

2020

THE TWENTY-FIFTH AMENDMENT—IN THE WORDS OF BIRCH BAYH, ITS PRINCIPAL

John D. Feerick

Dean Emeritus, Sidney C. Norris Chair of Law in Public Service, and Founder and Senior Counsel, Feerick Center for Social Justice, Fordham University School of Law.

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

John D. Feerick, *THE TWENTY-FIFTH AMENDMENT—IN THE WORDS OF BIRCH BAYH, ITS PRINCIPAL*, 89 Fordham L. Rev. 31 (2020).

Available at: <https://ir.lawnet.fordham.edu/flr/vol89/iss1/6>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE TWENTY-FIFTH AMENDMENT—IN THE WORDS OF BIRCH BAYH, ITS PRINCIPAL AUTHOR

*John D. Feerick**

INTRODUCTION

Senator Birch Bayh of Indiana began the first of his three terms in the U.S. Senate on January 3, 1963.¹ Less than a year later, the Senate Subcommittee on Constitutional Amendments, of which he was the new chairman following the death of Senator Estes Kefauver,² had the opportunity to continue to find a solution to the problem of presidential inability. As Senator Kenneth Keating of New York, a subcommittee member at the time, said, “As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land.”³ Keating added:

The death of Estes Kefauver and John F. Kennedy provides a dual lesson for us. First, it is a grim reminder of the universality of tragedy, that no man, no matter his station, is immune from the accidents of fate that befall ordinary mortals.

Secondly, however, it cautions those who survive of the difficulty of clearly foreseeing the absolutely incredible. Human legislation partakes always of human fallibility. No act of lawmaking, no matter how carefully conceived and executed, can possibly safeguard against all the freak

* Dean Emeritus, Sidney C. Norris Chair of Law in Public Service, and Founder and Senior Counsel, Feerick Center for Social Justice, Fordham University School of Law. A Symposium entitled *Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, hosted by Fordham Law School’s Feerick Center for Social Justice, was held on October 16, 2019, at Fordham University School of Law. This piece was prepared as part of a corresponding Tribute honoring the life of Senator Birch Bayh. For an overview of this Tribute, see *Foreword: Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, 89 FORDHAM L. REV 1 (2020).

1. *Bayh, Birch Evans*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=B000254> [https://perma.cc/9E4R-LULT] (last visited June 22, 2020).

2. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATION* 55–56 (3d ed. 2014).

3. *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 88th Cong. 22 (1964) [hereinafter *1964 Senate Hearings*] (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Const. Amends.).

contingencies of our existence. The best we can hope to achieve is the best practical solution⁴

Keating and Kefauver had formulated a proposed amendment to address the problem of presidential inability before President John F. Kennedy's death. Advocating for this proposal, Keating stated:

Senator Kefauver and I . . . agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best from among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it.⁵

Picking up the reins of leadership in a country devastated by the death of a young president, Senator Bayh, with the help of his small staff, developed a proposed constitutional amendment that borrowed from the work of his predecessors and reflected his own views as a graduate of Indiana University Maurer School of Law, where his favorite subject was constitutional law.⁶ The amendment, Senate Joint Resolution 139 ("S.J. Res. 139"), contained provisions on presidential inability, filling a vacancy in the vice presidency, and providing for a cabinet line of succession beyond the vice presidency.⁷ In January 1964, hearings of Bayh's subcommittee began with a focus on S.J. Res. 139 and other proposals before the committee.⁸ By May 1964, the subcommittee had completed its work and recommended S.J. Res. 139, with revisions, to the full Senate Committee on the Judiciary.⁹ The new version removed from the proposal any mention of the line of succession beyond the vice presidency and incorporated recommendations from a task force of the American Bar Association.¹⁰ On August 4, the Senate Committee on the Judiciary approved the proposed amendment for floor consideration with an accompanying report explaining it.¹¹

On September 28, 1964, the Senate approved the proposed amendment by a voice vote.¹² On the following day, the Senate again approved S.J. Res. 139 by a roll call vote of 65 to 0.¹³ The Senate discussions dealt largely with the method for filling a vacancy in the vice presidency without any significant disagreement with respect to the procedures for handling a

4. *Id.*

5. S. REP. NO. 88-1382, at 18 (1964).

6. Interview, *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 787 (2010).

7. See FEERICK, *supra* note 2, at 71–74.

8. See *id.* at 57.

9. See *id.* at 71.

10. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 244–54 (1965).

11. FEERICK, *supra* note 2, at 75.

12. See *id.* at 76–78.

13. *Id.* at 78.

presidential inability.¹⁴ As to filling a vacancy in the vice presidency, Bayh said that the selection of the president's choice would lead to a more peaceful transition, adding: "What better opportunity is there for the people to express their wishes than through those who serve in Congress?"¹⁵

Introduced as Senate Joint Resolution 1 ("S.J. Res. 1") in January 1965, the proposed amendment was approved by the Senate, again with some revisions, on February 19, 1965, by a vote of 72 to 0.¹⁶ On April 13, 1965, the House of Representatives approved its version of S.J. Res. 1 by a vote of 368 to 29 but with considerably more detail than the Senate version.¹⁷ A conference committee of six members from each chamber of Congress was established, with Senator Bayh serving as its chair.¹⁸ The committee, after almost two months of discussion, presented a unanimous report.¹⁹ It was adopted by the House of Representatives on June 30 by a voice vote.²⁰ The Senate, some members of which had language concerns with the conference committee report, required two days for consideration of the report—June 30 and July 6, 1965.²¹ The Senate then approved the amendment by a vote of 68 to 5 and sent it to the states for ratification.²² By February 1967, it obtained approval from three-fourths of the states, and President Lyndon B. Johnson proclaimed the amendment as part of the Constitution on February 23, 1967.²³

