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Joel K. Goldstein

*Vincent C. Immel Professor of Law Emeritus, Saint Louis University School of Law*

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# BIRCH BAYH AND THE TWENTY-FIFTH AMENDMENT: LESSONS IN LEADERSHIP

Joel K. Goldstein\*

## INTRODUCTION

Historians debate whether great people make history or whether certain circumstances present the occasions which allow great figures to emerge. In fact, the truth includes elements of both. Significant, positive change depends on—but is not made inevitable by—historical context alone. Great accomplishments do not just happen. History’s great, positive developments most often occur when talent and circumstance intersect—when a person of vision, skill, and will seizes an opportunity presented by the times to propel the future in a more positive direction. Reform depends on wise and effective leadership—people who have the understanding and vision to imagine a better way and the skill, credibility, and fortitude to make it happen.

These thoughts belong to a discussion of Senator Birch Bayh and the Twenty-Fifth Amendment.<sup>1</sup> Formal constitutional amendments in the American system are extraordinary events, made so by the challenges of meeting the degree of consensus that the multiple, high, supermajority hurdles impose.<sup>2</sup> Only twenty-seven formal amendments have revised the U.S. Constitution in 231 years but even that ratio of one amendment every 8.5 years overstates their frequency since ten amendments came in the first two years of our government and the first twelve within the first fifteen years.<sup>3</sup> In other words, there have been only fifteen amendments during the last 216 years, one every 14.4 years. No amendment has been both proposed

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\* Vincent C. Immel Professor of Law Emeritus, Saint Louis University School of Law. I was honored to offer brief comments regarding the role of Senator Birch Bayh in the passage of the Twenty-Fifth Amendment to the U.S. Constitution during 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 on October 16, 2019, at Fordham University School of Law. This Essay is an elaborated and much-expanded discussion of some of the thoughts I briefly expressed on that occasion. I am grateful to John D. Feerick and John Rogan for including me in this program and allowing me to pay tribute to such a consequential public servant as Senator Birch Bayh. For an overview of the corresponding 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. U.S. CONST. amend. XXV.  
2. See U.S. CONST. art. V (providing that a constitutional amendment must be proposed by two-thirds of both chambers of Congress and ratified by three-fourths of the states).  
3. See *America’s Founding Documents: The Constitution: Amendments 11–27*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/amendments-11-27> [<https://perma.cc/7JFF-UEYY>] (last visited June 22, 2020) [hereinafter *America’s Founding Documents*].

and ratified in almost fifty years since 1971 when Congress proposed, and the states ratified, the Twenty-Sixth Amendment, extending the vote to citizens eighteen years of age and older.<sup>4</sup> Birch Bayh had something to do with that contribution to democratic governance too,<sup>5</sup> but his work on that constitutional amendment is not the topic of this Essay—the Twenty-Fifth Amendment is.

The Twenty-Fifth Amendment provided a means to fill a vice presidential vacancy before awaiting the next scheduled presidential election and created procedures to transfer presidential powers and duties from a disabled president to the vice president.<sup>6</sup> Under Bayh's leadership, Congress proposed it in July 1965, and three-fourths of the states ratified it just nineteen months later in February 1967.<sup>7</sup>

In constitutional analysis, as in life, there is a tendency to take for granted the things that have been long in place; to view them as inevitable; to forget or ignore the difficult paths that led to their creation; to underestimate the barriers overcome, the skill required, and the magnitude of the accomplishments. That is certainly true of the Twenty-Fifth Amendment. It was a highly constructive change, which responded to constitutional defects that dated from the 1787 convention in Philadelphia. Although subsequent events made those defects even more troubling, they had resisted correction.

It has often been noted that the amendment would not have occurred but for the three presidential periods of incapacity of President Dwight D. Eisenhower in the mid-1950s<sup>8</sup> and the assassination of President John F. Kennedy on November 22, 1963.<sup>9</sup> Those events occurred during the atomic age and Cold War, circumstances which exponentially increased the importance of presidential continuity and lent urgency to a response.

Those events and circumstances certainly formed an important part of the historical context of the mid-1960s, but they did not make the Twenty-Fifth Amendment inevitable. Eisenhower's last incapacity occurred in November 1957,<sup>10</sup> yet he left office without either chamber of Congress having proposed a solution, a step that did not occur for nearly another seven years, in late September 1964, when the Senate unanimously approved Bayh's proposed resolution.<sup>11</sup> The following year both chambers of Congress approved different versions of Bayh's amendment and, after a difficult

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4. U.S. CONST. amend. XXVI. The Twenty-Seventh Amendment, which was ratified in 1992, was actually proposed in 1789. See *America's Founding Documents*, *supra* note 3.

5. Jesse Wegman, *The Man Who Changed the Constitution, Twice*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/opinion/birch-bayh-constitution.html> [https://perma.cc/Q2EE-GF4Z] (noting Senator Bayh's role in drafting both the Twenty-Sixth and Twenty-Fifth amendments).

6. See U.S. CONST. amend. XXV, §§ 2–4.

7. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 104–05 (3d ed. 2014).

8. See Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1137, 1141 (2017).

9. See *id.* at 1144.

10. See *infra* Part I.

11. 110 CONG. REC. 23,002, 23,061 (1964).

conference that finally reconciled the variations, Congress accepted the product and submitted the proposal to the states.<sup>12</sup> Kennedy's assassination was a national trauma that elevated the issue of presidential continuity in the public's consciousness, yet even that haunting event did not make action inexorable. Congressmen and others advocated multiple inconsistent proposals to deal with presidential succession, vice presidential vacancy, and presidential inability.<sup>13</sup> Basic differences over design and details threatened to prevent progress. Legislators had little inclination to invest the huge amount of time and energy to secure a constitutional amendment regarding a topic that offered no political payoff. At various junctures, views diverged, objections arose, and obstacles surfaced that made progress doubtful. Earlier crises relating to presidential continuity had not produced resolution. There was no reason to be optimistic this time either.

What was different this time was Birch Bayh. The amendment simply would not have happened without his wise, inspired, persistent, and effective political leadership. He was the missing ingredient, the indispensable actor, the change agent that made the amendment happen. And so, it is worth unpacking that story, not only to recognize a great public servant, indeed a constitutional architect, but to extract, be instructed, and perhaps inspired by the lessons the story offers about political leadership. This Essay will begin by providing a brief historical overview of the problems relating to presidential succession, vice presidential vacancy, and presidential inability before outlining the steps Bayh took that culminated in Congress proposing to the states what became the Twenty-Fifth Amendment. It will then distill from that summary some of the leadership qualities Bayh displayed that were essential to the adoption and implementation of the amendment.

## I. THE HISTORICAL BACKGROUND

The Constitution, as written in Philadelphia in 1787 and ratified by the states, provided that in case of presidential death, resignation, removal, or inability to perform the powers and duties of the office, "the same" devolved on the vice president.<sup>14</sup> It further authorized Congress to designate some officer to act as president if some combination of those four contingencies prevented both the president and vice president from executing the office.<sup>15</sup> The Constitution did not define presidential inability nor did it provide any procedures for determining an inability or transferring presidential powers and duties when one occurred.<sup>16</sup> Although overwhelming evidence suggests

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12. FEERICK, *supra* note 7, at 79–104.

13. *See infra* Part II.

14. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . .").

