Branch the power to implement its general caveats by legislating the details of the method.
>
> The Constitution likewise explicitly authorizes Congress to provide for succession when the President and Vice President shall be out of the picture.

Letter from Louis C. Wyman, U.S. Representative, to Paul Freund, Professor, Harvard Law Sch. (Jan. 21, 1964) (on file with author). In response to Congressman Wyman, I said:

> I find it difficult to accept that a statute which would divert the determination of inability from the person next in line, be he the Vice President or, as now, the Speaker, would be constitutional. As the Constitution now stands, it is the duty of the Vice President (or the officer next in line) to act as President in cases of inability and therefore, by implication, his duty alone to make the determination. My reading of the debates at the Constitutional Convention . . . leads me to the conclusion that Congress has no power to legislate in this area other than to name the successors after the Vice President.

Letter from John D. Feerick to the Louis C. Wyman, U.S. Representative (Jan. 28, 1964) (on file with author).

23. *See* LOWELL R. BECK, I FOUND MY NICHE: A LIFETIME JOURNEY OF LOBBYING AND ASSOCIATION LEADERSHIP 91 (2016).

24. *Id.* at 80–105. Lowell Beck's book, *I Found My Niche*, gives an excellent account of the ABA's engagement with the field of presidential inability and the creation of its conference. *See generally id.*

25. The members included Herbert Brownell, former Attorney General; Walter F. Craig Jr., president of the ABA and chair of the meetings; Professor Paul A. Freund of Harvard Law School; Jonathan C. Gibson, chair of the ABA Committee on Jurisprudence and the Law; Richard H. Hansen, author of *The Year We Had No President*; James C. Kirby Jr., former general counsel of the Senate Subcommittee on Constitutional Amendments; Ross L. Malone, general counsel of General Motors and a former U.S. Deputy Attorney General; Dean Charles

what was to come and was concerned about the diversion of time from my billable work at Skadden, where I was a young associate. The firm became totally supportive of this activity.

## THE ABA CONFERENCE AND CONSENSUS

Before the meetings in Washington's famous Mayflower Hotel, each participant received a binder of reading material. I was surprised to see my article as the leadoff reading. If it did nothing else, it gave a detailed history of presidential disability from colonial America to 1963;[26] it discussed precedents in the fifty states[27] and foreign countries,[28] and the many proposals to solve the problem; and it suggested that the major roles should be with the President and Vice President,[29] with the additional recommendation that, in making any determination, the Vice President should secure the opinions of "the heads of executive departments."[30] Other material in the binder included an article by Lewis F. Powell Jr.; excerpts from both President Nixon's book, *Six Crises*, and the Congressional Record; a copy of Senate Joint Resolution 139 ("S.J. Res. 139"), then not yet in print; and a print of the Senate hearings of June 1963, chaired by Senator Estes Kefauver, who had died in August 1963.

From this two-day conference, the following consensus developed as to the content of a constitutional amendment:

> (1) [i]n the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice-President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;
>
> (2) 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;
>
> (3) the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice-President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;
>
> (4) the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice-President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the

B. Nutting of the George Washington University Law School; Lewis F. Powell Jr.; Martin Taylor, chair of the New York State Bar Association committee on the Constitution; and Edward L. Wright, chair of the ABA House of Delegates. *See* JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 244 (1965).

26. Feerick, *supra* note 1, at 90–102.
27. *Id.* at 102–05.
28. *Id.* at 105–10.
29. *Id.* at 112–13.
30. *Id.* at 114.

> continuing disability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress; and
>
> (5) when a vacancy occurs in the office of the Vice-President the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice-President for the unexpired term.[31]

I found the meetings stimulating. ABA President Craig made clear that no one was too young to participate. At the meetings, I sat near Paul Freund and Senator Birch Bayh. This contributed to a once-in-a-lifetime opportunity to come to know them. Freund was America's preeminent constitutional scholar and later would write the foreword to my first book on presidential succession,[32] and Bayh would write the foreword to my second book on the Amendment itself.[33] I found fascinating the openness of the discussions, the way everyone respectfully challenged each other's points of view, and the spirit that prevailed of reaching a consensus.

The need for substantial reform had no doubters in the group. Some favored giving Congress a broad power to legislate with respect to this area, while others, including myself, were fearful of this approach because of the possible political uses of such a power. Professor Freund, gentle and soft-spoken with an angelic quality to him, wondered out loud whether a disability commission with a mixed composition might be worthy of consideration. I remember commenting, shyly, that such a commission would not be compatible with the principle of separation of powers, a subject I had studied at Fordham College. He said, without explanation, "I agree" and thereafter did not press this idea.

Vincent Doyle of the Library of Congress, an invited guest, suggested that we combine both approaches in a constitutional amendment—granting power to determine inability to a specific body such as the Cabinet and granting power to establish another body. This led to the wording that is contained in Section 4 of the Twenty-Fifth Amendment, which combines the Vice President with the Cabinet or "such other body as Congress may by law provide" for the declaration of inability and its termination.[34] The "other body" expression reflected the approach of Senate Joint Resolution 35 ("S.J. Res. 35"), then pending in Congress, sponsored by Senator Kenneth B. Keating of New York State, and supported by the ABA, the New York State Bar Association, and the New York City Bar Association.[35] The Senate champion of the first approach was a new and young Senator from Indiana, Birch Bayh (then age thirty-five), who had succeeded Kefauver as chair of the Subcommittee on Constitutional Amendments. Bayh's approach was

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31. FEERICK, *supra* note 25, at 245 (footnote omitted); *see also* James C. Kirby Jr., *A Breakthrough on Presidential Inability: The ABA Conference Consensus*, 17 VAND. L. REV. 463, 475–78 (1964).

32. *See generally* FEERICK, *supra* note 25, at ix–xi.

33. *See* Birch Bayh, *Foreword to the 1976 Edition* of JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS, at xix, xix (3d ed. 2014).

34. U.S. CONST. amend. XXV, § 4.

35. S.J. Res. 35, 88th Cong. (1963).

reflected in a draft he had with him of S.J. Res. 139. As we left the consensus meeting, Doyle said to me that he was helped coming to his view from reading my *Fordham Law Review* article.

Unlike the subject of presidential inability, it was not difficult at the conference to reach a consensus on how to fill a vacancy in the vice presidency. The approach of point (5) of the consensus mirrored the practice that had developed of presidential candidates selecting their running mates. The provision calling for confirmation by both houses of Congress was seen as a way of expressing a national consensus in support of the President's nominee for the position. Almost as an afterthought, someone pointed out that the determination of an inability by the Vice President in point (3), with the approval of the Cabinet or another body, would not work if there were a vacancy in the vice presidency. A suggestion was made, accepted, and placed in point (1) that the person next in line of succession should perform that role. I recall noticing on the second day, as we were about to conclude, that the draft was not clear on whether a President declaring his own inability could be prevented from resuming his powers and duties by the check of the Vice President and Cabinet (or another body). Such a check appeared in proposals at the time. A suggestion I made for eliminating such a check, where the President declared his own inability (reflecting other proposals at the time and a point made in my article), was not accepted. Later, in a letter dated March 29, 1966, to Larry Conrad, chief counsel of the Senate's Subcommittee on Constitutional Amendment, who asked me for a chronological listing of my activities, I said,

> At the consensus sessions I strongly advocated a constitutional amendment embodying a specific method of determining inability, and spoke in favor of the determination of inability being made by the Vice-President and, if another body was considered necessary, by the Cabinet. Participated in the drafting of the consensus at an informal session after the formal session on January 20, and at a breakfast conference on January 21. Emphasized at the informal session of January 20, when it was not clear whether a consensus existed, that it was incumbent upon the panel to propose a method of determining inability. At formal session of January 21 suggested a two-thirds vote of each House to prevent the President from resuming his powers and duties.[36]

## BUILDING A NATIONAL CONSENSUS

Following the ABA conference, Senator Bayh and members of Congress responded favorably to the consensus recommendations, with some exceptions. The use of a joint session of Congress for filling a vacancy in the vice presidency was not adopted nor was the idea of the person next in the line of succession having authority to act with the Cabinet when there was a vice presidential vacancy. A number of the recommendations ran parallel to ideas already in the draft S.J. Res. 139 and earlier legislative proposals. The

36. Letter from John D. Feerick to Larry A. Conrad, Chief Counsel, Subcommittee on Constitutional Amendments, Senate Comm. on the Judiciary (Mar. 29, 1966) (on file with author).

consensus was presented to the Senate Subcommittee on Constitutional Amendments on February 24, 1964, by Walter Craig and Lewis F. Powell.[37] I was invited to testify in my own right on February 28,[38] as were other members of our group. Present when I testified were Senators Bayh, presiding, Olin Johnston of South Carolina, Kenneth Keating of New York, and Hiram Fong of Hawaii.[39] I read a written statement and responded to questions. Below are some of the points of my testimony:

> The circumstances surrounding the death of President Kennedy should have taught us that we can no longer afford the uncertainty that presently exists regarding the critical problem of Presidential inability.
>
> . . . I am convinced that this problem can be solved.
>
> . . . .
>
> . . . To miss this opportunity and again leave unsolved one of the most serious problems ever to confront the Congress would be to trifle with the security of this great Nation. Therefore, we must make every human effort to agree on a workable solution.
>
> A tremendous advance in the effort at agreement was made a little over a month ago. At that time the most workable solution which I have seen to date was proposed by a group of lawyers who were called together by the American Bar Association
>
> . . . .
>
> . . . The very fact that 12 individuals who represented nearly as many points of view could reach such a consensus is, in my opinion, a tremendous thing.
>
> . . . I support it wholeheartedly.
>
> . . . .
>
> First, the panel agreed that a constitutional amendment is necessary to solve the problem. . . . Some members of the panel believed that Congress has no power at all to legislate on the subject—that it merely has the power to legislate on the line of succession beyond the Vice President.
>
> Most of the panel believed that the Vice President now has the constitutional power to determine inability and, therefore, this power could not be, constitutionally, taken from him by legislation. The panel further believed that if a legislative solution to the problem were enacted, it would be subject to constitutional challenge which would come very likely during a time of inability—when we least could afford it.
>
> . . . .
>
> Second, the panel recommended that an amendment make it clear that in cases of inability the powers and duties of the Presidency devolve on the

37. *See Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 84 (1964) (statement of Walter Craig, President, American Bar Association).