Throughout the amendment's evolution from 1963 to 1965, Senator Bayh led the way as its principal author and chairman of the Senate Subcommittee on Constitutional Amendments. He secured, by the force of his personality and advocacy, widespread support from members of both political parties in both chambers of Congress and also from the organized bar of every state and the District of Columbia. When first filing his proposal on December 12, 1963, he spoke passionately of the need to deal with succession to the offices of the president and vice president and handling cases where the president is unable to discharge the powers and duties of his office. He declared that: "If we do not act in this time of sober and reasoned reflection, when shall we act? When will we be as close to the issue as we are today?"

14. *See id.* at 75–78.

15. 110 CONG. REC. 22,996 (1964) (statement of Sen. Birch Bayh). In opening the Senate hearings of 1964, Senator Bayh said of the use of the Electoral College in filling a vacancy that the "electoral college is not chosen, as is Congress, to exercise any considered judgment or reasoning," that it "is not equipped . . . to conduct hearings on the qualifications of the nominee submitted by the President" for the vice presidency, that "[i]t would be a cumbersome body to try to assemble quickly," and that the people would hesitate to have electors unknown to them decide on the confirmation of a vice president. *See 1964 Senate Hearings, supra* note 3, at 5 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

16. *See* FEERICK, *supra* note 2, at 87–91.

17. *See id.* at 95, 100.

18. *See* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 280 (1968).

19. *See* FEERICK, *supra* note 2, at 100.

20. *See id.* at 101.

21. *See id.* at 101, 103.

22. *See id.* at 104.

23. *See id.* at 105. For a detailed account of this history, see *id.* at 56–107.

Hopefully, never. But because history is unpredictable, we must provide for the unsought moments of national crises.”²⁴

As he advanced this constitutional reform, he made clear, in congressional debates, hearings, and committee reports, what the amendment intended. What follows is some of his thinking and reasoning as he created an important record of legislative history.

I. THE PATH THROUGH THE SENATE

A. *December 12, 1963*

As the discussions about S.J. Res. 139 began, Senator Bayh offered his reasons in support of a constitutional amendment, stating:

Many constitutional authorities have questioned the authority of Congress to deal with the subject of inability in a statute. More important, both the questions of succession—which clearly can be dealt with in a statute—and inability are precisely the types of questions which should be incorporated in the Constitution, our basic charter of government. Not only are they exactly the type of provision which one normally finds in a constitution, but also, once so enacted—and this is important—they are not subject to the political whims of a particular day. These are problems which go to the very heart of our democratic form of government²⁵

Section 1, he said, contained the heart of his proposal, then in the form of S.J. Res. 139: “It provides that the Vice President become President for the unexpired portion of the term of a President who dies, resigns, or is removed from office. It eliminates the historical confusion as to whether the Vice President becomes President or Acting President.”²⁶ He pointed to the succession of Vice President John Tyler, who became the new president in the face of many who felt he became only the acting president. The Tyler precedent, Bayh said, became generally accepted despite the absence of any specific change in the Constitution.²⁷ Section 1 codified that precedent.²⁸

Section 2 provided for refilling the office of vice president whenever the president dies, resigns, or is removed or if any of these contingencies occur regarding the vice president instead.²⁹ Of the vice presidency, Bayh said, “[T]here have been a number of instances of succession to the Presidency on the part of the Vice President. Each case has demonstrated the weakness of a system whereby there is no replacement of the Vice President,”³⁰ adding that “[t]he accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we

24. 109 CONG. REC. 24,420 (1963).

25. *Id.* at 24,421.

26. *Id.* at 24,420.

27. *Id.* at 24,420–21.

28. See FEERICK, *supra* note 2, at 108.

29. See *id.* at 109.

30. 109 CONG. REC. 24,421.

change our system to provide for not only a President but a Vice President at all times.”³¹ Of the role of a vice president, he said:

The modern concept of the Vice Presidency is that of a man “standing in the wings” . . . ready at all times to take the burden. He must know the job of the President. He must keep current on all national and international developments. He must, in fact, be something of an “assistant President” . . .³²

As to his proposal, Bayh stated:

By leaving the nomination of the new Vice President up to the President himself, and the approval of that nomination up to the representatives of the people in Congress, my amendment provides for a means of selection very similar to the one which now prevails in our nomination and election process.³³

He further explained:

There can be no question that when our two great parties meet in convention, the presidential nomination having been made, the presidential nominee of each party has a great voice in determining who his running mate for Vice President shall be. In addition, it is imperative that the President should have as his Vice President one with whom he can work and who can assist him in carrying the burdens of the Presidency.³⁴

Bayh also asserted that his proposal had the additional advantage of “provid[ing] for continuity in the office of President of the same party during any 4-year term.”³⁵ “It is this refilling of the office of Vice President,” Bayh said, “which is the key provision in the proposal.”³⁶

Section 3, he said, contained a “mechanism for the assumption” of the presidency by the vice president as acting president during a presidential inability.³⁷ This section, he noted, dealt “with the situation where the President is able and willing to declare his own inability in writing.”³⁸ Section 4, he said, provided “for the situation where the President is either unwilling or unable to make such declaration.”³⁹ In section 5 of his proposal, a modified version of which is now in section 4, he said that there was a mechanism “whereby a President can resume his office after recovery from a disability.”⁴⁰ That provision, later to be changed, allowed the vice president to remain as acting president only with the written approval of a majority of the cabinet and concurring votes of two-thirds of the members present in both chambers of Congress.⁴¹

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.*

Upon laying the groundwork for his proposal, Senator Bayh remained open to suggestions from his colleagues and others, including the American legal community.