15. *Id.* ("[A]nd the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

16. FEERICK, *supra* note 7, at 3.

that the constitutional framers intended that the vice president would simply act as, not become, president when any of the four contingencies occurred and that the president could resume those powers and duties when the inability ended,<sup>17</sup> a quite different practice developed beginning in 1841 after President William Henry Harrison became the first president to die in office.<sup>18</sup> His vice president, John Tyler, claimed that he had become president and was not simply discharging presidential authorities as vice president.<sup>19</sup> Tyler's position was accepted and followed by other vice presidents upon the deaths of the presidents under whom they served.<sup>20</sup> Since the Constitution assigned the vice president the same status when any of the four contingencies affected the president, the Tyler precedent raised the possibility that a presidential inability might elevate the vice president to the first office, thereby displacing the original chief executive forever, even if he recovered.<sup>21</sup> That scenario gave vice presidents and others pause about declaring a president disabled. The constitutional gaps, especially the absence of procedures and the uncertainty regarding whether the president would be displaced, contributed to the inaction when President James Garfield was disabled for eighty days between the time of his shooting and his death in 1881 and when President Woodrow Wilson was incapacitated for a substantial portion of the last seventeen months of his term due to a stroke and other ailments.<sup>22</sup> The three Eisenhower illnesses—a serious heart attack in September 1955, ileitis surgery in June 1956, and a stroke in November 1957<sup>23</sup>—were the first events of their kind during the Cold War and nuclear age, events that made some solution urgent.<sup>24</sup>

Yet when Birch Bayh first entered the U.S. Senate in January 1963,<sup>25</sup> more than five years after the last of these events, Congress had reached no consensus. Indeed, its failure to make tangible progress had prompted President Eisenhower and Vice President Richard Nixon to commit to an informal letter agreement regarding presidential inability.<sup>26</sup> It allowed Eisenhower or, if he was unable to do so, Nixon to determine that Eisenhower was disabled and thereby transfer presidential power temporarily to Nixon, with the understanding that Eisenhower could reclaim presidential powers and duties unilaterally.<sup>27</sup> John F. Kennedy and Lyndon B. Johnson made essentially the same arrangement in August 1961.<sup>28</sup> This approach provided

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17. See Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 668–71 (2016).

18. *Id.* at 671–72.

19. *Id.*

20. *Id.* at 673.

21. *Id.* at 674–75.

22. *Id.* at 675–76.

23. Goldstein, *supra* note 8, at 1141 n.24.

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

25. See BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION I (1968).

26. Goldstein, *supra* note 17, at 676–77. See generally FEERICK, *supra* note 7, at 53–54.

27. Goldstein, *supra* note 24, at 964–65.

28. *Id.*

a stopgap, but it was an imperfect remedy. It was not legally binding, it did not address the situation where a president was disabled but unwilling to so recognize, and it would have allowed the president to resume powers even if his disability continued.<sup>29</sup>

The Kennedy assassination raised a second vexing problem. For the sixteenth time in American history, the vice presidency was vacant.<sup>30</sup> Congress had placed the Speaker of the House of Representatives and President pro tempore of the Senate next in the line of presidential succession in 1947,<sup>31</sup> but this legislative line presented some problems. The occupants of those positions, John McCormack and Carl Hayden respectively, had not been considered “presidential timber”<sup>32</sup> and now stood behind a president who had himself suffered a serious heart attack in July 1955, a few months before Eisenhower’s coronary.<sup>33</sup> The picture of the aged-looking McCormack and Hayden behind Johnson when the new president gave a televised address to Congress a few days after Kennedy’s assassination went viral (to the extent an image could in 1963) and created unease.<sup>34</sup> Moreover, Nixon and Johnson’s service elevated the vice presidency.<sup>35</sup> The office was widely viewed not only as the best solution to presidential succession but also as an office that could help the president.<sup>36</sup> Although McCormack and Hayden belonged to President Johnson’s party, legislative leaders may come from the opposite party.<sup>37</sup> And some simply thought legislative succession was unconstitutional.<sup>38</sup>

## II. THE TWENTY-FIFTH AMENDMENT: A BRIEF OVERVIEW OF BIRCH BAYH IN ACTION

Roughly three years after graduating from law school in 1960 and during his first year in the U.S. Senate, Birch Bayh, then age thirty-five and the second-youngest member of the upper chamber, became chairman of the

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29. See, e.g., *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. 43 (1964) [hereinafter *1964 Senate Hearings*] (statement of Professor James Kirby, Associate Professor of Law, Vanderbilt University).

30. See JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 258 (1965).

31. See Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

32. Goldstein, *supra* note 24, at 965.

33. *Id.*

34. Interview, *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 *FORDHAM L. REV.* 781, 789 (2011).

35. See JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN* 25–26 (2016); see also FEERICK, *supra* note 30, at 212–13, 231–32.

36. See generally FEERICK, *supra* note 30, at 211–33.

37. *Id.* at 264, 267; Goldstein, *supra* note 24, at 1027–29.

38. See FEERICK, *supra* note 30, at 267–69 (summarizing legal arguments against a legislative line of succession).

Senate Subcommittee on Constitutional Amendments.<sup>39</sup> Then, as at the time of Kennedy's assassination several months later, the Senate Committee on the Judiciary had before it Senate Joint Resolution 35 ("S.J. Res. 35"), a proposed constitutional amendment providing simply that a disabled president could temporarily transfer power to the vice president and that Congress could otherwise legislate on the subject.<sup>40</sup> S.J. Res. 35 was the product of Senator Estes Kefauver, Bayh's predecessor as the subcommittee chair, who had died in August 1963, and the ranking minority member, Senator Kenneth Keating of New York.<sup>41</sup> It also had the support of some important senators as well as the influential American Bar Association (ABA) and Deputy Attorney General Nicholas Katzenbach.<sup>42</sup>

Shortly after the Kennedy assassination made presidential continuity a pressing issue, Bayh studied the topic and concluded that a constitutional amendment was needed to address the problem but that S.J. Res. 35 was substantively and politically flawed.<sup>43</sup> By giving Congress a blank legislative check,<sup>44</sup> it failed to provide constitutional constraints to prevent a hostile Congress from pretextually using presidential inability to undermine appropriate presidential powers. It also did not provide a means to fill a vice presidential vacancy, a remedy Bayh thought essential given the development of the second office and the problems inherent with other potential successors to the presidency.<sup>45</sup> Bayh found S.J. Res. 35 politically misguided because it deferred the most difficult problem regarding presidential inability: how to handle a situation where an incapacitated president was unwilling or unable to recognize his own inability.<sup>46</sup> Bayh realized that the Kennedy assassination provided the ideal context to act substantively, that action, not more study, was the primary need, and that punting the most challenging questions to the future would squander the interest in the topic created by Kennedy's assassination. And as a former Indiana state legislator, Bayh realized that state legislatures would be unlikely to ratify a proposed constitutional amendment that essentially gave Congress a blank legislative check, an approach with profound federalism and separation of powers implications.<sup>47</sup> Accordingly, he opposed it effectively during committee discussions a couple of weeks after Kennedy's assassination.

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39. BAYH, *supra* note 25, at 29. The chairman of the Senate Committee on the Judiciary, Senator James Eastland, a Mississippi Democrat, had planned to close the subcommittee after the death of its prior chair, Senator Estes Kefauver, but acceded to Bayh's request that Bayh be allowed to chair it. *Id.* at 28–29.

40. Goldstein, *supra* note 8, at 1144.

41. *See Presidential Inability: Hearings on S.J. Res. 28, S.J. Res. 35, and S.J. Res. 84 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 88th Cong. 5–6 (1963).

42. Goldstein, *supra* note 8, at 1143–44.

43. *See id.* at 1146.

44. *Id.*

45. BAYH, *supra* note 25, at 34.

46. *Id.* at 34–35.

47. *Id.* at 35.