38. *Id.* at 149–58 (statement of John D. Feerick).

39. *Id.* at 149.

Vice President for the duration of the inability, while in cases of death, resignation, and removal, the office of President devolves for the rest of the term.

This would eliminate the fear that the Vice President would oust the President if he acted as President in a case of inability. It would also give constitutional recognition to the Tyler precedent.

. . . .

Third, the panel recommended that the President be able to declare his own inability in writing. There is no good reason why this should not be.

. . . .

Fourth, to meet the case where a President is disabled but is unwilling or actually unable to make a determination, the panel would give the decisive role to the Vice President and the Cabinet. In such a case, the Vice President, with majority approval of the Cabinet, could make the determination.

The panel believed that the Vice President should not have the sole power as he would be an interested party and, therefore, too reluctant to make a determination.

On the other hand, it was felt that he should not be eliminated entirely as it would be his duty to act as President and, therefore, he should have a say in determining when to act. The Cabinet was thought to be the best possible body to assist him in making the determination.

That Cabinet members are close to the President, that they would likely be aware of an inability and would know if the circumstances were such that the Vice President should act, that they are part of the executive branch, and that the public would have confidence in the rightness of their decision were reasons for the selection of this body. A primary consideration for [this] approach was that it would involve no violation of the principle of separation of powers.

It has been said that Cabinet members, out of loyalty or fear of losing their jobs, might be too hesitant to find the President disabled. This is flatly contradicted by the fact that the Garfield and Wilson Cabinet actually urged the respective Vice President to act as President.

Fifth, the panel recommended that the President should be able to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.

In a case where the Vice President and a majority of the Cabinet disagree with the President's declaration of recovery, review by Congress would be required. The Vice President would continue to act in the interim, however. It would take a two-thirds vote of both Houses of Congress to keep the President from resuming his powers and duties.

A two-thirds vote was decided upon in order to weight the provision heavily in favor of the President and also because it would conform with

> the two-thirds vote required by the Constitution to remove a President from office.
>
> Sixth, the panel recommended the inclusion of a provision that Congress could change the Cabinet as the body to function with the Vice President. It was felt that this had the advantage of flexibility so that if it should become necessary to do so, Congress could, by legislation change the procedure relatively quickly without having to resort to a constitutional amendment. (I would like to say, parenthetically, here, that I, personally, would like to keep Congress out of the matter altogether . . . .)
>
> Seventh, the panel recommended that the Vice Presidency be filled at all times. It suggested that the President be allowed to nominate a new Vice President, subject to confirmation by the Congress. My own examination of all the debates surrounding the various succession laws . . . suggests that the best way to solve the succession problem is by filling the Vice Presidency . . . .[40]

The remainder of my written statement addressed objections that had been raised to the panel consensus and offered positive reasons for a detailed amendment, concluding that the ABA consensus

> [w]ithout further legislation [] is complete, is practical, is consistent with the principle of separation of powers, gives the decisive role to those in whom the people would most likely have confidence, involves only persons who have been elected by the people or approved by their representatives, and embodies checks on all concerned—the President, Vice President and the Cabinet.

Finally, since it would be embodied in a constitutional amendment, there would be no question about its constitutionality.[41]

I then answered questions put to me by Senators Bayh and Johnston, appreciating as I did Senator Johnston's statement, "I am very much pleased with your remarks."[42] I would later have other experiences testifying before Congress, but there was nothing quite like the first time.

## THE POSTHEARING PERIOD

Following the subcommittee hearings, I began to assist the Washington office of the ABA, headed by Donald Channell and his deputy, Lowell R. Beck, in promoting the proposed amendment. I also began to assist Larry Conrad, chief counsel of the subcommittee, in the formulation of the amendment, and in time, Congressman Richard Poff of Virginia of the House Judiciary Committee. The ABA essentially set up a clearinghouse in its

40. *Id.* at 150–52. Recognition of "the Tyler precedent" (in the second point of my testimony) was important because Vice President John Tyler became President when William Henry Harrison died in office. *Id.* at 101 (statement of Lewis Powell, President-Elect, American Bar Association).

41. *Id.* at 153 (statement of John D. Feerick).

42. *Id.* at 154.

Washington office,[43] receiving calls from members of Congress and their staffs and from bar leaders and the media regarding the proposed amendment. They sent material to members of Congress and their staffs, called on state and local bar leaders to lobby their congressional members, and made regular visits to Congress and key judiciary staff. I frequently was on the phone with Channell and Beck, and also their talented assistant, Michael Spence, as the amendment worked its way through Congress in 1964 and 1965 and then through the state legislatures. I gave speeches to bar and citizen groups, explained the proposed amendment to journalists and lawyers who were assisting in the effort, wrote articles for bar journals,[44] and appeared before the New York City Bar's influential Federal Legislation Committee to advocate a change in its position.[45] I also began to write a book on the history of presidential succession, at the suggestion of my law school professor and mentor, Leonard Manning, after I had written a second article in 1964, entitled, "The Vice-Presidency and the Problems of Presidential Succession and Inability."[46] His advice to me was to begin the book by combining my two *Fordham Law Review* articles. He also introduced me to the Fordham University Press and its head, Father Edwin Quain, S.J., who expressed an interest in publishing such a book.

Other requests came my way in 1964, including doing an analysis for the American Enterprise Institute of the pending legislative proposals on the subjects of presidential inability and vice presidential vacancy. My wife, Emalie, became the glue for me on this project and wrote out a summary of the proposals.[47] We discussed little else than presidential succession in the very early years of our marriage, except our desire to have a family. Another request I received was to serve in an advisory capacity to a prominent committee of business leaders of the Committee for Economic Development (CED), aided by distinguished political science professors. Some of the professors favored a solution different from the one offered by the ABA,

43. SPECIAL COMM. ON PRESIDENTIAL INABILITY & VICE-PRESIDENTIAL VACANCY, AM. BAR ASS'N, RECOMMENDATION THAT THE SPECIAL COMMITTEE ON PRESIDENTIAL INABILITY AND VICE-PRESIDENTIAL VACANCY AND ITS ADVISORY COMMITTEE BE CONTINUED 2 (1964).

44. *See generally* John D. Feerick, *Presidential Inability: The Problem and a Solution*, 50 A.B.A. J. 321 (1964); John D. Feerick, *The Problem of Presidential Inability—It Must Be Solved Now*, 36 N.Y. ST. B.J. 181 (1964). I was required by the *New York State Bar Journal* to remove my point of view from the article because it was not consistent with the New York State Bar's position.

45. In December 1963, Representative Emanuel Celler of the House Judiciary Committee addressed the Legislation Committee and encouraged it to study the problem of presidential inability and succession. The Committee started its review by creating a subcommittee and securing copies of my 1963 *Fordham Law Review* article, which had been brought to their attention by my law firm colleague, Barry Garfinkel. I was asked to address the bar subcommittee and strongly urged at its meeting of early February 1964 to change its existing position and adopt the ABA consensus. The full committee came to adopt the ABA consensus, with a few suggested modifications, in its report of May 1, 1964, which was approved by the New York City Bar Association at its annual meeting on May 12, 1964.

46. *See generally* John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457 (1964).

47. *See Presidential Inability and Vice Presidential Vacancies*, CONG. Q. ALMANAC, http://library.cqpress.com/cqalmanac/cqal641304708 [https://perma.cc/SX4X-V48Q] (last visited Nov. 17, 2017).

which made the experience a taxing one for me, as summarized in my March 1966 letter to Larry Conrad:

> Some of those who worked on [a policy] statement, particularly political scientists, strenuously opposed S.J. Res. 139. I strongly supported S.J. Res. 139's approach and succeeded in getting much of it accepted by the Subcommittee [of the CED]. . . . The Subcommittee, however, refused to include the Vice-President in its inability solution, giving the role solely to the Cabinet. Spoke against the omission of the Vice President at the decisive meeting of the Research and Policy Committee of CED, suggesting that [the] Vice-President should be part of any approach and emphasizing the need for consensus (referring to the ABA Consensus) at this time in history. The Research and Policy committee agreed, so that the CED recommendation which emerged was substantially the same in principle as the S.J. Res. 139 approach.[48]

As more requests piled up, I spent whatever nonwork time I could find trying to finish my book. This would not have been possible without Emalie, who gave up her employment to help me. Pregnant with our first child in 1964, Emalie dedicated an enormous amount of time to the project, while I did what was necessary to keep my position at Skadden. She researched the congressional debates surrounding the Twelfth Amendment, drafted a book chapter on the hidden inability of President Grover Cleveland, made editing suggestions, helped with the development of a bibliography, and did much of the proofreading. The final result, *From Failing Hands: The Story of Presidential Succession*, appeared in March 1965.[49] I was overwhelmed to see a dozen or so copies displayed in the first floor window at 302 Broadway, a space then occupied by the Fordham University Press. A few months prior, our first child, Maureen Grace, was born on December 29, 1964. I recall Emalie working on the index to the book, alongside my brother Donald and my friend Joe Hart, and having to leave this project when Maureen was about to arrive on the scene.[50]

Some months before all of this, in March 1964, the ABA set up a nationwide committee in its Junior Bar Conference (JBC), later called the Young Lawyers Section, which I was asked to chair.[51] Its mission was to gain grassroots support for S.J. Res. 139. Another ABA committee was formed, chaired by Herbert Brownell, to buttress this effort. JBC committee members, almost immediately after their appointment, reached out to members of Congress from their states to promote the passage of S.J. Res. 139. Members of the ABA House of Delegates wrote to the Senators and

48. Letter from John D. Feerick to Larry A. Conrad, *supra* note 36.

49. *See generally* FEERICK, *supra* note 25.

