2-9-1965

Presidential Inability: Hearings Before the Committee on the Judiciary, House of Representatives, 89th Congress

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PRESIDENTIAL INABILITY

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
EIGHTY-NINTH CONGRESS
FIRST SESSION

ON
H.R. 836; H.R. 3792; H.J. Res. 1, H.J. Res. 3, H.J. Res. 29,
Res. 329.

MISCELLANEOUS PROPOSALS RELATING TO PRESIDENTIAL
INABILITY

FEBRUARY 9, 10, 13, AND 17, 1965

Serial No. 1

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1965
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The committee met at 10 a.m., pursuant to call, in room 346, Cannon Building, Hon. Emanuel Celler (chairman) presiding.

Present: Representatives Celler, Rodino, Rogers, Donohue, Brooks, Kastenmeier, Corman, McCulloch, Cramer, Lindsay, Mathias, and Hutchinson.

Also present: William II. Copenhaver, associate counsel; William R. Foley, general counsel.

The CHAIRMAN. The meeting will come to order.

The Chair will read an opening statement, followed by a statement to be read by our esteemed Representative from Ohio, Mr. McCulloch.

(Opening statement, Chairman Emanuel Celler:)

Today, the full committee of the House Committee on the Judiciary initiates hearings on 32 proposals relating to the problem of presidential inability.

We are confronted with one of the most difficult problems that has ever challenged a Congress. It is a problem which has existed since the adoption of the Constitution and on more than one occasion it has been a stark reality.

There is no doubt that this problem has many difficult facets—legal, political, and constitutional. A mere review of the congressional attempts to find a solution is adequate proof of the complexities and difficulties involved. Moreover, the history of the Presidency and the Vice-Presidency indicates the necessity for meeting this problem head-on. Eight of our Presidents have died in office and on 16 different occasions the office of Vice President has been vacant. We are very fortunate that at no time have both offices been vacant simultaneously. It is interesting to note also that public interest in a solution to the problem of presidential inability reaches its peak when the situation arises, but subsides once the emergency has passed. The recent tragic death of President Kennedy has served to arouse public interest in the problem. We cannot permit this interest to languish into apathy again.

I, for one, have had a deep and probing interest in solving the problem which arises from the vague language of article II, section 1, clause 6 of the Constitution relating to presidential inability. In 1955, as chairman of this committee, I ordered a staff study of this problem and I appointed a special subcommittee of the ranking members to further the study. This study sought out the views of a select group of leading constitutional law professors and leading political scientists by way of a questionnaire. These answers and an analysis of them
was published by this committee in 1957. While that study and the subsequent hearings did not result in a definite legislative proposal, I am convinced that it laid a sound groundwork for the future congressional activities which have taken place in this field.

As a result also of the activities of the press and public and professional groups, the public has been educated to the seriousness of this question.

There can be no doubt in anybody's mind that this Nation cannot permit the Office of the President to be vacant even for a moment. Our position of world leadership demands that we avoid the terrible crisis which would result if a vacancy existed in the Office of the President for even a short time. The President stands for the sovereignty and the unity of the American people. He leads the national administration; he is the Commander-in-Chief of all the Armed Forces, and in this nuclear age his finger rests upon the trigger. He is the sculptor and the administrator of our foreign policy. One would have to be blind not to see and acknowledge the dangers and the risks we are faced with at this very moment lacking a constitutional procedure for the smooth transition of a successor to the office or to the powers and duties of the President. Fate has been most kind to Americans but we should not continue to tempt it.

I am mindful, of course, that this problem is a difficult one. During the course of the hearings held before this committee in 1956, a leading authority from the office of the President testified as follows:

Every constitutional system must pay some price in weakness for the elements of strength it has. Not everything is soluble. Not everything can be controlled by law. Some things, as a matter of course, have to be lived with in the full knowledge that they embrace built-in risks of the gravest sort. Some things which are in need of solution, must be entrusted to the discretion of duly elected officials—whose constitutional morality must be taken on faith. For though it is true enough on doctrinal grounds, that our aim is to have a government of laws and not of men, experience supports Edmund Burke's observation, that "the laws reach but a very little. Constitute the government however you will, infinitely the greater part of it must depend on the uprightness and wisdom of the chief ministers of state."

This committee, with praiseworthy objectivity, is now at grips with a potent weakness in our constitutional system; namely, the uncertainty about the way a Vice President can succeed to the place of a disabled President without laying himself open to the charge of usurpation. Before anything else is said on this head, one must first decide which of two alternatives contain the greater or lesser risk to constitutional government.

The more lack of the perfect solution to this problem should not be a deterrent to action by this committee. I sincerely hope that the action will be expeditious and I am sure that the House Committee on the Judiciary will meet its responsibility.

The CHAIRMAN. I recognize the gentleman from Ohio, Mr. William McCulloch.

STATEMENT OF CONGRESSMAN WILLIAM M. McCULLOCH

Mr. McCulloch. Mr. Chairman, I had intended to make, at this point, a lengthy statement on the matter before us, but in view of the urgency of the new Attorney General being elsewhere today and the urgency of Senator Bach being elsewhere, I shall read only one page of the statement and submit the rest for the record.
Mr. Chairman, in commencing these hearings on "Presidential Inability and Succession," I am of the opinion that the Judiciary Committee is considering one of the most important and challenging issues of our time. With our country's global responsibilities, with existing world turmoil and upheaval, and with pressing domestic problems, the United States must at all times have the benefit of capable, dynamic, and certain leadership.

There was a day, perhaps in the history of the United States when Presidential inability or the existence of a vacancy in the office of Vice President was not so alarming. President Garfield in 1881 lay wounded 80 days; President Wilson was, in part, incapacitated for a substantial part of his second term of office.

In the time of the space age, however, that day has gone forever.

The Constitution of the United States provides in detail the procedure for removing a President from office, but, aside from indicating that Congress shall provide for the succession to the Presidency, there is no specification as to how the disability of a President shall be determined.

There is, therefore, a pressing necessity for Congress to act upon this matter with all deliberate speed. In urging action, however, I wish to offer a word of caution. We are about to propose an amendment to the Constitution of the United States. Contrary to other nations, and many States, such undertaking has never been and should not be done without careful deliberation. Frankly, while recognizing the need for prompt action, I am somewhat disturbed by the speed with which an amendment is being proposed. Undue haste could lead to oversight, imperfection, and regret.

As an aside, Mr. Chairman, even the administration proposal which had lengthy hearings in the Senate last year was amended by the full Judiciary Committee of the Senate last week.

I am well aware of the wide support given to the administration's proposal introduced in the House by the distinguished chairman of the Judiciary Committee and, in the Senate, by Mr. Bayh. But, in spite of the proposal I have introduced and in spite of the wide support given the administration's proposed amendment, I hope that the Judiciary Committee will give full consideration to alternative proposals and to efforts to perfect as good an amendment as possible.

Mr. Chairman, in the interest of saving time, I offer the rest of my statement for the record.

The Chairman. It will be received in the record.

(Further statement of Congressman William M. McCulloch.)

The proposed amendment which I introduced provides that the President may, in his own behalf, issue a declaration announcing his inability. If he should fail to make such declaration, or in the case where he is too ill to do so, the Vice President may issue such a declaration if he has the concurrence of a majority of the Cabinet, or some other body provided by law of Congress. In such a case, the Vice President would become Acting President for the period of the inability.

My proposed amendment also provides that after the President has, through whatever means, been found to suffer an inability, the President may resume the powers and duties of his office by issuing a declaration that his inability has terminated.
If it is believed, however, that the President's inability continues, the amendment provides that the Vice President, with the concurrence of a majority of the Cabinet, or such other body as designated by Congress, shall within 2 days declare in writing that such inability continues.

Up to this point, my proposed amendment is identical to the administration's proposal. At this point, however, I have made a major change.

Whereas, the administration's proposal only provides that Congress shall immediately act upon the Vice President's declaration, I propose that it must act within 10 days of the President's declaration of termination of inability, which would be at least 8 days after the Vice President's declaration of the President's continuing inability.

In both proposals, the President shall be refused the right to resume office only if the Congress, by a two-thirds vote, determines that the President's inability continues. I am of the opinion, however, that a definite time limit should be placed upon the right of Congress to determine the issue.

For, right or wrong, we are providing a means for taking away the President's office. The burden should thereby be placed upon the Vice President and, indirectly, the Congress to have the issue decided without unnecessary delay. I am not wedded to a particular time period, but I am of the opinion that a definite time period should be established.

In our history, we have had instances where a President was faced with a hostile Congress. Such hostility should not be permitted to indefinitely keep a President from his rightful office. In our history, we have also had instances where the President and the Vice President were not on friendly terms. If such a case were to exist again, we could permit an occasion to exist where a Vice President could prevent the President's resumption of office by failing to reconvene an adjourned Congress.

Under my proposal, Congress would have to face the issue within a specified period of time. If it were adjourned, the Vice President must recall it. If procedural delays or filibusters were attempted in the House or Senate, the Vice President would need to generate two-thirds support in Congress to break the logjam which, by the way, is no greater support than the two-thirds vote he would have to obtain to uphold his declaration of the President's continuing disability. If these hurdles were not overcome, the President would automatically resume his office, which is how it should be. I might also point out that my proposal will permit Congress to avoid taking sides when in doubt about the President's or the Vice President's declaration. By refusing to take action within the prescribed time, the President would thereby receive the benefit of the doubt and automatically resume office.

Turning to the other basic problem of maintaining effective Executive leadership, my proposed amendment and that proposed by the administration provides that, when a vacancy occurs in the Office of the Vice President, the President shall appoint a Vice President who shall be confirmed by Congress.

Today, far more than in earlier times, the Vice President has an active part in leadership of the Nation. He participates in Cabinet meetings. He has been designated a statutory member of the Na-
tional Security Council. He is Chairman of the President's Committee on Equal Employment Opportunity. He has been designated as the coordinator of civil rights enforcement in the executive branch of Government. He is Chairman of the National Aeronautics and Space Council. He is frequently designated as the President's representative in foreign and domestic matters. He is assigned to important troubleshooting tasks. And, perhaps most important of all, he is but one heartbeat away from becoming President. The importance of the office of the Vice President means, then, that the country must always have a Vice President who is well informed and well schooled in the important issues that face the Nation.

This completes the summary of the provisions in my proposed amendment and its comparison to the administration's proposal. By providing for the case of Presidential inability and succession, we will undoubtedly be correcting the most important shortcomings in the fundamental law of the land.

Yet, without unduly prolonging my statement or exhausting the committee's patience, I would like to list a number of questions and issues which I believe the committee should consider if it is to fully explore this subject matter.

First, a number of questions arise as to the method of approach and completeness of the administration's proposal.

1. Would it be more desirable to enact an amendment giving Congress the general authority to pass legislation on this subject matter—thereby not locking in a single approach?

2. Should the President be given the authority to nominate a new Vice President?

3. Should the Vice President be given the right (or the burden) to declare the President's initial or continuing inability?

4. Should the President be given the right to select the body to pass upon his inability?

5. Under the doctrine of separation of powers, should Congress be given the right to prevent the President's resumption of office?

Secondly, a number of situations may arise which will not be covered by the administration's proposed amendment:

1. The simultaneous disability of the President and Vice President.

2. The disability of the President when there is no Vice President.

3. The death of the President-elect, or both the President-elect and Vice-President-elect, during the period between election day and the meeting of the electoral college; between the meeting of the electoral college and Congress counting of the electoral votes; and between the counting of the electoral votes and inauguration.

I recognize that all of these issues and questions cannot or, at least, should not be settled through the adoption of a single constitutional amendment.

As a matter of fact, I believe some of them can be better handled through an amendment relating to a change in the electoral college system.
PRESIDENTIAL INABILITY

I do believe, however, that detailed and scholarly consideration must be given to as many of these issues and questions as possible, during these hearings, so that the Judiciary Committee may send to the House the best considered proposal to amend the Constitution that our capabilities permit.

The CHAIRMAN. The first speaker this morning is the distinguished Senator, Hon. Birch E. Bayh, of Indiana, a dedicated legislator who has labored long to get a provision in the Constitution concerning Presidential inability, to form an amendment and Senator, we give you a warm welcome here this morning. We are glad to hear from you.

First, Senator, I would like to have the record show the various proposals we have—some 38 bills, and also the message of the President.

(Message from the President of the United States):

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES Transmitting a Draft of Proposed Legislation Entitled, "A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to the Election of the President and Vice President"

To the Congress of the United States:

In 1787, Benjamin Franklin remarked near the conclusion of the Constitutional Convention at Philadelphia, "It astonishes me, Sir, to find this system approaching so near to perfection as it does."

One hundred and seventy-eight years later the relevance of that Constitution of 1787 to our society of 1965 is remarkable. Yet it is truly astonishing that, over this span, we have neither perfected the provisions for orderly continuity in the executive direction of our system nor, as yet, paid the price our continuing inaction so clearly invites and so recklessly risks.

I refer, of course, to three conspicuous and long-recognized defects in the Constitution relating to the office of the Presidency:

1. The lack of a constitutional provision assuring the orderly discharge of the powers and duties of the President—Commander in Chief—in the event of the disability or incapacity of the incumbent.

2. The lack of a constitutional provision assuring continuity in the office of the Vice President, an office which itself is provided within our system for the primary purpose of assuring continuity.

3. The lack of a constitutional provision assuring that the votes of electors in the electoral college shall without question reflect the expressed will of the people in the actual election of their President and Vice President.

Over the years, as I have noted, we have escaped the mischief these obvious omissions invite and permit. Our escape has been more the result of providence than of any prudence on our part. For it is not necessary to conjure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.

On at least two occasions in our history, and perhaps others, American Presidents—James Garfield and Woodrow Wilson—have for prolonged periods been rendered incapable of discharging their Presidential duties. On 16 occasions in our 36 administrations, the office of Vice President has been vacant—and over the two perilous decades since the end of the Second World War, that vital office has been vacant the equivalent of 1 year out of 4. Finally, over recent years, complex but concerted campaigns have been openly undertaken—fortunately without success, as yet—to subvert the electoral college so that it would register not the will of the people of individual States but, rather, the wishes of the electors themselves.

The potential of paralysis implicit in these conditions constitutes an indefensible folly for our responsible society in these times. Common sense impels, duty requires us to act—and to act now, without further delay.
Action is in the tradition of our forebears.—Since adoption of the "Bill of Rights"—the first 10 amendments to our Constitution—9 of the 14 subsequent amendments have related directly either to the offices of the Presidency and Vice-Presidency or to assuring the responsibilities of our voting processes to the will of the people. As long ago as 1804 and as recently as 1964, Americans have amended their Constitution in striving for its greater perfection in these most sensitive and critical areas.

I believe it is the strong and overriding will of the people today that we should act now to eliminate these unhappy possibilities inherent in our system as it now exists. Likewise, I believe it is the consensus of an overwhelming majority of the Congress—without thought of partisanship—that effective action be taken promptly. I am, accordingly, addressing this communication to both Houses to ask that this prevailing will be translated into action which would permit the people, through the process of constitutional amendment, to overcome these omissions so clearly evident in our system.

I. PRESIDENTIAL INABILITY

Our Constitution clearly prescribes the order of procedure for assuring continuity in the Office of the Presidency in the event of the death of the incumbent. These provisions have met their tragic tests successfully. Our system, unlike many others, has never experienced the catastrophe of disputed succession or the chaos of uncertain command.

Our stability is, nonetheless, more superficial than sure. While we are prepared for the possibility of a President's death, we are all but defenseless against the probability of a President's incapacity by injury, illness, senility, or other affliction. A nation bearing the responsibilities we are privileged to bear for our own security—and the security of the free world—cannot justify the appalling gamble of entrusting its security to the immobilized hands of an incapacitated Chief in Chief unable to command.

On September 29, 1964, the Senate passed Senate Joint Resolution 190, proposing a constitutional amendment to deal with this perplexing question of Presidential disability—as well as the question, which I shall discuss below, of filling vacancies in the office of Vice President. The same measure has been introduced in this Congress as Senate Joint Resolution 1 and House Joint Resolution 1.

The provisions of these measures have been carefully considered and are the product of many of our finest constitutional and legal minds. Believing, as I do, that Senate Joint Resolution 1 and House Joint Resolution 1 would responsibly meet the pressing need I have outlined, I urge the Congress to approve them forthwith for submission to ratification by the States.

II. VACANCY IN THE OFFICE OF THE VICE PRESIDENT

Indelible personal experience has impressed upon me the indisputable logic and imperative necessity of assuring that the Second Office of our system shall be the First Office, be at all times occupied by an incumbent who is able and who is ready to assume the powers and duties of the Chief Executive and Commander in Chief.

In our history, to this point, the office of the Presidency has never devolved below the first clearly prescribed step of constitutional succession. In moments of need, there has always been a Vice President, yet Vice Presidents are no less mortal than President. Seven men have died in the office and one has resigned—in addition to the eight who left the office vacant to succeed to the Presidency.

We recognized long ago the necessity of assuring automatic succession in the absence of a Vice President. Various statutes have been enacted at various times prescribing orders of succession from among either the presiding officers of the Houses of Congress or the heads of executive departments who, together, comprise the traditional Cabinet of the President. In these times, such orders of succession are no substitute for an office of succession.

Since the last order of succession was prescribed by the Congress in 1947, the office of the Vice Presidency has undergone the most significant transformation and enlargement of duties in its history.

Presidents Truman, Eisenhower, and Kennedy have successively expanded the role of the Vice President, even as I expect to do in this administration.

Once only an appendage, the office of Vice President is an integral part of the chain of command and its occupancy on a full-time basis is imperative.
PRESIDENTIAL INABILITY

For this reason, I must strongly endorse the objective of both Senate Joint Resolution 1 and House Joint Resolution 1 in providing that whenever there is a vacancy in the office of Vice President, provision shall exist for that office to be filled with a person qualified to succeed to the Presidency.

III. REFORM OF THE ELECTORAL COLLEGE SYSTEM

We believe that the people should elect their President and Vice President. One of the earliest amendments to our Constitution was submitted and ratified in response to the unhappy experience of an electoral college statemate which jeopardized this principle. Today there lurks in the electoral college system the over-present possibility that electors may substitute their own will for the will of the people. I believe that possibility should be foreclosed.

Our present system of computing and awarding electoral votes by States is an essential counterpart of our Federal system and the provisions of our Constitution which recognize and maintain our Nation as a union of States. It supports the two-party system which has served our Nation well. I believe this system should be retained. But it is imperative that the electoral votes of a State be cast for those persons who receive the greatest number of votes for President and Vice President—and for no one else.

At the same time, I believe we should eliminate the omission in our present system which leaves the continuity of the offices of President and Vice President unprotected if the persons receiving a majority of the electoral votes for either or both of these offices should die after the election in November and before the inauguration of the President.

Electors are now legally free to choose the President without regard to the outcome of the election. I believe that if the President-elect dies under these circumstances, our laws should provide that the Vice-President-elect should become President when the new term begins. Conversely, if death should come to the Vice-President-elect during this interim, I believe the President-elect should, upon taking office, be required to follow the procedures otherwise prescribed for filling the unexpired term of the Vice President. If both should die or become unable to serve in this interim, I believe the Congress should be made responsible for providing the method of selecting officials for both positions. I am transmitting herewith a draft amendment to the Constitution to resolve these problems.

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


LYNDON B. JOHNSON.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to the election of the President and Vice President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein) That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

ARTICLE —

"Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during a term of four years, and together with the Vice President, chosen for the same term, be elected as provided in this Constitution. No person constitutionally ineligible for the office of President shall be eligible for that of Vice President of the United States.

"Each State shall be entitled to cast for President and Vice President a number of electoral votes equal to the whole number of Senators and Representatives to which such State may entitled in the Congress. Such electoral votes shall be cast, in the manner provided by section 2 of this article, upon the basis of an
PRESIDENTIAL INABILITY

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election in which the people of such State shall cast their votes for President and for Vice President. The voters in each State in any such election shall have the qualifications requisite for persons voting for members of the most numerous branch of the State legislature.

"The Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin.

"Sec. 2. In such election within any State, each voter by one ballot shall cast his vote for President and his vote for Vice President. The name of any person may be placed upon any ballot for President or for Vice President only with the consent of such person. The electoral votes which each State is entitled to cast for President and for Vice President shall be cast for the persons who in such election in that State receive the greatest number of votes for President and Vice President, respectively, except that if the person for whom any State casts its electoral votes for President is an inhabitant of that State, its electoral votes for Vice President shall be cast for the person not an inhabitant of that State who receives the greatest number of votes for Vice President.

"Within forty-five days after the election, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall prepare, sign, certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate, a list of all persons for whom votes were cast for President and a separate list of all persons for whom votes were cast for Vice President. Upon each such list there shall be entered the number of votes cast for each person whose name appears thereon, the total number of votes cast for all such persons, and the name of the person for whom the electoral votes of each State are cast.

"Sec. 3. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the electoral votes shall be counted. The person having the greatest number of votes for President shall be the President, and the person having the greatest number of votes for Vice President shall be the Vice President, if such person be a majority of the whole number of electoral votes. If no person has a majority of the whole number of electoral votes for President or Vice President, then from the persons not exceeding three, having the highest number of electoral votes for such office, the Senate and the House of Representatives sitting in joint session shall choose such officer immediately by ballot. The vote of each Member of each House shall be publicly announced and recorded. A quorum for this purpose shall consist of three-fourths of the whole number of the Senators and Representatives, and the person receiving the greatest number of votes shall be chosen.

"Sec. 4. If, at the time fixed for the counting of the electoral votes as provided in section 3, the presidential candidate who would have been entitled to receive a majority of the electoral votes for President has died, the vice presidential candidate who is entitled to receive the majority of the electoral votes for Vice President shall become President-elect.

"Sec. 5. The Congress may by law provide for the case of the death of any of the persons from whom the Senate and House of Representatives may choose a President or a Vice President whenever the right of choice shall have devolved upon them, and for the case of death of both the presidential and vice presidential candidates who, except for their death, would have been entitled to receive a majority of the electoral votes for President and for Vice President.

"Sec. 6. The first, second, third, and fourth paragraphs of section 1, article II, of the Constitution, the twelfth article of amendment to the Constitution, and section 5 of the twentieth article of amendment to the Constitution, are hereby repealed.

"Sec. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."
PRESIDENTIAL INABILITY


[H.J. Res. 1, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, each of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[H.J. Res. 3, 80th Cong., 1st sess.]

JOINT RESOLUTION To propose an amendment to the Constitution of the United States relating to the succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:


**PRESIDENTIAL INABILITY**

"**ARTICLE—**

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall promptly nominate a Vice President who shall take office upon qualification by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the discharge of the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President makes a public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the second day of making such announcement, or at such earlier time after such announcement as he or the Vice President may determine, except that if the Vice President with the written concurrence of the majority of the heads of the executive departments in office at the time of such announcement or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President's inability has not terminated, the Vice President shall continue to discharge the powers and duties of the office as Acting President. If the Congress, within ten days after receipt of the Vice President's written declaration, determines by a vote of two-thirds of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the discharge of the powers and duties of his office."

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**JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.**

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"**ARTICLE—**

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon qualification by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law
provide, transmits within two days to the Congress his written declaration that
the President is unable to discharge the powers and duties of his office. There-
upon Congress shall immediately decide the issue. If the Congress determines by
two-thirds vote of both Houses that the President is unable to discharge the
powers and duties of the office, the Vice President shall continue to discharge
the same as Acting President; otherwise the President shall resume the powers
and duties of his office.”

[II. J. Res. 33, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States
relating to Presidential inability

Resolved by the Senate and House of Representatives of the United States of
America in Congress assembled (two-thirds of each House concurring therein),
That the following article is proposed as an amendment to the Constitution of
the United States, and shall be valid to all intents and purposes as part of the
Constitution when ratified by the legislatures of three-fourths of the several
States:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office, or his death or
resignation, the said office shall devolve on the Vice President. In case of the
inability of the President to discharge the powers and duties of the said office, the
said powers and duties shall devolve on the Vice President, until the inability be
removed. 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 be President, or in case of inability, act as President, and such
officer shall be or act as President accordingly, until a President shall be elected or,
in case of inability, until the inability shall be earlier removed. The commenc-
ment and termination of any inability shall be determined by such method as
Congress shall by law provide.

"SEC. 2. This article shall be inoperative unless it shall have been ratified as
an amendment to the Constitution by the legislatures of three-fourths of the
several States within seven years from the date of its submission to the States
by the Congress."

[II. J. Res. 41, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States
relating to succession to the Presidency and Vice-Presidency and to cases where
the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of
America in Congress assembled (two-thirds of each House concurring therein),
That the following article is proposed as an amendment to the Constitution of
the United States, which shall be valid to all intents and purposes as part of the
Constitution when ratified by the legislatures of three-fourths of the several
States:

"SECTION 1. In case of the removal of the President from office, or of his death or
resignation, the Vice President shall become President for the unexpired por-
tion of the then current term. Within a period of thirty days thereafter, the
new President shall nominate a Vice President who shall take office upon con-
firmation by both Houses of Congress by a majority of those present and voting.

"SEC. 2. In case of the removal of the Vice President from office, or of his death or
resignation, the President, within a period of thirty days thereafter, shall
nominate a Vice President who shall take office upon confirmation by both Houses
of Congress by a majority vote of those present and voting.

"SEC. 3. If the President shall declare in writing that he is unable to discharge
the powers and duties of his office, such powers and duties shall be discharged by
the Vice President as Acting President.

"SEC. 4. If the President does not so declare, the Vice President, if satisfied
that such inability exists, shall, upon the written approval of a majority of the
heads of the executive departments in office, assume the discharge of the powers
and duties of the office as Acting President.

"SEC. 5. Whenever the President makes public announcement in writing that
his inability has terminated, he shall resume the discharge of the powers and
duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's disability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the disability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's disability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's disability has ended, or (3) the President's term ends.

"Sec. 6. (a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President, shall act as President: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, and such other heads of executive departments as may be established hereafter and in order of their establishment.

"(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this section.

"(3) To qualify under this section, an individual must have been appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, or inability of the President and Vice President, and must not be under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon him.

"(b) In case of the death, resignation, or removal of both the President and Vice President, his successor shall be President until the expiration of the then current presidential term. In case of the inability of the President and Vice President to discharge the powers and duties of the office of President, his successor, as designated in this section, shall be subject to the provisions of sections 3, 4, and 5 of this article as if he were a Vice President acting in case of disability of the President.

"(c) The taking of the oath of office by an individual specified in the list of paragraph (1) of subsection (a) shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

"(d) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

"Sec. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

[II.J. Res. 53, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the appointment of a new Vice President whenever there is a vacancy in the office of Vice President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, and shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

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PRESIDENTIAL INABILITY

"ARTICLE --

"SECTION 1. Whenever the office of Vice President becomes vacant at any time, more than thirty days before the expiration of the term for which the Vice President was elected, because of the death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall nominate and, subject to confirmation by the Senate and the House of Representatives acting in joint session, shall appoint a person to act as Vice President.