Instead, Bayh embarked on a different course and conceived an approach that became the basis of the eventual Twenty-Fifth Amendment.<sup>48</sup> Bayh's original Senate Joint Resolution 139 ("S.J. Res. 139") evolved during the eighty-eighth Congress into Senate Joint Resolution 1 ("S.J. Res. 1") in the eighty-ninth Congress and ultimately into the form Congress proposed and the states ratified as the Twenty-Fifth Amendment.<sup>49</sup> His proposal comprehensively addressed the major problems involved with presidential succession and inability and vice presidential vacancy.<sup>50</sup> It provided for the temporary, not permanent, transfer of presidential powers and duties to the vice president when a president was disabled, even though if the president died, resigned, or was removed, the vice president would become president for the duration of the term.<sup>51</sup> Bayh's approach also provided a means to transfer presidential power and duties from a disabled president by the president himself or by others in the executive branch if the president was unwilling or unable to do so, subject to congressional oversight.<sup>52</sup> Finally, Bayh proposed a means for filling a vice presidential vacancy,<sup>53</sup> a situation that had existed following presidential or vice presidential deaths—or, in one case, a vice presidential resignation—during more than 20 percent of American history.<sup>54</sup> The proposed amendment passed the House by a two-thirds vote on June 30, 1965,<sup>55</sup> and by a 68 to 5 vote in the Senate on July 6, 1965,<sup>56</sup> and was ratified by three-fourths of the states by February 10, 1967.<sup>57</sup>

This summation of basic facts cannot begin to capture Bayh's political and legislative leadership and the labor that converted ideas into constitutional law. That story, which was written day by day for several years, does not lend itself to a quick retelling since much of its power is in the details, the hundreds of small acts and gestures that helped convert an idea into a constitutional amendment. But even the following, much-abridged version provides some sense of the range of talents that Bayh displayed as he devoted himself to improving on the work of George Washington, James Madison, Alexander Hamilton, and others from the founding generation.

Right after Bayh introduced S.J. Res. 139 on December 12, 1963, he paid courtesy calls to Speaker of the House John McCormack and Senate President Pro Tempore Carl Hayden.<sup>58</sup> McCormack and Hayden followed Johnson in the line of succession, and the widespread perception that neither was presidential timber complicated the effort to create a means of filling a vice presidential vacancy.<sup>59</sup> Many legislators viewed that idea as an adverse

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48. Goldstein, *supra* note 8, at 1146.

49. *Id.*

50. *Id.*

51. Goldstein, *supra* note 24, at 967–68.

52. *See id.*

53. *Id.* at 968–69.

54. FEERICK, *supra* note 30, at 258.

55. 111 CONG. REC. 15,216 (1965).

56. *Id.* at 15,596.

57. FEERICK, *supra* note 7, at 105.

58. BAYH, *supra* note 25, at 38–42.

59. *See supra* notes 32–34 and accompanying text.



reflection on McCormack, and his allies, especially those in the House, were unwilling to consider a constitutional amendment until a new vice president was inaugurated in 1965. Bayh visited McCormack and Hayden to communicate his regard for them and to assure them that his proposal was not directed at them.<sup>60</sup> He also discussed his proposals with key Democratic senators like Majority Leader Michael Mansfield, Majority Whip Hubert H. Humphrey, and Richard Russell.<sup>61</sup> Knowing that a constitutional amendment would require Republican support, Bayh also reached out to Senate Minority Leader Everett Dirksen.<sup>62</sup>

Bayh discussed his proposal with President Johnson<sup>63</sup> and Johnson aides whom Bayh knew, such as Larry O'Brien and Lee White,<sup>64</sup> during the spring of 1964. He did not press the new president for open support, knowing that Johnson would not wish to become involved until after a new vice president was elected to avoid offending McCormack.<sup>65</sup>

In addition to reaching out to key Senate leaders, Bayh recognized that the success of his proposal would depend on winning support from important groups and individuals outside of Congress. The ABA, which had endorsed S.J. Res. 35, had convened a blue-ribbon group in Washington, D.C., to consider the subject on January 20 and 21, 1964.<sup>66</sup> Bayh addressed and met with the group,<sup>67</sup> as did some other legislators.<sup>68</sup> Bayh made a persuasive case for S.J. Res. 139<sup>69</sup> and the ABA group issued a statement of principles that, despite some differences, generally coincided with Bayh's proposal instead of with S.J. Res. 35.<sup>70</sup> So began an ongoing relationship with ABA leaders and professionals that proved critical to advancing the project.<sup>71</sup> During the next two years, Bayh's deepening ABA ties produced expert witnesses, a vehicle for legislative outreach, a convener of meetings with counterparts in the House of Representatives, and a nationwide network that communicated with members of Congress and state legislators.

With the vice presidency vacant, McCormack next in the line of succession, and widespread doubts that he was up to being a heartbeat away from the presidency (especially since President Johnson had himself had a

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60. BAYH, *supra* note 25, at 38–41.

61. *Id.* at 38–39, 42, 45.

62. *Id.* at 105–07.

63. *Id.* at 94–95; Interview by Paige E. Mulhollan with Birch Bayh, U.S. Senator from Ind. (Feb. 12, 1969), [http://www.lbjlibrary.net/assets/documents/archives/oral\\_histories/bayh\\_b/Bayh.PDF](http://www.lbjlibrary.net/assets/documents/archives/oral_histories/bayh_b/Bayh.PDF) [<https://perma.cc/Z9NP-Q7ST>] [hereinafter Mulhollan Interview].

64. BAYH, *supra* note 25, at 92–93.

65. *Id.* at 92–95; Interview, *supra* note 34, at 793–94; Mulhollan Interview, *supra* note 63.

66. John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 FORDHAM L. REV. 1075, 1078–79 (2017); *see also* BAYH, *supra* note 25, at 45–50.

67. BAYH, *supra* note 25, at 45–48.

68. *Id.* at 45, 48–49.

69. Feerick, *supra* note 66, at 1080–81.

70. *Id.* at 1079–81.

71. *See* BAYH, *supra* note 25, at 49–50; *see also* JOHN D. FEERICK, *THAT FURTHER SHORE: A MEMOIR OF IRISH ROOTS AND AMERICAN PROMISE* 242–66 (2020) (describing some of the ABA's activities supporting the amendment).

serious heart attack), it was clear that the House of Representatives would not act during the eighty-eighth Congress out of respect for its Speaker and its institution. The realization that the House would not act in 1964 did not cause Bayh to regard further effort during that Congress as wasted effort. Instead, he aggressively forged ahead, recognizing that headway in the Senate would pay dividends in the future.

Bayh held hearings on the various proposals before the Senate over six of the first sixty-five days of 1964.<sup>72</sup> Bayh strenuously rejected any suggestion that McCormack was unfit<sup>73</sup> and encouraged others to express their admiration for him.<sup>74</sup> The best way to assure presidential continuity was to provide a means to fill a vice presidential vacancy, he said, and he also advocated the need to establish procedures to transfer power from a disabled president and to provide that the president could resume power when the inability ended.<sup>75</sup> Bayh argued that a constitutional amendment was needed to solve the problem.<sup>76</sup>

Bayh initially heard from senators who had offered eight different proposals in January 1964.<sup>77</sup> North Carolina Democratic Senator Sam Ervin proposed that a joint session of Congress elect a new vice president within ten days of any vacancy in that office.<sup>78</sup> New York Republican Senator Kenneth Keating favored an amendment that would make clear that in case of presidential inability, the powers and duties of the presidency—but not the office—passed to the vice president while the inability lasted and empowered Congress to provide for a double vacancy.<sup>79</sup> Keating separately proposed replacing the single vice presidency with an executive vice president and a legislative vice president who would split the duties of the existing office and both be in the line of succession.<sup>80</sup> Oklahoma Democratic Senator Mike Monroney proposed establishing a bipartisan commission to study presidential inability.<sup>81</sup> New York Republican Senator Jacob Javits offered Senate Joint Resolution 138 (“S.J. Res. 138”), which was similar to Senator Ervin’s plan but provided that the election be made with the “advice and consent” of the president.<sup>82</sup> On presidential inability, Javits would essentially adopt Bayh’s proposal but would amend it to allow Congress to

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72. See generally *1964 Senate Hearings*, *supra* note 29.

73. *Id.* at 2 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.) (“There can be little doubt as to his capability.”).

74. *Id.* at 63–64 (statements of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends., and Sen. Frank E. Moss).

75. *Id.* at 1–5 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

76. *Id.* at 3 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. On Const. Amends.).

77. *Id.* at 7–16.

78. *Id.* at 18–19 (statement of Sen. Sam J. Ervin Jr., Member, S. Comm. on the Judiciary); see also *id.* at 15.

79. *Id.* at 24 (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Const. Amends.); see also *id.* at 16.

80. *Id.* at 26–27 (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Const. Amends.); see also *id.* at 13–15.