50. The collaboration Emalie and I developed in the field of presidential succession led us to coauthor a book on the Vice Presidents of the United States for high school students. Published in 1967, it was dedicated to our baby during its writing, Maureen Grace. *See generally* JOHN D. FEERICK & EMALIE P. FEERICK, THE VICE-PRESIDENTS OF THE UNITED STATES (1967). I dedicated subsequent writings to our other children and first grandchild, David LeBlanc, and Uncle Pat, my brother Donald, and Professor Manning.

51. *See* Letter from John G. Weinmann, Chairman, Junior Bar Conference, D.C. Office, Am. Bar Ass'n, to author (Apr. 20, 1964) (on file with author).

Representatives in Congress to promote S.J. Res. 139, leading to many cosponsors.[52] I recall Senator Bayh saying later that one Senate colleague, Harry Byrd, told him to sign him up as a supporter of S.J. Res. 139, as Byrd had never before heard from so many lawyers in his state. The work of young lawyers in particular was reflected in a June 1965 JBC report:

> In the period between August, 1964 and June, 1965, the state representatives on the Junior Bar Conference presidential inability committee have been instrumental in getting their state and local bar associations to endorse [Senate Joint Resolution 1] and [House Joint Resolution 1], their newspapers to lend editorial support of these proposals, and their fellow citizens to write letters to the members of the Congress urging action on them. Articles by Junior Bar leaders appeared in bar publications in Arkansas, Colorado, Georgia, Idaho, Illinois, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, [and others]. Letters to the Editor by Junior Bar leaders appeared in newspapers across the country. Literally thousands of letters by citizens and organizations were sent to the members of Congress due to the leadership of junior bar leaders. Junior bar representatives appeared on radio and television in support of prompt congressional action . . . in Illinois, New York, Pennsylvania, etc. Numerous others delivered talks before various civic organizations. Speaker bureaus were set up in a number of states for the purpose of informing organizations of the problems . . . in Arizona, Colorado, Illinois, North Carolina, Ohio, Pennsylvania, South Carolina, etc. On the eve of key votes in the Senate and the House, Junior Bar leaders made telephone calls and sent letters and telegrams to their Congressmen and Senators.[53]

The report identified by name thirty-one state representatives who rendered "truly outstanding leadership" in this period and another twenty-seven individuals who made substantial contributions, including Fordham graduates James Tolan and James McGough.[54]

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52. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Members of the Comm. on Presidential Inability (Sept. 3, 1964) (on file with author).

53. Memorandum from Junior Bar Conference, Am. Bar Ass'n, 1964–1965 Final Report of the Junior Bar Conference Committee on Presidential Inability and the Vice-Presidential Vacancy (June 15, 1965) (on file with author).

54. *Id.* In a December 1964 progress report on the JBC's efforts, I wrote,

> *Arizona*: C. Kimball Rose has appointed a chairman for each congressional district in the state. Each chairman is active in contacting the state's Congressmen and sending speakers to meetings of various civic organizations.
>
> *California*: Richard P. Byrne is formulating an inability program for the southern part of the state, while Howard Nemerovski is busy on the northern part.
>
> *Colorado*: R. Dale Tooley has succeeded in obtaining a commitment from the State Democratic Party and has set up a speaker's bureau and publicity committee to encourage interest . . . .
>
> *Connecticut*: Jay S. Siegel is working on a state-wide television panel program for the end of January.
>
> *Illinois*[:] Harold I. Levine has had distributed to over 3000 young lawyers a newsletter dealing with the problems . . . .
>
> *Iowa*: Robert E. Drey has obtained the support of 99 county chairmen each of whom is charged with spearheading a massive publicity campaign within his county.
>
> *Louisiana*: Jack Weinman has delivered a score of talks on the problems to various civic groups.

A January 6, 1966, report of the JBC committee, six months after the amendment had been proposed by Congress, said:

> As of this writing, the proposed amendment has been ratified by . . . [thirteen states].
>
> Members of this Committee played a large role in making the above ratifications possible . . . .
>
> Much groundwork for ratification in the remaining states . . . is being (or has been) laid by members of this Committee . . . .[55]

Six months later, in a July 18, 1966, communication to Bert Nettles, Channell said:

> I realize that anyone who looks at the proposed amendment may have his own ideas as to other ways of accomplishing the best results. Certainly there were many ideas among members of Congress and we can never expect a perfect solution which would please everyone. I certainly believe that the proposed resolution which resulted from a consensus among

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*Maine*: Horace A. Hildreth, Jr. has been active in contacting Maine's congressional delegation.

*North Carolina*: John Hunter has established a working group in each of the 100 counties of his state. Each group is responsible for contacting civic organizations. John reports that each group has speakers prepared to deliver a five-minute or half-hour talk . . . .

*Ohio*: Robert A. Blattner has had published in the . . . Cleveland Bar Association [Journal] an article . . . . Bob has been appointed chairman of a subcommittee of the Cleveland Bar Association charged with formulating a public-relations program on the problem. . . . John C. Lilly . . . will also be spearheading a campaign in Ohio. Bill [Falsgraf] . . . is author of a forthcoming article on the JBC inability program in the ABA Journal.

*Oregon*: Robert L. Ridgley has formed a "geographically oriented committee" to obtain (1) endorsements from the various local bar associations throughout the state, and (2) commitments from members of the state in Congress.

*Pennsylvania*: Franklin Kury and his thirty-member committee have been extremely busy getting commitments from Pennsylvania Congressmen, suggesting pertinent editorials in the newspapers, writing letters to the editor, [and] speaking at meetings of various civic organizations throughout the state . . . . Mercer Tate . . . spoke on television on the problems to an audience estimated at 95,000.

. . . .

*South Carolina*: William F. Able is . . . publish[ing] . . . an article . . . . Bill has also appeared before the Executive Committee of the [South Carolina Bar] Association to enlist its support . . . . His program is aimed at having (1) people write to their Congressmen; (2) newspapers to carry editorials on the problems; and (3) speakers dispatched to meetings of civic organizations.

*Texas*: Lawrence Jackson is working on a full-scale publicity program for the state, and is busy getting a chairman appointed at every bar association in the state.

Memorandum from John D. Feerick, Chairman, Junior Bar Conference Nat'l Comm. on Presidential Inability & Vice Presidential Vacancy, Am. Bar Ass'n, to Participants in Junior Bar Conference Program on Presidential Inability & Vice Presidential Vacancy 1–4 (Dec. 17, 1964) (on file with author). This memorandum also identified twenty-two other young lawyers at work setting up programs in other states. *Id.* at 4–5.

55. Memorandum from Young Lawyers Section, Am. Bar Ass'n, Mid-Year (1965–1966) Report of Committee on Presidential Inability and Vice-Presidential Vacancy (Jan. 6, 1966) (on file with author).

> outstanding lawyers, Constitutional scholars and members of Congress is the best approach that can be devised.[56]

Six months later, a January 1967 JBC report said that only six states remained for ratification and added that "[s]ince the state legislatures are now convening, young lawyer representatives of this Committee are at work to secure the ratification of the proposed amendment. . . . Our job during the next few weeks will be to do everything in our power to accomplish this objective."[57] Left unsaid was the incredible work of the ABA as an institution. Throughout this entire period, the staff of the ABA, under the sterling leadership of Channell and Beck, was relentless and persistent; they sent kits of supporting material to bar leaders around the country including a proposed ratification model resolution and a history of the steps necessary for ratification in each state. Reprints of my articles were used in this effort, plus the handout that was developed for the May 1964 Eisenhower luncheon. Walter Craig was exceptional in his efforts, as was his successor, Lewis Powell. Craig played a key role in the ratification of the amendment in Arizona, California, Nevada, and elsewhere, while Powell brokered a key meeting between Senator Bayh and Congressman Emanuel Celler that broke a congressional impasse which could have defeated the amendment.[58]

Among the many young lawyers who made significant contributions were Mercer Tate and Franklin Kury in Pennsylvania[59] and Richard Hansen, a JBC member who gave dozens of speeches throughout Nebraska in support of the amendment[60] and had the joy of seeing his state become the first to ratify it on July 12, 1965.[61] I did not focus on this seminal date until the writing of this chapter, as that day I was probably celebrating the last of my birthdays in my twenties. The late Dale Tooley of Colorado stood out as well for his remarkable leadership. He took on the task of dealing with two major newspapers, the *Denver Post* and the *Rocky Mountain News*, that were pitted against each other, with the latter favoring the amendment and the former opposing it.[62] The *Post* did not like the provisions of the proposed section 4, involving, it said, too many interested parties. It also complained that the

56. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Bert Nettles (July 18, 1966) (on file with author).

57. Letter from John D. Feerick to Stanley H. Burdick (Jan. 19, 1967) (on file with author) (enclosing a report of the Young Lawyers Committee on Presidential Inability and Vice-Presidential Vacancy).

58. *See* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 302–04 (1968).

59. *See, e.g.*, Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Franklin L. Kury (Aug. 19, 1965) (on file with author).

60. *See generally Richard H. Hansen, Lawyer, 61*, N.Y. TIMES (Jan. 12, 1991), http://www.nytimes.com/1991/01/12/obituaries/richard-h-hansen-lawyer-61.html [https://perma.cc/X53R-BFAB] ("Mr. Hansen testified before Congress in 1963 to urge [the Twenty-Fifth Amendment's] adoption.").

61. *See* BAYH, *supra* note 58, at 337.