"Sec. 2. The person discharging the powers and duties of the President shall convene the Senate and House of Representatives in joint session for the purpose of carrying out the provisions of this article. A quorum of each House of the Congress being present at such joint session, the person nominated to act as Vice President under the first section of this article shall be confirmed by majority vote of the Members of the Senate and of the House of Representatives present and voting, each such Member having one vote.

"Sec. 3. No person constitutionally ineligible to the office of President shall be appointed under this article. A person appointed under this article to act as Vice President shall act accordingly until the end of the term for which the Vice President or Vice-President-elect whom he succeeds was elected. While so acting he shall have in all respects the same status, powers, and duties as an elected Vice President."

[113. Res. 07, 50th Cong. 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein) That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE --

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmit within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon, Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."
PRESIDENTIAL INABILITY

[H.J. Res. 118, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States on Presidential power and succession

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

"SEC. 2. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability or disability of the President to discharge the powers and duties of his office, those powers and duties shall be discharged by the Vice President until the inability or disability of the President has ceased.

"SEC. 3. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine by a two-thirds vote thereof, all questions concerning the inability or disability of the President to discharge the powers and duties of his office, and determine when such inability or disability ceases. Upon such determination, the President and Vice President shall resume their former powers and duties.

"SEC. 4. When a Vice President becomes President by the removal, death, or resignation of the President, the new President shall recommend to Congress a candidate for Vice President. The Congress, by majority vote thereof, shall elect such candidate. If the Congress does not elect such candidate within a reasonable time, the new President shall submit the name of another candidate and repeat the individual recommendations until the Congress shall elect one of such candidates for the office of Vice President to serve until the end of the President's term.

"SEC. 5. The Vice President shall not preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

"SEC. 6. The Congress shall have power to carry this article into effect by appropriate legislation.

"SEC. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."
"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office on the second day following the transmittal of such declaration to the Congress unless, prior to his resumption of such powers and duties, the Vice President transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, in which case the Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office on the tenth day following the transmittal to the Congress of his declaration that no inability exists. Any declaration by the Vice President that the President is unable to resume the powers and duties of his office may be transmitted to the Congress only with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide."

Joint Resolution Proposing an amendment to the Constitution of the United States to establish a Commission to determine the inability of a President to discharge the powers and duties of the office of President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein).

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"Article—

"Section 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term.

"Sec. 2. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the individual next in line of succession to the Presidency as Acting President: after any such declaration the President shall forthwith resume the powers and duties of his office by declaring in writing that his disability has terminated.

"Sec. 3. There is hereby established a Commission to be known as the President Inability Commission, hereinafter referred to as the 'Commission'. Subject to conditions contained herein, the Commission shall have the responsibility and authority in the manner prescribed herein to relieve the President or Acting President of the United States of his powers and duties as such, upon a determination that he is not able to discharge properly the powers and duties of the office of President, and after any such action, to restore the President or Acting President to the assumption of such powers and duties upon a determination within the same term of office that he is able to discharge properly the powers and duties of the office of President.

"Sec. 4. The Commission shall be composed of eight members as follows:

"(1) The Chief Justice of the United States shall serve as Chairman of the Commission. The Chairman shall have no vote in the proceedings of the Commission except in the case of a tie.

"(2) The Senior Associate Justice of the Supreme Court of the United States.

"(3) The Secretary of State.

"(4) The Secretary of the Treasury.

"(5) The Speaker of the House of Representatives.

"(6) The leader in the House of Representatives of the political party having the second greatest number of Members of the House of Representatives.
"(7) The leader in the Senate of the political party having the greatest number of Members of the Senate.

"(8) The leader in the Senate of the political party having the second greatest number of Members of the Senate.

"SEC. 5. Five members of the Commission shall constitute a quorum. The concurrence in writing of at least five members shall be required for any determination made by the Commission.

"SEC. 6. Members of the Commission shall serve as such without compensation; but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

"SEC. 7. The Chairman shall convene the Commission without delay upon receipt by him of a communication in writing from any two members of the Commission stating that they have sufficient cause to believe that the President is unable to discharge properly the powers and duties of the office of President. The Commission shall seek competent medical advice as to the condition of the President and his ability to discharge properly the powers and duties of his office. If the Commission shall determine that the President is unable to discharge properly the powers and duties of the office of President, it shall so notify by written communication the House of Representatives and the Senate (if Congress is then in session), the President and the individual next in line of succession to the Presidency and such powers and duties of the office of President shall thereupon devolve upon the individual next in line of succession to the Presidency as Acting President.

"SEC. 8. Whenever the Chairman receives in writing a communication from any two members of the Commission during the unexpired portion of a disabled President's term stating that they have sufficient cause to believe that the President is able to discharge properly the powers and duties of the office of President, the Chairman shall convene the Commission without delay. The Commission shall seek competent medical advice as to the condition of the President and his ability to discharge properly the powers and duties of that office. If the Commission shall determine that the disability no longer exists and that the President is able to discharge properly the powers and duties of the office of President, it shall notify the House of Representatives and the Senate (if Congress is then in session), the President and the Acting President of its decision by written communication, and the President shall forthwith reassume the powers and duties of the office of President. The provisions of this section shall be applicable in restoring an Acting President to the assumption of the powers and duties of the office of President.

"SEC. 9. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

[H.J. Res. 139, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:.

"ARTICLE —

"SECTION 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term.

"SEC. 2. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 3. If the President does not so declare, the Vice President, if satisfied that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the office as Acting President.
Sec. 4. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall assume the discharge of such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended. (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

Sec. 5. The Congress may by law provide for the case of the 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. If at any time there is no Vice President, the powers and duties conferred by this article upon the Vice President shall devolve upon the officer eligible to act as President next in line of succession to the office of President, as provided by law.

Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the selection of a new Vice President whenever there is a vacancy in the office of Vice President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, and shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE

Section 1. Wherever the office of Vice President becomes vacant at any time, more than thirty days before the expiration of the term for which the Vice President was elected, because of the death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall convene the Senate and the House of Representatives in joint session to select a person to act as Vice President. The person discharging the powers and duties of the President shall have the right to veto any selection made by the Senate and the House of Representatives acting in such joint session.

Section 2. The Speaker of the House of Representatives shall preside over such joint session. A quorum of each House of the Congress being present at such joint session, such person shall be selected, subject to the right of veto by the person discharging the powers and duties of the President, by majority vote of the Members of the Senate and of the House of Representatives present and voting, each such member having one vote. The selection under this article shall be made from persons who at the time of such joint session are heads of executive departments of the Government, Members of the Congress, or the Governors of the several States. The person so selected shall vacate his office as the head of an
executive department, as a Member of the Congress, or as the Governor of a State.

"SEC. 3. In any case in which the person discharging the powers and duties of the President shall veto any selection made under this article, he shall again convene the Senate and House of Representatives in joint session to make another selection in accordance with section 2 of this article, except that no person whose selection is vetoed shall again be eligible for selection as long as the person discharging the powers and duties of President is the same person who vetoed such selection.

"SEC. 4. A person selected under this article to act as Vice President shall act accordingly until the end of the term for which the Vice President-elect whom he succeeds was elected. While so acting he shall have in all respects the same status, powers, and duties as an elected Vice President.

"SEC. 5. Nothing contained in this article shall prevent the Congress from providing by law, consistently with the provisions of this article, for the designation of an officer who shall act as President at any time at which vacancies exist in the offices of both President and Vice President."

[...]

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SEC. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"SEC. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 4. If the President does not declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"SEC. 5. Unless, prior to his resumption of such powers and duties, the Vice President transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office on the tenth day following the transmittal to the Congress of his declaration that no inability exists. Any declaration by the President that the President is unable to resume the powers and duties of his office may be transmitted to the Congress only with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide."
PRESIDENTIAL INABILITY

[II.J. Res. 154, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States on Presidential power and succession

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE--

"Section 1. The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

"Section 2. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability or disability of the President to discharge the powers and duties of his office, those powers and duties shall be discharged by the Vice President until the inability or disability of the President has ceased.

"Section 3. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine by a two-thirds vote thereof, all questions concerning the inability or disability of the President to discharge the powers and duties of his office, and determine when such inability or disability ceases. Upon such determination, the President and Vice President shall resume their former powers and duties.

"Section 4. When a Vice President becomes President by the removal, death or resignation of the President, the new President shall recommend to Congress a candidate for Vice President. The Congress by majority vote thereof shall elect such candidate. If the Congress does not elect such candidate within a reasonable time, the new President shall submit the name of another candidate and repeat the individual recommendations until the Congress shall elect one of such candidates for the office of Vice President to serve until the end of the President's term.

"Section 5. The Vice President shall not preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

"Section 6. The Congress shall have power to carry this article into effect by appropriate legislation.

"Section 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."

[II.J. Res. 158, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE--

"Section 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. Within a period of thirty days thereafter, the new President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority of those present and voting.
"Sec. 2. In case of the removal of the Vice President from office, or of his death or resignation, the President, within a period of thirty days thereafter, shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting.

"Sec. 3. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, the Vice President, if satisfied that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office at the time of such announcement, transmit to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

"Sec. 5. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall discharge such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President's inability has ended, (2) the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

"Sec. 6. (a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President, shall act as President: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, and such other heads of executive departments as may be established hereafter and in order of their establishment.

"(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this section.

"(3) To qualify under this section, an individual must have been appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, or inability of the President and Vice President, and must not be under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon him.

"(b) In case of the death, resignation, or removal of both the President and Vice President, his successor shall be President until the expiration of the then current presidential term. In case of the President's inability of the President and Vice President to discharge the powers and duties of the office of President, his successor, as designated in this section, shall be subject to the provisions of sections 3, 4, and 5 of this article as if he were a Vice President acting in case of disability of the President.

"(c) The taking of the oath of office by an individual specified in the list of paragraph (1) of subsection (a) shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

"(d) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

"Sec. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."
JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[HI. Res. 210, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and
duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 3. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress will immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

"ARTICLE -

"Section 1. The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

"Sec. 2. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability or disability of the President to discharge the powers and duties of his office, these powers and duties shall be discharged by the Vice President until the inability or disability of the President has ceased.

"Sec. 3. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine by a two-thirds vote thereof, all questions concerning the inability or disability of the President to discharge the powers and duties of his office, and determine when such inability or disability ceases. Upon such determination, the President and Vice President shall resume their former powers and duties.

"Sec. 4. When a Vice President becomes President by the removal, death, or resignation of the President, the new President shall recommend to Congress a candidate for Vice President. The Congress by majority vote thereof shall elect such candidate. If the Congress does not elect such candidate within a reasonable time, the new President shall submit the name of another candidate and repeat the individual recommendations until the Congress shall elect one of such candidates for the office of Vice President to serve until the end of the President's term.

"Sec. 5. The Vice President shall not preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

"Sec. 6. The Congress shall have power to carry this article into effect by appropriate legislation.

"Sec. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."
PRESIDENTIAL INABILITY

[H.J. Res. 224, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[H.J. Res. 235, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office."

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."
and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[II. J. Res. 236, 89th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring thereon), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office on the third day following the transmittal of such declaration to the Congress unless, prior to the end of the third day, the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, in which case Congress shall immediately decide the issue. If the Congress determines by a two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."
of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[II.J. Res. 240, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein): That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. If the President does not so declare, and the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress will immediately decide the issue. If the Congress determines by
two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

[II.J. Res. 248, 80th Cong., 1st sess.]

JOINT RESOLUTION To propose an amendment to the Constitution of the United States relating to the succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President."

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall promptly nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the discharge of the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President makes a public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the second day of making such announcement, or a such earlier time after such announcement as he or the Vice President may determine, except that if the Vice President with the written concurrence of the majority of the heads of the executive departments in office at the time of such announcement or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President’s inability has not terminated, the Vice President shall continue to discharge the powers and duties of the office as Acting President. If the Congress, within ten days after receipt of the Vice President’s written declaration, determines by two-thirds of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the discharge of the powers and duties of his office."

[II.J. Res. 250, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office of Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[H.J. Res. 254, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may be law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress will immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[H.J. Res. 264, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution to provide for the selection of a new Vice President whenever there is a vacancy in the office of Vice President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),
That the following article is proposed as an amendment to the Constitution of the United States, and shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Section 1. Whenever the office of Vice President becomes vacant at any time, more than thirty days before the expiration of the term for which the Vice President was elected, because of the death, removal from office, or resignation of the Vice President or the death of a Vice-President-elect before the time fixed for the beginning of his term, or because of the assumption by the Vice President or a Vice-President-elect of the powers and duties of President by reason of the death, removal from office, or resignation of the President or the death of a Vice-President-elect before the time fixed for the beginning of his term, the person discharging the powers and duties of President shall convene the Senate and House of Representatives in joint session to select a person to act as Vice President. The person discharging the powers and duties of the President shall have the right to veto any selection made by the Senate and the House of Representatives acting in such joint session, but such veto must be exercised within three days after such selection is made.

"Sec. 2. The Speaker of the House of Representatives shall preside over such joint session. A quorum of each House of the Congress being present at such joint session, such person shall be selected, subject to the right of veto within three days by the person discharging the powers and duties of the President, by majority vote of the Members of the Senate and of the House of Representatives present and voting, each such Member having one vote.

"Sec. 3. In any case in which the person discharging the powers and duties of the President shall veto any selection made under this article, the Senate and House of Representatives shall continue in joint session to make another selection in accordance with section 2 of this article, except that no person whose selection is vetoed shall again be eligible for selection so long as the person discharging the powers and duties of President is the same person who vetoed such selection.

"Sec. 4. No person constitutionally ineligible to the office of President shall be eligible to that of Vice President under this article. A person selected under this article to act as Vice President shall act accordingly until the end of the term for which the Vice President or Vice-President-elect whom he succeeds was elected. While so acting he shall have in all respects the same status, powers, and duties as an elected Vice President."

[H.J. Res. 262, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Sec. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his
written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office on the second day following the transmittal of such declaration to the Congress unless, prior to his resumption of such powers and duties, the Vice President transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, in which case the Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office on the tenth day following the transmittal to the Congress of his declaration that no inability exists. Any declaration by the Vice President that the President is unable to resume the powers and duties of his office may be transmitted to the Congress only with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide."

[H.J. Res. 274, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President until the President declares in writing that no inability exists.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. In any case in which the Vice President has become Acting President pursuant to section 4 of this article, the President shall resume his powers and duties on the second day following his transmittal to the Congress of a written declaration that no inability exists unless, prior to his resumption of such powers and duties, the Vice President transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, in which case the Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office on the tenth day following the transmittal to the Congress of his declaration that no inability exists. Any declaration by the Vice President that the President is unable to resume the powers and duties of his office may be transmitted to the Congress only with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide."
PRESIDENTIAL INABILITY

[II. J. Res. 290, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two thirds of each House concurring therein),

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

[II. J. Res. 293, 80th Cong., 1st sess.]

JOINT RESOLUTION To establish a permanent commission on Presidential disability, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in accordance with and pursuant to the provisions of clause 6 of section 1 of article II of the Constitution authorizing the Congress to provide by law for the case of the inability of the President and Vice President until the disability be removed, the Congress hereby declares that the determination of inability of the President or Vice President is a political decision based upon the best, most impartial and nonpartisan expert medical opinion available and that there should be an agency or instrumentality of government, in which the minority party shall have representation, created for the purpose of making the determination with respect to the inability of the President and the termination of the period of disability.

Sec. 2. As used in this Act—

(1) The term "Commission" means the Commission on Presidential Disability established by section 3; and

(2) The term "President" means the President of the United States, including any person on whom the powers and duties of that office may have devolved as provided in clause 6 of section 1 of article II of the Constitution of the United States, and as provided in section 10 of title 3 of the United States Code.
SEC. 3. (a) There is established a commission to be known as the Commission on Presidential Disability to be composed of ten members as follows:

1. the Vice President of the United States;
2. the Speaker of the House of Representatives;
3. the President pro tempore of the Senate;
4. the Secretary of State;
5. the Secretary of the Treasury;
6. the Secretary of Defense;
7. the majority leader of the Senate;
8. the minority leader of the Senate;
9. the majority leader of the House of Representatives; and
10. the minority leader of the House of Representatives.

(b) The Vice President shall be Chairman of the Commission.

(c) In case there is no Vice President, the Speaker of the House of Representatives shall be Chairman of the Commission.

(d) The Chairman of the Commission shall not be entitled to vote in connection with any declaration of the Commission issued under authority of this joint resolution.

SEC. 4. (a) Whenever, in the opinion of the Chairman or any three members of the Commission, circumstances exist which create a doubt as to the ability of the President to discharge the powers and duties of his office, the Commission shall be convened by the Chairman. After so convening, the Commission may, by a vote of not less than five of the members thereof, issue a declaration that the President is unable to discharge the powers and duties of his office.

(b) The Commission may, in the same manner as provided in subsection (a) of this section for declaring a disability, issue a declaration that any disability with respect to which it issued a declaration under such subsection (a) no longer exists. In case the Commission issues a declaration under this subsection that a disability no longer exists, the person with respect to whom such declaration is issued shall resume the discharge of the powers and duties of the office of President effective as of the date of such declaration, except that this sentence shall not apply with respect to any person acting as President under authority of section 10(d) of title 3 of the United States Code.

SEC. 5. (a) The President may, by proclamation—

1. declare that he is unable to discharge the powers and duties of his office; and
2. before the end of the then current Presidential term, declare that such disability no longer exists.

(b) Whenever the President issues a proclamation under paragraph (2) of subsection (a) of this section, effective as of the date of such proclamation, the powers and duties of the office of President shall be automatically restored to him, and he shall resume the discharge of such powers and duties, except that no such proclamation shall operate to restore the powers and duties of the office of President to any person acting as President under authority of section 10(b) of title 3 of the United States Code.

(c) During any period of disability proclaimed by the President pursuant to the provisions of paragraph (1) of subsection (a) of this section, the Commission shall have no authority to issue a declaration with respect to such disability.

SEC. 6. (a) Whenever, in the opinion of the Chairman or any three members of the Commission, circumstances exist which create a doubt as to whether the President is alive, the Commission shall be convened by the Chairman. After so convening, the Commission may, by a vote of not less than five of the members thereof, issue a declaration that the death of the President shall be presumed.

(b) The Commission may, in the same manner provided in subsection (a) of this section for issuing a declaration presuming the death of the President, issue a declaration that the President is alive. The person with respect to whom a declaration is issued under this subsection shall resume the discharge of the powers and duties of the office of President effective as of the date of such declaration.

SEC. 7. (a) In any case in which the Commission issues a declaration under section 4(a), or under section 6(a), or the President issues a proclamation under section 5(a)(1), the powers and duties of the office of President shall devolve as provided in clause 8 of section 1 of article II of the Constitution of the United States, or as provided in section 10 of title 3 of the United States Code, as the case may be.
(b) No declaration issued by the Commission under this Act shall be reviewed by any court or officer of the United States.

c) During the period that the powers and duties of the office of President devolve on the Vice President by reason of a declaration issued under this joint resolution, he shall receive compensation at the rate then provided by law for the President.

Sec. 8. No person who assumes the discharge of the powers and duties of the office of President solely by reason of a disability of the President declared or proclaimed under authority of this joint resolution shall remove from office the Secretary of State, the Secretary of the Treasury, or the Secretary of Defense, except with the approval of not less than a majority of the members of the Commission who are Members of the Congress.

Sec. 9. (a) The Commission may, for the purpose of carrying out the provisions of this joint resolution, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission may deem advisable. Subpoenas may be issued over the signature of the Chairman of the Commission, and may be served by any person designated by him. The provisions of sections 102 to 104, inclusive, of the Revised Statutes of the United States (2 U.S.C. 192-194), shall apply in the case of any failure of any witness to comply with any subpoena or to testify when summoned under authority of this section.

(b) The Commission is authorized to secure directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality information, suggestions, estimates, and statistics for the purpose of this joint resolution; and each such department, bureau, agency, board, commission, office, establishment, or instrumentality is authorized and directed to furnish such information, suggestions, estimates, and statistics directly to the Commission, upon request made by the Chairman.

c) The Commission shall have power to appoint and fix the compensation of such personnel as it deems advisable, without regard to the provisions of the civil service laws and the Classification Act of 1940, as amended.

d) The Commission may procure, without regard to the civil service laws and the classification laws, temporary and intermittent services to the same extent as is authorized for the departments by section 15 of the Administrative Expenses Act of 1940 (5 U.S.C. 55a), but at rates not to exceed $50 per diem for individuals.

(e) Employment of an individual by the Commission as an attorney or expert in any business or professional field, on a part-time or full-time basis, with or without compensation, shall not be considered as employment bringing such individual within the provisions of sections 281, 283, 284, 334, or 1014 of title 18 of the United States Code, or section 106 of the Revised Statutes of the United States (5 U.S.C. 90).

Sec. 10. (a) Members of Congress who are members of the Commission shall serve without compensation in addition to that received for their services as Members of Congress, but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their functions as members of the Commission.

(b) The members of the Commission who are in the executive branch of the Government shall serve without compensation in addition to that received for their services in the executive branch, but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their functions as members of the Commission.

Sec. 11. There is hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

Sec. 12. This Act shall take effect on enactment.

[In 1st Joint] JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to Presidential Inability

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of
PRESIDENTIAL INABILITY

the United States, and shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office, or his death or resignation, the said office shall devolve on the Vice President. In case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President until the inability be removed. 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 be President, or in case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in case of inability, until the inability be earlier removed. The commencement and termination of any inability shall be determined by such method as Congress shall by law provide.

"SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."
PRESIDENTIAL INABILITY

[H.J. Res. 310, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take oath of office upon confirmation by a majority vote of both Houses of Congress.

"SEC. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"SEC. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by a two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

[H.J. Res. 312, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take oath of office upon confirmation by a majority vote of both Houses of Congress.

"SEC. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."
duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

[H.J. Res. 320, 80th Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relating to succession in the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"Section 1. In case of the removal of the President from office or his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever a vacancy occurs in the office of the Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

"Sec. 3. In case of the removal of the President from office or of his death or resignation, the said office shall devolve on the Vice President, in case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed. 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 be President, or in case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected, or in case of inability, until the inability shall be earlier removed. The commencement and termination of any inability may be determined by such method as Congress shall by law provide.

"Sec. 4. Article II, section 1, paragraph 5, is hereby repealed."

[H.R. 830, 80th Cong., 1st sess.]

A BILL To provide a method for determining Presidential inability, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the determination as to whether the President, or any individual acting as President, is unable to discharge the powers and duties of the office of President shall be made as provided by this Act:

Sec. 2. Such determination shall be made in the following manner:

1) The House of Representatives shall, by a resolution adopted by a vote of the majority of the Members of the House of Representatives present and voting (providing a quorum is present), request the Senate to take appropriate action to determine whether the President is unable to discharge the powers and duties of his office. A copy of such resolution shall, upon its adoption, be forwarded immediately to the Chief Justice of the United States.

2) The Chief Justice of the United States shall, upon receipt of a copy of such resolution, convene the Senate in a special session for the purpose of determining whether the President is unable to discharge the powers and duties
of his office. The Vice President shall not participate in the proceedings of
the Senate during such special session.

(3) If the Senate determines, by a vote of two-thirds of the Senators present
and voting (providing a quorum is present), that the President is unable to dis-
charge the powers and duties of his office, the Senate shall, by a resolution
adopted by the same two-thirds vote required to make such determination, direct
the Vice President to act as President during the period of inability of the Presi-
dent, or until the end of the then current Presidential term, as may be provided
by such resolution.

(4) Any determination made by the Senate under paragraph (3) may be
revoked, and the inability of the President which was the basis of such de-
termination may be declared to have terminated, in the same manner as in the
case of the original determination, except that the Senate shall be convened in
a special session for such purpose by the Chief Justice of the United States upon
receipt by him of a resolution requesting such special session adopted by a vote
of the majority of the Members of either House of the Congress present and vot-
ing (providing a quorum is present).

(5) If the Senate revokes any determination made by it under paragraph (3),
the Senate shall, by a resolution adopted by a vote of two-thirds of the Senators
present and voting (providing a quorum is present), declare that the President is
restored to the assumption of the powers and duties of the office of President
effective at such time as may be provided by such resolution.

SEC. 3. (a) The provisions of section 2 shall be applicable with respect to
determining whether the Vice President, or any other individual acting as Presi-
dent, is unable to discharge the powers and duties of the office of President, and,
in any such case, the resolution referred to in paragraph (3) shall direct the
individually next in line of succession to the Presidency to act as President during
the period of inability of the Vice President or such other individual, or until
the end of the then current Presidential term, as may be provided by such resolu-
tion.

(b) The provisions of section 2 shall also be applicable with respect to revoking
any determination that the Vice President is unable to discharge the powers and
duties of the office of President and restoring him to the assumption of the
powers and duties of the office of President. The provisions of section 2 shall
also be applicable with respect to revoking any determination that any other
individual acting as President is unable to discharge the powers and duties of
the office of President and, subject to section 10 (d) of title 3, United States
Code, shall be applicable with respect to restoring such individual to the as-
sumption of the powers and duties of the office of President.

[H.R. 3702, 80th Cong., 1st sess.]
A BILL To provide for the case of inability of the President or Vice President or Interim
successor

That the determination of whether the President, or any individual acting as President, has an inability to discharge the
powers and duties of President shall be made as provided by this Act.

SEC. 2. (a) If the President shall by message to Congress announce that he
has an inability to discharge the powers and duties of his office, such powers
and duties shall be discharged by the Vice President as Acting President.

(b) If the President does not so announce but the Vice President or person
next in line of succession to the President is satisfied that the President or person
then Acting President has such an inability, he shall give written notification
thereof to the Chairman and members of the Commission provided for by section
8 of this Act. Upon receipt of such written notification of Presidential inability
or upon its own motion whenever a majority of its membership shall be of the
opinion that there exists such Presidential inability, the Commission shall forth-
with convene and determine whether in its opinion the President or Acting
President has an inability to discharge the powers and duties of the said
office. Notice and opportunity to be heard shall be given to the President. If the
Commission so determines, the Chairman shall forthwith give written notice of its
determination to the Speaker of the House of Representatives and to the
President pro tempore of the Senate with a copy of such written notice to the Vice President or person next in line of succession to the Presidency.
Upon receipt of this written notice the Vice President or person next in line of succession to the Presidency shall forthwith proceed to discharge the powers and duties of the office of the President pending final determination of the question of inability as provided herein.

Sec. 3. (a) There is hereby established a commission to be known as the Presidential Inability Commission, hereinafter referred to as the "Commission." The Commission shall be composed of the following members: (1) The Chief Justice of the United States, who shall act as Chairman. The Chairman shall have no vote in the proceedings of the Commission except in the case of a tie. (2) The leader of the House of Representatives of the political party having the greatest number of Members of the House of Representatives. (3) The leader of the House of Representatives of the political party having the second greatest number of Members of the House of Representatives. (4) The leader in the Senate of the political party having the greatest number of Members of the Senate. (5) The leader of the Senate of the political party having the second greatest number of Members of the Senate. (6) The Surgeon General of the United States.