81. *Id.* at 30, 34–37 (statement of Sen. Mike A. S. Monroney).

82. *Id.* at 53 (statement of Sen. Jacob J. Javits); see also *id.* at 11.

empower some other body to act with the vice president in declaring a president disabled,<sup>83</sup> thereby adopting a feature of the principles outlined by an ABA conference.<sup>84</sup> Senators Frank Moss<sup>85</sup> and Edward Long<sup>86</sup> expressed support for S.J. Res. 139, while Senator Roman Hruska favored Senate Joint Resolution 84 (“S.J. Res. 84”), which resembled Keating’s S.J. Res. 35 except it required Congress to respect separation of powers principles in legislating on disability procedures.<sup>87</sup> Senator Frank Church proposed that a vice presidential vacancy be filled by the president who, with the Senate’s advice and consent, would nominate between two and five prospective vice presidents, from which the House would elect one.<sup>88</sup> Professor James MacGregor Burns was among those who favored establishing a presidential inability commission that, in his proposal, would consist of an interbranch commission, which would consult medical experts in deciding if the president had a temporary or permanent disability.<sup>89</sup> Burns thought the vice president was “the worst person to decide Presidential inability”<sup>90</sup> and opposed giving Congress a role.<sup>91</sup>

From an early point, Bayh signaled his interest in reaching an agreement. For instance, noting the ABA’s ability to reach consensus in its January deliberations, he asked Javits on January 23, 1964, for suggestions on how Congress might do the same.<sup>92</sup> Javits suggested that Bayh conduct informal meetings with senators to that end.<sup>93</sup>

Bayh understood that success in the legislative arena also depended on actions that occurred outside of Capitol Hill. After hearing from senators for two days in January, he adjourned his hearings for a month until after the ABA House of Delegates had considered the recommendation of the ABA’s blue-ribbon commission, whose principles largely tracked the format of S.J. Res. 139. On February 17, 1964, Bayh traveled to Chicago to speak to the gathering<sup>94</sup> and it unanimously endorsed the consensus principles,<sup>95</sup> which closely tracked S.J. Res. 139. Upon reconvening in late February, then ABA President Walter Craig and President-Elect Lewis Powell testified regarding

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83. *Id.* at 54 (statement of Sen. Jacob J. Javits).

84. *Id.* at 7.

85. *Id.* at 59 (statement of Sen. Frank E. Moss).

86. *Id.* at 68 (statement of Sen. Edward V. Long, Member, S. Comm. on the Judiciary).

87. *Id.* at 70–71, 74–75 (statement of Sen. Roman L. Hruska, Member, S. Comm. on the Judiciary); *see also id.* at 10–11.

88. *Id.* at 79–80 (statement of Sen. Frank Church).

89. *Id.* at 113, 115–16 (statement of James MacGregor Burns, Chairman, Political Science Department, Williams College).

90. *Id.* at 115 (statement of James MacGregor Burns, Chairman, Political Science Department, Williams College).

91. *Id.* at 120 (statement of James MacGregor Burns, Chairman, Political Science Department, Williams College).

92. *Id.* at 56 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

93. *Id.* at 56–57 (statement of Sen. Jacob J. Javits).

94. BAYH, *supra* note 25, at 62–63.

95. 1964 Senate Hearings, *supra* note 29, at 85–90 (statement of Walter Craig, President, American Bar Association).

the ABA consensus.<sup>96</sup> The ABA's support lent momentum to Bayh's proposal, notwithstanding the testimony of a witness for the New York Bar Association who supported S.J. Res. 35.<sup>97</sup> The following day, Eisenhower's first attorney general, Herbert Brownell,<sup>98</sup> and Harvard's iconic law professor, Paul A. Freund,<sup>99</sup> both supported the ABA approach that they had helped formulate, thereby drowning out Burns's advocacy for a disability commission. Bayh's committee also heard from a range of scholars—a young lawyer, John D. Feerick,<sup>100</sup> who had participated in the ABA blue-ribbon commission and was en route to becoming the nation's leading expert on the subject; Ruth Silva,<sup>101</sup> who generally favored S.J. Res. 139; and presidential scholars Richard Neustadt,<sup>102</sup> Clinton Rossiter,<sup>103</sup> and Sidney Hyman,<sup>104</sup> who tended to favor less formal arrangements.

Bayh also understood the importance of educating the public and mobilizing popular support. In addition to courting backing from Johnson and the ABA and communicating his views through national media,<sup>105</sup> he focused attention on two other nationally prominent figures—Eisenhower and Nixon. Eisenhower provided a letter generally supportive of Bayh's position with one exception. It provided that, in the highly unlikely event of a difference of opinion between the president and vice president regarding a once disabled president's fitness to resume the powers and duties of the presidency, an interbranch disability commission with medical expertise should decide the matter.<sup>106</sup> Nixon's high profile and lengthy testimony concluded Bayh's hearings.<sup>107</sup> Although Nixon had authored an article proposing that the Electoral College be reconvened to consider a presidential nomination of a new vice president to fill a vacancy in the second office,<sup>108</sup> during his testimony he expressed support either for that idea or for Bayh's proposal,<sup>109</sup> as well as the presidential inability provisions of S.J. Res. 139.<sup>110</sup>

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96. *See id.* at 84, 91–104 (statement of Lewis F. Powell Jr., President-Elect, American Bar Association).

97. *See id.* at 106–09 (statement of Martin Taylor, Chairman, Committee on Constitutional Law, New York Bar Association).

98. *Id.* at 134–42 (statement of Herbert Brownell, President, Association of the Bar of the City of New York).

99. *Id.* at 128–34 (statement of Paul A. Freund, Professor of Law, Harvard University).

100. *Id.* at 149–60 (statement of John D. Feerick).

101. *Id.* at 160–65 (statement of Ruth C. Silva, Professor, Pennsylvania State University).

102. *Id.* at 166–77 (statement of Richard Neustadt, Professor, Columbia University).

103. *Id.* at 214–31 (statement of Clinton Rossiter, Professor of American Institutions, Cornell University).

104. *Id.* at 179–87 (statement of Sidney Hyman).

105. BAYH, *supra* note 25, at 96–98.

106. 1964 Senate Hearings, *supra* note 29, at 232–33.

107. *See generally id.* at 234–50 (statement of Richard M. Nixon, Former Vice President of the United States).

108. *See generally* Richard M. Nixon, *We Need a Vice President Now*, SATURDAY EVENING POST, Jan. 1, 1964 (on file with the *Fordham Law Review*).

109. 1964 Senate Hearings, *supra* note 29, at 239–40, 245–46, 249–50 (statement of Richard M. Nixon, Former Vice President of the United States).

110. *Id.* at 241–43, 248 (statement of Richard M. Nixon, Former Vice President of the United States).

Nixon, like Bayh, emphasized the importance of achieving a solution, not any particular remedy.<sup>111</sup>

The National Forum on Presidential Inability, which the ABA convened in Washington, D.C., on May 25, 1964,<sup>112</sup> provided another opportunity to educate the public on this pressing national problem. Bayh, along with Brownell and Edward L. Wright, the chair of the ABA House of Delegates, joined House Judiciary Committee Chairman Emanuel Celler on a panel.<sup>113</sup> Eisenhower gave the keynote address but prior to it, at Bayh's initiative, Brownell and Bayh successfully lobbied Eisenhower not to repeat the suggestion of an interbranch and medical commission to resolve an intraexecutive branch dispute.<sup>114</sup> Bayh was always prepared to seize an opportunity to advance the cause.