62. *See* Letter from R. Dale Tooley, Schmidt & Van Cise, to author (July 22, 1965) (on file with author); Letter from R. Dale Tooley, Schmidt & Van Cise, to Editor, Denver Post (July 21, 1965) (on file with author); *see also 25th Amendment Has Serious Defects*, DENVER POST, July 20, 1965, at 20; *GOP Senator Explains Vote on Amendment*, ROCKY MOUNTAIN NEWS, July 22, 1965, at 48.

provision for filling a vice presidential vacancy was undemocratic.[63] Tooley, who would later become District Attorney of Denver and have a plaza named in his memory, encouraged the Colorado Bar Association to adopt the cause as a high priority and the state's representatives in Congress to vote for it. In a letter to Senator Bayh, dated February 2, 1966, Tooley summarized his activities:

> Copy of an article in support of the amendment which appeared in the January 26 edition of the *Rocky Mountain News*. As you can see, I had copies of this article reproduced and, through Representative Lisco, had them distributed to each member of the House.
>
> Copy of a letter of January 27, 1966, which we prepared and which the Chairman of the Young Lawyers Section of the Colorado Bar Association signed, which went to each of the council members, officers, chairmen and members of committees of that section. Attached to it is a page of a letter which went to all members of the Legislative Committee of the Colorado Bar Association from Charles Gallagher, the effective and hard-working Chairman of that committee.
>
> Additional editorial in support of the amendment which appeared in the January 31 edition of the *Rocky Mountain News* and a news story on the appeal by the Congressman for ratification.
>
> Finally, the editorial which appeared on January 30, 1966, which was the Sunday edition of the *News*. As you can see, the *News* has been extremely cooperative with us, and at least the *Denver Post* has been silent in the last few days.
>
> Copy of a postcard which was sent last week to each member of the Colorado Bar Association under the signature of President Heinicke and a copy of a letter from Representative Rich Gebhardt in which he agreed to change his vote.
>
> A copy of the statement in opposition to the amendment prepared by Representative John S. Carroll. This is the statement which was so effectively answered by the letter which your office prepared on behalf of Senator Bayh.[64]

## PERSONAL COMMUNICATIONS

My files are filled with communications and correspondence regarding the work of young lawyers in this grand effort at constitutional reform and also of senior lawyers and the ABA's incredible staff. I was privileged to be part of this effort; below, I offer, from my personal files, a snapshot of history.

By letter dated April 10, 1964, I was asked by Lowell R. Beck for my views concerning issues raised in a letter he received about the 1963 ABA consensus.[65] The writer inquired about a situation involving a disabled

63. *25th Amendment Has Serious Defects*, *supra* note 62.

64. The text in the block quote reproduces the author's recollection of a letter dated February 2, 1966, from Dale Tooley to Senator Birch Bayh, on which the author was copied.

65. Letter from Lowell R. Beck, Assistant Dir., D.C. Office, Am. Bar Ass'n, to author (Apr. 10, 1964) (on file with the Fordham University School of Law Maloney Library); *see also supra* note 31 and accompanying text.

President whose Vice President had died and whether a statutory successor acting as President could nominate a new Vice President under the consensus recommendation for filling a vacancy.[66] I expressed hesitancy about his doing so in that context, as the President might recover from his inability and have his own ideas for Vice President.[67] The writer also questioned whether a Vice President and Cabinet, out of loyalty or fear of reprisal, would ever use their power to declare a President disabled, except in extreme circumstances.

In response to Beck's request, I wrote to Larry Conrad on May 22, 1964, and explained the consensus recommendation that the Vice President should continue to act as President during the period in which Congress had to resolve a presidential inability disagreement and noted that the ABA's view was "premised on the thinking that the Congress would act immediately to decide the issue."[68] I also noted the possibility that Congress might delay doing so but reasoned that it would be under pressure from the people to act and that it would also have a "moral and legal obligation" to do so.[69] To cover this situation, after reviewing past and pending legislative proposals, I suggested to Conrad the following language:

> Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the *second* day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine, except that if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Vice President shall continue to act as President and the Congress shall immediately thereupon consider the issue.[70]

A letter of mine, dated June 2, 1964, to Conrad, concerning the ABA recommendation for filling a vice presidential vacancy, stated:

> 1. The Constitution states in Article 2 that the Vice President of the United States shall be "elected" in a certain manner. Thus to fill a vacancy in the Vice Presidency by statute would clearly violate this Article.
>
> 2. It may be that Congress has the power to create an office of Acting Vice President, as some suggest, under the Necessary and Proper Clause and to make the Acting Vice President the Officer next in line of succession after the Vice President under Article 2, Section 1, Clause 6. However, the Acting Vice President would not be able to preside over the Senate in that

66. *See* BECK, *supra* note 23, at 91.

67. Letter from John D. Feerick to Lowell R. Beck, Assistant Dir., D.C. Office, Am. Bar Ass'n (Apr. 13, 1964) (on file with the Fordham University School of Law Maloney Library).

68. Letter from John D. Feerick to Larry A. Conrad, Chief Counsel, Subcommittee on Constitutional Amendments, Senate Comm. on the Judiciary (May 22, 1964) (on file with author).

69. *Id.*

70. *Id.* Some of this language is reflected in section 5 of S.J. Res. 1 as it appeared when passed by the Senate in 1965. *See* S.J. Res. 1, 89th Cong. (1965).

> capacity, since this function is given only to the Vice President provided for in the Constitution. A mere statute could not make it otherwise.
>
> 3. Whether or not Congress has the power to fill a vacancy in the Vice Presidency is subject to considerable doubt so that a constitutional amendment is necessary to resolve all doubt on the point.[71]

In a letter dated June 5, 1964, to Robert Nordhord, a staff member of the Office of the Legislative Counsel in the House of Representatives, I responded to subjects that he had asked about in a telephone conversation earlier that same day. These subjects included the consensus recommendation for a two-thirds vote in a joint session of Congress (for which he said there were no rules) and the required vote in Congress for filling a vice presidential vacancy. I suggested a majority of a quorum, as is required with other nominations. With respect to an inability disagreement between the President, the Vice President, and the Cabinet, the letter said:

> [T]he Vice President would continue to act as President until Congress had decided the issue. The ABA consensus contained no specific recommendation as to how the disagreement issue might be presented to the Congress. It is my feeling that the Vice President should be required to transmit to the Congress, in writing, a disagreement declaration within a certain period of time. If Congress were not then in session, he would be obliged to convene a special session before such period has expired. If he failed to transmit a declaration to Congress within this period, the President would thereupon resume his powers and duties as soon as the period had ended. Assuming that a declaration was presented to Congress in time, Congress would be required to decide the issue, not within any specified period of time, but as soon as possible. If the Congress failed to decide the issue, or delayed for an unreasonable amount of time, the Vice President would still continue to act as President under the ABA consensus. This is one of these areas, I submit, where we must assume that Congress will act immediately. It would be directed by the Constitution to do so and the people would not tolerate a different course of action.[72]

On June 23, 1964, I responded to a letter from Channell asking why the U.S. Supreme Court was given no role in determining a President's inability under the ABA consensus.[73] I made reference to separation of powers, the views of Chief Justice Earl Warren in opposition to Justices serving on a disability commission,[74] the analogy of the impeachment process involving only Congress, and the desirability of having a body like the Cabinet that could act quickly and unanimously.[75] Channell's letter was likely influenced by a resolution of the Massachusetts Bar Association calling for the Supreme

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71. Letter from John D. Feerick to Larry A. Conrad, Chief Counsel, Subcommittee on Constitutional Amendments, Senate Comm. on the Judiciary (June 2, 1964) (on file with author).

72. Letter from John D. Feerick to Robert Nordhord, Office of Legislative Counsel, U.S. House of Representatives (June 5, 1964) (on file with author).

73. Letter from John D. Feerick to Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n (June 23, 1964) (on file with author).

74. *Id.*; *see also* FEERICK, *supra* note 25, at 248.

75. *See* Letter from John D. Feerick to Donald E. Channell, *supra* note 73.

Court to decide a President's inability and when he might resume his powers and duties. Most other state bars supported the consensus.

S.J. Res. 139 was approved by the Senate Subcommittee on Constitutional Amendments on May 27, 1964, and by the full Judiciary Committee on August 4.[76] The Senate approved the amendment by voice vote on September 28, 1964, (with only a few Senators present)[77] and again the following day, by a vote of 65 to 0.[78] The amendment was reintroduced in the eighty-ninth Congress as Senate Joint Resolution 1 ("S.J. Res. 1"), in a form identical to House Joint Resolution 1 ("H.R.J. Res. 1"), which was also introduced in January 1965.

By letter dated January 5, 1965, to House Judiciary Committee Chair Celler, Channell noted:

> A press release will be issued tomorrow commending you for sponsoring the proposed amendment and there will be a story in the American Bar News which is sent to the 118,000 members. Also, I plan to devote considerable space to this subject in the Washington Letter which is sent to all bar associations and to some 6,000 bar leaders.[79]

By letter dated January 26, 1965, I informed Channell of a meeting I had with Senator Hruska's assistant, and possibly also Hruska himself, hoping to persuade the Senator not to oppose S.J. Res. 1.[80] The Senator had expressed concerns about the wording of the provisions giving Congress a role in determining an inability in the event of an inability disagreement and its power to substitute a different body for the Cabinet. The Senator, who spoke to the ABA consensus group, was a strong supporter of the office of the President and separation of powers and gave strong supporting testimony concerning the proposed amendment.

On January 28, 1965, President Johnson sent a special message to Congress, which urged adoption and ratification of S.J. Res. 1 and H.R.J. Res. 1. He stated that the provisions have been "carefully considered and are the product of many of our finest constitutional and legal minds."[81] Thereupon, in February 1965, the Senate unanimously approved S.J. Res. 1, as amended.[82] Then the House Judiciary Committee commenced hearings on H.R.J. Res. 1 and more than thirty other proposals for dealing with the inability problem, some containing a time limitation placed on congressional action if there were a challenge to a presidential declaration of recovery.