(b) Four members of the Commission shall constitute a quorum and a concurrence in writing by at least four members shall be required for any determination made by the Commission.

(c) Members of the Commission shall serve as such without compensation; but they shall be reimbursed for travel, subsistence, and necessary expenses incurred by them in the performance of their duties.

(d) The Chairman shall convene the Commission without delay upon receipt by him of a written notification from the Vice President or person next in line of succession to the Presidency provided by section 2(b) or upon receipt by him of a communication in writing from two members thereof stating that they have sufficient cause to believe that the President has an inability to discharge the powers and duties of the office of the President.

Sec. 4. (1) Upon receipt of written notification from the Commission of Presidential inability pursuant to section 2(b) of this Act, the House of Representatives, if then in session and if not at such time as it shall convene, shall proceed forthwith by resolution adopted by a vote of the majority of the Members of the House of Representatives' present and voting (providing a quorum is present) to request the Senate to take appropriate action to determine whether the President has an inability to discharge the powers and duties of his office. A copy of such resolution shall, upon its adoption, be forwarded immediately to the Chief Justice of the United States and to the Senate. If the House shall fail to request the Senate as aforesaid, the Clerk of the House shall immediately thereafter give written notification to the person acting as President of such fact and such person shall forthwith cease to discharge the powers and duties of the President.

(2) Upon receipt of the copy of such resolution the Senate shall forthwith proceed to finally determine whether the President has such inability to discharge the powers and duties of his office. The Chief Justice of the United States shall preside over the Senate throughout its deliberations and the Vice President shall not participate therein. Notice and opportunity to be heard shall be given to the President.

(3) If the Senate determines, by a vote of two-thirds of the Senate present and voting (providing a quorum is present), that the President or the person acting as President has such inability to discharge the powers and duties of his office, the Senate shall, by a resolution adopted by the same two-thirds vote required to make such determination, direct the Vice President or person next in line of succession to the Presidency to act as President during the period of inability of the President or Acting President, or until the end of the then current Presidential term. If the Senate shall fail to so determine the existence of Presidential inability, the Secretary of the Senate shall immediately give written notification to the person acting as President of such fact and such person shall forthwith cease to discharge the powers and duties of the President.

(4) Any determination made by the Senate under the preceding paragraph may be revoked and the inability of the President or the person acting as President which was the basis of such determination may be declared to have terminated by the Senate as in the case and manner of the original determination. And in such event the Senate shall by a resolution adopted by a vote of two-thirds of the Senate present and voting (providing a quorum is present) declare that the President is restored to the powers and duties of the office of the President effective at such time as may be provided by such resolution.

The CHAIRMAN. I will hear you now, Senator.
Senator Bayh. Mr. Chairman, may I first ask the chairman of the committee if I may have permission to have Mr. Conrad, chief counsel of our Subcommittee on Constitutional Amendments seated at the witness table. Second, I would be more than happy to yield the honor you have given me as first witness to the Attorney General. Is that in accordance with the wishes of the chairman? I only want to make this as expeditious as possible and whatever the chairman decides certainly will be in accordance with my wishes.

The Chairman. Mr. Attorney General, do you want to embrace that invitation of the Senator?

Mr. Katzenbach. No, Mr. Chairman, I think Senator Bayh has been burdened by this for a long time and I would be happy to have him go first.

Mr. Poff. We are going to have the services of the Attorney General. He is going to be here to testify. If we don't complete it this morning, we will want him back.

The Chairman. Proceed, sir.

Senator Bayh. Mr. Chairman, I have a statement which, in light of the very pertinent statements of both the distinguished chairman and ranking minority member of the committee I feel would be best inserted in the record at this point. I would be happy to just summarize the statement rather than read it.

The Chairman. Be glad to have it received in the record, sir.

(The prepared statement of Senator Birch Bayh is as follows:)

Testimony by Senator Birch Bayh

Mr. Chairman, and members of the committee, I am Birch Bayh, U.S. Senator from Indiana. I am grateful for this opportunity to appear before you and testify in behalf of House Joint Resolution 1, introduced by the distinguished chairman of this committee, relating to the problems of Presidential inability and filling vacancies in the office of Vice President.

I was privileged to sponsor in the Senate this year a resolution identical to one which I had sponsored in the 88th Congress and which passed the Senate by a vote of 65 to 0.

Last year, the Senate Subcommittee on Constitutional Amendments, of which I have the honor to be chairman, conducted extensive hearings on 18 resolutions dealing with Presidential inability and filling vacancies in the office of Vice President. This year, the Senate subcommittee conducted 1 full day of hearings and heard testimony from several distinguished witnesses, including the Honorable Nicholas Katzenbach, President Johnson's nominee for Attorney General of the United States.

The Subcommittee on Constitutional Amendments reported favorably on Senate Joint Resolution 1 which, at that time, was identical to House Joint Resolution 1 now before this committee. The full Senate Committee on the Judiciary subsequently reported the proposal to the Senate with no substantive changes but with several alterations in language.

It is to the resolution now pending before the Senate that I would like to address myself and to commend its present form to this committee for its earnest consideration.

Mr. Chairman, at this time I request that Senate Joint Resolution 1, as altered by the Senate Committee on the Judiciary, be printed as a part of my remarks.

Section 1 of the resolution simply puts into the Constitution a practice which has been traditional in the United States since 1841. In that year, with the death of President William Henry Harrison, Vice President John Tyler established the so-called Tyler precedent by insisting that he was the President and not merely Acting President. This complete transfer of Presidential preroga-
ties to the Vice President upon the death of an incumbent President has been accepted ever since. Yet, it has never failed to be questioned by some Americans. Even after the tragic events of November 22, 1963, when Vice President Johnson ascended to the Presidency, a suit was filed challenging Mr. Johnson's rightful claim to the Presidency. All that is done by section 1 of Senate Joint Resolution 1 and House Joint Resolution 1 is to remove forever the last shred of doubt that "in case of the removal of the President from office or his death or resignation, the Vice President shall become President."

Section 2 of the proposal provides that "whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." This section is based upon a broad consensus that this Nation must never for long be without a Vice President. The office of Vice President, once scorned even by those who held it, has become the second most exalted position in American Government—and rightfully so. Today, the Vice President is not a figurehead, whom no one recognizes, few have heard of, and who has so little to do that he must spend the major share of his time feeding pigeons in the park. The Vice President today has a number of statutory and ad hoc duties which are of signal importance. Only recently the President named his Vice President to head the President's Council on Equal Opportunity, a group which will coordinate the Government's extensive agency and departmental work in the field of civil rights. The Vice President participates in all Cabinet meetings. He is a statutory member of the National Security Council which only last Sunday night made a grave and far-reaching decision concerning the role of the United States in Vietnam. The Vice President is the Chairman of the National Aeronautics and Space Council which coordinates this Nation's exploration of the vast and little-known sea of space. Perhaps most importantly, though, is the very real fact that at any moment, the Vice President is the man who may assume the awesome and lonely burdens of the Presidency itself.

It has been the singular good fortune of this Nation that in its history, a President and a Vice President have not been lost within the same 4-year term of office. That such an eventuality is possible has been brought home to us several times in our history. But perhaps the most tragic example of man's absolute mortality was the sudden, shocking, and almost unbelievable loss of our 35th President in the very vigorous prime of his life and work. The Nation continued, however, as it always has and as it always must. The purpose of section 2 of this proposed constitutional amendment is to provide a means whereby this Nation shall have executive continuity. The best way to accomplish this, I strongly believe, is to provide that the office of Vice President of the United States never be left unoccupied for very long.

Having a Vice President for all but perhaps a relatively few days also would provide a ready means by which we can have executive continuity even if the President of the United States were disabled temporarily or permanently.

Section 3 of Senate Joint Resolution 1 provides that "whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President."

Here, then, we provide a means by which a President can voluntarily divest himself of his powers and duties if he is temporarily disabled—or, indeed, if he knows that he soon will become temporarily disabled. The President may, for example, be about to undergo surgery and the domestic and world situation at that time may demand no interruption—even for a day or two—of Executive leadership. It is possible that President Eisenhower would have availed himself of this proviso had it been in force and effect during any of the three illnesses he experienced as President.

Section 4 provides a means whereby the Vice President and a majority of the principal officers of the executive departments—that is, the Cabinet—may declare that the President is unable to discharge the powers and duties of his office. This is intended to provide for the contingency that the nature of the President's disability precludes him from declaring his own inability. Upon the written transmission of this declaration from the Vice President and a majority of the Cabinet to the Speaker and the President of the Senate, the Vice President would immediately assume the powers and duties of the office of President as Acting President.
Although we consider as highly unlikely the possibility of a dispute between the Vice President and Cabinet on one hand and the President on the other as to the Chief Executive’s ability to discharge the powers and duties of his office, we nonetheless strongly believe that we must provide for such a contingency in the Constitution.

Section 3 of Senate Joint Resolution 1 provides the machinery to deal with such a contingency. First, and most importantly, it establishes the formula by which a President shall resume the powers and duties of his office following his temporary displacement.

Secondly, it permits the Vice President and majority of the Cabinet a 2-day period in which they may challenge the President’s declaration that no inability exists. The language of the section would permit the Vice President to direct himself of the powers and duties of the Presidency immediately. But if a serious question existed as to the President’s ability to resume his powers and duties, the Vice President—if he has the support of a majority of the Cabinet—could retain the powers and duties for 2 days following the President’s declaration.

If within those 2 days, the Vice President and majority of the Cabinet challenged the President’s declaration, Congress would “immediately proceed to decide the issue.” This, we believe, is a clear constitutional mandate for Congress to drop everything else or, if it were not then in session, to immediately reassemble to consider this issue. The words “immediately proceed to decide the issue” were drawn so as to allow Congress time to consider the facts before voting.

Section 5 then provides that “if the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.”

The language clearly implies, we believe, that the Vice President shall continue to act as President while the dispute is being settled by the Congress. Note that if the Vice President achieves a two-thirds vote in both Houses, he continues to discharge the powers and duties of the Presidency. He does not resume the powers and duties—he continues to exercise them.

Several questions have been raised on the portions of Senate Joint Resolution 1 and House Joint Resolution 1 relating to inability. I shall attempt to answer them briefly.

First, some believe that because we are dealing with executive continuity, we should in no instance bring the Congress into the picture. To do this, it has been said, would breach the traditional separation of powers. I would point out, Mr. Chairman, that there is ample precedent involving a reasonable commingling of the three branches of Government. The first and most obvious is the authority granted to the Chief Executive to veto bills passed by both Houses of Congress. If there were absolute separation, the President would have no such authority.

Conversely, many Presidential appointments and all treaties entered into by the President must receive the advice and consent of the Senate before they become effective. In certain prescribed circumstances, the House of Representatives is empowered with the great responsibility of electing a President of the United States. In the procedures established to impeach and convict a President of the United States, we see the commingling of the executive, legislative, and judicial branches of Government. Finally, the Vice President himself has certain duties in both the executive and legislative branches of Government. In Senate Joint Resolution 1 and House Joint Resolution 1, the Congress becomes involved after a decision has been made in the executive branch—and only then when that decision is challenged within the executive branch. Omitting Congress as an arbiter of this issue would open the door to the possibility of a coup, a possibility both foreign and offensive to our form of government.

Another question has been raised as to whether additional language is required in section 3 of the amendment to enable a President to immediately resume his powers after he has voluntarily given them up. We maintain that such language would be superfluous and perhaps even harmful. Suppose, if you will, that such language were added. A President voluntarily divests himself of his powers and duties. Then, when he believes he is fit, he immediately resumes them. Then, pursuant to section 4 of the proposal, the Vice President and majority of the Cabinet declare the President really isn’t fit at all. The Vice President immediately resumes the powers and duties of the Presidency. Then, under section 5, the President again declares no inability exists. The Vice President and Cabinet,
under section 5, challenge the President's declaration again. Then Congress decides in favor of the President, who immediately resumes the powers and duties again. Here, in the space of a few days, the Nation would have the powers and duties of the Presidency change hands three times. The turmoil this would create is almost unimaginable. As now written, Senate Joint Resolution 1 and House Joint Resolution 1 would keep the transfer of these awesome powers and duties to an irreducible minimum, thereby enabling as smooth a transition of executive power as possible in difficult circumstances.

Others have argued that a time limit should be placed upon the Congress to decide a dispute in the executive branch over the President's inability. The purpose of this argument is to avoid the possibility of the Congress prolonging a determination of the President's fitness and thus keep the Vice President acting as President for as long as possible—theoretically against the best interests of the Nation. The Senate Committee on the Judiciary, as I indicated earlier, was more concerned that the Congress have a reasonable time in which to decide this crucial issue. It was the consensus that the obedience to and implementation of any law depends ultimately upon the good will of the vast majority of our governmental leaders at all levels.

Somewhere along the line, in our form of government, trust must be placed in men to obey and implement the letter and spirit of the law. The language of this amendment makes it abundantly clear that the purpose and intent of section 5 is for Congress to decide the issue as quickly as possible. If we attempt to place a time limit upon the Congress, we are then saying that 20, 50 or 100 years from now, in any situation that we can imagine and some that we cannot, the Congress should be able to determine this crucial question of presidential inability within 10 days, or 20 days, or 30 days. If we make a time limitation too brief, then Congress may not have time to view the facts and reach a just decision. If we make the limitation too long, we may imply the Congress should take as much time as allowed before deciding the issue. In my opinion, we must keep the language of the Constitution general enough to be flexible in situations we are unable at this point in history to foresee.

Mr. Chairman and members of the committee, for too many years the debate over filling for presidential inability and filling vacancies in the office of Vice President has been waged on the academic level. Few believed that anything ever would be accomplished to fill an obvious and glaring constitutional void. Now we are in a position to see on the horizon the fruition of years of work by many in this vital area.

I would be remiss if, at this point, I did not single out for praise the distinguished chairman of this committee, its ranking minority member and leaders of the American Bar Association, whose efforts in this area have been persistent, articulate, and effective.

In this era, when whole armies can be moved half-way around the world in a matter of hours and when civilization as we know it can be destroyed in a matter of minutes, we must never be without a firm hand on the tiller—a hand belonging to a man mentally and physically capable of making the decisions affecting the destiny of the free world.

History has been trying to tell us something, Mr. Chairman. It is time we listened.

Senator Bayh. I would also like to ask the chairman's permission to include in the record at this point a copy of Senate Joint Resolution 1, as reported by the Senate Committee on the Judiciary, February 4, 1965.

The CHAIRMAN. You have that permission.

(Text of S. J. Res. 1:)

TEXT OF SENATE JOINT RESOLUTION 1 AS REPORTED BY SENATE COMMITTEE ON THE JUDICIARY ON FEBRUARY 4, 1965

SECTION 1. In case of the removal of the President from office or his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he
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is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits to the President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Sec. 5. Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

Senator Bayh. As you know, your present witness considers it an honor to have the opportunity to cosponsor a bill the distinguished chairman of this committee has introduced in the House.

Let me very quickly summarize the process of development which led us to Senate Joint Resolution 1 and House Joint Resolution 1. Last year a similar measure was introduced into the Senate and passed the Senate 66 to 0 under the title of Senate Joint Resolution 130. I certainly want to voice hearty agreement with the statement of Mr. McCulloch that the Constitution should not be amended in any hit-or-miss fashion. In fact, it has been our effort to try to prevent this from happening. As the chairman knows, Senate Joint Resolution 130 was a result of a broad consensus reached after long study and extensive consultations with leading political scientists, constitutional scholars, State legislators, journalists, and leaders of the American Bar Association.

The Chairman. Sir, may I interrupt you there? I neglected to call on Congressman Andrew Jacobs, Jr., of Indiana, one of our new members. Mr. Jacobs here? Forgive me for not calling on you before.

STATEMENT OF HON. ANDREW JACOBS, JR., OF INDIANA

Mr. Jacobs. I am sorry to interrupt the junior Senator from Indiana but I wanted to read and I thank you for this opportunity you grant your most junior member to comment on Senator Bayh's testimony.

I want to join the numerous organizations and individuals who have commended Senator Bayh for the judicious dispatch with which he has conducted the hearings in this vital legislation in this session of Congress and to add such accomplishments would not have been possible, of course, without the vital work Senator Bayh performed in the 88th Congress. The American Bar Association, among others, wisely has recognized the urgency and necessity of Senator Bayh's proposals. They would correct the situation that has resulted in the office of Vice President being vacant 16 times for a total of 37 years in this Nation's history.
I am pleased and proud to add my endorsement guided by the splendid work my fellow Hoosier, the distinguished Senator from Indiana, Birch E. Bayh.

Senator Bayh. Thank you, Congressman Jacobs. I think the committee already knows the great esteem I have for the junior member of your committee, Mr. Chairman. You will be as proud of him in a few short months as we are in Indiana.

I want to reemphasize what was said by both the chairman and the ranking minority member that there is no perfect solution to this rather complicated and vexing problem with which we have been dealing for a number of years. Our efforts have been directed at finding the best proposal possible. Each has been willing to give and take a little bit on his idea in the true legislative process to come up with the best solution we could find—one which would certainly be better than none at all. I feel extensive hearings, study, the effort for a consensus, the support of the American Bar Association House of Delegates, the brief hearings which we held this year, plus the extensive scrutiny which our committee has given it—not to mention the extensive scrutiny that this committee will give these proposals—will guarantee that we don't find a hit-and-miss solution to the double-barreled problem with which we are dealing this morning.

The subcommittee of which I am a representative before the committee passed out Senate Joint Resolution 1 unaltered, but as pointed out by Mr. McCulloch, the full Senate Committee on the Judiciary held 2 days of executive sessions in which we very closely scrutinized this measure and did make some changes. The changes, I feel, make the bill a better bill. I will say very quickly that I do not believe that any of the changes deal with the substance of the resolution, but rather to language perfections which will make the meaning and the intentions easier to perceive. Quickly, let me run through the bill section by section since I'm certain all of you are very familiar with its provisions.

Then I will hit on one or two of the specific questions we discussed in the committee so that your committee may have the thinking of our committee in making your decision. I don't mean to imply you necessarily are going to accept the thinking of our committee, but I did want you to have the benefit of it in your deliberations.

Section 1 of Joint Resolution 1, of course, deals with the Tyler precedent. I think that really the Tyler precedent makes it almost superfluous to include section 1 which makes clear that when the President dies, the Vice President becomes President and not Acting President. However, even after the tragic events of November in Dallas we find that an American citizen thought there was sufficient doubt to file in the courts a suit contesting the right of the President to assume the office as President. I think we can clarify this long-standing doubt in one simple sentence.

Section 2 permits us to have a Vice President at all times. Whether the President dies and the Vice President succeeds him as has happened eight times, or if the Vice President dies, which has happened seven times or if a Vice President resigns, which has happened once, we propose the office be filled by the President nominating a successor and the majority of both Houses of Congress confirming this nomination.
The CHAIRMAN. You care to answer questions as you go along or you want us to wait?

Senator BAYH. It would be fine.

The CHAIRMAN. You say by a majority vote of both Houses of Congress; would that mean a joint session or separate action by each House?

Senator BAYH. We suggest that this would be separate action by both Houses. There seems to be ample precedent whenever the wording is used in the bill that it does mean separate sessions of each branch of the Legislature.

Mr. Poff. May I inquire? Would the witness prefer that question be postponed until he has concluded his statement?

Senator BAYH. Perhaps it would give us more continuity if I quickly finished my five-section summary and then submitted to questions. I have no objection; whatever the committee wants.

Mr. Poff. That is entirely acceptable to me, Mr. Chairman.

Senator BAYH. Fine.

I might say one word about the thinking of the committee in this section 2 because we had a rather extensive debate on whether we should change the language in the bill that the chairman and I have cosponsored in which we say by confirmation of both Houses, to read the advice and consent of both Houses.

Senator Ervin, who is a rather distinguished constitutional scholar, was very strong in his feeling—very persuasive I felt—that the constitutional precedent of advice and consent which gives the Senate the power to advise and consent under certain circumstances, also enables presidential nominees to function in office in the absence of any advice and consent of the Senate. It is our feeling that certainly the Members of the 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 that he might in fact through a tragic set of circumstances be the President before any of us in Congress would have any voice in this matter whatsoever. 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.

Section 3 deals with the disability problem in which the President may divest himself of the powers and duties of his office voluntarily, in the event he feels he is unable to perform properly these powers and duties. In this case, the Vice President would assume the powers and duties as the Acting President during the tenure of the disability.

Section 4 permits the Vice President and the majority of the Cabinet to make the decision that the President is unable to perform the powers and duties of the office in the absence of a Presidential statement to this effect. We also provide for the unforeseen contingency that the Cabinet may not prove to be the best body to determine presidential inability in conjunction with the Vice President. So we would allow Congress might provide by law for another such body to participate in the decision. This approach would enable flexibility without requiring another constitutional amendment.

Section 5 deals with the remote possibility that the President, on one hand, would say he is able; and the Vice President and the
majority of the Cabinet saying, "Mr. President, you may be able to walk and talk, but those of us who know you best can tell the best interest of the country is that the Vice President should continue to perform these functions, and that you are not recovered."

In this case we feel, to put it very quickly, the issue should be put to Congress. Both Houses of Congress, acting by two-thirds vote—more than required in the impeachment provisions—would be required to support the contention of the Vice President and Cabinet majority.

Now let me hit on two or three questions, if I may, gentlemen, before yielding to your questions.

One of the problems that has been discussed not only by our committee but at some length in the news media is the problem of time limitation. How quickly should Congress act? The distinguished ranking minority member of this committee has suggested there should be a 10-day time limitation. There have been other time limitations suggested. Some of the news media have suggested the use of the word "immediately" is too vague. It would let Congress become embroiled in long debate stretching out over months, they say, and consequently we should tie the hands of Congress and should limit them.

I must say the feeling of my colleagues in the committee was quite the contrary. They felt that the use of the word "immediately" could well be too restrictive. The use of the word "immediately" might even imply a decision without any debate whatsoever, without the opportunity to call on medical witnesses, without the opportunity to consult with the members of the Cabinet and the Vice President who had made this important decision. For this reason, we finally decided to amend the paragraph so that it reads, "Congress shall immediately proceed to decide the issue," feeling that the words "proceed to" would more clearly imply that the process of determination could include calling witnesses and the like. Nevertheless, the word "immediately" means forthwith, quickly, and with the greatest of dispatch. Now this committee, in its judgment, can determine whether this gives too much leeway or not.

For the purpose of assuring proper and public notice of inability declarations, we made provisions for the President to provide a written declaration of inability under section 8 to the Speaker of the House and the President of the Senate. 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. One other question I will touch on is the strong feeling on the part of some that we are violating the traditional separation of powers by permitting the Congress to get into the act, not only in choosing a Vice President but particularly in the area of the final determination as to whether the President is able or unable to perform the powers and duties of his office.

I would like to point out I am a strong adherent to the separation of powers doctrine. I would like to also point out that our forefathers have found it expedient and wise to include in the body of the Consti-
tution itself, as have subsequent amendments, certain commingling of the various branches. The veto power is one area in which the executive attempts to check and sometimes does check the legislative branch. The confirmation power of the Senate is another apparent attempt to commingle and to provide a check. The House of Representatives, as you know, according to the 12th amendment to the Constitution, does, in fact, elect a President of the United States if no candidate gets a majority of the electoral votes. In the impeachment provisions of the Constitution we not only involve the House and the Senate, but in the final determination we bring in as presiding officer the Chief Justice of the Supreme Court. I feel it is necessary to bring Congress into the picture because I don't want the powers which have been given to the President by all of the people to be taken away from him without the representatives of the people having a voice.

Now, Mr. Chairman, I proceed at greater length than I intended to, in a summary.

Mr. Rogers. Mr. Chairman.

The Chairman. Mr. Rogers.

Mr. Rogers. Do I understand you did discuss the question in section 2 of your proposed constitutional amendment that in the event that the President should name a Vice President and the Congress, that is the House and the Senate, did not confirm that designation; would the Speaker of the House then assume the duties of the President in the event of a vacancy?

Senator Bayh. Yes, sir; Congressman. This would be the case. This is one of the imperfections of this measure. Quite frankly, I can envision the possibility, although I think it is very unlikely, that Congress for some reason or other would not go along with the suggestion or suggestions that the President might send to the Congress and in this case if something would happen to the President while there was a vacancy the present line of succession would be implemented. However, our feeling was—

Mr. Rogers. Go ahead.

Senator Bayh. I just want to emphasize why I think this would be unlikely. Our feeling is that in a time of national tragedy such as a death of a President where the Vice President succeeds, or where the Vice President himself dies—the country is in no mood to tolerate political chicanery in the appointment of a Vice President and I don't think this would be the case.

Mr. Rogers. You think it is political chicanery, you in your judgment as a Member of the U.S. Senate, should feel a man is not competent to be a Vice President or President? Don't you think it is your duty to vote against him and if you vote against him you call that political chicanery?

Senator Bayh. No. But I think in most—

Mr. Rogers. Well, aren't you at the same time advocating and saying that you as a Member of the U.S. Senate and I as a Member of the House, if we should vote against that, that we are not exercising our best judgment?

Senator Bayh. First of all, Congressman, perhaps the use of the term “political chicanery” was not a good one.

Mr. Rogers. Well.
But there is a possibility of a political power struggle going on and this is one possibility.

Surely.

Under the present circumstances, usually the President would be able to rely on the members of his own party to support his own choice as to who the Vice President should be which would be very similar to our nominating procedures. In the event the opposite party controlled the Congress, then I feel that the effort to play politics with this appointment would be prevented by a strong voicing of public opinion and I think this could be supported by the tradition which finds very limited opposition to the power that the President now has to appoint his Cabinet and many other officers who must be confirmed by the vote of the Senate.

Under this amendment could the President nominate someone for Vice President who is not 35 years of age?

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 in the past.

Well, I just wanted to get the record clear that you have no intention under this amendment.

None whatsoever. In fact the 12th amendment setting up new electoral procedure does not carry over all the qualifications of the President in the 12th amendment.

You would have no objection to being so spelled out in this amendment?

No, sir. Well, I ask the committee's consideration of our efforts to keep the amendment as brief as we can. Things like this we tried to put in our report. Perhaps this committee would prefer to lengthen the amendment by adding this safeguard. I, for one, would prefer seeing it in the report and keeping the amendment short.

You see any political implications that might arise due to the fact we are removing the Speaker of the House of Representatives as a possible successor to the office of President in this amendment?

No, sir. Well, I ask the committee's consideration of our efforts to keep the amendment as brief as we can. Things like this we tried to put in our report. Perhaps this committee would prefer to lengthen the amendment by adding this safeguard. I, for one, would prefer seeing it in the report and keeping the amendment short.