B. September 28 and 29, 1964

In the Senate discussions of September 1964, Senator Bayh recounted what he had said earlier about the history of presidential succession, the deaths in office of presidents and vice presidents, and the incapacities suffered by Presidents James Garfield, Woodrow Wilson, and Dwight D. Eisenhower.⁴² He was expansive in his praise of others for reaching a moment in time when a proposed amendment on the dual subjects of presidential inability and vice presidential vacancy would be approved for the first time in the country's history.⁴³

Addressing the informal protocol worked out by President Eisenhower and Vice President Richard Nixon for dealing with a presidential inability, Senator Bayh said:

I compliment both those gentlemen for taking the initiative. It was the first time that anything concrete had been proposed in this area. But such informal agreements are unsatisfactory as permanent solutions. Both Mr. Eisenhower and Mr. Nixon were among the first to say so. Such agreements depend on good will between the President and Vice President. They do not have the force of law. They could be subjected to serious constitutional challenge. They open the door for possible usurpation of power from the President.⁴⁴

Concerning the role played by the Senate Majority Leader Michael Mansfield in helping secure the Senate's approval of the amendment, Senator Bayh said:

Mr. President, if I may take one final moment I would like the Senate to know that none of this could have taken place without the continuing interest and assistance of the distinguished majority leader. During the last 2 historic years, when the Congress has been faced with a multitude of pressing, often delicate, problems, and has been confronted with a number of delays, the distinguished Senator from Montana [Mr. Mansfield] has never lost sight of the significance of this issue now before us. Now, when all of us are anxious to complete our business, he has, nonetheless, seen to it that we take the time to debate and act on this issue It is just one more example of his statesmanship and devotion to the good and welfare of our Nation above all other considerations.⁴⁵

As to the involvement of the American Bar Association, he said:

Today, I am happy to report there is a vast grassroots feeling of urgency. I should like to give particular credit to the American Bar Association

42. 110 CONG. REC. 22,950, 22,983-86 (1964).

43. *See id.* at 22,950, 22,987.

44. *Id.* at 22,987. For a discussion of these protocols, see FEERICK, *supra* note 2, at 53-54; *see also* FEERICK, *supra* note 10, at 211-29.

45. 110 CONG. REC. 23,001 (alteration in original).

which has done more than any single group to help us arrive at this consensus. I present this consensus today on behalf of the Subcommittee on Constitutional Amendments and on behalf of the Committee on the Judiciary.

Early this year, the American Bar Association conducted a 2-day meeting—a forum of the leading constitutional lawyers and scholars in the Nation—to which members of the subcommittee were invited. Those at the meeting had as many different ideas as there were people present. At least 14 or 15 different ideas were propounded.

At the meeting, each one present entered into reasonable give-and-take in the hope that we could finally come forth with a proposal that might not be perfect nor totally acceptable to any one of us, yet nevertheless a workable plan which could be enacted by the Congress and approved by the several States.⁴⁶

In concluding his remarks, Bayh turned to Senators John Cooper and John Stennis, who wanted a roll call vote, and said:

I thank the Senator from Kentucky and the Senator from Mississippi for lending their voices in support of this particular piece of legislation. They are extremely able attorneys. As a freshman Member of the Senate, it is very comforting and rewarding to me to have their support. I particularly thank the Senator for cosponsoring this measure. Putting the name “COOPER” on this legislation is like putting the name “sterling” on silver. I appreciate it very much.⁴⁷

Replying to Senator Sam J. Ervin of North Carolina, who said the proposed amendment would be “saying ‘amen’ in the year 1964 to what John Tyler”⁴⁸ said in 1841, Bayh asserted: “Let this Senator say ‘amen’ to what the Senator from North Carolina has said I believe that by requiring cooperation by all branches of the Government, we shall arrive at the right answer.”⁴⁹

C. *The Debates of February 19, 1965*

While a conference committee in June 1965 would make final changes to the proposed amendment, the Senate debates of February 19, 1965, which resulted in a favorable vote of 72 to 0, set the tone for the success that followed.⁵⁰ In these debates, Senator Bayh dealt with alternative proposals by colleagues and, in the process, made as clear as could be what was intended conceptually by the amendment.⁵¹ Some salient remarks by him are illustrative. Of a constitutional amendment and not a congressional statute, he observed that

certain guarantees of Presidential action could be provided. For example, a two-thirds vote is required by Congress before the President can be removed. But if it were left to Congress to specify by law what formula

46. *Id.* at 22,983 (statement of Sen. Birch Bayh).

47. *Id.* at 23,058.

48. *Id.* at 22,989 (statement of Sen. Sam J. Ervin).

49. *Id.* (statement of Sen. Birch Bayh).