Bayh devoted time during the spring and summer months of 1964 to getting S.J. Res. 139 through his subcommittee and the Senate Committee on the Judiciary. He accepted proposals for minor change from Senator Ervin,<sup>115</sup> added fellow Democratic subcommittee member Tom Dodd as a cosponsor,<sup>116</sup> and worked closely with Senators Keating and Hiram Fong to agree to report S.J. Res. 139 to the full committee.<sup>117</sup> There, he successfully resisted an effort to report both S.J. Res. 139 and Keating's measure to the floor, arguing that doing so would repeat the unhappy patterns of the past in which the inability to reach agreement had precluded any action.<sup>118</sup> Bayh's passion prevailed and the committee reported S.J. Res. 139 to the floor with the understanding that members reserved the right to propose amendments.<sup>119</sup>

Bayh astutely recognized that his committee colleagues had acquiesced in part because they recognized that the House's inaction meant that any Senate proposal would die on the floor.<sup>120</sup> They thought they had given little in deferring to Bayh's argument. They underestimated Birch Bayh. His realization that Congress would not act did not diminish Bayh's belief that the Senate should forge ahead. Bayh continued to collect influential cosponsors, like Ervin and Javits,<sup>121</sup> and pressed Senate Majority Leader Mansfield to bring the measure to the floor.<sup>122</sup>

When Mansfield pointed out that the eighty-eighth Congress would not propose an amendment, Bayh nevertheless insisted that action that session in the Senate would allow the measure to move quickly in the upper chamber

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111. *Id.* at 234–35 (statement of Richard M. Nixon, Former Vice President of the United States).

112. BAYH, *supra* note 25, at 111.

113. *Id.* at 112–18.

114. *Id.* at 119–23.

115. *See, e.g., id.* at 102.

116. *Id.* at 105.

117. *Id.*

118. *See id.* at 131–32.

119. *Id.* at 132.

120. *Id.* at 133–34.

121. *Id.* at 135–36.

122. *Id.* at 138.

during the next Congress and focus attention on the House.<sup>123</sup> Accordingly, Mansfield scheduled debate on September 28, 1964, but with only a few hours of advance notice to Bayh.<sup>124</sup> Bayh had promised Keating and Hruska that they could offer amendments on the floor, but both were out of town on the day Mansfield scheduled the measure without notice. When Bayh called them about the situation, they waived Bayh's agreement and allowed him to proceed.<sup>125</sup> Much of the Senate's discussion that day focused on the importance of the vice presidency and the new method to fill a vice presidential vacancy.<sup>126</sup> That theme resonated during the presidential campaign when comparing the Democratic candidate, Senator Hubert Humphrey, who was one of the century's most effective legislators, and his opponent, Representative William Miller, who had been chosen largely due to his skill as a political combatant. Following the debate, the Senate passed the proposed constitutional measure by voice vote with few senators on the floor.<sup>127</sup>

The following day, Senator John Stennis objected to the procedure used to pass S.J. Res. 139.<sup>128</sup> Although Bayh initially feared Stennis was hostile to the measure and sought to undermine Bayh's work, Stennis was acting based on the principled belief that the Senate should not propose a constitutional amendment based on a voice vote.<sup>129</sup> Bayh quickly appreciated the advantages of a roll call vote.<sup>130</sup> After brief debate, the Senate voted again, 65 to 0, in favor of Bayh's measure.<sup>131</sup>

That overwhelming vote was a tribute to Bayh and the action had two critical legislative consequences. First, it placed more than two-thirds of the Senate on record in support of Bayh's basic approach. That development eased Bayh's burden in winning support for the measure the next session. Indeed, more than two-thirds of the Senate cosponsored S.J. Res. 1, the successor to S.J. Res. 139.<sup>132</sup> The 1964 vote also gave Bayh leverage in suggesting to the House that S.J. Res. 139 should form the basis for the proposed amendment.

It was uncertain whether the Senate and House would proceed in tandem. Celler had labored on the subject in the mid-1950s as chairman of the House Judiciary Committee while Bayh was a new member of the Indiana House of Representatives and—especially in such situations—senior House chairmen are not accustomed to deferring to novice senators. At a strategy meeting

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123. *Id.*

124. *Id.* at 138–39.

125. *Id.* at 140.

126. *See* 110 CONG. REC. 22,982–23,002 (1964).

127. *See id.* at 23,001–02; *see also* BAYH, *supra* note 25, at 156.

128. 110 CONG. REC. 23,019–20.

129. *Id.* at 23,019–20, 23,056–57 (statement of Sen. John Stennis); *see also* BAYH, *supra* note 25, at 157–58.

130. BAYH, *supra* note 25, at 157–58.

131. 110 CONG. REC. 23,061. In addition, some twenty additional absent senators also supported the measure. *Id.* at 23,060–61.

132. BAYH, *supra* note 25, at 365.

with ABA officials, it was decided that Brownell,<sup>133</sup> the former attorney general and luminary from New York who had testified before Celler's committee in 1957<sup>134</sup> and was a key part of the ABA consensus, would approach Celler and ask him to introduce as House of Representatives Joint Resolution 1 ("H.R.J. Res. 1") a measure identical to Bayh's Senate proposal.<sup>135</sup> Celler agreed and 1965 began with essentially identical proposals in the two chambers, based on Bayh's approach from the prior Congress.<sup>136</sup>

With a vice president elected, Bayh ramped up his efforts to secure White House support for his plan. He worked closely with White House aides, like Bill Moyers, Ramsey Clark, and McGeorge Bundy, and spoke with Johnson and Acting Attorney General Katzenbach in December 1964 and January 1965.<sup>137</sup> Bayh's White House feelers produced a favorable mention from Johnson in his 1965 State of the Union address<sup>138</sup> and a presidential message on the subject<sup>139</sup> consistent with Bayh's measure. Senate momentum enabled the Senate to proceed first, with short hearings on January 29, 1965,<sup>140</sup> a report to the Senate floor early in February,<sup>141</sup> and floor passage, 72 to 0, that month.<sup>142</sup>

This chronology of successes should not create the impression that the 1964 vote put the wind at Bayh's back, made the legislative sailing smooth, and made a successful outcome certain. It did not. Challenges remained along the way. Dirksen,<sup>143</sup> Hruska,<sup>144</sup> and some other Republicans preferred Keating's simpler approach, which authorized Congress to act in the future. Ervin, who was not feeling well, was in North Carolina when the Senate planned to consider the measure, but he drove to Washington, D.C., to help Bayh.<sup>145</sup> With help from Ervin and Republican Leverett Saltonstall, Bayh defeated the Dirksen substitute.<sup>146</sup> Dirksen,<sup>147</sup> Hruska, and other Republicans then supported S.J. Res. 1. The Senate also rejected Senator

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133. *Id.* at 162–63.

134. *Presidential Inability: Hearings Before the Spec. Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. 31 (1957) (statement of Herbert Brownell Jr., Att'y Gen. of the United States).

135. BAYH, *supra* note 25, at 162.

136. *Id.* at 162–63.

137. *Id.* at 163–67; Mulhollan Interview, *supra* note 63.

138. Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 1, 8 (Jan. 4, 1965) ("Even the best of government is subject to the worst of hazards. I will propose laws to insure the necessary continuity of leadership should the President become disabled or die.").

139. Special Message to the Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100 (Jan. 28, 1965).

140. *See Presidential Inability and Vacancies in the Office of the Vice President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. of the Judiciary*, 89th Cong. 1 (1965).

141. S. REP. NO. 89-66, at 13 (1965).

142. 111 CONG. REC. 3286 (1965).

143. Interview, *supra* note 34, at 789–90.

144. S. REP. NO. 89-66, at 22.

145. BAYH, *supra* note 25–39, at 245.

146. 111 CONG. REC. 3272.