You feel Members of the House would go right along and think that their prerogative passing legislation where the Speaker is—the one in succession—that that removal meets with their approval and they wouldn't hesitate to approve it on account of that?

You, sir, could speak better to this question than I. It is a problem that is presented.

Senator, may I interject? Would you yield?

Yes, sir.

As I see it, I don't see how it would interfere with the line of succession. The line of succession only comes into being when both the President and Vice President are no longer with us. Then you start the line of succession beginning with the Speaker of the House. Under this proposal it doesn't provide—it doesn't take care of a contingency when both are no longer with us. That is taken care of by the line of succession statute.

That is correct.
Mr. Rooza. Apparently, I didn't make myself clear. In the first instance an order for the President to nominate a Vice President and have him confirmed—now that as I indicated—suppose he is not confirmed by Congress. The succession would be if we follow the law now, in the event of the death of the President the Speaker of the House of Representatives would become President of the United States.

Senator Bayh. That would be the law, sir, after the ratification by the Congress and the legislatures of this amendment. It would not change that law.

Mr. Rooza. It wouldn't change that law and, therefore, that is what I wanted to make sure, that is what your intent was, the succession we have spelled out so far would remain the law. But you do admit that it does permit the President to pick anybody as long as he is 35 years of age and I assume American born as required by the Constitution and name him as Vice President under this section 2.

Senator Bayh. Provided the majority of Congress will go along.

Mr. Rooza. But if the majority did not go along and a vacancy did then occur, then the Speaker of the House would become President.

Senator Bayh. That is correct, if the Congress failed to confirm a Vice President.

Mr. Rooza. Well, I just wanted to get that clear.

Senator Bayh. May I insert one thought here at this time?

We are trying to recognize in this measure the development of the office of Vice President and the need to have an able-bodied, working, capable, articulate, intelligent Vice President at all times. The Vice President can be a great asset to the President. The line of succession after a double death would not be changed.

Mr. Rooza. We change the line of succession by the virtue of the statute.

Senator Bayh. That is correct.

Mr. Rooza. Not the Constitution, but the point that I'm getting at is that we have the statute now and apparently would not change it. Now, let's go to section 3.

Mr. Tenzer. Mr. Chairman, will the gentleman yield?

The CHAIRMAN. Just a moment.

Senator, I think there is a bit of faulty reasoning here, if you permit me. The line of succession act only applies, as I said before, when both the President and the Vice President is no longer with us. If, perchance, we pass this constitutional amendment and the Vice President is not with us, dies, resigns, or what have you, and the President appoints a successor and the House and the Senate does not confirm it, it does not follow that the Speaker becomes Vice President. It only—the Speaker only advances when both the President and Vice President are gone.

Senator Bayh. I didn't understand Congressman Rogers' question. I thought he meant on the death of the President.

Mr. Rooza. I never—

Senator Bayh. I didn't think that was the question.

Mr. Rooza. Mr. Chairman, I didn't have that in mind. The only thing is I was, as you and I know, we have had this question of presidential inability discussed from the time that President Eisenhower had his heart attack in 1955 and we conducted many hearings over
here in connection with it and one of the difficulties was that you couldn't get an agreement of who is going to act in certain instances and if they did act, in what capacity were they permitted to act and, therefore, if this is to be presented, I think that we should spell these things out so there would be no question of what your intention is and what would be the intentions of the members of this committee if this is to be adopted. That's the reason I am asking the question, because you can readily appreciate that if a vacancy does occur in the Presidency and the Senate and the House does not confirm the President's nominee, then, in the event of a vacancy, who is to take over? And your answer is that we keep the statute of a line of succession that we now have—it would be the Speaker of the House of Representatives—and you don't feel that that presents any political problem in removing the Speaker as a possible successor to the Presidency, that they will go along, Members of the House will—whatever prerogative they may have thought they gained by the passage of that piece of legislation they will willingly surrender it for this constitutional amendment.

Now, that is your thought as I understand it.

Senator Bayh. That is my thought; yes, sir.

Mr. Ashmore. Will the gentleman yield for one observation?

Mr. Rogers. Yes.

Mr. Ashmore. Did your committee consider the situation that might arise in the case where the President should nominate or name the Speaker of the House as Vice President? Then the Congress refused to confirm the Speaker of the House.

Where are you then?

Senator Bayh. You would probably be in a rather unlikely situation.

Mr. Ashmore. Speaker of the House would take over anyway wouldn't he?

Senator Bayh. On the death of the President. You see, the Speaker doesn't get in the picture unless we have two deaths. This would be the case if the nominee for Vice President was not confirmed by the Congress and the President died.

Mr. Tenzer. Mr. Chairman, would the gentleman yield?

Mr. Ashmore. Well, does your bill provide if the Congress should refuse to confirm the person the President has named, then would the President be authorized to submit another name?

Senator Bayh. Yes, sir; and another, and another, and another. There is no limit on the number of names the President could submit to the Congress. I think if we didn't pass on the first name, it would be logical for a second name to be submitted.

For any legislation to work, gentlemen, I think we have to assume we are dealing with reasonable men. They would give reasonable consideration to the name submitted by the President. If Congress didn't approve, another name would be submitted.

Mr. Tenzer. Would the gentleman yield?

Mr. Ashmore. I yield.

Mr. Whittener. I would like to ask the Senator if it is the feeling of his subcommittee that a constitutional amendment is necessary to accomplish this purpose.
Senator Bayh. Yes, sir; we feel a constitutional amendment is necessary.

Mr. Whitener. Now, article II, clause 5, section 1 says that in case of the removal of the President from office or of his death, resignation, or inability to discharge the powers and the duties of said office, the same shall devolve on the Vice President and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice President, declaring what officer shall then act as President and such officer shall act accordingly until the disability be removed or a President shall be elected.

Senator Bayh. As the Congressman undoubtedly knows there has been a considerable amount of debate over whether a constitutional amendment was in fact needed because of the very wording he just read to the committee. Because there is sufficient debate, some doubt, we felt it would be safer—to be absolutely safe—to put a matter like this in the bedrock law of the Constitution so there cannot be a court test at some moment of crisis as to the constitutionality of this provision.

Mr. Whitener. I gather from the question these gentlemen ask that the amendment you now propose also raises question so it doesn't seem likely we are going to eliminate legal questions.

Senator Bayh. But we would eliminate constitutional questions if it is the Constitution, would we not?

Mr. Whitener. It seems to me this language is abundantly clear. The only thing that I can see that you make clear in this that is not clear in the present Constitution is that you take away from the Congress the right to move without the intercession of the President in making this determination. Under this proposed amendment, the Congress, it seems to me, will have to sit here and wait until the President makes a move whereas without this amendment and going under the present language of the Constitution, the Congress on its own motion makes this decision.

Senator Bayh. Well, the Congress, of course, has not made its own motion and there is a considerable amount of division of opinion as to whether it does have the constitutional authority to do so in this particular case—in the case of disability. There seems to be almost unanimous agreement that Congress does not have the power to appoint a new Vice President, which is the second part of this amendment. This would require without a doubt a constitutional amendment.

Mr. Whitener. I think that's clear that the present language does not apply to the Vice-Presidency, but if this situation arises that we are talking about, the dual death—the Vice President and the President, we have—we either have the constitutional authority to do what you would propose to do in this amendment to the Constitution or we didn't have the authority to do what was done when we put the Speaker in the third position. Isn't that correct?

Senator Bayh. In the case of the Speaker, we are dealing with the death of both officers and the Speaker does take over as President.

Mr. Whitener. Or inability.

Senator Bayh. The problem of inability is different because we hope this is a temporary divestiture of the powers and duties of the office. If we go back to the Tyler precedent and apply it to disability, then we see that when the President is ill and the Vice President as-
sumes the powers and duties of the office, he is not Acting President. He is the President. And as Henry Clay said a long time ago, it is impossible to separate these two offices.

Mr. Whitener. The Constitution, to read it a different way, says "Congress may by law provide for the inability both of the President and Vice President declaring what officer shall then act as President."

Well, may I ask you one other little question?

I notice in your amendment—

Senator Bayh. Before you proceed, may I say I don't think my personal opinion as to whether we need a constitutional amendment or not is as important as the fact that my distinguished friend from North Carolina and I put ourselves in this debate. This is just a small part of the debate that has gone on in the past. We have proposed a constitutional amendment on these points just to be safe so there will be no doubt about it. I think this is just being safe by putting it in the Constitution.

Mr. Whitener. If the gentleman would yield to one further question. I notice that you used section 4, the language:

A majority of the principal officers of the executive departments.

Now, as I remember it, that's used only one other—or at one time in the present Constitution. Now, in your prepared statement which I glanced at, you and our chairman in his statement just seemed to assume that that meant members of the President's Cabinet. Now, what legal authority do you have for saying that the words "a majority of the principal officers of the executive departments" means members of the President's Cabinet?

Senator Bayh. This has been the general interpretation put on this language.

Mr. Whitener. By whom?

Senator Bayh. As it has been used in the past. I feel this is a legitimate question, and we made our intent abundantly clear in our report.

Mr. Whitener. Now, let's take the Department of Defense. We have the Department of Defense. Within that Department we have the Department of the Navy, the Department of the Air Force, the Department of the Army. Would the principal officers of the Department of the Navy be one of these people?

Senator Bayh. I would say not.

Mr. Whitener. Why?

Senator Bayh. Because in the reorganization of the Armed Forces, the Department of Defense superseded the other three Departments and they became subordinate thereto and these other three officers do not sit in the President's Cabinet. The logical interpretation is that the heads of the executive departments are the principal officers of the executive departments. This is the Cabinet.

Mr. Whitener. It seems to me the Navy Department is an executive department and that the principal officer of that Department is the Secretary of the Navy.

Senator Bayh. I suppose it's important we make it clear we are talking about the Cabinet. I think this is the interpretation that has been put on it.

Mr. Whitener. If the gentleman would excuse me, why did you not say the members of the President's Cabinet?
Senator Bayh. The terminology has never been used in the Constitution. The term "executive departments" has, and in the report we define this as the Cabinet, making this interpretation very clear.

Mr. Whittener. Of course, when that was used in the original Constitution they didn't contemplate several departments we now have. I think that putting it into the report would not obviate the hazard any more than language that has been put in many reports to which courts have paid no attention to in the past.

Senator Bayh. If my recollection serves me correctly—and you are probably more aware of this than I—isn't this the same language used in the succession statute?

Mr. Whittener. I don't think so. It may be in the statutes.

Senator Bayh. The officers are set out.

Mr. Whittener. There again, I think you are in a different legal field when you have a court-interpreted statute as regards a court-interpreted constitution.

Mr. Rogers. In the statute of succession you don't have to have an interpretation by the Chief Executives as to whether the Speaker should take over in the event of a vacancy, vacancy in the Presidency; do you?

So it would have no application to the response to what the gentleman has said.

But may I back up and inquire about your section 8.

You say if the President declares in writing he is unable to discharge the powers and duties of the office, such powers and duties shall be discharged by the President as Acting President. Well, now—

Senator Bayh. By the Vice President.

Mr. Rogers. What are you going to do, sir, as they claimed at the time of Woodrow Wilson when he had a stroke and many people claimed he didn't have the capacity, mental capacity with which to sign a letter. Now, if someone should show up with a letter presumably signed by him would that give to the President or Vice President the authority to assume the office under this amendment?

Senator Bayh. Well, first of all, this is one reason we changed the wording in the proposal. You can no longer show up with a letter. It has to be written, a written declaration which has been transmitted to the President of the Senate and Speaker of the House, and certainly so—

Mr. Rogers. That isn't what I construe section 8 to mean.

It says if the President declares in writing he is unable to discharge the powers and duties of his office such powers and duties shall be discharged by the President as Acting President.

Now, my question is, suppose the Vice President runs down 16th—or Pennsylvania Avenue and says, "I got a letter from the President. He says he is not able to perform these duties. Therefore I am acting as President."

Now, is there anybody in a position to stop him from acting?

Senator Bayh. First of all, I want to repeat once again. Apparently, I did not make it clear. 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 which the Congressman referred 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.

Is that sufficient?

Mr. Rogers. That is, if the—there was transmitted from the President of the United States to the Speaker of the House of Representatives and to the President of the Senate a letter from the President then that would be—that's the amendment that you have offered on the Senate side?

Senator Bayh. Yes, sir, that is correct.

Mr. Donahue. Would the gentleman yield?

Mr. Rogers. Yes.

Mr. Donahue. Let us assume the President becomes mentally incompetent. If the President declares in writing that he is unable to discharge his duties, if he is mentally incompetent, what value should that writing have?

Senator Bayh. Well, if he is mentally incompetent, whether the value of the writing was in question or not, I think it would be incumbent upon the Vice President and Cabinet under section 4 to assume the powers and the duties of the office as if there was no writing by the President.

The problem of mental disability to which you referred and Mr. Rogers referred is a tough one. Its problem, really, is much like the Wilson problem, in which the facts are difficult to nail down. The President is surrounded by his official family, and his wife and his doctor certainly have a tremendous influence on him. It seems to me that section 5 would be implemented and Congress would have to make a determination of this once and for all.

Mr. Donahue. Senator, may I ask you this? Isn't the whole problem we are confronted with, one of what shall be done when the President shall become physically or mentally incompetent to carry out the duties of the office?

Senator Bayh. Yes, sir, that is. That is.

Mr. Donahue. In other words, the present statute relating to the succession is perfectly sound.

Senator Bayh. It has nothing to do with the problem we are discussing here today.

Mr. Donahue. That is right. So what we should try to resolve is what shall be done when the President becomes physically or mentally incompetent. It all boils down to that, doesn't it?

Senator Bayh. Yes, sir, that's what we are trying to do.

The Chairman. Would the gentleman from Colorado yield to the gentleman from New York, Mr. Tenzer?

Mr. Tenzer. We are now talking about sections 3 and 4 but I was addressing my inquiry to the Senator. Under section 2 would it not be clear that if the President made a nomination for Vice President and if both Houses of Congress did not approve, then the President would make another nomination before the Speaker of House would succeed?

Senator Bayh. Yes, sir.

Mr. Tenzer. Wouldn't that be one?

Senator Bayh. Of course, the Speaker of the House does not succeed at all, unless there is a double death.
Mr. Tenzer. That is both President and Vice President.

Senator Bayh. Yes. Yes.

Mr. Tenzer. That is what I want to make perfectly clear. Another nomination would have to be made.

Mr. Donohue. They would have to die simultaneously in a catastrophe?

Mr. Tenzer. Yes.

The Chairman. Would the gentleman from Colorado yield?

When the gentleman from North Carolina, Mr. Whitener, spoke that the statute may be sufficient, I would like to draw the committee's attention to a statement made by former Attorney General Brownell when he appeared before this committee on April 1, 1957, on this subject. He said as follows:

The number of respected constitutional authorities have argued that there can be no temporary devolution of presidential power on the Vice President during periods of presidential inability and whatever we may think of that argument I think that a statute would not protect the Nation adequately for the doubts that have been raised have been raised too persistently. As long as there is doubt, lingering doubt, concerning the constitutionality of the statute, as long as there is a question concerning the disabled President's constitutional stature after his recovery, I do not believe any inability as a practical matter, however severe it may be would be recognized lest recognition in that disability would oust the disabled President from office. Moreover if the presidential inability was severe and prolonged, to note the devolution of presidential power on the Vice President would create somewhat of a crisis itself.

Therefore, he came to the unalterable conclusion a constitutional amendment would be necessary.

Senator Bayh. I think the words of the new Attorney General will be particularly interesting in this area also.

The Chairman. Go ahead.

Mr. Rogers. Senator, turning to section 4, as amended, it says, "Whenever the Vice President, and a majority of his principal officers of the executive departments"—let's stop there.

Who do you envision as being principal officers of the executive department?

Senator Bayh. The President's Cabinet.

Mr. Rogers. And when you use it in that term you only intend to have the President's Cabinet?

Senator Bayh. That is correct, sir.

Mr. Rogers. And none other?

Senator Bayh. Yes, sir.

Mr. Rogers. If in the future we should create an office of Cabinet of Humanities as an example or of Natural Resources and so forth, each one of those would be a member of the Cabinet who would be in a position to act. In other words—

Senator Bayh. That is correct.

Mr. Rogers. If, any Cabinet officer created under the act of Congress would be in a position to act.

Senator Bayh. That is correct. Yes, sir.

Mr. Rogers. You and I recognize that these positions are at the pleasure of the President and subject to confirmation of the House—or the Senate.

Now, do you suppose that a majority of the officers should arrive at a conclusion that the President is unable to perform the duties of his office and he learns of it, and he immediately discharges all of them,
accepts their resignations—then where are we in your constitutional amendment if he says you no longer are a member of the Cabinet hence you cannot say that I can't perform the duties of the office. What would happen in that case?

Senator Bayh. This is one of the contingencies for which it is very difficult to find a positive solution. If I may go one step further and expand your question.

Mr. Rogers. Yes.

Senator Bayh. To take another very similar possibility, suppose the President doesn't find out about it—or suppose he is unconscious and the Vice President with the consent of the majority of the Cabinet does take over. Then suppose the vote was 7 to 3, and the Vice President as Acting President promptly proceeded to fire the three who voted against him—

Mr. Rogers. Sure—

Senator Bayh. On the other side, we don't want to put a Vice President in a situation as Acting President where someone dies on the Cabinet and he doesn't have the authority to replace him.

Mr. Rogers. No, but here the point is this: that the man selected for the Cabinet position, the men selected for the Cabinet positions are those the President has trust and he expects honor from them. He's not now likely to look with favor to them if they pass a resolution saying you are no longer competent. They are turning on the man who made their position possible. Do you think that that is the proper body to make this determination?

Senator Bayh. Yes, I do, sir, for the reason that I feel that the body that works the closest with the President, that is most familiar with his capability, should have the opportunity to make this determination with the Vice President who, I think, has the inescapable constitutional responsibility of participating.

The Chairman. Isn't there a safeguard because you say, "or such other body as Congress may by law provide."

Mr. Rogers. Now, that, Mr. Chairman. That's true.

The Chairman. That body could be the body of physicians, the Supreme Court or what have you. That is the safety valve, isn't it?

Senator Bayh. Yes, sir, and that's—

Mr. Rogers. Would the gentleman yield?

Senator Bayh. That is the very reason this was put into the language. We don't know what the future is going to reveal to us. We might find the Cabinet is unworkable. We want the Congress, without going through the whole constitutional amendment procedure, to be able to set up another body if, in its wisdom, it thinks it is necessary.

Mr. Rodino. Senator, I don't want to seem to be facetious. Let's consider this possibility since we are going to take into consideration situations to occur and sometimes those most unlikely to occur.

What provision do we make here, or is there any provision intended to be made if after the assumption of the Vice President to the powers and duties as Acting President that the then Acting President becomes disabled?

Senator Bayh. We have not provided for this contingency.

Mr. Rogers. May I follow through?
Mr. Rompino. Is there the likelihood, especially in this day and age, when we hear so much of the seriousness of heart attacks and other serious ailments that suddenly strike, or again the question of mental competency, and it could very likely happen, though it may not be within the realm of probability, right within that administration that both the President and the Vice President who assumes the duties of the office of the President as an Acting President; then he too maybe is stricken with some disability but it's likely to occur and if we are going to now amend the Constitution I think that we should well weigh the question and make some provision.

Senator Bayh. I think that it is wise for the committee to weigh it and I think it is a question well put; but the reason we did not include it was that the more complicated you make a constitutional amendment, quite frankly, the more contingencies for which you provide, the more difficult it is to get it passed. The more contingencies you place in it the more difficult it is to get the two-thirds vote of Congress and three-fourths the State legislatures. What we tried to do is provide for the most likely eventualities and hope we can get it through, feeling we would have most of these things covered.

There are other contingencies. For example, what happens if the President and Vice President are killed after election, prior to being sworn in? There are many facets of the normal transfer of Executive power that we did not include in the final amendment after giving it a great deal of debate. This is one we didn't consider, but we did not include for that reason.

The Chairman. Would the gentleman yield for a moment to clear up a point with reference to what you spoke, a resignation of a member of the Cabinet which might gum up the works?

I don't think you took into consideration the amendment that the Senate put into section 4. That amendment is as follows:

Whenever the Vice President and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits to the Senate and the Speaker of the House of Representatives their written declaration—

that means their written declaration—not only the Vice President but the members of the Cabinet—if the member of the Cabinet resigns or is fired after he signs the written declaration prevails, he has made a decision. What happens after he makes his decision could not operate retroactively so he is out so that I think your question and the answers that were given should be clarified so that it makes no difference whether that Cabinet officer resigns after he made his written declaration.

Mr. Rogers. But the point I tried to emphasize is not only that, but naturally if a man, if he is President and has lots of people around, certainly he is going to have at least one loyal member among the Cabinet say a meeting is necessary to determine whether you should continue to be President; that he might take the action before they get this written declaration. That's the point I am trying to emphasize and I want to follow through on the other problem as presented here.

Where you say the majority of the principal officers which you have said are the Cabinet. Now, or such other body as Congress may by law provide.
Now may I inquire, sir, if Congress should set up a commission composed of say five psychiatrists, and five Members of the House and five of the Senate, would that body then make an examination of the President and we provide in the statute that they shall make the examination and make their report. Would they then—could Congress enact such a law and designate such people to make these determinations and immediately upon that being transmitted to the Speaker of the House of Representatives and the President of the Senate, that that immediately removes the President from his position?

Senator Bayh. With the consent of the Vice President, yes, sir, the Congress could. Just as the Congress can finally take the President out of office by impeachment, and under section 5 of this proposal for disability.

Mr. Rogers. Now suppose that does happen and immediately the President under section 5 says he transmits his declaration that no inability exists. Then who is President?

Senator Bayh. The Vice President continues to act as President until the Congress decides the issue. We have given this a considerable amount of study and we have tried to arrive at a situation where there is a minimum amount of change back and forth.

Mr. Rogers. Then I gather from what you state that if the situation should arise whether it is the Cabinet or whether it is a statute as authorized by Congress and a declaration has been made and transmitted that immediately removes the President. Following his removal he then certifies that he has the ability to resume the office. Then he cannot resume his office until he has a majority of the principal officers of the executive departments or such other body as Congress may provide.

Senator Bayh. No, sir, let me clarify this. 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. So in that circumstance, the President, if having been declared by this body that's been set up by Congress and the Vice President to be ill, makes a declaration he is well, the only way they could take the office away from him would be for both the Vice President, a majority of the Cabinet or this other body and two-thirds of Congress to support that contention he was ill.

Mr. Rogers. But your first—your section 4 provides that whenever this Cabinet or whenever this committee or whatever is provided by statute, when they make the determination and transmit it immediately the Vice President becomes the Acting President.

Senator Bayh. That is correct.

Mr. Rogers. This divests the man who has been elected President of the United States of his office by the action of either the people who have—he has appointed, or people that Congress have authorized to make this determination.

Senator Bayh. That is correct.

Mr. Whitener. Would the gentleman yield?

The CHAIRMAN. Would the gentleman yield?

Mr. Whitener. I notice you and our chairman keep referring to members of the Cabinet and I don't want to belabor this point, but you
say a majority of the principal officers of the executive departments and no one questions that Congress has the right to create executive departments, I assume. Now, I just quickly looked here at the title 5, section 1 of the United States Code, and it says that the provisions of this title shall apply to the following executive departments.

First, the Department of State.
Second, the Department of Defense.
Third, the Department of the Treasury.
Department of Justice.
Post Office Department.
Department of the Interior.
Department of Agriculture.
Department of Commerce.
Department of Labor.
Department of Health, Education, and Welfare.

Then when we go to title 10, section 101, relating to the Defense Department, and from this in subsection 6, quote: “Executive part of the Department,” unquote, means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force as the case may be at the seat of the Government.

And then when we look at title 42, section 201, subsection (e), we find the Congress defining “executive department” as follows:

The term “executive department” means any executive department, agency, or independent establishment of the United States or any corporation wholly owned by the United States.”

Now in 5 minutes I have found these definitions of executive department in existing statutes.

If the Congress has the authority under your amendment to—and if the amendment says that the principal officers in the executive departments are to make this decision, it seems to me that you have opened up greater opportunity for litigation and contention by the use of that language and that if you mean the Cabinet you should say the Cabinet. There are probably other conflicts. I am sure the learned Attorney General when he appears will tell us other definitions of the executive department to be found in the United States Code.

Senator Bayh. I will merely say that whatever language is used that the intention should be made clear that we are talking about the President’s Cabinet, his official family. I, for one, think that the language

Mr. Whitmer. Or such other body as Congress may designate and if Congress—

Senator Bayh. The Congressman is talking about the use of the words “executive departments” and I admit this other is in there. It is in there for the purpose we discussed but when you are talking about the principal officers of the executive departments I, for one, think it is clear we are talking about the President’s Cabinet.

Mr. Mathias. Would the gentleman yield?

Mr. Moore. Why do you object to putting it in? Why do you object to using Cabinet?

Senator Bayh. I have no specific objection to putting it in, except that—
Mr. Chairman, if I may clarify my reason again. The reason it was put in, the word “Cabinet” was not used in the Constitution. The words “members of the executive department” are.

Mr. Moore. If I may interrupt. The gentleman from North Carolina picked out three or four instances in which the phrase “executive department heads” has been used which certainly should lead you to the conclusion there could be some confusion somewhere. Why would it not be best to designate who shall have this responsibility to determine the incapability or capability of the President to handle the affairs of his office?

Senator Bayh. I have no objection if the committee wants to change the wording. I might say the distinguished senior Senator from North Carolina was the one most vehement in his feeling against putting additional language in the Constitution that has no precedent so long as we make it clear. If you gentlemen don’t think this is clear, we ought to take further steps.

Senator Ervin feels this is sufficient. I do, too. But if the committee differs, I think it should be made abundantly clear whether in the proposal, in the reports, or whether in the discussion on the floor, that we are talking about the President’s Cabinet. We don’t want the head of Soil Conservation Service or the Veterans’ Administration or someone else to be brought into this determination. We are talking about the President’s Cabinet, the people who sit with him.

Mr. Whitener. May I say this? Senator Ervin is one of my most distinguished constituents and one of the most able lawyers to be found.

In section 2 you use the wording, “confirmation by a majority vote of both Houses of Congress” and then you go on again in section 5 the line 5 on page 3, “If the Congress determines by two-thirds vote of both Houses, do we mean actually a majority of the Members of the House of Representatives or a majority of the Members present and voting? Do we mean two-thirds of the Members of the House of Representatives or two-thirds of the Members present and voting?

Senator Bayh. This is one question that was asked of the Attorney General. It is his opinion, and it was our intention, that we prescribed a majority of the quorum or two-thirds of the quorum as prescribed by the rules of both Houses. The Attorney General was of the opinion we have adequate precedent so that whenever we talk about a majority or two-thirds we are talking about a majority of the quorum which is necessary to conduct the business in the first place.