50. See FEERICK, *supra* note 2, at 87–91.

51. See 111 CONG. REC. 3250–86 (1965).

should be followed, that could best be done by a majority vote. I believe that that would afford insufficient protection for the President.⁵²

In addressing why there was a need for an amendment with details, he said that “[s]tate legislative bodies would prefer to . . . deal with a specific proposal and not give Congress a blank check to take away the safeguards” of the amendment.⁵³ He commented that the “horrible tragedy in Dallas, Tex., would have been much worse . . . if we had not had a definite procedure which was accepted by the people of America so that Lyndon Johnson could assume the office of President . . . from that of Vice President.”⁵⁴

Of the approach in section 2 for filling a vacancy in the vice presidency, he said:

It was the opinion of the subcommittee, plus that of the American Bar Association in their consensus group, and the full Committee on the Judiciary, that by combining both presidential and congressional action, we were doing two things. We were guaranteeing that the President would have a man with whom he could work. We were also guaranteeing to the people their right to make that decision.⁵⁵

When opposing time limits in section 2, he said: “There is a President who is able to conduct business and to carry on the affairs of our country. I should dislike to see everything that must be decided by Congress come to a stop in the event Congress becomes logjammed on this question.”⁵⁶

As to the possibility of a Congress not of the president’s party delaying a vote on a vice presidential nomination to keep the Speaker in place as next in the line of succession, Bayh said: “I have more faith in the Congress acting in an emergency in the white heat of publicity, with the American people looking on. The last thing Congress would dare to do would be to become involved in a purely political move.”⁵⁷

As to the term “inability,” he said:

[T]he word “inability” and the word “unable,” as used in [section 4] . . . refer to an impairment of the President’s faculties, mean that he is unable to either make or communicate his decisions as to his own competency to execute the powers and duties of his office. I should like for the RECORD to include that as my definition of the words “inability” and “unable.”⁵⁸

As to the combination of the vice president and cabinet having the power to declare a president disabled, Bayh endorsed a statement by Senator Hiram Fong of Hawaii, Bayh’s colleague on the Senate subcommittee. Fong explained: “It is reasonable to assume that persons the President selects as Cabinet officers are the President’s most devoted and loyal supporters who

52. *Id.* at 3254.

53. *Id.* at 3271.

54. *Id.*

55. *Id.* at 3255.

56. *Id.* at 3277.

57. *Id.* at 3275.

58. *Id.* at 3282.

would naturally wish his continuance as President.”⁵⁹ Responding immediately after Fong finished his remarks on the Senate floor, Bayh said:

I compliment the Senator from Hawaii . . . on his well-defined statement, in which he covered all the principal points, and in which he stressed the need for the Senate to join behind the consensus of the experts, feeling that we have the best proposal before the Senate now, and that if we spend more time searching for that which is perfect it will become a search for the impossible.⁶⁰

Regarding the need to resolve quickly the issue of presidential inability, Bayh said, “[W]e are questioning the disability of the President, the man who has his ‘finger on the button.’ This issue needs to be decided immediately.”⁶¹

As to why the vice president remained the acting president during the period in which Congress had to decide a disagreement over presidential inability, he said:

[W]e desired to try to prevent a back-and-forth ping-pong sort of situation in which the Vice President and the Cabinet would make a declaration. The President might be out and the Vice President would be in. Then the issue would go to Congress and Congress might make a declaration that the Vice President should be out and the President in. Under the proposal there would be fewer transfers of power and more continuity, which I feel should be basic.⁶²

As for the waiting period for resuming the powers and duties of president, Bayh also said that the vice president would be the acting president during this time because

there would be a serious enough doubt about the mental capacity—and usually it would be the mental capacity of the President—that the decision [by the vice president and cabinet] would be made, [so] the Vice President would assume the powers and duties as Acting President while the decision was being made by Congress.⁶³

As to the waiting period, he noted that “[t]he provision would not prevent the Vice President and the President agreeing to a lesser period of time.”⁶⁴

II. SENATOR BIRCH BAYH ADDRESSES THE HOUSE JUDICIARY COMMITTEE

In February 1965, Senator Bayh was invited to testify before the House Judiciary Committee to answer questions from its members about S.J. Res. 1.⁶⁵ He responded to a great many such questions, including questions in the

59. *Id.* at 3262.

60. *Id.* at 3263.

61. *Id.* at 3281.

62. *Id.* at 3284.

63. *Id.* at 3285.

64. *Id.*

65. See *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 39 (1965) [hereinafter *1965 House Hearings*] (statement of Sen. Birch Bayh).

form of hypotheticals concerning possible workings of the amendment.⁶⁶ Some examples follow.

In responding to questions concerning a president's choice of vice president under section 2, he observed that

if we weren't careful we were going to proliferate further the executive branch and try to set up someone who would be competing with the President unless we gave the President primary responsibility of picking the man with whom he could work. If the person is a namby-pamby person, the Congress wouldn't go along. He would have to send another name.

. . . .

. . . The most important thing is getting not only a man who is well qualified, but getting a man who was not a political hack. The man would have to be well qualified, but he should be one with whom the President could work.⁶⁷

Bayh also commented:

If I may ask you to think with me on the recent tragedy in Dallas where Lyndon Johnson was suddenly elevated to the office of President, and the whole world was in mourning. The last thing that the electorate of the country would have tolerated would have been the selection of a Vice President who was not extremely qualified for the job.⁶⁸

Of the use of the word "confirmation" in section 2, Bayh replied:

It is our feeling that certainly the Members of Congress would not want the Vice President to assume the powers and duties of the office of Vice President in the absence of some advice and consent So we felt the word "confirmation" in this case was better than the use of the words "advise and consent" because of the implications that might be involved by past precedent.⁶⁹

Discussing the meaning of "vacancy" in section 2, he agreed with Congressman Richard Poff that it refers "to those cases where the President or Vice President is no longer occupying the office by reason of death, resignation, or removal."⁷⁰ Senator Bayh observed that there was "ample precedent to indicate that this is the preponderance of legal thought on the question."⁷¹

On whether a vice president under section 2 could nominate someone under the age of thirty-five, Bayh said: "I would think not. I would think, certainly, that just the adding of an amendment to the Constitution does not repeal previous requirements that have been put on this office"⁷² He also said that there was no intention whatsoever to do so, observing that "[i]n

66. *See id.* at 91 (statement of Sen. Birch Bayh).