147. Interview, *supra* note 34, at 789–90.

Strom Thurmond's proposal to empower the Electoral College, not Congress, to confirm a vice presidential nominee.<sup>148</sup> After various Democratic senators pushed to amend Bayh's measure to limit Congress's time to resolve an intraexecutive branch disability dispute, Bayh was on the verge of accepting their suggestion.<sup>149</sup> Ervin and Hruska successfully implored him to stand his ground.<sup>150</sup> They recognized that such a change was unnecessary because Bayh had the necessary votes, whereas the change would cost the proposal some support and would likely result in returning the measure to committee where it would probably die.<sup>151</sup> Bayh held his ground and his proposal passed 72 to 0.<sup>152</sup>

Bayh also needed to defend the measure before the House Judiciary Committee. He testified at length on February 9, 1965, responding to numerous questions from an engaged committee.<sup>153</sup>

The amended version of H.R.J. Res. 1 that the House passed on April 13, 1965,<sup>154</sup> differed in several material respects from the Senate measure. It gave the vice president and cabinet two, rather than seven, days to respond to a disabled president's declaration of his fitness<sup>155</sup> and provided that Congress would decide an intraexecutive branch dispute within ten days, rather than "immediately."<sup>156</sup> Bayh was chosen to head the Senate's delegation to the conference committee, which consisted of Senators Dirksen, Ervin, Hruska, and James Eastland.<sup>157</sup> Although the other variations lent themselves to simple compromises, resolving the ten-day decision versus immediate decision difference presented difficulties, especially for Southern and conservative senators who adamantly resisted any effort to impose time limits on the Senate's tradition of unlimited debate. Ultimately, the conference agreed to the compromises Bayh suggested.<sup>158</sup> The final issue—an agreement that the House and Senate would resolve a dispute between the president and vice president over the former's inability within twenty-one days—was most complicated. Several meetings and the intervention of ABA President Lewis Powell were required before the House, especially Representative William McCulloch, agreed to a period in excess of ten days.<sup>159</sup>

When the Senate considered the conference report, Senators Albert Gore and Eugene McCarthy questioned some language that was added to the

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148. 111 CONG. REC. 3274.

149. *Id.* at 3275–80; *see also* BAYH, *supra* note 25, at 265.

150. BAYH, *supra* note 25, at 265.

151. *Id.* at 265–69.

152. 111 CONG. REC. 3281, 3286.

153. *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 39–70, 77–95 (1965) (statement of Sen. Birch Bayh).

154. 111 CONG. REC. 7968–69.

155. BAYH, *supra* note 25, at 282–85.

156. FEERICK, *supra* note 7, at 100.

157. BAYH, *supra* note 25, at 280.

158. *See id.* at 292–95, 303–04; Feerick, *supra* note 66, at 1075, 1097–1100 (providing further details regarding the conference).

159. *See* BAYH, *supra* note 25, at 301–03.



amendment during the conference at the request of Senator Hruska.<sup>160</sup> They thought the language made it ambiguous whether Congress could create an “other body” under section 4 that would provide an alternative co-decision maker along with the vice president or would replace the cabinet when deciding if the president was able or unable to serve.<sup>161</sup> Bayh insisted that such “other body” would replace the cabinet as the group to act with the vice president.<sup>162</sup> The debate forced a postponement until July 6, 1965, when the Senate joined the House in approving the proposed amendment before sending it to the states.<sup>163</sup>

### III. THE ESSENCE OF BAYH’S LEADERSHIP

The preceding overview suggests that the Twenty-Fifth Amendment was not inevitable. Of course, Eisenhower’s inabilities and the nightmare in Dallas, superimposed on the Cold War and nuclear age, established a context that encouraged action.<sup>164</sup> Yet, the range of alternative approaches, the competing philosophies, the high barriers against constitutional amendments, and the inherent inertia of the system—especially regarding issues like presidential continuity—introduced daunting obstacles. Those formidable hurdles needed to be overcome, and they were by the skillful and determined political leadership of Birch Bayh. The nature of Bayh’s accomplishment becomes more apparent if we shift the focus from the chronology of events to the leadership qualities he brought to the table.

To begin with, Bayh demonstrated what might be called high legislative ethics. Whereas many legislators are content to give a speech, cast a vote, or introduce legislation without performing the heavy work to secure enactment, Bayh was different. He was not interested in making speeches or taking positions to curry favor. He wanted to help solve vexing problems that had lingered since the nation’s infancy and that posed more ominous risks in a world made smaller by technology. His steadfast focus was on achieving concrete legal reforms to better ensure presidential continuity. He wanted to provide a means to fill a vice presidential vacancy without having to wait for the next regularly scheduled election and to create procedures to transfer presidential powers and duties from a disabled president while allowing the president to resume those powers and duties upon recovery. Bayh wanted to address the problem. Bayh’s commitment to problem-solving was all the more admirable because the issue was complex, required an enormous time commitment, and offered no political payoff. Voters would not reward a legislator who devoted himself to presidential continuity, an issue of contingent significance that had a remote impact on any constituent’s or group’s well-being. That was not the way to curry favor or build a campaign war chest. Political expediency seemed to counsel focusing

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160. 111 CONG. REC. 15,381–87 (1965).

161. *See id.*

162. *Id.* at 15,382–84 (statement of Sen. Birch Bayh).

163. *Id.* at 15,596.

164. *See supra* notes 8–9 and accompanying text.

on bread-and-butter issues that translated more directly into people's lives. Yet, Bayh went to Washington to do good. He took an oath to support the Constitution and, to Bayh, those commitments compelled him to devote himself to improving America's system of presidential continuity.

In order to improve America's system of ensuring presidential continuity, Bayh needed to have a deep intellectual understanding of the specific problems of presidential succession and inability within the larger context of American government and politics. Bayh's constitutional vision led him to conclude that the presidency needed to be filled at all times with a functioning and legitimate chief executive. The vice presidency provided the best means of addressing presidential succession and presidential inability. A vice president would be most effective and legitimate as a successor if he were personally and politically compatible with the president but also had some democratic pedigree. Furthermore, a system of presidential inability needed to protect the nation from a disabled president, protect the president from having his power usurped, and encourage decision makers to act when appropriate. Bayh designed S.J. Res. 1 to accommodate that vision with all of its complexity and tensions.

Bayh mastered the issue of presidential succession and inability. He learned from the hearings, where he engaged with practitioners and scholars.<sup>165</sup> As he did, his understanding of the subject and mastery of the arguments increased. He could respond ably to hypotheticals and provide reasoned arguments based on history and his knowledge of political and constitutional institutions to satisfy colleagues. His understanding of the subject was evident and enhanced his credibility with other legislators and participants in the reform effort.

Although an intellectual understanding of the subject matter was necessary in leading an effort to close gaps regarding presidential continuity, it was not sufficient. Bayh also needed to understand the legal, political, and legislative contexts in which he was operating in order to succeed. He soon realized many of the reforms he pursued required a constitutional amendment. That was certainly true regarding the goal of establishing a means to fill the vice presidency between quadrennial elections and to transfer presidential powers and duties from a disabled president over his objection, and it was perhaps true regarding other aspects of the Twenty-Fifth Amendment as well. The need to amend the Constitution imposed multiple supermajority requirements: two-thirds in each house and three-fourths of the states.<sup>166</sup> Moreover, the unique quality of a constitutional amendment, and the difficulty of correcting a mistake, would make legislators hesitant to act.

Bayh understood that these obstacles required certain strategic and tactical responses. He needed to exploit and build upon the concern President Kennedy's assassination had created to find a solution quickly<sup>167</sup> rather than defer the heavy lifting until later, as S.J. Res. 35 would have done. Bayh

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165. See *supra* notes 94–111 and accompanying text.