Mr. Rogers. The House when you have 218. If there are 218 present, two-thirds of them vote. That meets the requirement?

Mr. Rodino. Is that what you mean?

Senator Bayh. That’s what we mean. That is the way it is always been construed.

Mr. Mathias. I thank the gentleman for yielding.

Going to the question of the gentleman of North Carolina, the use of the phrase “majority of the principal officers of the executive departments” and relating this to the term “Cabinet” because these are not necessarily parallel terms; today I believe that the Ambassador of the United Nations sits with and as a member of the Cabinet. This is a practice that has gone on since Henry Cabot Lodge was appointed
Ambassador by President Eisenhower's administration. I understand some other executive officers, including the head of the poverty program, Mr. Shriver, is also sitting as a member of the Cabinet. Would it be desirable as a matter of policy that people of this sort who have close contact with the President and who are constantly in communication with him be included in the generic term, "the Cabinet," though they are excluded by the language that has been used so far?

Senator Bayh. I personally do not think they should be included. There are arguments on both sides of this. If you use Cabinet it could very well be interpreted to include Mr. Stevenson, Mr. Shriver, or others who might by custom begin to sit in on the Cabinet meetings. However, we are thinking about the chief executive officers of this country, which I think exclude United Nations or the poverty program director.

Mr. Mathias. He isn't sitting there by custom, but by invitation of the President of the United States to become part of the Cabinet and is part of the Cabinet. If we are thinking of getting the Cabinet together, it might be less important, for instance, for the Postmaster General who, perhaps, has very casual contacts with the President, than the United Nations Ambassador who may see the President on a weekly or more than weekly basis, daily basis.

The Chairman. Will the gentleman yield?

I think we find the words "executive departments" in another part of the Constitution. In article 2, section 2, of this language it says:

The President shall be Commander-in-Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States; he may require the Opinion, in writing, of the principal Officer of each of the executive Departments.

What did the Founding Fathers mean when they used the term "executive departments"? I imagine they must have meant the members of the Cabinet so called when they used that term when they first adopted the Constitution.

Mr. Rogers. The point is——

Mr. McCulloch. I should like to ask this question.

Is the Atomic Energy Commission an executive department of the Government? Would the principal officer of the Atomic Energy Commission be one clothed with authority under this proposal?

And I refer specifically to the section of the Constitution which the chairman just read.

Senator Bayh. If you are asking me, I would say "No." I would say "No." I would say this is not the interpretation.

Mr. McCulloch. First of all the Atomic Energy Commission is not an executive department of Government. Do you make that conclusion?

Senator Bayh. Not in the last degree, it is not. Not in the highest degree. It is a subsidiary branch. It is not a department but a commission.

The Chairman. I think we are going to have the Attorney General appear here subsequently. I think he might give us some enlightenment on this matter. I think it should be clarified because there are undoubtedly some doubts in the minds of a good many present. I think there should be some precise language so that there be no ambiguity whatsoever. I think you would agree?
Senator Bayh. I agree.

The CHAIRMAN. There should also be an amendment to null that down.

Senator Bayh. Yes, sir, if necessary.

The CHAIRMAN. May I ask this other question. I think the gentleman from Colorado reading something about section 3, whenever the President transmits to the President of the Senate—no—section 4 whenever the Vice President and so forth—does certain things with the concurrence of the members of the Cabinet—he then shall succeed and become Acting President.

I think the gentleman from Colorado feared there might be some ambitious Vice President who might want to usurp power. Haven’t we got a safety valve there, also, if he is such a gentleman and acts ruthlessly and seeks to stage a coup d’etat, that we could impeach; and impeachment proceedings always lie back of this whole proposition so that the Congress can always have the last word on this?

Mr. Rogers. I am sure, Mr. Chairman, we have had many ambitious Vice Presidents in the past and I anticipate we will have many in the future; but the point is this.

To place in the hands of a few individuals to upset what the people of the United States have done in electing a President by the whim of a signature which may or may not be genuine, it goes a long way. That’s the thing that I’m emphasizing.

The CHAIRMAN. The answer is impeachment.

Mr. Rogers. Well, of course.

Senator Bayh. May I just try to think out loud for a moment to clarify this. You can think of all sorts of eventualities, but in section 3 which the gentleman referred to first; this is a voluntary procedure in which—

Mr. Rogers. What?

Senator Bayh. This is a voluntary procedure which the President voluntarily submits to. Now if someone shows up with a written letter and says, “Look what I got from the President,” and the President comes on television the next instant and says this is a forgery—

Mr. Rogers. Yes, but under this, suppose as suggested by the gentleman from Massachusetts a moment ago that he is actually insane and the ambitious Vice President knows that he is insane and—

Senator Bayh. I would think if he is insane we better get him out of there.

Mr. Rogers. Immediately suppose he is insane and somebody through trickery got him to sign it or suppose that he is unable to even sign it. Then this, if he shows—somebody shows up with the letter, then immediately the Vice President takes over.

Now, the point is, that I think it is dangerous to put in the hands of a few people the right to upset what the majority of the people in this country has determined.

Senator Bayh. The final right, if I may say so, is not in the hands of a few people, but in the vote of two-thirds of the vote of the House and Senate.

Mr. Rogers. Not—

The CHAIRMAN. Not in section 4.

Mr. Rogers. Not in section 3 because in section 3 if he shows up with a signature that he voluntarily resigns or he can’t perform the
duties of the office, then the Vice President takes over. Now can’t you envision a dangerous situation that would develop in carrying out the executive department of this Nation if the signature of one man would be the determining factor of whether he was President or whether he wasn’t? Don’t you think that we could meet the problem more directly?

Senator Bayh. What if the President would write his written resignation and send it under the constitutional authority he now has? It seems to me we have to look at this in terms of the limelight focused on the President.

One, if the President feels he has to undergo a serious operation or something like this and he feels it is in the best interest of the country, he would make a written, open declaration and the Vice President would assume the powers and duties.

Two, if he’s unable to do this, the only way an ambitious Vice President—and there undoubtedly have been and will be ambitious Vice Presidents—but the only way he can assume the powers and duties even temporarily is to get a majority of the Cabinet which was appointed by the President he seeks to depose and then—if I may continue my line of thought and then I’ll yield.

Mr. Rogers. Sure.

Senator Bayh. Then, although I heard a voice of dissent over here, in the final analysis the only way the Vice President can continue to act beyond a reasonable period in which this decision is being made in the Congress is to get two-thirds of the vote of both Houses of Congress and I don’t think he should be able to take over with any less support.

Mr. Rodino. Senator as a matter of fact, doesn’t section 5 immediately go into play where the Vice President may have acted in this matter? All that has to be done is that the President himself declares that he has the ability to act and then the question becomes an issue and nothing more.

Senator Bayh. Right, the issue is drawn and Congress decides. If you don’t get two-thirds votes [snapping fingers] it’s back like that.

Mr. Rogers. Mr. Chairman, I will yield back to the floor.

Mr. Poff. Mr. Chairman, may I say I think we should all recognize candidly what hasn’t yet been articulated: namely, that the Celler-Bayh proposal or the Bayh-Celler proposal is the end result, the precipitant of a long process of distillation and filtration in which many hands have played a part. I say this because I want to emphasize that this is not a carelessly drawn measure and I say that because I am anxious to see that expeditions action is taken at this session of Congress on this vitally important matter.

Now having said that, however, I think it is important that we not do anything precipitously, that we not do any rash acts which all of
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us and future generations may regret. To illustrate what I mean by that, I call attention to the fact that most legal scholars thought that the Senate bill had been refined to its highest state of polish and yet the Senator has brought with him what is described as the text of this Senate Joint Resolution 1 as reported by the Judiciary Committee on February 4, 1905, and most of his testimony has been addressed to the changes that have been made.

Now, I suggest that the fact that the Senate committee was able to discover the need for changes demonstrates that this committee should be careful in dealing with the subject and that we should not in any way be foreclosed in our examination of the subject. This applies not only to the present witness but to all other witnesses who may follow him in the chair, particularly the most learned Attorney General of the United States and, Mr. Chairman, while I repeat I want to do everything I can to expedite final action as promptly as possible I expect to insist I be given an opportunity to inquire in detail and at length and I make no apology for making that demand.

Now, Mr. Chairman, having made that preliminary statement which I might add is in lieu of the testimony I had expected to make this morning.

The CHAIRMAN. We always welcome your scholarly inquiries.

Mr. Poff. The gentleman is most generous. I shall not testify as I previously intended. Perhaps I can make my points in my interrogation.

I begin my interrogation by saying I agree with most of the language changes as made. I think it was an improvement on the original Bayh-Celler bill. I have some reservation about the deletion of the word “Cabinet” and the use of the phrase “principal officers of the executive departments.” This is something that needs to be carefully studied before this committee deals with it. Now, I might also ask the Senator if in the interests of language clarity he might be willing to accept a language amendment in section 4 next to the last line on the text of Senate Joint Resolution 1 as reported by said committee. I suggest it would be helpful if after the word “the” a word before the word “powers” we inserted the words, “discharge of the.”

I make this suggestion because we have used that language in other places preceding section 4 and because I want to make it crystal clear there is a distinction not only between the Vice President assuming the office of President or assuming the duties and powers of the President but also a distinction between those two and his assuming the discharge of the powers and duties of the office.

I think what the Senator intends to do and what the American Bar Association intends is that the Vice President has as Acting President assumed the discharge of the duties rather than the duties themselves. This may not be a vital point, but for the sake of consistency we might consider that.

The CHAIRMAN. Where you add the word “discharge”?

Mr. Poff. Discharge of—have it before the word “powers” in section 4, next to the last line.

Senator Bayh. If I may say so, I think whether the words are used or not, the wisdom of this committee should be carefully given to their inclusion. The 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.

Mr. Poff. I am not sure we want him to have any title to the powers and duties. Speaking for myself, I am jealous of the powers and duties for the sake of the President who has been elected by the people. I want the Vice President to have only the right to discharge the powers and duties. I say the distinction may be a small one, but I think it is important in dramatizing our first concern for the protection of the duties and powers of the President.

Senator Bayh. If I may point out that even with the outright disposition of the powers and duties as we have it in the language, the next wording, if you notice, is that he does not have the office of President but that of Acting President. He does not get the full powers and duties of the office of President unabated. He is Acting President.

Mr. Poff. I don't think we have any disagreement about that point. Senator, may I direct your attention to section 2. You have previously addressed yourself briefly to the advisability of a time limit, but you do so with reference to the action that would be taken under section 5. Now under section 2 it is possible that a time limit should be considered for two separate acts. First of all, the nomination of a Vice President by the President and second, the second action by the Congress on the nomination once made. Do you think it would be advisable to impose upon the President a time limit?

Senator Bayh. I don't believe it is necessary. There is controversy on this. My opinion is that there should not be a roadblock to prevent us from reaching a solution, but there are all sorts of questions that arise. When you put a time limit in the Constitution, then what happens if a sequence of unforeseen events prohibits the President from adhering to this time limit? Then he is in violation of the Constitution.

We felt we must assume we are dealing with reasonable men. With the glare of publicity and public opinion on the President, as well as on all of us in Congress, if this should ever happen—and the memory of all of us encompasses November of 1903 and I think we can still sense the tenor of the country and the feeling of urgency—the business would be disposed of judiciously and quickly—

Mr. Poff. I might say I tend to agree with the Senator. However, I think we must recognize there might be situations in which the President might hesitate to nominate promptly. For instance; Let's assume that the vacancy in the Vice-Presidency occurs on Christmas Day preceding Inauguration Day. He might decide it was unnecessary to fill the Vice-Presidency. Now, this might be a reasonable decision on his part. It might be reasonable if the vacancy occurred on the 1st day of December preceding inauguration, but isn't reasonable in July preceding the inauguration.

In other words he is not required to nominate and it becomes a matter of his subjective judgment as to whether he is going to nominate or not. If we are going to talk about playing politics in the two Houses of Congress, let's think about the possibility of the President playing politics.

The Chairman. Will the gentleman yield?

Mr. Poff. Yes.
The CHAIRMAN. Is this supposed to take into consideration any time between the time of election and inauguration?

Senator Bayh. No.

The CHAIRMAN. I think if that is the case there would be no President on Christmas Day if Christmas happens between the election and inauguration.

Mr. Poff. I think, perhaps the chairman makes a good point. I use that as an example.

Let’s say that the vacancy occurred the day before election preceding inauguration.

Senator Bayh. Whenever we impose a time limitation, we do limit and urge the President to act and give a time within which we must act. But we also run afoul of the possibility that through good reason he cannot act. I for one have enough faith in our President and our Congress to believe that in these circumstances they are going to act judiciously in a reasonable period of time.

Mr. Poff. I repeat, I am inclined to agree with the Senator. I ask one further question on that point.

Would you object if the adverb “promptly” were inserted to modify the verb “nominate”?

Senator Bayh. I have no objection to the word “promptly.” I hope your committee doesn’t spend as much time with the word “promptly” as we did on debate of the word “immediately.”

When you include that one word all the ramifications go with it. I trust the judgment of the committee on it.

Mr. Poff. All right, may I direct your attention to the second phase of section 2.

Do you think it would be wise to have a time limit on the mandate that the Congress act upon the President’s nomination?

Senator Bayh. In other words, the time limitation in section 2.

Mr. Poff. Well, I am asking—suppose the President has nominated a Vice President to fill the vacancy.

Senator Bayh. I understand.

Mr. Poff. Should there be a time limit within which the Congress should be asked to respect his nomination?

Senator Bayh. I feel as far as time limitation is considered throughout in a constitutional provision, it would be better to leave them out and trust the President and Congress to use their good judgment as to what would be reasonable. There would be some times, perhaps, when a name would be submitted for which there would be patent reasons for a tremendous amount of debate. Other times a name might be submitted and would be readily acceptable and there would be little reason for a prolonged debate and everyone would recognize this. I think the good judgment—

The CHAIRMAN. Pardon me, that’s another reason.

Congress may be dominated by a party other than the President also which might raise complications.

Senator Bayh. This would take longer, I would think normally, than if his own party was in power.

I think we could still reach a decision, a conclusion.

Mr. McCulloch. Mr. Chairman, will the gentleman from Virginia yield for this observation?

Mr. Poff. Yes.
Mr. McCulloch. I would like to say that while the Vice President is the Acting President, even though the Congress may be in adjournment, under the Constitution he would have the right to convene the Congress and in these days of fast transportation it doesn't take too long for the Congress to convene and quick, certain, effective, dynamic leadership may justify such an action and that, by the way, is one of the reasons why I said we had to discuss a bit further some of these proposals.

Senator Bayh. May I offer one word here so that the record, in my opinion, may be abundantly clear?

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—and if I know this committee, it will—give it the most careful examination 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. I have no objections to answering questions at all.

The Chairman. Will the gentleman yield?

Mr. Poff. Yes.

The Chairman. In answer to your question by our distinguished ranking Republican member that 10 days may elapse between the nomination and the confirmation, suppose that the Congress does not act within 10 days? If we put 10 days in there what would happen then?

Mr. McCulloch. Mr. Chairman, I might answer that question if the chairman will permit.

The Chairman. Yes, sir.

Mr. McCulloch. The legislation that I proposed provided that under section 5 the President shall forthwith thereafter resume the duties of the Presidency.

Senator Bayh. May I disclose the thinking of our committee as far as this particular limitation is concerned—and here again I think we have carefully considered it.

It might well take longer for Congress to make a determination in one type of illness than another type of illness. The type of testimony that would be involved to fully disclose to the Members of Congress the condition of the President might take longer in one type of illness than another.

In fact, one horrible example that was brought to our attention that I don't anticipate—but if we are looking for horrible possibilities, here is one: What if we were engaged in nuclear war and the seat of Government is destroyed? There would be a time element involved finding a place where the Congress could meet and convene despite rapid travel we take for granted.

Mr. McCulloch. Mr. Chairman, I would like to reply that 10 days was an arbitrary time limit suggested for the very purpose of what we are doing now, discussing, and if we determined that a time limit should be set whether it is 5 days or 10 days or 20 days, is a question of judgment and time delays do not concern me too much in assembling
the representative of the people of the United States when the occasion demands it.

Mr. WHITTENER. Mr. Chairman.
Mr. POFF. Mr. Chairman, if I may recapture the floor.
Mr. WHITTENER. Just one question.

Senator, earlier I made some reference using the expression members of the President's Cabinet. I think now, perhaps, I understand more fully the problem in looking at Corwin on Constitution of the United States. I find this statement.

The Cabinet as we know it today, that is to say, the Cabinet meeting, was brought about solely on the initiative of the first President and may be dispensed with on Presidential initiative at any time being totally unknown to the Constitution.

I do note there was a study made by the Attorney General, 36 Opinion, Attorney General, April 12-16, 1929, on the history of this proposition. I am just hoping it possibly will be available.

Mr. POFF. Has the gentleman concluded?
Mr. WHITTENER. Yes, sir; thank you very much.

Mr. POFF. Mr. Chairman, to this point my line of inquiry has been addressed to section 2.

Now, I want to shift to section 5, if I may. I believe the Senator knows I am the author of House Joint Resolution 3 which was introduced on January 4, the first day of the session this year. My bill in most particulars is the same as the bill the Senator introduced. Its principal point of departure is in section 5. It follows somewhat the concept to which the distinguished gentleman from Ohio alluded, but they are not altogether the same.

In order to put my questions in proper perspective may I read the pertinent language from my section 5?

If the Congress within ten days after receipt of the vice-presidential written declaration determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office of the Vice President shall continue to discharge the same as Acting President. Otherwise the President shall resume the discharge of the powers and duties of his office.

Now, the purpose of structuring the language so was to give the Congress of the United States the opportunity to defend the President without giving positive offense to the Vice President.

May I explain what I mean? Under the language that I have just read the Congress would have three possible choices. After the Vice President has submitted his challenge, the Congress, first, can vote and uphold the vice-presidential challenge. Second, the Congress can vote and reject the vice-presidential challenge. Third, the Congress could allow the 10-day period to expire without voting at all.

Now, if Congress chose to pursue the latter alternative it would be equivalent to the second alternative; namely, voting on the Vice President's challenge but rejecting it. I can envision the possibility that the Congress might want to defend the President by rejecting the Vice President's challenge but would rather not have to vote on it.

I am not talking about courage. I am talking about the pragmatic doubt that might be involved. Now, I ask the gentleman if he has considered that approach?
Senator Bayh. 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 that 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?

So, the final result of inactivity would be the same as activity and the only—

Mr. Poff. I don't want to engage in a quarrel. I am not.

I am trying to reason with him. Is it not possible, sir, under your proposal, for a Congress that happened to be hostile to the President, simply to sit idly by and do nothing when the Vice President's challenge reaches it?

Senator Bayh. In what circumstances, if I may ask?

Mr. Poff. Sir?

Senator Bayh. Under the provisions you propose?

Mr. Poff. Under your bill, wouldn't that be possible?

Senator Bayh. Yes, it would be.

Mr. Poff. Would it not also be possible if the—

Senator Bayh. May I say, if they sat idly and did nothing for an extensive period of time the President could resume his powers and duties because the Congress didn't act immediately?

Mr. Poff. Well, let's suppose the Vice President who is discharging the duties of the presidency has a hostile Congress and suppose that Congress is not motivated so much by a desire to uphold the President as to punish the Vice President. Wouldn't the same possibility entail?

I am arguing, of course, for the logic of a time limit.

Senator Bayh. We are not really arguing. We are trying to explore each other's thoughts here. I think it is something you must pursue. The question is whether you want to limit the capacity of Congress—all of us sitting here—to delve into this matter and finally decide in our own minds on a matter of grave importance to the country. I, for one, feel that I can trust you and my colleagues in the Senate to do this with reasonable dispatch but would rather not hang around their necks an arbitrary time limit so that if action is not taken the President finally resumes the powers and duties of his office. Suppose it is a complicated situation, for example Congress has held hearings and had expert testimony. It looks like within 18 days they are going to be able to get this done. Representative McCulloch says "10" is just an arbitrary figure but let's use it. Let's say within 10 days the power reverts to the President.

Here you have a rather unstable situation. First, a Vice President takes over from the President and then the 10-day time limit expires. Then the President takes his power back and 10 days later Congress decides the Vice President is right and the power comes back to the Vice President again. This is why we stayed up until the wee hours of the night finally deciding that through this period of decision we should know who had the powers and duties, and that should be the Vice President until the decision was made. Then either the President or Vice President would continue to perform the powers and duties.
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Mr. PopI. I don't know the 10-day period is any magic period. Probably it is not. Probably it's too short. In any event, I don't see any danger in the power shifting back to where it belonged, where the people placed it—in the President. So, if the 10-day period expired without the Congress acting, I would be glad to see the power go back where it belonged and reside there.

The CHAIRMAN. There is a quorum call, and, Senator, can you come back at 2 o'clock?

Senator BAYH. I will be glad to be back whenever the chairman would like.

I am still feeling very guilty about the Attorney General, knowing he is busier than I am.

The CHAIRMAN. The Chair now will announce a recess until 2 o'clock.

So, Mr. Chairman, I should like to have unanimous authority to strike from my statement these words, "a hit-or-miss process which is done indiscriminately" and insert the word, "done" thereafter.

(Whereupon, at 12:12 p.m., the committee was recessed, to reconvene at 2 p.m.)

AFTERNOON SESSION

The CHAIRMAN. For the witness this afternoon we will hear from our distinguished colleague, Mr. Lindsay.

Mr. Katzenbach was to return this afternoon, so I am sure we will be able to work it out.

Proceed, Mr. Lindsay.

STATEMENT OF HON. JOHN V. LINDSAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. LINDSAY. Mr. Chairman, I think it is important that Members who wish to testify be heard, and particularly, if they are members of the committee, and I think it is important, too, that those who have been working on this subject nigh on to 8 or 10 years should be listened to.

On the first point, which is the question of Presidential inability, which we were discussing this morning——

The CHAIRMAN. Do you have a statement?

Mr. LINDSAY. I am going to speak from notes. I am not going to submit a formal statement.

On the first point, Presidential inability, I think it is scandalous that the Congress has never acted on this in spite of the fact that administrations, beginning with the Eisenhower administration, have requested Congress to take action, and Congress has done nothing. To move the Congress it has taken the tragic death of a President, President Kennedy, and the blatant danger that existed when Mr. Johnson became President and there was no Vice President.

The country finally became alarmed, and has, I think, exercised enough pressure to push the Congress to taking some action on this subject.
On inability, it doesn't, I suppose, need to be restated how pressing the problem has been in history and how much more pressing it is today in a smaller world in constant danger of hydrogen warfare. Under such circumstances we need decision and fast communication. We recall that President Garfield was in a coma for 80 days, and during that period considerable Government business in both the domestic and international field was impaired.

We know further that during that period of Garfield's incapacity, the Cabinet, including the Attorney General, was divided in its opinion as to who had power. If Vice President Arthur proceeded to act nobody could state with any degree of sureness whether the Vice President's acts would be lawful. As the committee may know, Vice President Arthur, under those circumstances, refused to make any decisions at all.

The disability of Wilson was longer; it was over a year, and although the extent of it is under considerable debate, nevertheless it is established that his disability prevented his participation in the debates over the Versailles Treaty and the League of Nations. This was a sensitive period, as have been periods since then in our history, but nothing compared to what we are faced with now.

We were discussing this morning the question about who shall make the decision as to presidential inability. Is it a vice-presidential decision, or is it a general executive decision, or should it be a congressional decision, or a court decision. There is a good deal of history on this. The question really first arose when President William Henry Harrison died of pneumonia in office. There were those who objected to Vice President Tyler's succession during the President's period of illness, and there were many more who objected to Tyler's succession to the Presidency even after President Harrison's death. The question was whether the Vice President really became President to fill out the unexpired term, or whether he just continued as Vice President and performed the duties of President.

Tyler first held the view that he would only act as President during the unexpired term. Then, later, he apparently changed his mind and decided to assume the Presidency.

Seven other Vice Presidents have followed suit since then. In other words, all of them have decided that they were the President, they were not Acting President; they had not just the name, but the powers of office of President. They were Fillmore, Andrew Johnson, Arthur, Theodore Roosevelt, Coolidge, Harry Truman, and Lyndon Johnson. This has a bearing on the question of disability, it seems to me. We are told that an examination of the original articles agreed upon by the Constitutional Convention showed that the delegates at that time agreed that upon the inability of the President to discharge the powers and duties of his office, the Vice President should exercise those powers and duties "until the inability of the President be removed."

The original thought of the framers of the Constitution was that the Vice President would act as the President in the case of the President's disability. This view, and I am sure the Attorney General when he testifies will support this, finds support in the debates.
of the Constitutional Convention indicating that the Vice-Presidency was originally created to provide for an alternate Chief Executive who might function from time to time should the President be unable to exercise the powers and duties of his office. When this provision was stated in so many words and was submitted to the Committee of Style, it was revised and reduced to the simplified statement that we have now: "In the case of removal, death, resignation, or inability to discharge the powers and duties of the office, the same shall devolve upon the Vice President," and that is the way it has remained ever since.

What this really means is that we are talking about an Executive decision rather than a congressional or a court decision in the first instance. This interpretation, in fact, has been shared by several Attorneys General in the past. Before the Senate subcommittee, Attorney General William Rogers said that in his opinion the Constitution invested in the Vice President initial determination as to the existence of an inability with respect to the President.

The same view was expressed earlier by Attorney General Herbert Brownell, who incidentally was the first governmental officer to draft and submit to the Congress legislation along these lines; indeed, the Bayh-Cellar proposal is an almost exact restatement of the original Brownell proposal made to the Congress, the 85th Congress, I believe, on the occasion or shortly after the occasion of President Eisenhower's illness.

Attorney General Brownell at that time summed up what has been the legal opinion of all of his predecessors in this area in modern history. He said as follows:

At the time of President Garfield's illness in 1881, the great weight of opinion favored the interpretation that Vice President Arthur, and he alone, could determine if the President was disabled. At that time most students of the Constitution said that the Vice President was obligated to exercise the powers of the Presidency during Garfield's illness, just as much as he was obligated to preside over the Senate or perform any other constitutional duty; and that no enabling action by the courts or Congress or the Cabinet was necessary.

Since the Vice President had the duty of acting as President, it was argued, in certain contingencies his official discretion extends to the determination of whether such a contingency actually existed; in other words, they were applying a well-known rule that in contingent grants of power, the one to whom the power is granted is to decide when the emergency has arisen.

Thus, there is solid basis in law here to argue that the initial decision must be made by the person who is to succeed in power. In this instance it would be the Vice President. This power to so act is very great. Therefore, it must be guarded.

The bill that I have resubmitted in the 89th Congress, as I have in the 86th, 87th, and 88th Congresses, is No. 139.

Members will see that it is very close to what is known here as the Bayh-Celler bill because, in fact, it is the predecessor of that bill. To sum it up: Section 1 empowers the Vice President to succeed to the Presidency in case the Chief Executive dies or resigns or is removed, and so forth; that is a restatement of old law.