67. *See id.* (statement of Sen. Birch Bayh).

68. *See id.* (statement of Sen. Birch Bayh).

69. *Id.* at 45 (statement of Sen. Birch Bayh). For instance, the term "advice and consent" has certain implications with regard to recess appointments.

70. *Id.* at 87 (statement of Rep. Richard H. Poff, Member, H. Comm. on the Judiciary).

71. *Id.* (statement of Sen. Birch Bayh).

72. *Id.* at 48 (statement of Sen. Birch Bayh).

fact the 12th amendment setting up new electoral procedure does not carry over all the qualifications of the President in the 12th amendment.”⁷³

On the disability provisions of the amendment and whether the vice president takes the presidential oath on becoming an acting president, Bayh said that

the oath of office as Vice President gets him into the position where he, under this constitutional amendment, would assume the powers and duties as Acting President, not as President. It would therefore be unnecessary for him, with this provision, to take the Presidential oath.

....

... We are not giving [him] the office but we are simply giving him the powers and duties of the office, which would be sufficient.⁷⁴

As to whether the amendment would change the line of succession as enacted by Congress, Bayh said:

I think the whole disability question can be greatly simplified, although not completely simplified by again looking at reality.

Let us say the President has a serious operation. He declares his own disability. There is no problem.

Say the President has a heart attack. He is in an oxygen tent and the Russians move missiles into Cuba. The Vice President gets together with the Cabinet and says something has to be done to protect the interests of the country. No problem.

These two examples would be 90 percent of the disability occurrences.⁷⁵

As for the remaining 10 percent, Bayh added:

I think that you have sufficient protection against usurpation of power by providing that the Vice President, the majority of the Cabinet, and two-thirds of the Members of Congress must agree the President is disabled. There isn't any way to make this seem as if it wouldn't be a tangled mess in the press or any place else.

....

... May I suggest that the damage to the President as an individual is not so important as the safety of the country.

....

... If Congress finds that the Cabinet cannot adequately fill this role, then it provides an alternative body which will function. This is the way we intended it.⁷⁶

Of a President who is found disabled at the end of the congressional process, Bayh said:

It is my impression or intent that he would have more than one chance but, having utilized the one chance, I think he would be very careful in making

73. *Id.* (statement of Sen. Birch Bayh).

74. *Id.* at 87–88 (statement of Sen. Birch Bayh).

75. *Id.* at 92 (statement of Sen. Birch Bayh).

76. *Id.* at 92–93 (statement of Sen. Birch Bayh).

a second appeal to the Congress because the degree of frequency with which he appealed to the Congress would certainly reflect the attitude with which Congress would look on his mental capacity.⁷⁷

Senator Bayh opined that an agreement by the president and vice president “would cover a great majority of the cases.”⁷⁸

On the reason for having written declarations of “inability,” Bayh said:

It was the feeling of the committee—and our report so states—that transmittal to the offices of the presiding officers of each House shall be sufficient constructive notice for the transferral of power, and that the time lapse involved in transmitting this notice from 1600 Pennsylvania Avenue to Capitol Hill is sufficiently short that it would not be something to concern ourselves with and would guarantee public notice for the entire country.⁷⁹

And, he added:

The committee was sufficiently concerned about the Vice President coming up with a letter in his pocket or finding it in his dresser drawer or something, that we changed the wording of the section . . . to read that a letter from the President must be transmitted in the normal course of business as all Executive messages are transmitted to the presiding officers of both Houses.⁸⁰

In a situation under section 4 (then section 5), wherein the president declares he is able, Bayh said:

The Vice President continues to act as President until the Congress decides the issue.

. . . .

. . . Then the burden is on the Vice President and the majority of the Cabinet. It is on their shoulders to get two-thirds of the Congress to support their contention that the President is unable to perform the powers and duties of the office.⁸¹

As to the expression “principal officers of the executive departments,”⁸² Bayh said: “The logical interpretation is that the heads of the executive departments are the principal officers of the executive departments. This is the Cabinet.”⁸³ He further contended that “[t]his has been the general interpretation put on this language [W]e made our intent abundantly clear in our report.”⁸⁴

As to a vice president acting as president who then becomes disabled, Bayh said, “[w]e have not provided for this contingency,”⁸⁵ and explained “the

77. *Id.* at 94 (statement of Sen. Birch Bayh).

78. *Id.* (statement of Sen. Birch Bayh).

79. *Id.* at 46 (statement of Sen. Birch Bayh).

80. *Id.* at 53–54 (statement of Sen. Birch Bayh).

81. *Id.* at 58 (statement of Sen. Birch Bayh).

82. *Id.* at 52 (statement of Rep. Basil Whitener, Member, H. Comm. on the Judiciary).

83. *Id.* (statement of Sen. Birch Bayh).

84. *Id.* (statement of Sen. Birch Bayh).