On February 7, 1965, I responded to a request from Congressman Poff asking for language to cover certain contingencies. I stated that I saw

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76. S. REP. NO. 88-1382, at 14 (1964).
77. 110 CONG. REC. 23,002 (1964).
78. *Id.* at 23,061.
79. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Emanuel Celler, U.S. Representative (Jan. 5, 1965) (on file with author).
80. Letter from John D. Feerick to Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, (Jan. 26, 1965) (on file with author).
81. President Lyndon B. Johnson, Special Message to the Congress on Presidential Disability and Related Matters (Jan. 28, 1965), http://www.presidency.ucsb.edu/ws/?pid=27063 [https://perma.cc/MQ7S-NMGT].
82. 111 CONG. REC. 3286 (1965).

essentially three situations: "(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."[83] I proposed the following provisions for incorporation in H.R.J. Res. 1:

> 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 [sic] had a provision of this kind.)[84]

The letter also contained suggestions for greater clarity in the legislative history regarding the wording of the then-proposed amendment, which I felt was important. In abbreviated form, these suggestions dealt with the proposed time limit of ten days for congressional action with respect to an inability disagreement (I thought the limit was unnecessary because of the term "immediately" in the proposal); whether the Vice President acts as President during the period in which Congress decides a disagreement (as recommended by the ABA consensus);[85] whether Congress would have the power to remove the Vice President from an inability determination (my view was different from the ABA consensus); the reach of the term "vacancy" for nominating a new Vice President (I said that the term was limited to death, resignation, and removal); the calling of a special session by the Vice President if Congress were out of session (I said it should be mandatory when a disagreement issue is raised); the need for the transmittal of an inability declaration to Congress to be spelled out in some manner (I suggested that rules were needed); the taking of the presidential oath of office by an Acting President (I said this should be the case); whether an Acting President can preside over the Senate (not under the Constitution); and the salary for a Vice President acting as President (I recommended that it be at the presidential rate).[86]

On February 13, 1965, I wrote to Lowell R. Beck, as he requested, to offer comments on testimony given by Attorney General Nicholas Katzenbach that a proposed amendment should make clear that a President declaring his own

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83. Letter from John D. Feerick to Richard Poff, U.S. Representative (Feb. 7, 1965) (on file with the Fordham University School of Law Maloney Library).

84. *Id.*

85. *Id.* ("Section 5 [of the proposed amendment] 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 . . . 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.").

86. *Id.*

inability can resume his powers and duties upon his recovery declaration without any check by the Vice President and Cabinet.[87] I recommended such clarification, which the ABA leadership accepted. As I recalled later in my Conrad summary letter of March 1966:

> I think it is important to note that I made a motion to this effect on the second day of the Washington Conference in January, 1964, and that the motion was unanimously (with the exception of my vote) defeated. The panel took the position that the recovery provisions should apply whenever a disabled President sought to resume his powers and duties, regardless of how his disability had been determined. Personally, I am in favor of the clarification (though I think language is required to carry it into effect) but, for the record, it is not consistent with the consensus.[88]

By letter dated February 16, 1965, Poff said, "Your letter of February 7 has been extremely helpful to me. During the course of interrogation, I have tried to write some of the legislative history you suggested."[89] As noted, the Senate approved S.J. Res. 1, as modified, on February 19, 1964, and the House Judiciary Committee approved H.R.J. Res. 1, as amended, on March 24.

On April 1, 1965, Channell wrote that substantial opposition could develop in the House of Representatives, given a 6 to 4 vote in the House Rules Committee to grant only a four-hour open rule for debate on the floor of the House. He said that "most members of the House of Representatives are not fully advised as to the need for this amendment."[90]

In a letter of April 5 to Poff, as action approached in the House, I suggested that he consider using the wisdom of Benjamin Franklin from the Constitutional Convention of 1787:

> I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us . . . . I doubt too whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me . . . to find this system approaching so near to perfection as it does . . . . Thus I consent . . . to this Constitution because I expect no better, and because I am not sure, that it is not the best . . . .
>
> On the whole, Sir, I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this

87. Letter from John D. Feerick to Lowell R. Beck, Assistant Dir., D.C. Office, Am. Bar Ass'n (Feb. 13, 1965) (on file with author).

88. *Id.*

89. Letter from Richard H. Poff, U.S. Representative, to author (Feb. 16, 1965) (on file with author).

90. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to the Officers and Bd. of Governors, Comm. on Presidential Inability (Apr. 1, 1965) (on file with author).

> occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument.[91]

In his acknowledgment letter of April 7, Poff said:

> Frankly, John, looking back down the corridor of the years of labor and scholarship which have finally brought us to this point so near to success, I am a little aghast at the dimensions and weight of the responsibility which is mine. What, if after all this struggle, if we should fail to persuade two-thirds? The thought has kept me awake at night. I am sure, with so much of yourself invested in this chore, you must share the anxiety I feel.[92]

I felt his anxiety. He added that the Franklin quote was "very helpful" and that "[i]t fits precisely into the speech I want to make while the rule is under consideration."[93]

On April 9, 1965, I sent a detailed letter to the editor of the *Wall Street Journal* concerning its editorial of April 5, 1965, opposing the amendment.[94] I corrected errors in the editorial as I saw them.[95] Although the letter was not published, the points contained in it were shared in discussions I had with ABA staff members and congressional staff in this period.

Another letter of mine on April 9, 1965, to Representative Charles Mathias, following a call with him, was designed to dispel his concern that the amendment might repeal Congress's line of succession authority under Article II.[96] I assured him that there was no intention to change such authority, and therefore, that there was no need for such authority to be written into the Twenty-Fifth Amendment.[97] Despite this effort at persuasion, Mathias did not vote for the proposed amendment, but later as it was being reviewed for ratification by the Maryland legislature, he declined to speak against it, as he had planned to do, in the face of strong support for the amendment in that body.[98]

On April 13, 1965, the House approved its version of the amendment, 368 to 29, containing a ten-day time limit for congressional action in the event of an inability disagreement.[99] Poff also sent me a gracious letter about my participation and asked that I give consideration to the matter described in a letter he sent that day to Channell, on which he copied me along with

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91. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642–43 (Max Farrand ed., 1911).

92. Letter from Richard H. Poff, U.S. Representative, to author (Apr. 7, 1965) (on file with author).

93. *Id.*

94. *See* Editorial, *A Disabling Amendment*, WALL ST. J., Apr. 5, 1965, at 14.

95. Letter from John D. Feerick to Editor, Wall St. Journal (Apr. 9, 1965) (on file with author).

96. Letter from John D. Feerick to Charles Mathias Jr., U.S. Representative (Apr. 9, 1965) (on file with author).

97. *Id.*

98. I discovered in the National Archives, while writing this chapter, a reference indicating that my 1965 *Fordham Law Review* article was helpful in explaining the amendment to state legislators in Maryland.

99. 111 CONG. REC. 7968 (1965).

Brownell and Powell. He said that on the date of the House vote the following occurred:

> Late in the afternoon the Speaker came to the Republican committee table and paid me a warm personal tribute for which I was very grateful. In the course of the conversation, he asked if I would introduce the "forty-eight hour" amendment. I told him that Chairman Celler had discussed it with me and I had agreed to introduce it. As the *Congressional Record* shows, the Speaker later took the Floor to urge support of the amendment. The Speaker's address, eloquent and persuasive as well as dramatic, was the factor which made our margin of success possible.[100]

Poff added that the amendment he offered was a "tactical concession and nothing more than that."[101] He said that he thought it was "unneeded to accomplish what the Speaker wanted" and added that it "may be a complicating factor which might cause serious problems at a critical time."[102] I had shared earlier with Poff and others such a concern on my part.[103]

In a letter to Poff dated April 19, 1965, as the conference committee of the two houses was about to attempt a resolution of their differences, I shared my views. First, the forty-eight-hour provision, while unwise, should remain as it was, as favored by Speaker McCormack. Second, the provision for placing a ten-day time limit on congressional action in the event of a disagreement, which was then strongly opposed by the Senate, should have a longer time period, perhaps fifteen days.[104] Changing my earlier view on the subject of a limit, I said it would be a "safeguard for the disabled President."[105]

> [I]f the Vice-President and Cabinet disagreed with a presidential declaration of recovery, the Congress would be obliged to decide the issue as soon as possible, giving the various parties ample opportunity to be heard. . . .
>
> . . . .
>
> It would appear to me that if after a Conference you had to give up the 48 hour provision in order to retain the ten day provision (perhaps as extended), Speaker McCormack would be pleased as the House measure would have, in the main, remained intact.[106]

By letter dated April 23, Poff commented:

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100. Letter from Richard H. Poff, U.S. Representative, to Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n (Apr. 15, 1965) (on file with author).

101. *Id.*

102. *Id.*

103. Section 4 of the Amendment, as adopted, states, "Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session." U.S. CONST. amend. XXV, § 4. I worried about the effect of Congress not assembling "immediately." Letter from John D. Feerick to Richard H. Poff, U.S. Representative (Feb. 7, 1965) (on file with the Fordham University School of Law Maloney Library).

104. Letter from John D. Feerick to Richard H. Poff, U.S. Representative (Apr. 19, 1965) (on file with author).

105. *Id.*

106. *Id.* I also noted as desirable the change made in the language of section 3 that a voluntary declaration by the President gave him the ability to resume his powers and duties on his own initiative without any check.

> Your letter of April 19 illustrates that you are not wholly without political "savvy." Why is it, John, that most people, particularly intellectuals, seem to derive some particular pride from a confession of political naiveté? As a practical politician, I can only hope that this is a Freudian scream of secret admiration for things political.[107]

He was probably right, but I also was a twenty-eight year old, humbled by everything and not wanting to appear presumptuous. Poff's letter noted my agreement with him on the use of a time limit, indicated his flexibility on the time period itself, and asked if I knew anyone who could approach the Speaker on the forty-eight-hour provision.[108] I left the latter alone!

On April 20, 1965, in response to Brownell's request for my views, I wrote him advising that the ten-day provision would not be inconsistent with the ABA consensus.[109]

In the weeks that followed, Poff and I had other communications, mainly with a focus on the time limitation. On May 26, 1965, I had conversations with Lowell Beck and Larry Conrad and learned that the "conferees had a heated discussion regarding the ten day provision," with the House not wanting to go beyond fourteen days with Representative McCulloch as the main line of resistance.[110] Then, on May 27, 1965, when I learned that the two houses were at an impasse on whether it should be fourteen or twenty-one days, I wrote a letter to Poff. In it, I gave my reasons why there was not much difference between fourteen and twenty-one days. I stated that twenty-one days was not "an unreasonable outside limitation for that most extraordinary situation where Congress might delay, without good cause, in deciding a disagreement issue," and suggested to him that since twenty-one days "would allow for a more complete investigation than either ten or fourteen days, I would be inclined to go along with such limitation."[111] I sent copies of my letter to Bayh, Brownell, and Beck, which concluded: "I send you these thoughts in the hope that they may have some value."[112]

By letter dated May 28, Poff wrote me and stated:

> Since I am one of the conferees and since what I am about to say would have the effect of weakening our bargaining power I must ask you to keep it in confidence. I would certainly accept 21 days if failure to do so would mean the loss of the Amendment.[113]

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107. Letter from Richard H. Poff, U.S. Representative, to author (Apr. 23, 1965) (on file with author).