Section 2 provides that if the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.
If the President is unwilling or unable to declare his own inability, section 3 authorizes the Vice President to do it; however, he needs the concurrence—this is again repetition of what the other bill has—of the majority members of the Cabinet. In other words, sole discretion is removed from the Vice President in this area.

Section 4 provides that if and when the President declares in writing that his disability is terminated, he should resume powers and so forth; and here again we have a parallel to what we have in the other bill. In this case, however, where the Vice President holds a contrary view, the Congress resolves the issue by a two-thirds vote in each House.

Now the final point that I would wish to make is that in section 4 of the bill. In case members don’t have it, I will read the pertinent sentence out of it.

 Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President’s inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President.

If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, thereupon, notwithstanding any further announcement by the President, the Vice President shall assume the discharge of such powers and duties as Acting President until the occurrence of the earliest of the following events: (1) the Acting President proclaims that the President’s inability has ended—

In other words, the person who has the power to make the initial decision has the power to make a second decision.

(2) —

This is the innovation that I would hope Members would be careful about and listen to:

The Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President’s inability has ended, or (3) the President’s term ends.

The importance of that second paragraph is very large, because here is a reservation of power by the Congress itself, by a simple majority vote, to take the initiative in making the decision that the inability has ended, thereby putting itself in between the Vice President and the President, if that should be necessary.

I think this safeguard is one that we might want to think about very carefully, and when the Attorney General is here, I would hope to examine him on this to see whether or not he would agree that this suggestion is one that might be a helpful one to resolve some of the problems that we have on this.

Mr. Poff. Will you yield?
Mr. LINDSAY. Yes.
Mr. Poff. Did I understand correctly from your reading of the language, if you meant to say that a majority present in each House— shouldn’t you say a quorum?
Mr. LINDSAY. I will accept that. I thank the gentleman from Virginia. Finally, because I assured the chairman that I would not take long—I would turn to the second issue and that is the incredible situa-
tion where we permit our system to exist with a President in office but no Vice President. This, I think, is very risky and should not be continued under any circumstances. The deficiencies in the situation I think are obvious, they have been discussed and rediscussed. Members know that the Speaker might well be of a different political party than is the President, and I do think, too, that it can be argued with logic that the concept of separation of powers is infringed when a Speaker must be trained and tuned to executive as well as congressional business in that period when the Vice President has acceded to the Presidency and the Speaker is next in line.

Second, I do think that you have a problem continually here of training and qualification which is important in this day and age. Particularly with lightning decisions being made or having to be made, one needs a full-time person as the Vice President at all times. So, the second resolution that I had submitted again in this Congress, House Joint Resolution 140, proposes a constitutional change to provide for the election of the new Vice President by the Congress.

Now, the method of this is slightly different from other Members’ suggestions, and I offer it for the consideration of the committee. It would provide a Presidential veto in the event that a President disagreed with the Vice President selected by the Congress. What is proposed is that the individual who would step into the office of the Presidency should immediately convene the Senate and House in joint session to select the Vice President. The selection would be by majority vote, each Member of Congress having one vote. The President would have a power of veto, and if he exercised it, Congress would propose another candidate.

There would be no right of overriding the veto. I have limited the possible candidates to Members of Congress, heads of executive departments, or Governors of States. The first person selected would be required to vacate his current office. This process would be followed when the office became vacant more than 80 days. It would also be followed if the Vice President left or might become permanently unable to take his office.

This again is a constitutional amendment that is of great importance and long overdue. The pressure of the Congress on this has not been as old as has been the pressure of the Congress on inability, but it is just as important in my opinion, and I hope, Mr. Chairman, that this committee in its wisdom will take action on these constitutional proposals as soon as possible, as speedily as possible, doing the best we can, and if we differ from the Senate versions then we will hammer it out in conference.

Thank you very much.

The CHAIRMAN. Thank you, sir.

The next witness is Mr. Dante Fascell, of Florida.

STATEMENT OF HON. DANTE FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FASCELL. Thank you, Mr. Chairman and members of the committee. Any time, now or in the future, that any President catches a cold, all of us are going to be concerned with the problem of who will run the country if he is unable to serve. Present law is obviously
inadequate and a change is called for. The committee is satisfied, or
ought to be satisfied, that there is now a broad base of support for
necessary changes. This is evidenced by resolutions of the American
bar and local associations and other organization that this problem
must be solved. Americans generally fully support the recognition
by this committee and its chairman of the urgency of the matter.
We certainly need to do whatever is necessary to strengthen the con-
cept of the continuity of the democratic institutions. Certainly it
ought to be clear, and I am sure it is that world conditions are such
that we cannot, in any time, under any conditions, suffer a time lag
with respect to the continuity of our own institutions.

We have obvious problems, all of which you recognize—the legal
form, the procedure itself, the language, the legal effect, personali-
ties, and politics—but I conclude with only one admonition which is
old homespun philosophy: The time has come to do something, even
if it is wrong.

Mr. Chairman, I have a prepared statement, which I request be
inserted in the record. Knowing full well of the ability of the mem-
ers of this committee, I am sure you will work out this problem to
the satisfaction of everyone concerned.

Thank you very much.

The CHAIRMAN. You want your prepared statement in the record?
Mr. FASCELL. Yes, thank you.
(The full statement of Mr. Fascei11 follows:)

STATEMENT OF DANTE B. FASCELL

Whenever one of our Presidents becomes ill or dies while in office, there is
invariably a flurry of concern about clarifying our laws so that we may be
able to deal more effectively with such situations than we have in the past.
Thus far, such flurries have not resulted in action.

President Garfield lay unconscious for most of 80 days after he had been
struck by an assassin's bullet. During that time, the country was without a
President even though the Constitution provides that when the President is
unable to carry out his duties the Vice President is to take over. It does not,
however, say whether he is to become President or merely act as President. It
does not say whether he is to take over until the end of the term or only until
the President again becomes able. It does not say who will decide when such a
disability begins and ends.

Because there is so much doubt about the law, Garfield's Vice President Chester
A. Arthur did nothing. The doubt also dissuaded Vice President Marshall from
acting during President Wilson's 18-month illness. The voluntary agreement
between President Eisenhower and Vice President Nixon was not worked out
until after the President had recovered from his last illness—too late for it
to be useful. In any case, there is general agreement that a Vice President
acting on the basis of a voluntary agreement cannot have the full confidence
of the people. Only an amendment to the Constitution can provide the necessary
air of legitimacy.

After each of these incidents, the problem of presidential inability and suc-
cession was explored, but not until last year was there any semblance of agree-
ment on a way to solve them. In January of 1964, at the call of the American
Bar Association, a dozen of the Nation's leading legal scholars met here in
Washington, discussed the possible solutions and, after two days, emerged with
a consensus subsequently endorsed by the ABA house of delegates.

Later in January, the Senate Subcommittee on Constitutional Amendments
began hearings on presidential inability which continued in February and March.
From these hearings and the many executive sessions which followed them, there
emerged Senate Joint Resolution 130 of the 88th Congress which the Senate
passed by a vote of 65 to 0 shortly before adjournment last year. Chairman
PRESIDENTIAL INABILITY

Celler has introduced this legislation in the 89th Congress, House Joint Resolution 1. I have sponsored an identical measure, House Joint Resolution 235.

This proposed constitutional amendment would solve two problems. It would solve the problem of vacancies in the office of Vice President, which has existed on 16 different occasions for periods totaling more than 87 years, by directing the President to nominate a Vice President who shall take office upon confirmation by a majority of both Houses of Congress. With the inauguration of Vice President Humphrey on January 20, 1965, we have a Vice President of the United States for the first time in 14 months.

It would also solve the problem of presidential inability by directing the Vice President to discharge the powers and duties of the Presidential office whenever the President declares in writing that he is unable to carry them out or, if the President does not so declare, whenever the Vice President—with a written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide—transmits to Congress his written declaration that the President is unable to discharge his duties. In either case, the President shall resume his office whenever he transmits to Congress his written declaration that no inability exists, unless the Vice President, with a written declaration that no inability exists, unless the Vice President, with a written declaration that the President is unable to carry out his duties. In such a case, Congress is to decide the issue immediately and unless two-thirds of both Houses decide that the President is unable, the President shall resume the powers and duties of his office.

Thus, the bill provides an orderly procedure whereby the Vice President may act as President in cases of presidential inability and, furthermore, provides the mechanism whereby a President can resume his office after recovery from a disability.

The bill is closely modeled after the recommendations of the American Bar Association proposal of January 1943. The proposed amendment also incorporates the recommendations of the Dade County Bar Association's resolution of March 5, 1964.

More recently, the Committee for Economic Development has issued a national policy statement on "Presidential Succession and Inability." The principal difference between their recommendations and this measure is that they would permit disagreements between the President and Vice President on disability to be resolved by the Cabinet. The Cabinet decision would stand unless upset by the Congress through the impeachment process.

On one thing there is complete agreement: There is urgent need for immediate action. In these perilous times there can never be a moment's doubt about whose hand is responsible for running this country. This resolution is the best solution I have yet seen and I urge the committee to act favorably upon it.

The CHAIRMAN. The Hon. Charles Bennett.

STATEMENT OF HON. CHARLES E. BENNETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BENNETT. I congratulate the committee for undertaking this important subject. As a member of the Armed Services Committee for many years, with the background of the full and ever-present knowledge of the fact that the President is Commander in Chief, I would like to underscore what Mr. Fascell said on the need to have somebody ready without any lapse of time to fulfill these responsibilities. That is one of the responsibilities of the Presidency. There are many others which I am sure the committee knows fully.

I want to congratulate the committee for undertaking this.

The CHAIRMAN. Have you got a statement?

Mr. BENNETT. I am submitting a statement. If you don't mind, I will add this to what I have said.

The CHAIRMAN. I accept it; thank you, sir.
MR. BAYH. I understand that Representatives Cohalan and Gonzalez will submit statements which will be inserted in the record.

Mr. Poff was addressing inquiries to you. Continue.

Mr. Poff. Thank you, Mr. Chairman.

I believe we will take up a new line of questioning now, if the Senator cares to do so.

If your bill became a part of the Constitution, would it meet the situation where the President and the Vice President simultaneously become disabled?
Senator Bayh. No; it will not.

Congressman Rodino posed that question earlier. This is a matter, quite frankly, which, if we were seeking perfection, should definitely be included. But we felt that we had to confine our efforts to the most vital, necessary problems now facing us.

We should get these proposals on the books and then seek others.

Mr. Poff. May I ask a related question?

Let us suppose the situation in which the office of Vice President becomes vacant and simultaneously the President becomes disabled. In your bill or in the Constitution, what would be the procedure?

Senator Bayh. In other words, the situation we had all of last year and the President would become disabled?

Mr. Poff. I could imagine a different situation.

Suppose the Vice President were killed by an assassin's bullet, instantly, and suppose another bullet from the assassin's gun disabled the President, and suppose that the Celler-Bayh amendment were a part of the Constitution, what would happen?

Senator Bayh. The Vice President certainly could not act and the President would be unable to appoint a successor.

This would be an impasse.

Mr. Poff. Isn't this a reasonable possibility?

Senator Bayh. This again falls into the category of a proposal much nearer perfection than the chairman's and my bill is. Perhaps we would want to provide unquestionable authority of the Congress to provide for these contingencies by statute, but we get into a rather lengthy amendment to the Constitution if we incorporate these.

Mr. Poff. Would it complicate matters greatly if the amendment were changed in such a manner as to permit the person next in line of presidential succession to initiate the action which your amendment vests originally with the Vice President?

Senator Bayh. If I may say so, it probably would because of the fact that the Speaker of the House is next in line of succession.

Then you open the whole can of worms of whether he would have to resign his own position as Speaker of the House which is a legislative office, or whether we would have a commingling of powers of legislative and executive.

Would he have to resign his seat as a Congressman? This very greatly complicates the problem.

The Chairman. Then, of course, if the Speaker becomes active and the disability is removed, then he is out in the cold; he is neither Congressman or Speaker?

Senator Bayh. That is correct. I did not get a chance to add one additional sentence that I want to add to the colloquy I had with the distinguished member of this committee from North Carolina.

The difference between outright succession and disability as far as the Tyler precedent is concerned is that in disability we hope and pray to God that the disability will be removed. With this amendment, the President can resume his powers and duties, and if he is replaced by the Vice President, that the Vice President can resume the powers and duties of his own office.

Mr. Moore. Will the gentleman yield?

Mr. Poff. Yes.
Mr. Moore. Since the gentleman from Virginia has raised this question, I would like to also ask the distinguished Senator this: What if we have a situation in which the President himself refuses to acknowledge his inability or the fact that he is incapable of handling the office and the Vice President for one reason or another, does not initiate, under his own signature, that which is set forth in section 3 of your bill; do you feel it is necessary that something should be done to this motion, in consideration of the case where the President does not take it upon himself to declare his own disability, and with the Vice President refusing to act?

I assume you have had some discussion of this. I would like the Senator’s attitude on this.

Senator Bayh. We had considerable discussion. In fact, one small change that we made in the final committee bill which, if you will notice, is a bit different from House and Senate Joint Resolution 1, was to give joint responsibility to the Cabinet and the 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.

It seems to me that when we are dealing with presidential power that is given by the people, aren’t we providing enough contingencies that unless we can get one of these individuals to act, that perhaps the President should be permitted to continue?

Mr. Moore. Well, we had I believe, if I might say in response, we had a circumstance in the Wilson administration where this is exactly what occurred. It would seem to me this is a contingency that is very real and could conceivably happen.

Senator Bayh. It is.

Mr. Moore. As I read your section 4 and I may not have before me House Joint Resolution 1 as amended, but it seems to me that your section 4 is conjunctive rather than otherwise, it is “The Vice President and a majority of the principal officers of the executive departments.”

Senator Bayh. But either may take the initiative.

Before we had it “The Vice President with the concurrence”——

Mr. Moore. Then you have not amended?

Senator Bayh. No; you read it properly “Whenever the Vice President and a majority of the principal officers,” it does not say “The Vice President with the concurrence.”

Mr. Moore. It would seem to me that we are going to have to change it if that is the correct language as amended to carry out the full intent, as the Senator has expressed it here, we are going to have to make a word change there to carry forth your thought.

Right at the present time, as I read it, sir, it would seem to me that “The Vice President and a majority of the principal officers” would have to collectively transmit to the President and Senate and Speaker of the House a written declaration.

Senator Bayh. That is correct; there is no question about that. Either may take the initiative. It was not our intention to remove either the Vice President or the Cabinet to permit circumstances where one could act without the other.
I personally feel that we need both of them. As President Eisenhower said in the bar association conference—

Mr. Moore, I would agree with you but you are going around the Horn on me a little bit.

In response to my initial question, you said either/or could happen.

Senator Bayh. I think they can; yes, initiate.

Either one may initiate, I would say.

Mr. Moore. You mean the initiation as to the capability?

Senator Bayh. Either one can pose the question and the other one can concur therein.

Mr. Moore. That is compatible with the language which I read but we are in agreement that in order for the declaration of the President that he is unable to discharge his duties to be effective, it must be a collective declaration with the Vice President and the members of the executive department joining in.

Senator Bayh. Yes.

Mr. Moore. The answer to that is "Yes"?

Senator Bayh. Yes. If I may say so, your Wilson example 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.

Mr. Moore. The constitutional provision has practically cleared that up, plus the fact that the informal agreements that have been in existence in the Eisenhower and the Kennedy and now the Johnson administrations take care of it.

The question that bothered Vice President Marshall in the Wilson situation has now practically been settled.

Senator Bayh. We had a similar set of circumstances when Garfield laid abed for 80 days and there was unanimous opinion on the part of the Cabinet that Chester Arthur should assume the powers and duties. Let me rephrase that. It was unanimous that Garfield was unable to perform the powers and duties, but that the majority of the Cabinet—I think it was a 4-to-3 vote with the Attorney General among the four—that if he did, he would be the President and Garfield would be out in the cold if he recuperated.

Mr. Moore. This is under the theory that the office itself is—

Senator Bayh. Yes. I may go one step further, the general reluctance on the part of the Vice Presidents to move in when there has been good cause for them to do so I think will serve as ample evidence against the idea of a power hungry Vice President. Any ambitious Vice President is going to be reluctant to put himself in the position of usurpation of the office because the glare of publicity will be on him all the time.

Mr. Moore. You brought me back to my first question too. You evaluated the exigency of the Vice President to move in these cases. Since this is a matter of highest concern to us today, do you feel that this proposal of yours should contain some method in the event the
Executive refuses himself to act or the Vice President refuses to act, that there is an area of government that can move?

Senator Bayh. Of course we always fall back on the impeachment provision, that if the President is out of the picture, you have the same vote requirement.

Mr. Moore. Then you say if you rely on impeachment, there is no such thing as Acting President.

Once he has been impeached he is impeached?

Senator Bayh. It is not a desirable alternative. It is one to be used in the last instance if necessary.

Mr. Moore. Maybe we might give some consideration—without wanting to complicate the matter, and I understand the Senator’s desire to keep this as simple as possible—that we have some method that either prompts the Vice President to act and make it a constitutional requirement of his, that he shall act in this regard or that it be vested in some other body.

Senator Bayh. May I respond just briefly to acquaint you with my thinking on this?

Mr. Moore. Yes.

Senator Bayh. It is going to be pretty difficult for us to correct the shortcomings that you pointed out, sir, without perhaps creating still other shortcomings that would be less desirable.

I hope you would look into this with me and see. If there is a way to do this, fine. We will put the Vice President in this position as a partner in this action because he has the constitutional responsibility to do this. As President Eisenhower said very emphatically at the American Bar Association Conference that was held in June, it is his opinion that the Vice President can’t escape this responsibility. It is his.

Mr. Moore. In history it has happened too.

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

Mr. Moore. I based my question on the premise which the gentleman from Virginia laid. We had the Vice President killed outright and the President was incapacitated.

Who is going to then suggest the inability of the President to serve in the event that he does not himself suggest that? You have got a gap that you ought to give a little bit of attention to.

Senator Bayh. I hope you can find a ready solution to it! I have not been able to.

Mr. Moore. I thank you.

Mr. Poff. Mr. Chairman, I am disturbed—

Senator Bayh. May I say one other thought and direct the committee’s attention to the CED report; that is, the Committee on Economic Development which wrote a report very similar to House Joint Resolution 1 and Senate Joint Resolution 1. One of the two minor variances was that they would give either the Vice President or the Cabinet power to act such as we have in the committee bill; that is, give either one the initiative. This was in our thoughts when we
dwelt on this matter in the committee. So the way the bill was originally drafted, the Vice President himself was the only one that had the power of initiative. We changed it and gave it to both.

Excuse me, Representative Poff?

Mr. Poff. That touches precisely on the point I was about to make. I am disturbed about what you have just said.

I agree that the language as it has been amended would do precisely what you say but I ask, Is it wise that this be done?

Now, some thought was given to this precise point by those in the American Bar Association and other legal scholars who concern themselves with this issue and I ask: Is it wise to give in the alternative the Vice President or the majority of the Cabinet the right to initiate this investigation because when you give the right to a majority of the Cabinet, that is the same thing as saying you give the right to one member of the Cabinet to start the agitation and I don't agree that this is wise and I hope the Senator will reflect on that and may choose now or later to advise us of his feeling on that point.

Senator Bayh. I will be glad to meditate a moment out loud with you on that.

Mr. Poff. All right.

Senator Bayh. I don't see any danger. One Cabinet member does not make a majority. You are going to have to have a majority. As long as the Vice President has a veto, they can't do anything. Even a unanimous vote of the Cabinet cannot do anything unless they get the Vice President to go along with them according to our constitutional amendment.

Mr. Poff. I do see a danger because the more you proliferate the authority to initiate the investigation, the more chance there is that the motives for initiating it will not be meritorious.

I can imagine that there might be ambitious members of the Cabinet or members of the Cabinet who would be hostile to the President philosophically or hostile to the President personally and who just as a matter of mischiefmaking, might want to start circulating a written declaration among his fellow Cabinet members.

The Vice President would have a veto power but the mischief would have been done. I hope you would think carefully.

Mr. Mathias. Would you yield?

Mr. Poff. Yes.

Mr. Mathias. This would have occurred in the Lincoln administration with Salmon P. Chase.

Mr. Poff. Precisely.

Senator Bayh. May I suggest, gentlemen, that again I ask you to look at the need to consider this in the light of what reasonable men are going to do.

I ask you to consider what circumstances the President himself is going to be in—physically or mentally—before a Vice President, be he ever so ambitious, and the majority of the Cabinet, be they ever so hostile or roguish, would take this action.

Particularly with the modern communications we have available, the President would have to be in pretty bad shape, and it would have to be rather obvious before these steps would be implemented.

Mr. Poff. I agree and we must some time reach a point where we trust somebody and yet I suggest that a reasonable man's rule fre-
quently is honored in its breach and I think we might point to some incidents in history which will reflect what I just said.

I say again, I hope you will think on this. If you have any additional advice, you might submit it to the committee at a later time.

The CHAIRMAN. In all this, Senator, hasn't the Congress the additional check and balance?

Senator Bayh. I was about to say this. We have an additional check and balance. Beyond the example of the Lincoln Cabinet, let us take the example of the same Cabinet imposed on the first President Johnson. There, I think, we could conceivably have had a Cabinet which was very hostile to the President. Even then, under those terrible circumstances, they could not get the two-thirds vote that was necessary in Congress when there was an obvious move to remove a President who was not disabled under the terms to which we refer.

Mr. Pop. Mr. Chairman, I don't mean to correct the Chairman but there is possibly a misunderstanding of terms. The Congress would play no part in the ascendency of the Vice President to the position of Acting President. This becomes an issue only in the situation contemplated in section 5, so it is not quite accurate to say that.

Senator Bayh. It would get there shortly. A matter of a moment is all that would be required for a President to send a declaration and to bring the Congress in as the Chairman so rightly points out. We have to visualize the situation which would exist. The President would have to be in sufficient condition (1) and the problems facing our Nation of such gravity (2) that the Vice President and a majority of the Cabinet would agree that the Vice President and a majority of the Cabinet would agree that the Vice President should take over. During this short period that would be required for congressional deliberation is the only possible period in which the power could be taken away from the President without the Congress acting. So we have three checks: The Vice President, the majority of the Cabinet, and a two-thirds vote of the Congress. That seems to me, in most if not all reasonable circumstances, to be adequate safeguards.

The CHAIRMAN. As to section 5, this is the case where the President himself says: "My disability is terminated." This is a case where the Vice President says "No; your disability is not terminated."

In a case like that, I think we should not rely solely on the Vice President and very wisely I think you say you should have a concurrence of two-thirds of the heads of the executive departments and then there is a clash of opinion.

Then Congress can come in and decide that issue. I think that is fair. There would have to be a majority.

Mr. Pop. If I may argue your point for you and I would not presume to do that because you are more able than I, it is true as a pragmatic matter that the Congress would have the last say for this reason, if the Vice President or Cabinet were acting for ulterior reasons the President would be able, the following day, to avail himself of the protection of the congressional action simply by following the procedure authorized in section 6.

Senator Bayh. The next moment. As soon as he learned of the transition, section 6 would be invoked.
Mr. Poff. You would intend that and this is what I intend.

Senator Bayh. We don't want a great delay. We want the President to say, "Wait a minute and let the Congress decide as quickly as possible."

Mr. Poff. I hope you will reflect on the question of allowing the Cabinet to initiate the investigation.

Senator Bayh. Will you clarify the question for me, please?

Mr. Poff. As I understand your testimony, in section 4, because of the conjunctive structure of that sentence, you feel that either the Vice President or, in the alternative, the Cabinet, can initiate the action to obtain a written declaration of inability, and I say I hope you will reflect on the wisdom of permitting this to be done; that is, the initiation to be done in the alternative.

Senator Bayh. I think the gentleman will perhaps get some idea as to what my preference is by looking at the original text, but I think he also recognizes the importance for the give and take, the consideration of everyone's opinion, and the draft that we have now permits either the Vice President or the Cabinet to initiate, and I am willing to abide by it.

Mr. Tenzer. Will the gentleman yield?

Mr. Poff. Yes.

Mr. Tenzer. Does section 4 of the proposed amendment give the Congress the right to any choice?

Senator Bayh. No, sir.

Mr. Tenzer. You have in your proposed amendment the following language:

Whenever the Vice President, and a majority of the principal officers of the executive departments or such other parties as the Congress may by law provide—

Under what circumstances would the Congress provide by law for another body to do anything?

Senator Bayh. This is just a safeguard, a safety check, trying to anticipate what the future might give us as far as the way the Cabinet functions.

Perhaps we will find out that our original—

Mr. Tenzer. I don't understand that provision in the amendment.

Senator Bayh. May I try to explain it?

Mr. Tenzer. Yes.

Senator Bayh. My opinion, and that of the majority of people with whom I talked, feel that action by the Vice President and the Cabinet offers the best solution. But in the event the future proves that the Cabinet, because of its close relationship with the President, will not function or, for some other reason is not the best body to make this determination with the Vice President, then and only then may the Congress step in and in its wisdom set up some other body to act in conjunction with the Vice President.

Mr. Tenzer. Then it is possible if neither the Vice President or the majority of the members of the executive branches do not act, that the Congress may act by appointing a designated body to investigate and make its recommendations to the Congress?

Senator Bayh. But it will be that body and not the Congress per se.
Mr. Tenzer. That is how I understand it.

Mr. Poff. Surely you don't want to proliferate that power to that extent. Suppose that the body which the Congress appoints to do this should be the Republican National Committee or a committee of the Congress. We would not want, would we, to give an extragovernmental body the power to go snooping around, agitating for what reasons only they know, the question of the President's physical or mental capacity?

Senator Bayh. I think this is extremely unwise. I think you are familiar with how that particular provision got in there. This is the result of the consensus session that we had a year ago last January when we had scholars and constitutional lawyers—

Mr. Poff. I am in favor of the inclusion of that clause but I don't favor the treating of the investigation in the alternative.

The language or legislative history should make it plain that the Vice President alone has the right to initiate the declaration of inability.

The Chairman. May I make an observation there?

We were told that there was some reluctance on the part of Marshall in the case of Wilson, and reluctance on the part of Arthur in the case of Garfield to make a declaration or even to initiate an inquiry as to whether the President is incapable and disabled; would you not still have that situation prevailing today?

If somebody else acts with them, it might remove that reluctance.

Mr. Poff. I could not agree more. I strongly underscore what the chairman has said. This is the reason it was written this way.

The way the language appears now as it is interpreted by the author of the bill places a new concept and grants a new and broader authority to unknown people and I say this is—

Senator Bayh. The gentleman is aware of the proposals that are being made of having a blue ribbon committee to include even the Supreme Court, the leaders of both Houses, plus expert doctors. This type of a blue ribbon committee has, I think, no place in this. But this is an effort at compromise and as long as the Vice President is permitted to have this veto power, I don't see that the committee would get out of hand.

Mr. Moore. May I ask a question?