85. *Id.* at 56 (statement of Sen. Birch Bayh).

reason we did not include it was that the more complicated you make a constitutional amendment . . . the more contingencies for which you provide, the more difficult it is to get it passed.”⁸⁶

In explaining the insertion of the word “discharge” before “powers and duties” in the inability sections, Bayh said that “[t]he goal is to provide that if we ever do get in this position—God forbid, but we may—the Vice President should not only have the powers and duties but should discharge them.”⁸⁷

As to a member of Congress not voting if presented with a case of presidential inability, Bayh said:

I think that we have to realize when we vote as Members of Congress or take action that we consider what the final result of our actions is going to be.

To feel in my mind that the President was incapable of fulfilling the powers and duties of his office, and sit silently by and do nothing to prevent him from resuming the powers and duties at the end of 10 days would constitute gross negligence. By inaction you are, in effect, acting, are you not?⁸⁸

As to the subject of the vice president and cabinet raising the question of an inability, Bayh said:

We had considerable discussion. In fact, one small change that we made in the final committee bill . . . was to give joint responsibility to the Cabinet and Vice President to act under section 4. We have another possibility; namely, not only that the President does not declare himself, but the Vice President does not so declare, nor does the Cabinet initiate.

. . . .

. . . But either may take the initiative.

. . . .

. . . [I]t does not say “the Vice President with the concurrence.”

. . . .

. . . Either one can pose the question and the other one can concur therein.⁸⁹

Explaining why the cabinet must be involved in these decisions, Bayh stated:

There was no precedent or constitutional provision such as we are trying to provide. We put the Cabinet in there because we feel this is the group which is best able to protect the President from a power-hungry Vice

86. *Id.* at 57 (statement of Sen. Birch Bayh).

87. *Id.* at 64–65 (statement of Sen. Birch Bayh).

88. *Id.* at 69 (statement of Sen. Birch Bayh). The waiting period before the president can resume the powers and duties of his office was changed from ten days to twenty-one days in the final amendment. *See* U.S. CONST. amend. XXV, § 4.

89. *1965 House Hearings, supra* note 65, at 79–80 (statement of Sen. Birch Bayh).

President and the group which is most intimately associated with his official status. It is a thorny problem.⁹⁰

Of the precedents, he said:

Wilson . . . is a good example of one of the most complicated problems which might arise under this and Marshall did not act. But history shows us that there was a great deal of concern about the Tyler precedent—that if he did act, would he then, in the event Wilson then recuperated, not be President and Wilson out in the cold?

We are making it easier for the Vice President to assume presidential duties. We should put in the amendment the provisions under which he may act and not make it look as if he is power hungry.⁹¹

In the course of his testimony that day before the House Judiciary Committee, Bayh said:

In no way are we attempting to say that as far as I am concerned, and I think so far as our committee is concerned, that this is it and this is the end. I think this committee should . . . give it the most careful consideration and scrutiny and so far as the junior Senator from Indiana is concerned, any questions you have to ask now, later, or any time on which I may be helpful, I am ready and willing to answer them because this is a matter of great concern and it shouldn't be entered into carelessly.⁹²

After the House of Representatives acted on the recommendations of the Judiciary Committee in April 1965, a conference committee was needed to resolve the language differences between the two chambers of Congress.

III. CHANGES BY THE CONFERENCE COMMITTEE

A. *The Conference Committee Report*

Senator Bayh presented the report of the conference committee to the Senate on June 30, 1965, stating:

In the Senate version of the measure we prescribed that all declarations concerning the inability of a President or of his ability to perform the powers and duties of that office . . . be transmitted to the Speaker of the House and to the President of the Senate.

The conference committee report proposes that those declarations go to the Speaker and the President pro tempore of the Senate. The reason for the change is, of course, that the Vice President, who is also the President of the Senate, would be participating in making a declaration of presidential inability [under Section 4], and therefore would be unable to transmit his own declaration to himself.⁹³

Addressing section 3, he said:

90. *Id.* at 81 (statement of Sen. Birch Bayh).

91. *Id.* at 80 (statement of Sen. Birch Bayh).

92. *Id.* at 67 (statement of Sen. Birch Bayh).

93. 111 CONG. REC. 15,378 (1965).

In the Senate version . . . we did not specify that if the President were to surrender his powers and duties voluntarily . . . he could resume them immediately upon declaring that his inability no longer existed.

. . . .

We added specific language enabling the President to resume his powers and duties immediately, with no waiting period, if he had given up his powers and duties by voluntary declaration.⁹⁴

Of another change in section 4, Senator Bayh said:

In the Senate version we prescribed that the President . . . could resume the powers and duties of the office of President . . . unless within 7 days the Vice President and a majority of the Cabinet or the other body issued a declaration challenging the President's intention [to resume the powers and duties of his office]. The House version prescribed that the waiting period be 2 days. The conference compromised on 4 days, and I urge the Senate to accept that as a reasonable compromise between the time limits imposed by the two bodies.

Furthermore, we have clarified language, at the request of the Senate conferees, to make crystal clear that the Vice President must be a party to any action declaring the President unable to perform his powers and duties.⁹⁵

Of another change, he said:

The Senate conferees accepted a House amendment requiring the Congress to convene within 48 hours, if they were not then in session, and if the Vice President and a majority of the Cabinet or other body were to challenge the President's declaration that he, the Chief Executive, were not disabled or, once again, able to perform the powers and duties of his office.