108. *Id.*

109. Letter from John D. Feerick to Herbert Brownell, Lord, Day & Lord (Apr. 20, 1965) (on file with author).

110. Memorandum regarding conversation with Lowell Beck and Larry Conrad (May 26, 1965) (on file with author).

111. Letter from John D. Feerick to Richard H. Poff, U.S. Representative (May 27, 1965) (on file with author).

112. *Id.*

113. Letter from Richard H. Poff, U.S. Representative, to author (May 28, 1965) (on file with author).

On June 1, I learned from Channell that Poff and William McCulloch, then the ranking Republican on the Judiciary Committee, had agreed to twenty-one days.[114]

By memorandum dated June 2, 1965, Channell advised that Senator Bayh and Congressman Celler had met that day and had agreed on a time limit of twenty-one days but that it was "to remain confidential until each of them [could] discuss the matter with their respective conferees."[115] As a historical note, it appears that the Senate's willingness to accept a time limit of twenty-one days was due to the persistence of Senator Sam Ervin Jr. of North Carolina.[116] He had dug in on twenty-one days, accepting an unprecedented limitation on Senate action. Bayh and Senate Minority Leader Dirksen also agreed on this limit. By confidential memorandum of June 14, Channell advised that all of the conferees but Representative McCulloch had agreed to the twenty-one-day provision.[117]

In late spring of 1965, as passage of the amendment was imminent, the *ABA Journal* asked me to write an article for the bar of the country explaining the amendment. I did so[118] and followed up with a more detailed explanation in the *Fordham Law Review*.[119] Other troubling issues, however, surfaced at this time. One of these issues involved whether the twenty-one-day provision should run from when Congress assembled, if not in session, or from the date when the Vice President and Cabinet had raised the inability issue by written declaration.[120] The Senate conferees wanted the former and the House wanted the latter. Channell asked me for drafting suggestions and requested that I call him on Sunday night, June 6, as the conferees would be meeting on Monday or Tuesday of that week. I called with my suggestions and followed up the next day by letter. The language I advanced was passed along to Conrad and became part of the section 4 drafting process. Channell noted by letter dated June 9, 1965, that he had discussed my suggestions "with Larry Conrad and believe[d] they were very helpful to him."[121]

The language I received to review provided:

> Thereupon Congress shall decide the issue, assembling within 48 hours for that purpose if not in session. If the Congress, within 21 days after the

114. Memorandum regarding conversation with Don Channell (June 1, 1965) (on file with author).

115. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to author (June 2, 1965) (on file with author).

116. BAYH, *supra* note 58, at 286–90.

117. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Members of the Comm. on Presidential Inability (June 14, 1965) (on file with author). It was unclear why McCulloch was opposed to twenty-one days given his earlier acquiescence and Poff's letter of May 28.

118. *See generally* John D. Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 A.B.A. J. 915 (1965).

119. *See generally* John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173 (1965).

120. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to author (June 6, 1965) (on file with author).

121. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to author (June 9, 1965) (on file with author).

> receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, determines by 2/3 vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.[122]

The language I suggested was as follows:

> Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the said declaration, or, if not in session, within twenty-one days after such assembling, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.[123]

The final wording was:

> Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.[124]

By letter dated June 16, 1965, which followed issuance of the joint conference committee report resolving the differences between the houses, I wrote a note of thanks to twenty-nine members of the JBC committee.[125] This turned out to be premature, however. On June 25, 1965, I saw the final conference committee's version of the amendment reprinted in a *New York Times* article[126] and issues jumped out at me right away. As summarized in my March 29, 1966, letter to Conrad:

> By letter to Don Channell dated June 25, 1965 (see copy attached) advised that the "either/or" language of Section 4 was ambiguous and suggested different language. Was advised later in week that it was 'too late' for any changes and that those consulted on the point thought there was no ambiguity. On July 1, 1965, while on vacation in Southampton, Long Island, received a call from Don Channell of the ABA to the effect that Senators Gore, McCarthy and others had succeeded the previous day in postponing debate on the amendment, having argued that the "either/or" expression was ambiguous. Spoke later in day with you and spent the next

122. Letter from Donald E. Channell, *supra* note 120.

123. Letter from John D. Feerick to Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n (June 8, 1965) (on file with author).

124. U.S. CONST. amend. XXV.

125. *See, e.g.*, Letter from John D. Feerick to Franklin L. Kury (June 16, 1965) (on file with author).

126. E.W. Kenworthy, *Conferees Back Succession Plan*, N.Y. TIMES, June 25, 1965, at 1, 16.

> few days doing legal research in the Suffolk County bar library . . . to support the use of the "either/or" expression. Results (case citations) telephoned in to you on Saturday, July 3, and Monday, July 5.[127]

What I telephoned in to Conrad, based on my research, was that the use of "either/or" meant that only one body could have such power, either the Cabinet, as in the amendment, or another body created by law to replace the Cabinet, that is, the heads of the executive departments. I rejected a possible construction, not intended by the ABA consensus, of two bodies being in existence at the same time each with the power to declare a President disabled. The "either/or" language, I was told, came from an assistant to Senator Hruska, reflecting Hruska's concern that the existing language might enable Congress to remove the Vice President from the process of determining a President's inability.

Finally, I remember being startled again when, at the last moment, I noticed a scrivener's error in the draft of the conference report.[128] When I reached Senator Bayh's staff by telephone, possibly on July 6, with my observation, I was told that the amendment had just been approved that day by the Senate, 68 to 5, and was on its way to the states for ratification. In other words, the amendment was beyond rescue for correction.

On July 7, 1965, I sent a letter of congratulations to Poff on the passage of the amendment stating that the "time limitation of Section 4 can properly be referred to as the 'Poff Provision.'"[129]

On July 8, Poff wrote me a poignant letter asking

> why the Washington press has so studiously avoided any mention of any Republican on either side of the Capitol in connection with this project. . . .
>
> As you know, our party is so frequently and so mercilessly condemned as negative that it does seem that when we assume a positive posture and make a positive contribution, we should be accorded at least minor recognition. Do you think I am being unreasonable?[130]

I subsequently responded to Poff, noting that the ABA gave credit to both political parties and that no amendment would have happened without President Eisenhower, Attorney General Brownell, and other Republicans, including Poff especially and Congressman William McCulloch. Later, Poff would write a very thoughtful review of my book, in which he provided

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127. Letter from John D. Feerick to Larry A. Conrad, Chief Counsel, Subcommittee on Constitutional Amendments, Senate Comm. on the Judiciary (Mar. 29, 1966) (on file with author).

128. It should have used "executive departments" twice in section 4 instead of "executive departments" and "executive department," the latter expression creating an ambiguity. *See* William Safire, *Desecration*, N.Y. TIMES MAG. (July 31, 2005), http://www.nytimes.com/2005/07/31/magazine/desecration.html [https://perma.cc/77DL-SNJA]. Safire referred to it as "the Ineradicable Typo." *Id.*

129. Letter from John D. Feerick to Richard H. Poff, U.S. Representative (July 7, 1965) (on file with author).

130. Letter from Richard H. Poff, U.S. Representative, to author (July 8, 1965) (on file with author).

important perspectives on the differences between the two houses in the development of the amendment.[131]

A memorandum of July 9, which I sent to the Junior Bar Conference of the ABA, stated optimistically that President Lewis Powell and former Attorney General Herbert Brownell "firmly believe that your outstanding work was instrumental in the overwhelming vote in the House of Representatives and the Senate . . . . The task of getting this measure ratified is largely ours. . . . Packs of ratification material will be forwarded to you shortly."[132]

The day before I attended a celebratory gathering at the Washington office of the ABA, I made a memorandum for my files of a conversation I had with Senator Bayh, in which he stated that "problems kept occurring up to the time the amendment was voted upon which left the outcome in doubt."[133] He mentioned an Alabama editorial, which said that under the amendment, if President Johnson died, Humphrey could nominate Martin Luther King Jr. for Vice President. As a result of this editorial, a number of Congressmen from southern states apparently informed Bayh that they would have to vote against the amendment. Bayh dissuaded them from doing so. Bayh also mentioned a voting strategy of moving the amendment immediately after Senators Gore and McCarthy voiced their objections to the use of "either/or."[134] According to Conrad, Bayh accused McCarthy a week before the vote of trying to "kill the amendment," to which McCarthy replied in the negative and said he would vote for it (but he did not do so on July 6).[135]

I add a few additional communications bearing on the ratification of the amendment:

> By letter dated August 19, 1965, from Channell to Franklin Kury, Young Lawyer chair in Pennsylvania, Chanell stated: "We are extremely pleased that the Pennsylvania legislature has ratified the proposed constitutional amendment. . . . I feel that your state was better organized than any to carry forward with the proposed amendment."[136]

Every congressman from Pennsylvania, but one, supported the amendment, including its two Senators.[137]

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131. Honorable Richard H. Poff, *From Failing Hands: The Story of Presidential Succession*, 67 COLUM. L. REV. 399, 401–02 (1967) (book review). In addition, he said that the book "was an important background study for the 89th Congress in its successful attempt to write a constitutional amendment nearly two years after an assassin's bullets again dramatized the importance of continuity in Executive power." *Id.* at 400. He was generous in his words about my book, which was made possible by Emalie's help.

132. Letter from John D. Feerick to Members of Comm. on Presidential Disability and the Vice-Presidential Vacancy, Junior Bar Conference, Am. Bar Ass'n (July 9, 1965) (on file with author).

133. Memorandum regarding meeting with Birch Bayh, U.S. Senator (July 8, 1965) (on file with author).

134. *Id.*

135. *Id.*

136. Letter from Donald E. Channell, Dir., D.C. Office, Am. Bar Ass'n, to Franklin L. Kury (Aug. 19, 1965) (on file with author).