I think you fully understand the manner in which our questions are evolved. I believe it is fair to determine from the manner of the questions and the questions themselves that we are interested in this. We want to see the problem and it is a very severe problem as far as the administration of our Government is concerned, solved.

I think, though, that we cannot take a half shot at this. I think that we have got to treat it in great detail. I appreciate the emphasis you have placed on this legislation, the fact that you have given it birth and life and the questions that I have asked are simply trying, in my own mind, to answer some of the questions that have come up.

I support the thesis here and the need that the Congress should act immediately and I congratulate the Senator for his wording; I do think, though, that there are several situations that have been pointed
up that leave the language of the Senate resolution somewhat wanting
as an adequate answer to the problem.

Thank you.

Mr. Poff. Now, if we may turn to another point and I hope you
won't think I am laboring these points unduly, I don't intend to. I
want to see this thing done as expeditiously as possible and I am
willing to compromise.

Senator Bayh. Let me make a statement before Congressman
Moore leaves.

None of the members of this committee need to apologize for asking
me questions. The more questions we ask and the more we try to
delve into each other's minds, the more all of us can see the difficulty
of solving this problem and the more opportunity we will have of
finding a solution. So fire away.

Mr. McCulloch. I would like to make this point clear. I under-
stand that there have been some questions raised by some people about
the lengthy questioning that has been going on at this committee. We
seek to change the fundamental law of the land and if we probe every
possibility or every probability and most possibilities, we will be doing
no more than a proper job that should be done.

I know that there is necessity for prompt action and to that end I
propose to lend every support that I know how to do it.

On the other hand, a day or a week or more, if it improves that
which we finally submit to the state of the Union, will be time well
spent and it is not done with the purpose or intent to improperly
delay anything.

This is not delivered to you, Senator. It is delivered to some others
who have raised the question of some of the minority to try to improve
that which is before the Congress and ultimately will be before the
States of the Union.

The CHAIRMAN. Of course I associate myself with that statement
you just made.

Mr. Poff. If I may approach another line, I dealt with simultaneous
inability of the President and Vice President. I want to associate
with that question the question of the inabilily of an Acting President
and the inability of a President when there is no Vice President and
directed toward those three possible cases, I am going to suggest
for the record—

Mr. Chairman. Will you say that again, please?

Mr. Poff. The question of simultaneous inability of the President
and Vice President, the case of the inability of an Acting President,
the case of the inability of a President when there is no Vice President
and to meet those three cases, I am going to suggest for the record,
language which might be added to this constitutional amendment and
I do so only for purposes of debate, not because I am wedded to the
language or because I am wedded to the idea that it should be included,
I am suggesting you may add in section 6 the following words:

The inability of the Vice President shall be determined in the same manner
as that of the President except that the Vice President has no right to partici-
participate in such determination.

In the case of the death, resignation, removal, or inability of the Vice President,
the person next in line of succession shall act in lieu of the Vice President under
sections 4 and 5.
Now having suggested that for the record, and realizing that it opens up a field of inquiry with which we cannot intelligently deal at this moment, I want to attempt, with the permission of the Senator, to write some legislative history which might be useful in the final passage of this bill.

The Senator knows that over the years, legal scholars have questioned the precise definition of the word "vacancy" as it is applied to the office of the President or Vice President.

And that word "vacancy" is used in section 2 of this bill.

Now, to me, it is clear that the word has reference to those cases where the President or Vice President is no longer occupying the office by reason of death, resignation, or removal and that as used in section 2 it has no application whatever to the question of inability, but I say legal scholars have disputed the question of whether permanent disability constitutes a vacancy.

Now, I assume that you share my feeling that the answer to that question is negative, namely that the word "vacancy" as used in section 2 deals only with the question of death, resignation, or removal.

Senator Bayh. I agree with you and I think we have ample precedent to indicate that this is the preponderance of legal thought on the question.

Mr. Popoff. I thank you.

Now another item.

Does the Senator feel that when the Vice President becomes Acting President as contemplated in this bill, he should, before he assumes the discharge of duties and powers of office, take the Presidential oath?

Senator Bayh. I think he could. The allegiance he swears as Vice President is similar to that he swears to as President. It is a question of semantics as to which oath he takes.

On second thought—you will forgive me for rambling—as you pose these questions I think of one thing and then another thought comes into mind. We are not in our amendment giving him the office of President. In fact the only way he gets to have the powers and duties—or as was suggested a moment ago, the discharge of the powers and duties as the case may be—is because he is Vice President and he is not taking over as President.

My opinion, as I think of it now, is 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.

Mr. Popoff. I am inclined to agree with you, but I yield to counsel.

Mr. Copeland. Under the Constitution, the language says:

The President is given the authority to veto acts of Congress to function as Commander in Chief, to grant reprieves and pardons, make treaties, to appoint officials, and convene Congress.

Would an Acting President have the same powers?

Senator Bayh. You said the President is given the power and we are giving the Acting President the powers and duties of the office. You answered your own question.

Mr. Copeland. The Constitution uses the word "President."

Senator Bayh. The President is a figurehead unless he has powers and duties which you subsequently referred to. We are not giving the
office but we are simply giving him the powers and duties of the office, which would be sufficient.

Mr. COPENHAVER. Would the Vice President, while acting as President, be entitled to the benefits and privileges of the office of President?

Senator BAYH. I would think he would be, yes, sir.

Mr. POPP. Now, the gentleman has reference to the question I was about to ask next, and this is no idle question. It must be dealt with. If the person next in line of succession succeeds to the Presidency, then he will be entitled to the privileges and benefits of the Presidency. I have in mind such things as salary, the use of the White House and the White House facilities, the White House staff, the White House stationery, and I think we are going to have to deal with this in a statute which fixed the salary of the Vice President. This could be amended by authorizing him to have the salary and to use the benefits of the White House.

Senator BAYH. I think we have a precedent for that. My counsel advises me they did do this for Lyndon Johnson. A concurrent resolution was passed. The point is well taken but it is not something that needs to be specified in the amendment itself.

Mr. POPP. Yes. In defense of counsel, we need to deal with that question. I think it is useful to make it part of the legislative history for that purpose.

Mr. Chairman, I have other questions but I yield the floor.

Senator BAYH. I am happy to offer what little knowledge I have. Unfortunately, I wish I had more.

Mr. POPP. I think you have been very helpful.

Mr. MACGREGOR. I will pass.

Mr. MATTHIAS. Senator, one thing that has occurred in this colloquy that I am curious about, there was some suggestion if a Vice President, by reason of the powers that would be conferred under this amendment were to hold on too long or in some way to hold on wrongfully, that impeachment would be the answer which would give the Congress the last word.

Section 4 of article II of the Constitution provides that impeachment shall be for treason, bribery, and other high crimes and misdemeanors. Would you say that under the powers of impeachment there would be a way to get at this particular problem which, after all, might be nothing more than a difference of opinion and possibly an honest difference of opinion as to the President's health.

Senator BAYH. The question is high crimes—whether it is a breach of his oath of duty or oath of office. I may not recollect correctly. I thought the question about impeachment of the Vice President dealt with his refusal to act, not the necessity of his taking too long and maintaining the powers.

The Congress can keep this from happening. The Congress can, by the same two-thirds vote that is required for impeachment, give the Vice President the power and, by less than that, the President immediately takes over. Nevertheless, the point is well taken. I would much prefer that we not have to use the impeachment powers.

I quite frankly don't see that we would under the provisions. I think the great weight of public opinion would compel the Vice President to act judicially and assume these powers and duties when-
ever he could get a majority support of the Cabinet and in the event that he does not let loose the reins, unless he is supported not only by the Cabinet but by the overwhelming weight of two-thirds of Congress, the President is going to take over again right away.

Mr. MATTHIAS. I would feel that the use of impeachment proceedings where there is a subjective question of the President's health or the President's physical abilities would be inappropriate. It wouldn't fall within high crimes or misdemeanors.

Turning to section 2, I am interested a little in the philosophy that may have been expressed in your committee about the fact that it is the President who shall nominate the Vice President. Under the provisions of the Constitution already in effect when there is a vacancy in the Presidency by reason of the failure of an election to be decisive, it is the House of Representatives where the election is decided.

Now, your committee has seen fit to deviate from this pattern and to say that the President himself shall be the one who shall nominate him and the Congress is relegated to the position of really confirming or refusing to confirm the President's nomination. I wonder what is the philosophy expressed in your committee?

Senator BAY. I will be glad to think a bit out loud with you on that. It is the feeling, first of all, in the normal procedure of our convention process, the President does have a strong voice—not always the final voice—but a strong voice in choosing who his running mate may be. Certainly it is wise, and particularly in the time of crisis it is imperative, that we have a Vice President with whom the President can work. It would be worse, in my judgment, to have a Vice President who was looking for ways to embarrass the President than to have no Vice President at all. For this reason, we give the President the same authority that he now has as far as the Cabinet officials and others are concerned to nominate. Then, instead of his selection being confirmed only by the Senate, we bring in the Senate and the House—sort of a combination of the election procedure of the 12th amendment plus the advise-and-consent powers that the Senate now has. They would work together as two Houses sitting separately, but making the final determination to support or refuse to support the President.

If they refuse to go along with his nominee, he certainly would bring up a second and perhaps a third or fourth.

Mr. WHITTENER. Will the gentleman yield for a comment—the chairman will remember this very personally, from personal experience, that when the last Succession Act was passed by the Congress one of the principal arguments presented by Mr. Truman as President was that it would be undemocratic for the President to be in position to select his successor and for that reason the Speaker of the House should be the man next in line behind the Vice President rather than a Secretary of State who was appointed by the President.

Now we come along here in 1965 and we say that we ought to reverse that philosophy. Maybe some of these veteran members will remember that.

Mr. MATTHIAS. I would like to pursue that.

Mr. McCULLOCH. May I reply to that observation?

Mr. MATTHIAS. I will be glad to yield.
Mr. McCulloch. I was glad to hear that observation. I am sure this was the opinion of President Truman. It merits great weight and much consideration by reason of that fact. However, I think the actualities of the situation are entirely different from the expression used long ago of the impropriety of that action.

I think the record shows, beyond question, that in recent conventions, in both parties, the person who is nominated for President almost invariably determined who was to be selected as the candidate for Vice President.

Mr. Whitener. When we nominated Mr. Stevenson, he left this wide open to the convention to make the decision and Senator Kefauver was nominated.

Mr. McCulloch. I remember, that might have been the exception. I remember the Chicago Convention when that wasn't the case in both parties. I am inclined to believe it certainly wasn't the case in 1904, at the Republican Convention, and probably wasn't at the Democratic Convention. Maybe others could answer that.

Senator Bayh. I have the greatest respect for President Truman and my memory isn't good enough to recollect specifically, but I will wager he did all he could to have his voice heard in 1948 as far as the vice-presidential choice is concerned.

Mr. McCulloch. I think there was a phrase which came out of that convention if I recall correctly.

Mr. Mathias. Mr. Chairman, if I can recover the floor, the colloquy has been very useful because it brings me to the point that I wanted to raise. This is provided by analogy to the position of a presidential candidate who is choosing his vice-presidential running mate, but I would suggest that the man who sits in the presidential suite of the Blackstone Hotel in Chicago, who looks forward to a period of 3 or 4 or 5 months of campaigning ahead of him, who needs to have a salesman with him, who is going to sell his ticket and his program and his platform to the American people, may be a very different man from the man who is ensconced in the full panoply of power at 1600 Pennsylvania Avenue and his motivations may be somewhat different.

Senator Bayh. May I speak to this? I think you are absolutely right, but I think we are going to come to opposite conclusions. Go right ahead.

Mr. Mathias. It will be interesting to hear your comment.

Senator Bayh. I think you are absolutely right, that in making his nomination, the incumbent President is looking toward being renominated and wants a Vice President not only with whom he can work, but perhaps primarily one that would add the biggest political punch to the ticket.

I think how much more judicious it is to have a President you say is ensconced at 1600 Pennsylvania Avenue. To me, he is a President in the full light of public opinion and he has no reason to choose a Vice President to get political power. His motivation then would be, I think, in all fairness to him, to get the very best possible man he could get for the job—and isn't that what we are really after as far as the Vice President is concerned?

Mr. Mathias. I wish I had your full faith in human nature, but I sometimes feel that people who sit in the White House are touched by
the magic of that office and rise to great heights of patriotism, but we
do see evidence, unfortunately, that not everyone has had the magic
wand hit him. It misses somehow.

A man who sat in the White House might well feel he would appear
greater on the pages of history if his Vice President were a weak and
pallid kind of an individual and I would say this is not an improbable
situation.

I don't want to recreate a current controversy out of context, but in
the foreign press and in the domestic press in the past few weeks there
has been the implication that the President of the United States was
trying to downgrade the Vice President by not letting him go to a
great state occasion in London. The implications were that he was
just downgrading him and keeping him out of the limelight, keeping
him from getting a public personality.

I am not giving any personal weight or credence to it. These are
motives which can be impugned to great men in great offices and it
possibly could apply to a President who was choosing a Vice President.

Senator Bayh. If you and I were to add up all of the motives that
could be attributed to the two of us, leaving the President out of this,
we would have a pretty long list right there. I think we are going to
have to look at this in the light of what the greater preponderance of
possibilities would be. 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 this country would have tolerated would
have been the selection of a Vice President who was not extremely well
qualified for the job.

Mr. Mathias. Well, a man may be visibly well qualified but may
not be bent to the President's uses which only the President may know.
This would be one of the great temptations facing the President.

Let us go to a more constructive aspect. Did your committee con-
sider turning this thing around and letting the Congress make the
election subject to the veto power of the President to insure that the
President did not have a lack of harmony within the official family?

Senator Bayh. We considered it. We also considered confining the
choice in Congress to those members of the political party of the
President. I, for one, feel—and particularly some of these constitu-
tional scholars felt very strongly about this—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.

Mr. Mathias. What was the purpose of letting Congress make the
initial selection?

Senator Bayh. 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.

Mr. Mathias. Of course, giving the President the veto power would
insure that the President wouldn't get anyone with whom he couldn't
work.
Senator Bayh. We are arguing which came first, the chicken or the egg. The President already has the power to nominate many executive offices and the Senate of the United States has the power to ratify, to confirm, to advise and consent or not to, and we are giving him the same power and bringing in the House of Representatives as the most populous and most representative power of the Congress. These shall have the final power of election after the President has nominated a Vice President.

Mr. Mathias. Just one final question dealing with the report in the fifth section. We get to public policy questions there, which are all difficult. Some have to be given priority over others. Certainly, the President, as the Head of Government, being vigorous in the most important policy consideration, it would outweigh the minor difficulties that might be involved.

Was any consideration given to the effect on the stability of the Government from the kind of hassle which would be involved or which is implied in the power of Congress to settle a dispute between the President and the Vice President on the question of whether or not the President was ready to assume this authority?

Senator Bayh. Yes, yes; this is a very touchy question. There isn't any way to simplify it, to make it look like it is going to work out without any feelings being hurt, without any controversy. It isn't. 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. What are you going to do with the other 10 percent? I can't think you can ignore it. 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.

In the event you had a President who said I am ready, willing, I am able, I want to take over again and the Vice President and the majority of the Cabinet saying that you are not—this would be most unfortunate. But we only bring the Congress in as a safeguard to protect the interests of the people.

We only bring the Congress in when the executive branch disagrees; when the Vice President, majority of the Cabinet, and the President can't decide this. Then we bring the Congress in. It is very similar to the impeachment proceeding, although it is not the same decision.

Mr. Mathias. This could result in a sort of dialog between President and Vice President which would sound a little like the poem "You are old, Father William," and it could be more damaging to the public prestige of the Presidency than almost anything you can imagine.
Senator Bayh. May I suggest that the damage to the President as an individual is not so important as the safety of the country. I think you will certainly agree. This is not your question.

Mr. Mathias. My statement related to damage to the Presidency, the office of the President.

Senator Bayh. I don’t think you are going to escape this colloquy between the President and the Vice President by keeping Congress out of it because, as I recall the Wilson situation, there was a great deal of congressional debate. In fact, Congress took it upon itself to appoint a committee which marched down to the White House. All this was done in the open, and certainly the inability of President Wilson to fulfill the powers and duties of his office and the shortcomings of our Constitution which prevented the possibility of his temporary removal was damaging to the Presidency also. There is going to be public debate no matter to which body you give the final power of decision.

Mr. Mathias. Was there any weight given in your committee to the private arrangements which were made between President Eisenhower and Vice President Nixon and President Kennedy and Vice President Johnson as a means of effecting a solution to the problem, but being done on a private basis which would accord with the personalities and habits and relationships of the individuals who are most likely involved?

Senator Bayh. Yes, a great deal of consideration was given to this. This is certainly a great improvement to what we had before. I think the Attorney General could best speak to this as far as the legal ramifications of a private agreement which could not be subjected to the test of a court until the country was in the midst of an emergency. There is always going to be controversy in testing in court, but when you have a private agreement between two individuals with no sanction by the Congress or State legislatures, there will be much less certainty about the transfer than if we put this in the bedrock law of the land.

Mr. Mathias. Thank you very much.

Mr. Hutchinson. May I ask the Senator one question.

Referring to section 4 of the bill, Senator. Let us assume the situation where the Congress has by law provided another body, other than the principal officers of the executive departments, so that we would have a general statute providing this other body as well as the constitutional provision referring to the majority of the principal officers of the executive offices as a body. My question is this: Under those circumstances, could it possibly be construed that a Vice President would have his choice as to whether he was to go to that other body or whether he was to go to the Cabinet?

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

Mr. Hutchinson. Thank you.
With reference to section 5, let us assume that the Congress by a two-thirds vote of each House decides the President is unable to discharge the powers and duties of his office. The Vice President continues to discharge the powers and duties of the Presidency. My question is this: Does that exhaust the power of the President to challenge the matter again or can he turn around the next day and seek to regain his powers?

Senator Bayh. I would think it would exhaust the power.

Mr. Hutchinson. So once the Congress had determined that the President was unable to discharge the powers and duties, it would in effect relieve him for the balance of his term?

Senator Bayh. No, not necessarily. The Vice President could agree that the President had resumed his previous capacity and then the President could take over again.

Mr. Hutchinson. In those circumstances then the decision would be entirely within the Vice President’s power. Congress wouldn’t have any further voice in the matter?

Mr. Poff. Let me go through it again.

Senator Bayh. I am not certain I understand your first question. Do I understand you wonder how many times the President may have the chance to appeal to the Congress or does he just have one chance?

Mr. Hutchinson. Yes.

Senator Bayh. If I answered that in the previous question, I clearly didn’t understand your question. 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 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.

Mr. Hutchinson. That is all.

Senator Bayh. At any time, the Vice President and the President could come to an agreement on this matter. In deference to the conversation Congressman Mathias and I had, this would cover a great majority of the cases. The President could be recovering and the Vice President would be able to be relieved.

Mr. Poff. Do you yield?

Mr. Hutchinson. Yes.

Mr. Poff. The Senator will notice that in section 5, you don’t have the conjunctive language that you have in section 4 and you say that the Vice President, with the written concurrence of the majority of the principal officers and so forth; section 4, is the Vice President and a majority of the principal officers and so forth. Now, in section 5, there is no alternative in the hands of principal officers to initiate the written declaration.

Senator Bayh. This may appear to be a bit inconsistent, but the difference in the situations is this. In section 4 you don’t have a President saying “I am being usurped or I am being wronged.” In section 5 you do. We wanted to limit the direction that could be taken more severely when you had a President who felt he was being wronged.

I am willing to answer more questions, but I notice the Attorney General is outside. If I may ask the committee, I will be glad to return any time you may have other questions. In deference to the Attorney General, perhaps I should yield to him.
The Chairman. The Attorney General is here. I think you have been very, very patient.

Senator Bayh. May I make one statement in summary, please?

First of all, I want to thank the committee for its penetrating questioning. I only hope that some of my answers served to shed a little light on this complex question. The main barrier, I want to emphasize, to our ability to find a solution has been the fact that so far we have had so many different opinions that we have never been able to come close to a consensus. Now we have, it seems to me, arrived at a situation where the chairman of this committee, the chairman of our subcommittee in the Senate, 76 of my colleagues in the Senate, the American Bar Association, and others are joining in this consensus, This in no way precludes this body from making improvements to the consensus, but I would ask you to consider once again the impossibility of finding perfection and the gravity of the situation which now exists in which we have no answer whatsoever.

I think for a number of years with a carrier pigeon being our most rapid means of communication and the caisson being one of the main implements of armed warfare, we didn’t have quite the problem. But now we can destroy the world as we know it in minutes. So we ought to take a second look at our individual views. We want to get an answer.

I appreciate the fact that the questions indicated you wanted to get an answer too, and my colleagues in the Senate want to work closely with you. Thank you for your studied approach and I will be glad to return if you want me to.

The Chairman. We are very grateful to you for your cogent and thorough presentation.

Thank you very much.

Our next-to-the-last witness is the distinguished Attorney General, Mr. Katzenbach.

STATEMENT OF HON. NICHOLAS J. B. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Katzenbach. Thank you, Mr. Chairman. I have a statement in support of House Joint Resolution 1, it is quite a long statement, and I am hesitant when the committee is sitting so long as it has today, to inflict the whole statement upon you. I thought if it is agreeable to you, I might submit the total of the statement for the record, and really simply go into some of the problems or some of the understandings that I have with respect to more difficult points and just read a small part of it so we could focus attention on those or if you would prefer I will submit the whole statement for the record and simply answer questions.

The Chairman. Proceed as you wish.

Mr. Katzenbach. Let me skip along in my statement after saying I am here to support House Joint Resolution 1, and to discuss other related proposals that are before the Committee with reference to House Joint Resolution 1.

First, let me say that in using the phrase “majority vote of both Houses of Congress” in section 2, and “two-thirds vote of both Houses” in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a
quorum being present. This interpretation is consistent with long-standing precedent.

And Senator Bayh stated that was the interpretation made on the Senate side.

The legislative history should show that. That interpretation, absent the inconsistent legislative history, would be the one that would normally be made, and there is judicial precedent for it.

I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only where the President has been declared disabled without his consent, in accordance with section 4, and that, where the President has voluntarily declared himself unable to act, pursuant to the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing that his inability has ended. However, I note in this regard that the Senate Committee on the Judiciary has recently approved an amended version of Senate Joint Resolution 1, the counterpart of House Joint Resolution 1, under which the President may resume his powers and duties in this situation only by following a procedure comparable to that established by section 5. I would much prefer a provision which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared. This is a terribly simple point. In terms of trying to solve, as this committee is, the more difficult problems, you shouldn't ignore the easy solutions or make the easy problems more difficult to resolve. At the present moment there is an understanding between the President and the Vice President with respect to inability. I think that is a good understanding. It is the same understanding that has been had now from the days of the Eisenhower-Nixon understanding. Kennedy and Johnson had one, and Johnson and McCormack had one. Under that more informal procedure, the President is able to say to the Vice President, "If I suffer an inability I want you to act until such time as I am able to act again." It could be something as simple as a minor surgery under a general anesthetic. It might be important in that 30 minutes that the Vice President be able to act in these times.

I don't think we should make that problem more difficult. I think that any constitutional amendment should take advantage of the practice that has existed, and not make the simple understanding which can be arrived at voluntarily any more difficult to put any roadblocks with respect to those. Everyone has agreed we are trying to encourage a Vice President and a President by this constitutional amendment to work out a system of continuity and not to be abashed if the Vice President should become Acting President for a short period of time.

The CHAIRMAN. I would like to ask a general question, Mr. Katzenbach.

Do you think a constitutional amendment is required or can we do this by simple statute?

Mr. Katzenbach. I think a constitutional amendment is certainly, as a practical matter, required. If you look at the language of the Constitution, there is an ambiguity in that language. While you might be prepared to say that that could perfectly legitimately be construed to permit legislation and some scholars have taken that view,
the great majority of constitutional experts have taken the view that it should be done by constitutional amendment. If that be true, irrespective of who is right as to what the Constitution means, it doesn't seem to me that we can successfully resolve doubts without amending the Constitution.

The Chairman. Your predecessors felt the same way.

Mr. Katzenbach. Yes, that was the view of Mr. Brownell, Mr. Rogers, and Mr. Kennedy.

Mr. McCulloch. Do you have language, or would you provide language indicated by the last sentence on page 4 of your statement under the paragraph No. 2? I would much prefer a provision which will clearly enable the President to terminate immediately any period of inability voluntarily declared. Does the Attorney General have language, or will the Attorney General prepare language which he would suggest would effectuate that suggestion?

Mr. Katzenbach. I would be happy to do so, Congressman. I will say generally that I will be happy to work on any of these points with the committee, and with the committee staff, in any way that I can be of assistance.

Mr. McCulloch. We found that always to be the occasion heretofore.

Mr. Poff. Will the gentleman yield?

Mr. McCulloch. Yes.

Mr. Poff. Has the distinguished witness discussed that with the American Bar Association representatives?

Mr. Katzenbach. No, I have not discussed that with the American Bar Association representatives. I made the same point in my testimony before the Senate, but I don't seem to have been particularly persuasive.

Mr. Poff. Without the change which you suggest, would you consider the proposal invalid and would you then not recommend its adoption?

Mr. Katzenbach. No; I don't think that I feel that strongly about it. I do feel, as I think several of you gentlemen said earlier, we are discussing an amendment to the Constitution, and I think that is a particularly demanding job of draftsmanship.

Mr. Dowdy. You referred to the agreement which has existed between the President and Vice President and no doubt now existing between our President and the Vice President regarding the President's inability to act and the thought occurred to me, suppose the President has an agreement with the Vice President to take over and fill the duties of the office provided the President was in the hospital, and, as you stated, under an anesthetic for 30 minutes, or maybe an hour or 3 or 4 hours, and it all comes up as an emergency, and during that emergency, whether it be hours or days, we were attacked by an enemy and the Vice President had to act, and would he have authority.

Is there anything in this legislation that would ratify or make legal what he did? The President hasn't foreseen this before he was attacked, became ill, or went to the hospital, he made no request that the Vice President should take over.

Mr. Katzenbach. I don't think that this, in and of itself, deals with that problem. I think the Presidential agreement between President Johnson and Vice President Humphrey does deal with that problem,
and I would think that the intention was not to interfere with that kind of arrangement, but in dealing with the difficult problems of disagreement between the President and the Vice President it might inadvertently cast some doubt on these voluntary arrangements.

Mr. Dowdy. Would it be or would it not be illegal—the actions the Vice President made during that period of time?

Mr. Katzenbach. Under House Joint Resolution 1, I would say that under section 3 it says if the President declares in writing that he is unable to discharge the powers and duties of his office, I would suppose that the President could say to the Vice President, even generally: "I want you to regard section 3 as operative, I want you to assume those duties in the event I am in anesthesia, that I am unable to perform my duties, I want you to regard me as unable to do so and to assume the powers and duties of the office," and I would suppose that there was room under section 3 to do that.