We feel that the requirement would encourage speedy disposition of the question by the Congress, and I urge its acceptance by the Senate.⁹⁶

Finally, he said:

[T]he Senate version imposed longtime limitations upon the Congress to settle a dispute as to whether the President or the Vice President could perform the powers and duties of the office of President. Senators know the question would come to the Congress only if the Vice President, who would then be acting as President, were to challenge, in conjunction with a majority of the Cabinet, the President's declaration that no inability existed. The House version imposed a 10-day time limitation. The Senate conferees were willing to have a time limitation as a further safeguard to the President, but we were unanimous that 10 days was too short a period in which to decide on that grave a question.

The conferees finally agreed to a 21-day time limitation after which, if the Vice President had failed to win the support of two-thirds of both the

94. *Id.*

95. *Id.* at 15,378–79.

96. *Id.* at 15,379.

Houses of Congress, the President would automatically return to the powers and duties of his office.⁹⁷

Senator Bayh then added that, “including a time limitation in the Constitution of the United States would impose upon those who come after us in this great body a limitation on their discussion and deliberation when surrounded by contingencies which we cannot foresee.”⁹⁸ He further said that “if one House voted but failed to get the necessary two-thirds majority, the other House would be precluded from using the 21 days and the President would immediately reassume the powers and duties of his office.”⁹⁹

Following Senator Bayh’s presentation on June 30, several major subjects were raised for discussion in the Senate. One involved the use of the cabinet in the process of declaring a president disabled.¹⁰⁰ Another related to the meaning of “inability.”¹⁰¹ Still another subject involved the introduction of the word “either,” in the section 4 clause language, as follows: (1) “[w]hensoever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide”¹⁰² and (2) “he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide.”¹⁰³

B. *The Use of the Cabinet*

Following Senator Bayh’s submission of the conference committee’s report on June 30, 1965, Senator Robert Kennedy of New York opened a discussion concerning the provision in section 4 that provided for Congress to create a “body” other than the cabinet for determining a president’s inability.¹⁰⁴ He expressed reservations about the use of the cabinet, stating that some people questioned whether “there is some better way to handle this very difficult matter.”¹⁰⁵ The subject, he said, was worthy of continuing reexamination, observing that “a President might fire his entire Cabinet.”¹⁰⁶ As to this issue, Senator Kennedy recounted the disability of President Wilson, observing that

there was no evidence of any overt attempt to usurp the powers of the President, [yet] the ailing President nevertheless decided to dispose of any Cabinet member who seemed to present a threat. More serious conflict

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at 15,380.

101. *See id.* at 15,381.

102. FEERICK, *supra* note 2, at 114.

103. *Id.*

104. *See* 111 CONG. REC. 15,380.

105. *Id.*

106. *Id.*

might follow, in a comparable situation, now that a procedure for determining disability is established.¹⁰⁷

He added:

[T]he committee reports and other legislative history make it quite clear that . . . the Deputies or Under Secretaries . . . would, when there clearly are vacancies in the Cabinet, become acting heads of the departments until new principal officers were confirmed, or, if Congress were not in session, until recess appointments were made.¹⁰⁸

In times of crisis, Senator Kennedy acknowledged, a dispute involving the firing of a cabinet would be difficult and disruptive, complicating the question of who is acting as president.¹⁰⁹ He therefore favored a continued examination of an alternative procedure after the amendment was adopted.¹¹⁰ Debate ensued on the House's version of this provision in section 4, with a particular focus on that feature.

C. The Term "Inability"

Following his exchange with Senator Bayh on the role of the cabinet, Senator Kennedy said he wished to clarify another important issue involving the scope of the "inability" provision of the amendment. This exchange followed:

Is it not true that the inability to which we are referring in the proposed amendment is total inability to exercise the powers and duties of the office?

Mr. BAYH: The inability that we deal with here is described several times in the amendment itself as the inability of the President to perform the powers and duties of his office.

It is conceivable that a President might be able to walk, for example, and thus, by the definition of some people, might be physically able, but at the same time he might not possess the mental capacity to make a decision and perform the powers and duties of his office. We are talking about inability to perform the constitutional duties of the office of President.

Mr. KENNEDY of New York: And that has to be total disability to perform the powers and duties of office.

Mr. BAYH: The Senator is correct. We are not getting into a position, through the pending measure, in which, when a President makes an unpopular decision, he would immediately be rendered unable to perform the duties of his office.

Mr. KENNEDY of New York: Is it limited to mental inability to make or communicate his decision regarding his capacity and mental inability to perform the powers and duties prescribed by law?

Mr. BAYH: I do not believe that we should limit it to mental disability. It is conceivable that the President might fall into the hands of the enemy, for example.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

Mr. KENNEDY of New York: It involves physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and duties of his office.

Mr. BAYH: The Senator is correct. That is very important. I would refer the Senator back to the definition which I read into the RECORD at the time the Senate passed this measure earlier this year.

Mr. KENNEDY of New York: It was that definition which I was seeking to reemphasize. May I ask one other question? Is it not true that the inability referred to must be expected to be of long duration, or at least one whose duration is uncertain and might persist?

Mr. BAYH: Here again I think one of the advantages of this particular amendment is the leeway it gives us. We are not talking about the kind of inability in which the President went to the dentist and was under anesthesia. It is not that type of inability we are talking about, but the Cabinet, as well as the Vice President and Congress, are going to have to judge the severity of the disability and the problems that face our country.

....

Mr. KENNEDY of New York: Is it not true that what we are talking about here, as far as inability is concerned, is not a brief or temporary inability?

Mr. BAYH: We are talking about one that would seriously impair the President's ability to perform the powers and duties of his office.

Mr. KENNEDY of New York: Could a President have such inability for a short period of time?