137. *See* FRANKLIN L. KURY, CLEAN POLITICS, CLEAN STREAMS: A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS 104–05 (2011). Kury later became a state Senator in

By letter dated October 28, 1965, I responded to Senator Bayh's request for my views on amending the statutory line of succession, stating:

> In order to avoid confusion I would be inclined to defer such action until the proposed Twenty-Fifth Amendment has been ratified. I think it would be appropriate, however, at that time to amend the law so as to add the Secretary of Health, Education and Welfare and the Secretary of the Housing and Urban Development Department to the line of succession.[138]

I also suggested adding a provision to compensate the Vice President at the presidential rate whenever he acts as President.[139]

A memorandum in my file of January 18, 1966, records a call from Larry Conrad on that date for permission to distribute my 1965 *Fordham Law Review* article to members of the West Virginia Legislature because some members were confused "as to the meaning of the amendment to such an extent that ratification was in doubt."[140] I gave permission and copies were thermofaxed for distribution in that state. Two days later the amendment was ratified in the state of West Virginia.[141]

By letter dated February 13, 1967, Bert S. Nettles of Alabama noted the ratification of the Twenty-Fifth Amendment and expressed "regret that we were unable to be of more assistance here in Alabama."[142] Nettles did an outstanding job in rallying the support of the bar in favor of the amendment, but the bar of his state held back in the end so as not to give Governor George Wallace a forum for using the amendment as a "whipping boy" for his political agenda.[143]

In a letter dated June 17, 1967, sent to young lawyer Stanley Burdick of Connecticut, enclosing the final report of the Young Lawyers Committee, I wrote:

> The work of the American Bar Association in the formation, promotion, and ratification of the Twenty-Fifth Amendment is now history. I am pleased to say that the work of this committee is part of that history. . . . Those who had a part to play in that work can take pride in the fact that today we have procedures for handling a case of presidential inability and filling a vacancy in the office of Vice-President.[144]

The amendment, as proposed, contained a seven-year time limit for ratification, following a similar time limit established for other constitutional amendments in the twentieth century. It was ratified on February 10, 1967, when Minnesota and Nevada added their approval, giving rise to the question

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Pennsylvania, *id.* at 86, and led an effort to adopt in his state a gubernatorial disability provision, which subsequently was implemented, *id*. at 103.

138. Letter from John D. Feerick to Birch Bayh, U.S. Senator (Oct. 28, 1965) (on file with author).

139. *Id.*

140. Memorandum regarding call from Larry Conrad, Chief Counsel, Subcommittee on Constitutional Amendments, Senate Judiciary Comm. (Jan. 18, 1966) (on file with author).

141. BAYH, *supra* note 58, at 338.

142. Letter from Bert S. Nettles, Johnston, Johnston & Nettles, to author (Feb. 13, 1967) (on file with author).

143. *See* FEERICK, *supra* note 33, at 106 n.‡.

144. Letter from John D. Feerick to Stanley Burdick (June 17, 1967) (on file with author).

of which one placed the Amendment in the Constitution.[145] All told, forty-seven states ratified the Amendment; the three not to do so were Georgia, North Dakota, and South Carolina.[146]

## SPECIAL MOMENTS

Looking back, several moments remain vivid. The first was meeting President Eisenhower in an anteroom of the Mayflower Hotel in May 1964 just before he gave a speech in support of the proposed reform. I was overwhelmed to shake his hand. He was reserved in appearance, humble, and deferential. No one was quite sure what he would say. Senator Bayh, in his book, recounts the mystery surrounding his speech as to where President Eisenhower was going to come out on the subject.[147] To everyone's pleasant surprise, he put his enormous weight behind the drive for the amendment, describing his personal experiences with medical disabilities and his faith in the office of the Vice President and the executive branch being able to deal with the issue responsibly. He did not opine for a disability commission, as some believed he might.

The speech was tied to a program organized by the ABA, in connection with which I had the privilege of helping to develop a handout for the occasion, which contained a descriptive history of the problem of presidential inability followed by a question-and-answer section.[148] The questions included: Why is a constitutional amendment necessary? May the President voluntarily declare his inability? May the President be declared disabled other than by his voluntary action? Why should the office of Vice President be filled at all times? Why not hold a general election for a new Vice President? The handout became a useful document for the ABA to circulate to people seeking information on the amendment.

A second moment involves a communication I received in late 1965 from Stephen Lesher, Press Secretary to Senator Bayh, mentioning an article in the *South Carolina Law Review* by Professor George D. Haimbaugh Jr., entitled "Vice Presidential Succession: A Criticism of the Bayh-Cellar [sic] Plan."[149] Lesher said that it was receiving wide distribution among state legislators and asked if I would write a response. He said that if unanswered, the article could be trouble.[150] The *Staten Island Advance* for January 27, 1966, reported it this way:

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145. *See id.*143 at 107.

146. *Id.*

147. *See* BAYH, *supra* note 58, at 119–24.

148. AM. BAR ASS'N, PRESIDENTIAL INABILITY AND VICE PRESIDENTIAL VACANCY: WITH QUESTIONS AND ANSWERS (1965) (on file with the Fordham University School of Law Maloney Library).

149. *See generally* George D. Haimbaugh Jr., *Vice Presidential Succession: A Criticism of the Bayh-Cellar* [sic] *Plan*, 17 S.C. L. REV. 315 (1965).

150. *See* Letter from Richard G. Lawrence, Articles Editor, S.C. Law Review, to author (Jan. 4, 1966) (on file with author) ("We have received your article in answer to Professor Haimbaugh's article on the Bayh-Celler proposal."); Letter from Steve Lesher, Press Sec'y, Office of Senator Birch Bayh, to author (Jan. 4, 1966) (on file with author) (thanking Feerick for his response to Haimbaugh's article).

> Feerick and his colleagues recently rushed to put out a small fire started by a South Carolina lawyer. The South Carolinian had argued in a state law review publication against passage of the measure, opposing specifically the provisions dealing with succession of the vice president. Copies of the article later showed up in the mailboxes of members of the Arkansas Legislature.[151]

Fortunately, I was given an opportunity by the *South Carolina Law Review* to offer a rebuttal. It appeared in that journal as an article entitled *Vice Presidential Succession: In Support of the Bayh-Celler Plan*,[152] to which Haimbaugh gave a short response. ABA members in Arkansas were also doing their part to answer the charges contained in Haimbaugh's article. They were effective in removing a block on the amendment in the state legislature and securing a favorable vote on its ratification. We did not do as well in South Carolina, as noted.

Another memorable moment involves a communication of February 2, 1966, that I received from the incredibly energetic Dale Tooley, in which he noted that the ratification vote in Colorado

> will be extremely close, and we are bending every effort to contact those who have indicated a willingness to reconsider their opposition to the amendment. As well as all of the others who voted "no" on second reading. You will probably see the results of the vote in the press . . . .[153]

On the following day, February 3, I was surprised to read, undoubtedly the handiwork of Tooley, a story in the *Rocky Mountain News* reporting on reprints of an article of mine being widely distributed in the state.[154] The article provided an analysis of every section of the amendment, concluding with this rallying cry, as quoted in the press story:

> Despite widespread recognition of the serious need for a method of determining presidential inability and, despite a long search for an acceptable method, none has ever been found which could command enough strength to be proposed by Congress . . . . It is doubtful that a better proposal could be devised, considering the complexity of the problems involved and the great diversity of views. The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation. It remains for the state legislatures to ratify it and to make it a permanent part of the Constitution. The nature of the subject dictates that this be done with all due speed.[155]

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151. Don Bacon, *25th Amendment on Way to OK*, STATEN ISLAND ADVANCE, Jan. 27, 1966, at 3.

152. *See generally* John D. Feerick, *Vice Presidential Succession: In Support of the Bayh-Celler Plan*, 18 S.C. L. REV. 226 (1966).

153. Letter from Dale Tooley to John D. Feerick (Feb. 2, 1966) (on file with author).

154. Robert L. Chase, *Careful Analysis of 25th*, ROCKY MOUNTAIN NEWS, Feb. 3, 1966, at 43.

155. Feerick, *supra* note 119, at 203–04.

These words, the reader will note, reflect the strong influence of Benjamin Franklin's clarion call of September 17, 1787.[156] On February 3, 1966, Colorado became the eighteenth state to ratify the amendment.

As for New York, although my letter to the Speaker of the State Assembly elicited his statement that the amendment would be approved shortly by his body, the chair of the Senate Judiciary Committee wrote that the Committee had more pressing items on its agenda.[157] There may also have been some confusion over whether a ratification vote required a public referendum. I passed along this letter to Brownell, who immediately wrote a letter to the chair with a different result: the Committee would take up the subject shortly, and it did—the amendment was ratified in New York on March 14, 1966.[158] Prior to its approval, I had lobbied the leadership of the New York City Bar Association to adopt a resolution favoring the amendment, reflecting the position it had taken based on the work of its Federal Legislation Committee.[159] It adopted such a resolution and sent it on to the legislature and Governor Rockefeller.[160]

On November 15, 1966, Herbert Brownell and I received, at a meeting of the New York City Bar Association, a special award from ABA President Orison Marden for our work in the development of the amendment. It was presented to us in the main meeting room of the Association's building on West 44th Street, a floor below where Emalie had done her research in connection with the writing of *From Failing Hands*. And, in this time period, Emalie and I were writing a book on the Vice Presidents for high school students, accepting an invitation from Franklin Watts, Inc., of the Grolier Publishing Company, as part of its first book series.[161]

### THE WHITE HOUSE, FEBRUARY 23, 1967

When the Twenty-Fifth Amendment was ratified, it became part of the Constitution. Although the President of the United States has no role in approving an amendment, President Lyndon B. Johnson, nonetheless, wished to have a White House ceremony to announce its adoption and to issue an accompanying proclamation. I was invited to this historic event, scheduled for February 23, 1967.[162] On the designated day, I arrived at LaGuardia airport early for an Eastern Airlines shuttle to Washington, D.C. But upon

156. *See* Benjamin Franklin, Remarks at Constitutional Convention (Sept. 17, 1787), http://avalon.law.yale.edu/18th_century/debates_917.asp [https://perma.cc/S3EC-P98E].