166. See U.S. CONST. art. V.

167. Goldstein, *supra* note 24, at 1000–01.

insisted that the aftermath of Kennedy's assassination presented the time for action, not for more study.<sup>168</sup> The issues had been studied extensively. He argued that the status quo was unacceptable. The opportunity the moment provided needed to be seized. Even as other major events diverted attention—Congress's passage of the tax cut,<sup>169</sup> the epic Civil Rights Act of 1964,<sup>170</sup> Johnson's vice presidential selection, the presidential campaign, and a plane crash that almost took Bayh's life<sup>171</sup>—he kept the legislative pedal to the metal, preserving and developing public opinion on the topic, pushing S.J. Res. 139 through committee, obtaining time on the Senate's calendar to consider the measure, and securing passage of it twice, ultimately by a 65 to 0 vote.<sup>172</sup> Once the 1964 election produced a vice president elect and removed the obstacle to further action in the House, Bayh continued to press forward by pursuing a strategy most likely to win Celler's support. Bayh obtained Johnson's public backing, testified before the House to defend his measure, and secured rapid passage in the Senate.<sup>173</sup>

The multiple supermajority requirements meant that the effort needed to be bipartisan and Bayh made sure that it was. As he later said, "The Twenty-Fifth Amendment is a good example of getting the so-called loyal opposition involved."<sup>174</sup> The pedigree of Bayh's proposal increased the prospect of the bipartisan support needed to pass a constitutional amendment. It was, after all, a modified and expanded version of a proposal the Eisenhower administration had recommended in 1957 and 1958.<sup>175</sup> Eisenhower's influential attorney general, Brownell, was likely to be receptive to approaches that included those he had crafted, as was the even more influential President Eisenhower who had adopted them. Their support no doubt reassured many, especially on the Republican side of the aisle. Even when Senate Minority Leader Dirksen offered an alternative to Bayh's approach in February 1965, only eleven Republican senators followed their leader and a greater number voted for Bayh's approach.<sup>176</sup>

Bayh made visible use of Republican luminaries to attract attention to the effort. Nixon's testimony was among the highlights of the 1964 hearings and Brownell offered important support, as did Eisenhower. Bayh reached out to Dirksen and worked closely with Republican colleagues like Senators

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168. *1964 Senate Hearings*, *supra* note 29, at 37–39 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

169. Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19 (codified as amended in scattered sections of 26 U.S.C.).

170. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

171. *Senator Kennedy Hurt in Air Crash; Bayh Injured, Too: Both Are in Fair Condition in Massachusetts Hospital—Pilot of Plane Killed*, N.Y. TIMES (June 20, 1964), <https://www.nytimes.com/1964/06/20/archives/senator-kennedy-hurt-in-air-crash-bayh-injured-too-both-are-in-fair.html> [<https://perma.cc/4W2P-SJPY>].

172. *See supra* notes 127–31 and accompanying text.

173. *See supra* Part II.

174. Interview, *supra* note 34, at 785.

175. Goldstein, *supra* note 8, at 1149.

176. 111 CONG. REC. 3272 (1965).

Hruska, Fong, Javits, Saltonstall, and James Pearson who provided important vocal support for his effort at critical times.<sup>177</sup>

Bayh understood that the significance and difficulty of correcting constitutional amendments make legislators most risk averse and, accordingly, the product had to be familiar and include some flexibility. To provide these characteristics, Bayh largely incorporated ideas and approaches that were recognizable and comfortable rather than reinventing the wheel.<sup>178</sup> The means to fill a vice presidential vacancy allowed the president to nominate and the two bodies of Congress to confirm a new vice president, an approach that followed the political practice of presidential nominees designating their running mates who were subject to convention approval and election. The presidential inability procedures resembled those the Eisenhower administration had proposed in the late 1950s under the leadership of Brownell and William Rogers, as well as informal letter agreements between Eisenhower and Nixon, Kennedy and Johnson, and Johnson and McCormack.<sup>179</sup> Section 4 was a modified version of the Eisenhower 1958 proposal.<sup>180</sup> Bayh's intuitive understanding of how to maximize the appeal of his amendment was critical in fashioning a proposal that could attract support. Bayh recognized that tried and familiar practices were more likely to win acceptance than blank checks or sweeping innovations. There was no shame in borrowing such ideas. On the contrary, had Bayh proposed something entirely new, the Twenty-Fifth Amendment would not have been adopted and we would probably still be trying to solve some of the problems the amendment successfully addressed. By reconfiguring familiar ideas, Bayh exploited the comfort many had with them.

Although Bayh's constitutional, legislative, and political understanding and vision were important, they would not have produced the Twenty-Fifth Amendment without his political skill in managing the legislative process. He did not simply understand legislative politics. He knew how to practice them. He was simply a good politician. He demonstrated his know-how in so many ways. He acted to neutralize powerful potential adversaries. He paid McCormack and Hayden early calls to assure them that his proposal was not targeted at them.<sup>181</sup> He went out of his way to praise them in order to negate any public comments that implied they were unfit.<sup>182</sup> He also dropped from his initial proposal a provision that would have run the line of succession through the cabinet, not congressional leaders, to mitigate the concern that the proposal was a negative reflection on those experienced legislators.

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177. *See supra* notes 145–51 and accompanying text.

178. Goldstein, *supra* note 24, at 1001–03.

179. *See supra* Part I.

180. *See* U.S. CONST. amend XXV, § 4.

181. *See supra* notes 58–60 and accompanying text.

182. *See supra* notes 73–74 and accompanying text.

He adopted an inclusive approach. He invited colleagues to contribute to perfecting the proposed amendment and many—Ervin, Hruska, Javits, Dirksen, and others—did. Bayh credited their contributions. Ervin, for instance, suggested that instead of using “cabinet” in his proposal, a word the Constitution did not contain, Bayh should use the constitutional formulation “heads of the executive departments.”<sup>183</sup> Bayh gladly adopted the suggestion, recognizing that the change gave Ervin a feeling of ownership over the amendment.<sup>184</sup> Bayh was disposed to focusing on areas where he and his colleagues agreed rather than emphasizing their divergences, and he used that skill to narrow differences and promote a collegial environment and a sense of a shared undertaking. When Ervin proposed an amendment on January 22, 1964, that would have allowed a joint session of Congress to elect a new vice president at hearings, Bayh emphasized that “we have a great deal of common agreement.”<sup>185</sup> Both thought current arrangements were inadequate and wanted to give the people’s representatives a role, so Bayh asked for “the benefit of [Ervin’s] wisdom” regarding any objections to allowing the president to suggest a nominee for Congress to consider.<sup>186</sup> Ervin averred that he did not have “too serious [an] objection to that” approach.<sup>187</sup> A few months later, Ervin agreed to cosponsor S.J. Res. 139<sup>188</sup> and became a valuable ally. The next day Bayh commented on the “substantial agreement”<sup>189</sup> between his approach and Javits’s, which called for Congress to elect a vice president with the advice and consent of the president. Bayh promised to consider Javits’s approach and observed that “we both share a deep concern that we get action,”<sup>190</sup> a subtle observation on the importance of adopting a solution, considering that many possibilities would have improved on the status quo. Javits approached Bayh about becoming a cosponsor of S.J. Res. 139 the same week Ervin did.<sup>191</sup>

Bayh understood that success depended on compromise.<sup>192</sup> He shared the impulse that Feerick articulated regarding the importance of emphasizing areas of agreement and building from those rather than insisting on a particular formulation.<sup>193</sup> Bayh’s original proposal did not include a provision that allowed Congress to replace the cabinet, as a section 4 decision maker to act with the vice president, with “such other body” as it created.<sup>194</sup>

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183. BAYH, *supra* note 25, at 102.

184. *Id.*

185. 1964 Senate Hearings, *supra* note 29, at 20–21 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

186. *Id.* (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

187. *Id.* at 21 (statement of Sen. Sam J. Ervin Jr., Member, S. Comm. on the Judiciary).

188. BAYH, *supra* note 25, at 136.

189. 1964 Senate Hearings, *supra* note 29, at 55 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

190. *Id.* at 56 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

191. BAYH, *supra* note 25, at 135–36.

192. Goldstein, *supra* note 24, at 1003–06.

193. 1964 Senate Hearings, *supra* note 29, at 150 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

194. U.S. CONST. amend XXV, § 4.

That concept came from the ABA consensus principles<sup>195</sup> and probably made the amendment more attractive to those wary of a system that lodged all responsibility for the decision in the executive branch. Bayh was good at identifying the basis of accommodation between the Senate and House measures. He dropped the effort to replace legislative succession with a cabinet line because he recognized that such an effort would offend some legislators, especially in the House, while offering little return. Although most of the issues between the House and the Senate were easily resolved, the biggest sticking point was in the difference between the House bill, which required that a dispute between the president, vice president, and cabinet over the president's ability to return to office be resolved within ten days, and the Senate measure, which did not impose a time limit but provided that Congress would "immediately proceed to decide the issue."<sup>196</sup> Bayh recognized the sensitivities of the issue, especially for Southern and conservative senators who resisted the idea of limits on debate. Bayh's fellow conferees from the Senate—Democrats Eastland and Ervin and Republicans Dirksen and Hruska—were not receptive to a firm timetable. Bayh expressed sympathy with their position, which no doubt enhanced his credibility with them, but he suggested a twenty-one-day time limit to decide whether the president was disabled or not.<sup>197</sup>

The twenty-one-day compromise was more than twice as long as the ten days the House had proposed. It thus represented a significant accommodation of the Senate, especially since limiting the time to decide who could discharge presidential powers and duties could be distinguished from other matters. It was palatable to the House because it could always return the president to power more quickly by deciding the issue in substantially less time. Once either chamber concluded that the president was not disabled, he resumed the powers and duties of his office.