Mr. BAYH: A President who was unconscious for 30 minutes when missiles were flying toward this country might only be disabled temporarily, but it would be of severe consequence when viewed in the light of the problems facing the country.

So at that time, even for that short duration, someone would have to make a decision. But a disability which has persisted for only a short time would ordinarily be excluded. If a President were unable to make an Executive decision which might have severe consequences for the country, I think we would be better off under the conditions of the amendment.

Mr. KENNEDY of New York: The Senator realizes the complications for the people of this country and the world under those circumstances.

Mr. BAYH: I do, indeed. I also recognize our difficulty if we had no amendment at all.¹¹¹

D. The Word "Either"

Senator Albert Gore of Tennessee and others saw the addition of "either" as a consequential change of language,¹¹² designed to make certain that the "Vice President would participate in the declaration of disability with a body created by law if such were done."¹¹³ Gore said that a vice president would

111. *Id.* at 15,381.

112. *Id.* at 15,593–94. I provided research assistance to Senator Bayh in connection with the language change. See BAYH, *supra* note 18, at 311; JOHN D. FEERICK, *THAT FURTHER SHORE: A MEMOIR OF IRISH ROOTS AND AMERICAN PROMISE* 261–62 (2020). See generally John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 FORDHAM L. REV. 1075 (2017).

113. 111 CONG. REC. 15,587 (statement of Sen. Albert Gore).

be in a position to “shop around” for support of his position that the president was unable to discharge the powers of his office.¹¹⁴

Addressing the argument that the language permitted two coequal bodies to function concurrently, Senator Bayh said:

I invite the attention of Senators to the definition of [“either/ or”] in Black’s Legal Dictionary and to most legal cases on the point—that when we talk about “either/or” it is interpreted in the disjunctive. It does not refer to two, but to either one or the other.

....

... Certainly it is the intention of the conference committee and it is my contention, as the floor manager of the joint resolution and as the principal sponsor of it . . . to have the Vice President and a majority of the Cabinet make the decision, unless Congress, in its wisdom, at some later time, determines by statute to establish some other body to act with the Vice President.¹¹⁵

He also expressed his view in the debate that, assuming any ambiguity in the use of “either/or,” a court would look to the legislative history.¹¹⁶ Moreover, he observed that Congress, were it to invoke the enabling provision to create another body, would specify that it was replacing the cabinet as acting in concert with the vice president.¹¹⁷

D. Concluding Remarks on July 6, 1965

Senator Bayh concluded his remarks by saying “I think we have to determine one question: Is the conference report the best piece of proposed legislation we can get and is it needed? As loudly as I can, I say that we must answer the question in the affirmative.”¹¹⁸ Senator Russell Long of Louisiana, supportive of Bayh, added that he might have preferred some changes be made, but the advice he received was “[p]lease don’t muddy the water.”¹¹⁹ “If we start all over again,” Long said, “other Senators will also have suggestions to make, and we shall be another 100 years getting to the point which we now have reached.”¹²⁰ Senator Ervin, strongly supportive of S.J. Res. 1 and the conference report, added:

When we started to consider the proposal . . . [w]e were concerned with the old adage that too many cooks would spoil the broth. We had more cooks with more zeal concerned with preparing this “broth” than any piece of proposed legislation I have ever seen in the time I have been in the Senate. If it had not been for the perseverance, the patience, and the willingness to compromise which was manifested on a multitude of occasions by the junior Senator from Indiana, we would never have gotten

114. *Id.*

115. *Id.* at 15,593.

116. *Id.* at 15,594.

117. *Id.* at 15,593–94.

118. *Id.* at 15,594.

119. *Id.* (statement of Sen. Russell Long).

120. *Id.*

the resolution out of the subcommittee, much less through the full Judiciary Committee and then through the conference with the House. I am of the opinion that the conference report which the Senator from Indiana is seeking to have approved would submit to the States the very best possible resolution on the subject obtainable in the Congress of the United States as it is now constituted. The Senator from Indiana deserves the thanks of the American people for the fact that he was willing to change the ingredients of the broth in order to appease a multitude of different cooks who had different recipes for it, including myself.¹²¹

The question was called and the proposed amendment was approved, 68 to 5, by two-thirds of the senators present and voting on July 6.¹²²

CONCLUSION

In the preface to Senator Bayh's book, *One Heartbeat Away: Presidential Disability and Succession*, Dwight D. Eisenhower's concluding words were: "To Senator Bayh and to all others whose persevering efforts are described in this book, I extend a hearty commendation for a task well performed."¹²³ In his concluding words of that book, Senator Bayh said:

In 1787, John Dick[i]nson of Delaware, a delegate to the Constitutional Convention meeting in Philadelphia, had asked, "What is meant by the term disability and who shall be the judge of it?" On February 23, 1966, at 1:18 P.M., 179 years later, in the East Room of the White House, John Dick[i]nson received his answer.¹²⁴

And let me conclude with the words of Senate Majority Leader Mansfield of Montana on the occasion of the very first vote of approval of the amendment on September 28, 1964:

I believe this is a momentous and historic occasion. I am delighted that so many of our colleagues on both sides of the aisle have joined with the distinguished junior Senator from Indiana, and, under his leadership, I am delighted that the proposed joint resolution is now on the verge of passage. It is a foundation which will set well in the building which is this Republic.¹²⁵

121. *Id.* at 15,594-95.

122. *Id.* at 15,595-96.

123. BAYH, *supra* note 18, at viii.

124. *Id.* at 342.

125. 110 CONG. REC. 23,001 (1964).