157. *See* Letter from John D. Feerick to Herbert Brownell, Lord, Day & Lord (Feb. 21, 1966) (on file with author); *see also* Letter from Anthony J. Travia, Speaker, N.Y. St. Assembly, to author (Feb. 22, 1966) (on file with author).

158. *See* Letter from John D. Feerick to H. Michael Spence, Assistant to the Dir., D.C. Office, Am. Bar Ass'n (Mar. 15, 1966) (on file with author).

159. *See, e.g.*, Letter from John D. Feerick to Herbert Brownell, Lord, Day & Lord (Mar. 1, 1966) (on file with author).

160. *See* Letter from John D. Feerick to Edwin L. Gasperini, Gasperini, Koch & Savage (Mar. 3, 1966) (on file with author).

161. *See generally* FEERICK & FEERICK, *supra* note 50.

162. *See* President Lyndon B. Johnson, Remarks at Ceremony Marking the Ratification of the Presidential Inability (25th) Amendment to the Constitution (Feb. 23, 1967), http://www.presidency.ucsb.edu/ws/index.php?pid=28658 [https://perma.cc/8BY8-3QRE].

my arrival, I learned that, because of the snow falling, no flights would be leaving. I was comforted, however, when I saw Orison Marden, believing that his presence meant a plane would be leaving after all. This did not happen, and after greeting me, he turned around and said he was going back to his New York City law office. I waited and waited, and then, to my utmost surprise, I heard the announcer say that a flight to Washington would be taking off shortly. I got on that flight, and when I arrived in Washington, the White House ceremony had already begun. I hailed a cab immediately and raced to the White House.

Arriving at the gate with the invitation in one hand and a small attaché in the other, I was waved through by the guards, and within seconds I was at the door of the White House. Upon opening it, I saw the President emerge from the East Room, where he had given remarks marking the ratification, which I later read in his official papers.[163]

He rushed to the Blue Room followed by many people, including Congressman Poff, who signaled to me to join him near the front of the line to greet the President. Before I could do so, security pulled me aside, took my attaché case, and asked what I was doing there. I explained and was then allowed, without the attaché case, to join Poff on the line. The picture I subsequently received, signed by the President, showed me shaking his hand with my eyes closed and in a suit badly in need of pressing. Its baggy nature was due to the inclement weather, while my facial expression reflected the exhilaration of meeting the President. Nonetheless, the picture was good enough for me, and today it adorns a wall in my office. Poff subsequently wrote me a letter and said the picture should have read at the bottom, "From Failing Hands."

## THE IMPLEMENTATION OF THE AMENDMENT

Six years later, I was shocked to see the Amendment implemented, in circumstances I never expected: the resignation of an elected Vice President, followed by his replacement under Section 2 of the Amendment; then the resignation nine months later of the President of the United States and the succession to the presidency of the replacing Vice President pursuant to Section 1, following which another Vice President was chosen under Section 2, nominated by President Ford.[164] The presence in the highest offices of two appointed officials, while unprecedented, gave the country enormous stability and continued party continuity in the White House.[165] In connection with the application of the Amendment, I was asked by Senator Bayh to prepare a memorandum for the Judiciary Committee on the legislative history

163. He began by quoting John Dickinson from the Constitutional Convention and singled out many individuals and organizations and "particularly the leaders of the American Bar Association." *Id.* He concluded, "they have further perfected the oldest written constitution in the world. They have earned the lasting thanks of the American people, for whom it has so long secured the blessings of liberty." *Id.*

164. *See* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 930–31 (2010).

165. *See id.* at 932–33.

of Section 2[166] and then later to testify before the Subcommittee on Constitutional Amendments on the first applications of the Amendment. I did so along with Professor Paul Freund and George Reedy, who was then dean of the journalism department of Marquette University. We all supported the first implementations of the Amendment. Reedy said:

> When I was preparing for this hearing, I consulted a number of my friends and people who have studied the matter, and the general conclusion that I came to is that the workings of the amendment are so well accepted, and the legitimacy of the present President is so well recognized, that it does not occur to anyone, except to people who do not like the present President, to challenge the workings of the amendment.[167]

Professor Freund testified "that no persuasive case has been made for repealing or altering section 2 of the amendment."[168] My testimony explained the legislative history of the Amendment.[169] It concurred with other witnesses who said that a succeeding Vice President appointed under the Twenty-Fifth Amendment, as well as a statutory successor such as the Speaker, could nominate a successor Vice President. Freund agreed with that conclusion, as did James Kirby in his separate testimony.[170] I also advanced in my testimony, on behalf of the ABA, a recommendation that in future invocations of Section 2, joint rather than separate hearings of the two Houses of Congress should occur, even though the Houses would vote separately on the issue of confirmation, in order to facilitate the selection of a new Vice President and reduce the risks associated with a vacancy in that office.[171] Unlike another occasion when I testified in support of the ABA's Electoral College position, Senator Thurmond had only one question of me:

> Mr. Feerick, from your statement, I construe that the American Bar Association had an active part in the formulation of the 25th amendment; and it is the position of the American Bar Association, and your personal position too, that it has worked, and that there is no need to change. Is that correct?"[172]

I replied, "Yes, sir."[173]

## CHANGING THE AMENDMENT

In the 1990s, I found myself immersed in the question of the Amendment's adequacy. This came about as a result of a recommendation in 1994 by President Jimmy Carter that the American Academy of Neurology organize

166. *See, e.g.*, S. DOC. NO. 93-42, at 279–300 (1973).
167. *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 134 (1975) (statement of George E. Reedy, Dean, Department of Journalism, Marquette University).
168. *Id.* at 136.
169. *Id.* at 138–39.
170. *Id.* at 136–38, 147–49.
171. *Id.* at 143–46.
172. *Id.* at 147.
173. *Id.*

a forum on presidential disability. This resulted in the convening of a working group, Disability in U.S. Presidents.[174] I declined to participate in its early going, believing I was too fixed in my points of view about the adequacy of the Amendment. As explained to me when I was invited to participate, there was a general view by the organizers of the group that the Amendment was not adequate—almost suggesting, as I remember the conversation, that its approach should be changed. From a conflict of interest perspective, I felt it best that I not participate as I was too fixed in my views. When asked by the ABA to be its representative on the group, I instead recommended that Professor Joel Goldstein be its representative, which he became.

This working group subsequently organized major sessions at the Carter Center in January 1995, Wake Forest University in November 1995, and the White House Convention Center in Washington, D.C., in December 1996. In the following year, a very impressive volume was published by the working group, entitled *Presidential Disability: Papers, Discussions, and Recommendations on the Twenty-Fifth Amendment and Issues of Inability and Disability in Presidents of the United States*, edited by James F. Toole and Robert J. Joynt.[175] I was encouraged to participate in both the Wake Forest Conference's plenary session and at the Convention Center meeting where the final recommendations of the group were actively considered. The Wake Forest Conference is memorable because I participated along with Senator Bayh and two distinguished members of the medical community who shared a different point of view of the Amendment from the one held by Bayh and me. President Gerald Ford opened the session and, in a friendly aside beforehand with Senator Bayh, asked him what to say (even though the President already had his prepared remarks), to which Bayh pointed to my article to be published in the *Wake Forest Law Review* in support of the Amendment.[176]

At the White House Convention Center, I felt uncomfortable because I ended up opposing some aspects of the recommendations on the table for discussion. One called for a separate determination by doctors of "presidential impairment" before a political judgment of "presidential inability," which caused me to join in a minority opinion as to the desirability of such a recommendation. I was joined in that opinion by both Professor Goldstein and Senator Bayh. We concluded with the statement that "decisions regarding the exercise of executive power under the Twenty-Fifth Amendment . . . should be made by accountable constitutional officials, not

174. *See generally* DISABILITY IN U.S. PRESIDENTS: REPORT, RECOMMENDATIONS AND COMMENTARIES BY THE WORKING GROUP 33 (James F. Toole et al. eds., 1997).

175. *See generally* PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY IN PRESIDENTS OF THE UNITED STATES (James F. Toole & Robert J. Joynt eds., 2001). For a summary of this fine work, see FEERICK, *supra* note 143, at 232–36.

176. *See generally* John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481 (1995).

by doctors, attorneys, or others who have not been elected by the people or confirmed by their representatives."[177]

From time to time since this review of the Amendment, I have returned to this subject by helping to develop a program at Fordham on the adequacy of our presidential succession system and a presidential succession clinic at Fordham University School of Law and by writing articles with my current perspectives.[178] In 2017, the Amendment took on a special examination by the media, in a heightened political context, in which I sought to educate others.[179] As I wrote in a personal document in February 1967, the meaning this field has given my life cannot be captured in words.

177. John D. Feerick, Joel K. Goldstein & Birch Bayh, *Minority Opinion Regarding Recommendation IV*, *in* DISABILITY IN U.S. PRESIDENTS: REPORT, RECOMMENDATIONS AND COMMENTARIES BY THE WORKING GROUP, *supra* note 174, at 20, 20.

178. *See generally* John D. Feerick, *A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41 (2010); John D. Feerick, *Presidential Inability: Filling in the Gaps*, POL. & LIFE SCI., Fall 2014, at 11 (2014); Feerick, *supra* note 164

179. *See* Jerry H. Goldfeder & Myrna Pérez, *President Trump and the 25th Amendment*, N.Y.L.J. (Apr. 27, 2017), http://www.law.com/newyorklawjournal/almID/1202784725189/ [https://perma.cc/J6B2-ZSSQ]; *see also* Rebecca Harrington, *A Loophole in the 25th Amendment Lets 14 People Remove a Sitting President from Office*, BUS. INSIDER (Mar. 14, 2017), http://www.businessinsider.com/25th-amendment-how-can-you-remove-president-from-office-2017-3 [https://perma.cc/4J6T-R5WA]; Evan Osnos, *How Trump Could Get Fired*, NEW YORKER (May 8, 2017), http://www.newyorker.com/magazine/2017/05/08/how-trump-could-get-fired [https://perma.cc/MC4N-328F].