Bayh's personal traits also enhanced the leadership that was crucial to the success of the Twenty-Fifth Amendment. Bayh was humble enough to understand that he needed help from more experienced and esteemed senators as well as public servants. He developed relationships with older, more seasoned leaders and he deployed them to advance the cause. Bayh cultivated Johnson, Dirksen, Ervin, and others.<sup>198</sup> He did not hesitate to ask Brownell to caution Eisenhower regarding the perils of a medical commission<sup>199</sup> or to approach Celler to persuade him to adopt the Senate proposal as H.R.J. Res. 1.<sup>200</sup> He enlisted Powell to approach Celler when negotiations between the House and Senate conferees reached an impasse.<sup>201</sup> Bayh did much of the heavy lifting and did not shy away from defending the proposed amendment. Yet he recognized that sometimes more senior, well-

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195. Interview, *supra* note 34, at 791–92.

196. FEERICK, *supra* note 7, at 304.

197. BAYH, *supra* note 25, at 293.

198. *See supra* Part II.

199. *See supra* notes 113–114 and accompanying text.

200. *See supra* notes 133–136 and accompanying text.

201. *See supra* note 159 and accompanying text.

respected colleagues and voices would carry influence, and he did not resist sharing the spotlight. He wanted to achieve results, not command attention.

Bayh's likability also helped make him the effective leader that he was. Bayh recalled learning at an early age "to treat other people the way you'd like to be treated yourself"<sup>202</sup> and he viewed that principle as a basic precept of legislative life.<sup>203</sup> Bayh was liked by his colleagues and other politicians. Because they liked him, they were willing to help on an endeavor that was important to him and constructive for the country. Instead of closing the Senate Subcommittee on Constitutional Amendments as he had intended, Senator Eastland responded favorably to Bayh's request that he chair the body.<sup>204</sup> After Senator Stennis rebelled at the idea of the Senate proposing a constitutional amendment by voice vote, he worked with Bayh to put most of their colleagues on record supporting Bayh's proposal.<sup>205</sup> When the Senate was about to debate Bayh's proposal in February 1965, Ervin, though not feeling well, abandoned a planned rest on short notice to drive back to Washington, D.C., from North Carolina to assist Bayh.<sup>206</sup> When Dirksen and Hruska failed to advance their preferred approaches, they rallied behind Bayh's. When some Senate colleagues criticized aspects of Bayh's proposal, Senate heavyweights like Ervin, Dirksen, Hart, Javits, and John Sherman Cooper rallied to his aid.<sup>207</sup> Bayh's colleagues wanted him to succeed. Bayh's likeability was certainly not the only reason his colleagues followed his lead on the Twenty-Fifth Amendment, but it certainly helped.

Bayh was persistent. He began to study presidential continuity shortly after Kennedy's assassination on November 22, 1963. His laser focus on the subject continued until the Twenty-Fifth Amendment was ratified on February 10, 1967. Even an airplane crash in July 1964, which almost took his life, did not deter Bayh from his legislative role. Even as new obstacles appeared, Bayh maintained his commitment to seeing the job to its finish.

In fact, the accomplishment of the Twenty-Fifth Amendment did not end his involvement with the issue. In the mid-1970s, he led the Senate through the first application of section 2 to fill the vice presidential vacancies when Spiro Agnew resigned and when Gerald R. Ford became president.<sup>208</sup> He held hearings in 1975 when colleagues raised proposals ranging from using section 2 to choose all vice presidents to replacing it with a system of special elections.<sup>209</sup> After he left the Senate, he cochaired, along with Brownell, the

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202. Interview, *supra* note 34, at 785.

203. *Id.*

204. See BAYH, *supra* note 25, at 28–29.

205. 110 CONG. REC. 23,056–61 (1964).

206. See *supra* note 145 and accompanying text.

207. See *supra* notes 150–52 and accompanying text; see also 111 CONG. REC. 15,383–86, 15,584, 15,588–92 (1965).

208. See generally FEERICK, *supra* note 7, at 135–189.

209. See *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Const. Amends. of the S. Comm on the Judiciary*, 94th Cong. 1 (1975).

National Commission on Presidential Disability and the Twenty-Fifth Amendment, sponsored by the University of Virginia's Miller Center.<sup>210</sup>

In the mid-1990s, I served with Bayh on the Working Group on Disability in U.S. Presidents, established at Wake Forest University by the distinguished Woodrow Wilson scholar, Professor Arthur Link, and a number of medical professionals who were interested in the issue of presidential health and initially critical of—indeed hostile to—the amendment. Bayh listened patiently to their objections without becoming defensive. He responded in a friendly and thoughtful manner. During the course of several meetings, Bayh patiently explained the process by which the amendment had been adopted, the complicated concerns it had sought to balance, and the reasons for the choices made. I watched as Bayh's explanations converted many of these thoughtful and concerned people from critics of the amendment to champions of it.<sup>211</sup> In 2010, Bayh participated in a *Fordham Law Review* symposium on presidential continuity.<sup>212</sup> As a senator and public citizen, Bayh maintained his commitment to exploring ways to better ensure presidential continuity and educating others about the problems.

To be sure, Bayh was not solely responsible for the adoption of the Twenty-Fifth Amendment, nor did he handle it without mistakes. Of course, perfection is never the test for great leadership, and human beings who assume difficult leadership roles (and even those who do not) inevitably make mistakes. Bayh's mistakes were few and far between, but he learned from them, corrected them, and moved ahead, as great leaders do.

It is remarkable that a senator who was as young and junior as Bayh was in the mid-1960s was the amendment's architect and builder, the person most responsible for the positive constitutional change the amendment produced. After all, Bayh could not lead based on the powers inherent in his position in the Senate, or from his professional reputation in the chamber, or stature and credibility from prior battles. His leadership tools at this beginning stage of his time in the Senate were simply his knowledge, judgment, skills, and personal traits. Nonetheless, Bayh's gifts enabled him, in his first years in Congress, to successfully lead an effort to amend the Constitution to address problems that dated from the early days of the republic.

The Twenty-Fifth Amendment was the first significant accomplishment of Birch Bayh's three terms in the U.S. Senate. It was an important part, although only a part, of the considerable substantive legacy of his senatorial career. His work on the amendment also left a compelling model of exemplary political leadership. As John Feerick observed:

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210. See generally MILLER CTR. COMM'N NO. 4 ET AL., REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT (1988), [https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth\\_amendment\\_reports](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_reports) [<https://perma.cc/GP83-A933>].

211. See also Feerick, *supra* note 66, at 1109–10, 1110 n.177.

212. See Reflection, Birch Bayh, *Remarks from Senator Birch Bayh*, 79 *FORDHAM L. REV.* 1091 (2010); see also Interview, *supra* note 34, at 781.



The one thing that was present at the time—there was a young Senator from Indiana by the name of Birch Bayh, who was chairman of a very important subcommittee and who had a very strong interest in the Constitution and issues such as succession and direct popular election. I'm not sure, without that kind of force of one person that galvanized an entire body, some of these reforms would ever have happened.<sup>213</sup>

Birch Bayh's gifted leadership made the Twenty-Fifth Amendment possible and provides an enduring example of political and legislative leadership of the highest order.

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213. Interview, *supra* note 34, at 814.