Mr. Dowdy. You would have to assume a lot—there is nothing in here giving you that authority; is there?

Mr. Katzenbach. No; but I don't think I am assuming a great deal because I am talking about practice that has been in existence for about 10 years, and I am talking against the background where nobody has been critical of that practice, and where there is no intention by the use of this language to interfere with it.

It would, I think, be desirable, either if it were clarified in the amendments or, at the very least, that it was made clear that there was no intention of interfering with that kind of an arrangement.

Mr. Dowdy. That is a real possibility though, a situation of that kind, and don't you think it should be clarified and make it possible that it is covered, or that it is not?

Mr. Katzenbach. I think it should be clarified in one way or the other. If I were writing on a fresh slate, I would prefer to see it clarified in the proposed amendment itself, but my hesitancy in saying that is only because so many distinguished people worked so long and hard to come up with this language, and there is such a consensus of agreement about it that if other changes were to be made, this is one that I would think might be useful.

Mr. Dowdy. Would you give it some further study and make some recommendations to the committee on that point?

Mr. Katzenbach. Yes; I will be happy to.

Mr. Donohue. You say that the existing agreements that have more or less carried out during the past 10 years are in no way in conflict with what appears in House Joint Resolution 1. Let me refer to the language, section 3. If the President declares in writing that he is unable to discharge the powers, well, there is no such writing in existence today that I know of between the President and Vice President that he shall take over in the event that he is undergoing an operation and is going to be hospitalized for such period of time.

Mr. Katzenbach. Well, those understandings have sometimes been reduced to writing. Where they haven't been, they almost are in effect because there is an oral understanding that the same terms that were reduced to writing before are in effect. Now, it might not quite meet the terms of this, Congressman, but I would suppose all that would have to be done would be for them to initial the understanding they presently have.
Mr. DoNojure. If we passed a bill with this language in it, would that not more or less vitiate any gentleman's agreement that existed between the President and Vice President? He would have to declare it in writing.

Mr. Katzenbach. He could declare in writing the present understanding he has and state in writing that "if in the event I am under anesthesia or similarly unable, I wish you to assume those duties," and I would think that section 3 was broad enough to include a prospective inability as well as an actual inability.

The Chairman. Mr. Attorney General, I want to get something straightened out that is getting me a little confused. Mr. McCulloch read from your statement on page 4, next to the last paragraph, when you explained subdivision 5, when you said:

I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only where the President has been declared disabled without his consent, in accordance with section 4; and that, where the President has voluntarily declared himself unable to act, pursuant to the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing that his inability has ended. However, I note in this regard that the Senate Committee on the Judiciary has recently approved an amended version of Senate Joint Resolution 1, the counterpart of House Joint Resolution 1, under which the President may resume his powers and duties in this situation only by following a procedure comparable to that established by section 5. I would much prefer a provision which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared.

You used the word "voluntary." I think that is significant. There are two kinds, one where he voluntarily declares himself disabled, and this provision would follow where he feels his disability is at an end.

Then we have the involuntary. In that case, section 5, as now written, would be approved; would it not?

Mr. Katzenbach. Yes.

The Chairman. Then you were going to supply us language to cover this additional situation.

Mr. Katzenbach. Yes; I think the difficulty, if I understand the amended version of Senate Joint Resolution 1 at the moment, is this: If the President voluntarily declares it, then he is subjected nonetheless to the provisions of section 5, which is a 48-hour, in effect, delay, but could be much less and might desirably be much less, if I understand their intention correctly on the amended language. And I believe if the President says, "Look, I am unable to act this afternoon," I wouldn't expect the Vice President to act, except in the case of emergency, because normally no action need be taken for that period of time. But should an emergency arise, the Vice President would act, then I think if the President comes out and is healthy—fine, he ought to continue to perform the functions of his office and not have an involuntary further waiting period of 44 hours or something like that.

The third point, I say on page 4, even where the President's inability was established originally pursuant to section 4, rather than declared voluntarily by him, the President could resume the powers and duties of his office immediately with the concurrence of the Acting President. He would not be obliged to wait the expiration of the 2-day period mentioned in section 5. I think the language will bear that instruction that he doesn't have to wait if the Vice President immediately
agrees with him. I think the point should be clearly understood in terms of at least the legislative history.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President’s inability pursuant to section 5.

It would seem to me that is clearly what the intent must be. If Congress is out of session, they must be called and he cannot, by his failure to call, delay the process.

The Senate Committee on the Judiciary has revised Senate Joint Resolution 1 to provide that all declarations, including the declarations by the President under sections 3 and 5 and the declaration by the Vice President under section 4, shall be transmitted to the President of the Senate and Speaker of the House of Representatives. This change, the committee states, would provide a basis on which congressional leaders could convene Congress if it were not then in session. However, the Constitution expressly authorizes only the President to convene Congress in special session—article II, section 3, clause 2—and in view of that provision it might be argued that Congress cannot be convened in special session by its own officers. Accordingly, I would think it preferable to provide that the Acting President must convene a special session in order to raise an issue under section 5 as to the President’s inability. Although section 5, as it now stands, could be construed in that way, the committee may wish to consider whether it would not be advisable to add express language which would make that intention unmistakable.

Mr. Poff. I assume you will submit the language which will implement that suggestion?

Mr. Katzenbach. I will be happy to, if it is the view of the committee.

Mr. Poff. We are going to wind up with a constitutional amendment that will be longer than the Constitution.

Mr. Katzenbach. I don’t think anything I am going to suggest will have that effect.

Mr. Poff. I hope not, but the amendment you suggested will occupy several paragraphs.

Mr. Katzenbach. I believe I can do that in less than 20 words, both of them.

Mr. Poff. I hope you can. I will recall that you said you could do so.

Mr. Katzenbach. Having said it, I will be sure to do so.

Mr. McCulloch. Mr. Chairman, I should like to ask the Attorney General whether or not he believes that there might be some conditions that exist in our country that would authorize the leaders of the House and the Senate to call the Congress into extraordinary session. And could this be one of them, if the Attorney General believes that there is such a foreseeable condition which might warrant that?

Mr. Katzenbach. I think the answer to both questions would be “Yes, sir.” I would think that if you had a simultaneous death of both the President and the Vice President, you have still got a suc-
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cession statute, but the succession statute presently covers people likely to be in Washington. I suppose in the event that you would run out of people on your succession statute, that the leaders would be justified in so doing for the want of anybody to perform the function which is expressly contained in the Constitution, if that is what you had in mind.

Mr. Mathias. Mr. Chairman, I note, sir, that both section 2 and section 5 refer respectively to a majority of both Houses of Congress and a two-thirds vote in both Houses. The Constitution is not completely uniform in its references to voting majorities or voting practices, but at least in some places, it provides, for instance, that two-thirds of the Senators present should concur. Would these provisions create any ambiguity in view of the fact that we are dealing with such a highly political subject?

Mr. Katzenbach. I don’t think that we have any ambiguity, unless ambiguity would be created by a conflicting legislative history as to what was meant. If the intention was clear that it meant a majority and two-thirds of a quorum and there was nothing in the legislative history to suggest the opposite, that would be a clear interpretation and there would be no need to clarify that in other language.

Mr. Mathias. There are some shocking opinions rendered in the States on this question which indicates that maybe the addition of not 20 words but 1 word would cause difficulty.

Mr. Katzenbach. There is precedent in the Supreme Court for the interpretation that I just made. The case is Missouri Pacific Railway Company v. Kansas.

Mr. Lindsay. Do you yield?

Mr. Mathias. Yes.

Mr. Lindsay. Mr. Attorney General, I take it under House Joint Resolution 1, in the event that section 5 is invoked and a two-thirds decision should be made and the President is held by Congress to be unable to perform his functions, that if the President should later wish to recapture the power and if the Vice President disagrees, you go through the same procedure all over again?

Mr. Katzenbach. I don’t believe you can otherwise interpret it unless you say—the only other possible interpretation would be that having been done once, he never can get back in, and I would not think that was the intention.

Mr. Lindsay. I would like to ask your opinion of some language that appears in an offering of my own, House Joint Resolution 139, in which I inserted the following after the two-thirds provision has occurred.

Mr. Katzenbach. I am familiar with that, Congressman.

Mr. Lindsay. Are you familiar with the three conditions?

Mr. Katzenbach. Yes.

Mr. Lindsay. What would you think of the incorporation of those three points in the constitutional draft?

Mr. Katzenbach. I have no objection to the three points that you have put in there to clarify this, other than—perhaps I can say it this way, Congressman: The House Joint Resolution 1, as has been pointed out, was worked on by many leaders of the bar and has the support of a large number of Senators. It is, as President Johnson says, a responsible resolution of a very difficult problem. I think any of us in
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this room could arrive at other responsible resolutions of the same problem which would vary in one way or another and which I might prefer or you might prefer. I think there is a problem in section 5 of recurrent procedures of this kind.

I would think, as a sensible interpretation of section 5 as it now exists, the Senate or the House would not continue to act on this, absent some change of circumstances. I do think the provisions that you have there would obviate that particular problem and they seem to me to be reasonable provisions in terms of dealing with what I think you envision of every 48 hours a new request.

Mr. LINDSAY. I was thinking not just of clarity, because you would have a continuing problem and there is room for clarification, I would think, in section 5, but I was thinking also of the importance of giving Congress at least the power to restore the condition as it was by a majority vote. You could have on your hands a most difficult, trying, dangerous, and nasty situation of a power fight between two branches of Government and this would at least retain, by constitutional language, in the Congress a final say to put an end to the whole show, should it become wise to do so. Otherwise, there is no area here at all where Congress has any initiative at all.

Would you agree with that?

Mr. KATZENBACH. I think you make a valid point.

Mr. LINDSAY. Thank you.

The CHAIRMAN. Are there any other questions?

Mr. CHEIF (presiding). Would you care to complete your testimony without interruption?

Mr. KATZENBACH. I had only one more point to make with respect to the "immediately decide" and "immediately proceed to decide" language that was discussed, and I think the committee is so familiar with the proposals that have been made and with the advantages and disadvantages, that it might be better for me to submit myself to questions at this point.

Mr. WHITTNER. You said there was an ambiguity in the present constitutional provision which you think may be construed to limit Congress in its right to legislate adequately in this field?

Mr. KATZENBACH. Yes.

Mr. WHITTNER. What is it?

Mr. KATZENBACH. Juxtaposition of the word "both" and the use of the conjunctive "and" at the end of the article.

Mr. WHITTNER. Equally good constitutional scholars as those to whom you referred take the position that it is ambiguous; there are equally good scholars who say it is unambiguous, aren't there?

Mr. KATZENBACH. No. If you will forgive me, I don't think anybody could read it without saying it is capable of more than one construction. It may be that there are equally good scholars, certainly, who say it should be construed in the way that it permits you to provide for only one. My point is that that doesn't solve the problem. If you have to debate as to whether or not that is correct construction you can't resolve that by legislation which later can be attacked as not being in accordance with the Constitution.

Mr. WHITTNER. But if House Joint Resolution 1 is written into the Constitution, it will not be sufficient in itself. There would still be a requirement for legislative action to implement it.
Mr. Katzenbach. It provides for some legislation and, I would suppose, legislation consistent with it could be enacted, but I would say that the effort here was to solve this problem without further legislation.

Mr. Whitener. But there are many questions which this would not answer; that is a constitutional amendment which could only be answered by legislation, isn’t that correct?

Mr. Katzenbach. I would—I am sure there may be some and I am sure that even with all the ability on this committee it is going to be impossible to draft anything which in every given circumstance gives you an absolute clear answer. That is beyond the capabilities of any legal draftsman.

Mr. Whitener. If I may ask you on one other matter that we referred to this morning: This proposition of referring to a majority of the principal officers of the executive department: We do have, apparently, varying definitions within the statutory law of the Nation on this subject?

Mr. Katzenbach. Yes.

Mr. Whitener. What is your opinion as to the adequacy of that descriptive language and your further attitude as to whether we should spell it out when we talk about these principal officers?

Mr. Katzenbach. I would think the straightforward interpretation of it would find some support as you indicated this morning, but what is meant by the language? Are the members of the Cabinet those who head executive departments? I would think that would be the normal part of it.

Mr. Chief. Plus the legislative history showing the purport and intent of the Congress.

Mr. Katzenbach. It doesn’t seem terribly important to clarify that particular provision in House Joint Resolution 1 because Congress is able anyhow to give that job to some other body, and by the same token could, by legislation, rather than write it into the Constitution, could simply say that body shall be, Secretary of State, Secretary of the Treasury, and so forth. Because it provides for legislation, it doesn’t seem to be a major stumbling block.

Mr. Whitener. Until Congress does that, there will be a great difference of opinion as to the meaning of this very important language.

Mr. Katzenbach. I doubt that there would be a great difference of opinion on it, but I would concede that it is capable.

Mr. Whitener. Congress has the authority to state what constitutes one of the executive departments.

Mr. Katzenbach. It has that authority. There is no question about it.

Mr. Whitener. It has said it in different statutes in different ways. If that be true, you have a patent ambiguity here that would have to be clarified by a statute.

Mr. Chief. Could that not be included in the report?

Mr. Katzenbach. I think that would be adequate.

Mr. Chief. As part of the legislative history. You come back to, “Why all the shooting?” It is because of the inability of those of us here today to intelligently interpret the situation. I can understand the reason why the brains of this country, who were the Founding
Fathers who drafted this wonderful Constitution of ours, even they, as I see now, were somewhat perplexed with this thing.

Mr. Whittenber. My only rebuttal would be that any lawyer who has ever read Steve Nelson's case and the report of the Congress on the Smith Act, who would have the slightest suspicion that the legislative history written in the committee report would have any bearing on the court, is a very trusting soul.

Mr. Poff. I quote from your testimony on page 6 the following section:

If the issue of national leadership is to be importantly affected by the delay, then delay should favor the President.

I might say I agree with you. Is it not true that delay in congressional action under section 5 of House Joint Resolution 1 would favor the Vice President?

Mr. Katzenbach. It certainly would, in the absence of at least one House acting. It is almost impossible for me to envision circumstances where there would, in fact, be delay.

For a Vice President to take those steps, it would really have to be assured of quick and overwhelming support in the Congress.

Mr. Poff. Your answer would apply equally to Resolution 1 as amended?

Mr. Chief. May I break in? Three bells are normally a quorum call, but this is an automatic rollcall on motion to recommit legislation before the floor. What is the will of the committee and you?

Mr. McCulloch. Mr. Chairman, I should like to say this: Since this is a rollcall on a motion to recommit, that means that in all likelihood there will be another vote on the merits and that means that there would be a delay of at least 45 minutes until the second vote would be complete.

Now, I would therefore suggest, unless the Attorney General has some commitments that he must make tomorrow morning, that we recess until a time certain tomorrow morning.

Mr. Katzenbach. I am afraid, Congressmen, I do have commitments for tomorrow morning. I have to testify on another bill in another House.

Mr. Chief. Let us recess with the understanding that the chairman and Attorney General will get together at a future date.

Mr. Poff. May I suggest if we could adjourn to an hour certain tomorrow and hear another witness and then arrange for the Attorney General to come back at a later date.

Mr. Chief. That is already done. I understand from counsel we have a witness scheduled in the morning.

The prepared statement of Attorney General Nicholas deB. Katzenbach will be made a part of this record.

(The statement of Mr. Katzenbach follows:)

STATEMENT BY NICHOLAS DEB. KATZENBACH, ACTING ATTORNEY GENERAL OF THE UNITED STATES

I am privileged to appear before this committee to give my support to House Joint Resolution 1 and to discuss related proposals which are before you to amend the Constitution in order to remedy two critical deficiencies. The proposed amendments would, first, clarify the situation that would exist in the event
that the President should become disabled, and second, provide a means for filling vacancies in the Office of Vice President.

About 10 years ago, the chairman of this committee initiated a scholarly study of the problem of presidential inability. A special subcommittee composed of ranking members of this committee was appointed. To insure a broad and impartial approach to the problem, a questionnaire was sent to eminent jurists, political scientists, and public officials. In the succeeding years, extended hearings were held and reports filed. I am not aware of any constitutional problem which has received more comprehensive and continuing attention by this committee than that of presidential inability. Therefore, I see no value in any extensive review of the history of the presidential inability provision of article II, section 1, clause 6 of the Constitution, or the interpretations which have been given to that provision over the years. These matters have been fully covered in the Attorney General's opinion to the President of August 2, 1961 (42 Ops. Atty. Gen. No. 6), and I respectfully request that the committee make that opinion a part of the record of these hearings.

At the outset I wish to reaffirm the view I have expressed on several previous occasions that the only satisfactory method of settling the problem of presidential inability is by constitutional amendment, as House Joint Resolution 1 proposes. The same of course is true of the problem of filling vacancies in the Office of Vice President. I know that some distinguished scholars take the view that Congress has power to act in the matter of presidential inability under the "necessary and proper" clause (art. I, sec. 8, clause 18), and that a statutory solution would therefore be adequate. There is, however, equally distinguished support, including that of the last three Attorneys General, for the proposition that the problem can be adequately resolved only by constitutional amendment. And as a practical matter, if what we want is to assure continuity in executive leadership— and if what we want to avoid is uncertainty, confusion and dissension at the very time of crisis— then in my judgment a statute would not provide a satisfactory solution. So I fully agree with the constitutional amendment route marked out by House Joint Resolution 1.

I. THE PROBLEM OF PRESIDENTIAL INABILITY

Article II, section 1, clause 6 of the Constitution provides as follows:

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

It is generally agreed that this provision poses no legal problem in the event of the death of a President. As a matter of historical practice, first established by John Tyler and followed by seven other Vice Presidents, the Vice President becomes President in such a contingency. Section 1 of House Joint Resolution 1 confirms this practice in the case of death and extends the same principle to removal of or resignation by the President. Under section 1, therefore, the Vice President would become President and be sworn in as President in the event of the latter's removal, death, or resignation. I can see no objection whatever to that section.

As for presidential inability, there is no similar settled practice because, of course, so far in our history no Vice President has ever exercised the powers and duties of the Presidency during a period of presidential inability. It is true that the identical Eisenhower-Nixon, Kennedy-Johnson, Johnson-McCormack, and Johnson-Humphrey understandings on this matter, supported as they are by the views of the last three Attorneys General, have gone far toward establishing a settled practice. These informal understandings, however, leave much to be desired as a means of resolving such fundamental questions. Moreover, they make no provision for the situation that would exist if the President and Vice President should disagree on the question of inability. Accordingly, it is clear that what is needed is a lasting and complete solution to the key questions which would arise under the ambiguous language of article II, section 1, clause 6 of the Constitution if a President were to become unable to discharge the powers and duties of his office. The first of these questions is whether it is the "office" of the President, or the "powers and duties" of the office, that would devolve upon the Vice President in the event of presidential inability. The second is who is au-
thorized to raise the question of “inability” and make a determination as to when it commences and when it terminated.

The great majority of constitutional scholars have expressed the opinion that in the event of presidential inability, the Vice President succeeds only temporarily to the powers and duties of the office and does not permanently become President. This has also been the unanimous view of Attorneys General of both Republican and Democratic administrations for at least the last decade. Similarly, the majority of scholars are agreed that the Vice President has constitutional authority to make the initial determination of presidential inability, and that the President has the authority to determine when his inability is at an end. My own judgment and that of many Attorneys General is that this is so. However, enough doubt has existed on the subjects in the past that several Vice Presidents have been deterred from acting as President when the President was temporarily disabled. As you will recall, this happened most dramatically during the prolonged illnesses of Presidents Garfield and Wilson, when the country was left without leadership and decisions were made, to the extent that they were made at all, in a questionable manner.

The events of the last decade demonstrate how quickly and unexpectedly disability can strike. If a President should become disabled while section 3 of House Joint Resolution 1 is in effect, there could be no dispute as to the status of the Vice President as Acting President in discharging the powers and duties of the disabled President. There also would be a firm constitutional guarantee that the President could resume his powers and duties as soon as his inability has ended. On this basis, we can assume that a President who is sick, or about to undergo an operation which will temporarily incapacitate him, would not hesitate to announce his inability, nor would a Vice President be unduly slow to act if an emergency situation of this kind should demand it.

The extraordinary situations—where the President cannot or does not declare his own inability, or where a dispute exists between the President and Vice President as to whether inability exists—are covered by sections 4 and 5 of House Joint Resolution 1.

Section 4 provides that if the President does not declare his inability, the Vice President, with the written concurrence of a majority of the heads of the executive departments (i.e., the members of the Cabinet) or of such other body as Congress might by law provide, may transmit to Congress his written declaration that the President is disabled, and immediately assume the powers and duties of the office as Acting President. Section 5 provides that the President can resume the powers and duties of his office by transmitting to the Congress his written declaration that his inability has ended. If, however, the Vice President does not agree that the President's inability has ended, section 5 further provides that the Vice President can, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress might by law provide, within 2 days so advise Congress. Thereupon Congress would be required immediately to decide the issue. A two-thirds vote of both Houses would be necessary to keep the President out and permit the Vice President to continue to act as Acting President. If the Vice President could not muster the necessary two-thirds vote in each House, the President would resume the powers and duties of his office.

As the committee well knows, the factual situations with which House Joint Resolution 1 is designed to deal are numerous and complex. Inevitably, therefore, some aspects of the proposal will raise problems of ambiguity for some observers. In order to assist in resolving any such ambiguity, I propose to set forth the interpretations I would make in several difficult areas so that the committee may consider whether clarification is needed.

First, I assume that in using the phrase “majority vote of both Houses of Congress” in section 2, and “two-thirds vote of both Houses” in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation is consistent with longstanding precedent (see, e.g., Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only where the President has been declared disabled without his consent, in accordance with section 4; and that, where the President has voluntarily declared himself unable to act, pursuant to the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing
that his inability has ended. However, I note in this regard that the Senate Committee on the Judiciary has recently approved an amended version of Senate Joint Resolution 1, the counterpart of House Joint Resolution 1, under which the President may resume his powers and duties in this situation only by following a procedure comparable to that established by section 5. I would much prefer a provision which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared.

Third, I assume that even where the President's inability was established originally pursuant to section 4, rather than declared voluntarily by him, the President could resume the powers and duties of his office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as implicitly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

The Senate Committee on the Judiciary has revised Senate Joint Resolution 1 to provide that all declarations, including the declarations by the President under sections 3 and 5 and the declaration by the Vice President under section 4, shall be transmitted to the President of the Senate and Speaker of the House of Representatives. This change, the committee states, would provide a basis on which congressional leaders could convene Congress if it were not then in session. However, the Constitution expressly authorizes only the President to convene Congress in special session (art. II, sec. 3, clause 2), and in view of that provision it might be argued that Congress cannot be convened in special session by its own officers. Accordingly, I would think it preferable to provide that the Acting President must convene a special session in order to raise an issue under section 5 as to the President's inability. Although section 5 as it now stands could be construed in that way, the committee may wish to consider whether it would not be advisable to add and express language which would make that intention unmistakable.

Fifth, I assume that the language used in section 5—to the effect that Congress "will immediately decide" the issue—means that if a decision were not reached by the Congress immediately, the powers and duties of the office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, even though used also in article I, section 8, clause 2 of the Constitution, that the committee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

The Senate Judiciary Committee, in approving Senate Joint Resolution 1, has changed the language "immediately decide the issue" to "immediately proceed to decide the issue." This change seems to have the effect of reversing the interpretation I have indicated, the result being that under Senate Joint Resolution 1, as approved by the Senate committee, the Acting President would continue to exercise the powers and duties of the Presidency while Congress considered the matter and until one of the Houses of Congress brought the issue to a vote and failed to support the Acting President by a two-thirds vote.

I note that the committee has before it several proposals (H.J. Res. 3, H.J. Res. 119, and H.J. Res. 248) which would provide that once the issue of inability was referred to Congress, the President would be automatically restored to the powers and duties of his office if Congress failed to act within 10 days. These proposals would add a measure of protection for the President against interminable consideration of the issue by Congress. However, it would still be possible under these proposals for the issue to be decided by delay rather than by a vote on the merits.

In view of the difficulty of establishing in advance exactly what period of consideration would be appropriate, the most effective course might be to initiate promptly the adoption of rules for the consideration of questions of inability that would insure a reasonably prompt vote on the merits. I do feel that, if the issue of national leadership is to be importantly affected by delay, then delay should favor the President. Particularly is this so if the President may not, under section 3, unilaterally declare an immediate end to periods of inability which he has voluntarily declared.
It is sometimes suggested, with respect to provisions like section 5, that the doctrine of separation of powers is violated by exercise of legislative authority in this field. I cannot accept this argument. Congress, it will be recalled, now has constitutional authority to enact a succession law when both the President and Vice President have suffered inability (art. II, sec. 1, clause 6). Congress is also authorized by the Constitution to determine Impeachment proceedings. Accordingly, vesting authority in the Congress by a two-thirds vote to determine the inability of the President in the event of an impasse between him and the Vice President would not seem to be a significant extension of its present authority. It should be noted in this connection that Congress would be authorized by section 5 only to confirm what the Vice President, acting with the concurrence of a majority of the Cabinet, has done. Congress could not initiate the procedure for determining the commencement or termination of presidential inability.

In my testimony on this subject in 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail. There is, however, overwhelming support for a measure such as House Joint Resolution 1, and widespread sentiment that these procedures should be written into the Constitution. The debate has already gone on much too long. Above all, we should be concerned with substance, not form. It is to the credit of House Joint Resolution 1 that it provides for immediate, self-implementing procedures that are not dependent on further congressional or presidential action. In addition, it has the advantage that the States, when called upon to ratify the proposed amendment to the Constitution, will know precisely what is intended. In view of these reasons supporting the method adopted by House Joint Resolution 1, I see no reason to insist upon the preference I expressed in 1963 and assert no objection on that ground.

II. FILLING VACANCIES IN THE OFFICE OF VICE PRESIDENT

Related to the problem of presidential inability is the equally critical problem of vacancies in the office of Vice President. Too often it is overlooked that the country has been without a Vice President 16 times—in almost half of the 86 administrations in the history of the Nation. In an age marked by crisis, we can no longer afford such a gap in the high command of the executive branch of the Government. Today more than ever, the working relationship between the President and Vice President has become increasingly close; the burdens of the Presidency and the exigencies of the times leave no other alternative. The need is therefore manifest for a constitutional amendment to assure that the office of Vice President will never again remain vacant.

In my opinion, House Joint Resolution 1 embodies a highly satisfactory solution to this problem. Section 2 would amend the Constitution to provide that whenever there is a vacancy in the office of Vice President the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Permitting the President to choose the Vice President, subject to congressional approval, will tend to insure the selection of an associate in whom the President has confidence and with whom he can work in harmony. Participation by Congress should help to insure that the person selected would be broadly acceptable to the people of the Nation.

All things considered, it is clear that House Joint Resolution 1 represents as formidable a consensus of opinion on a proposed amendment to the Constitution as we are ever likely to find. It may not satisfy in all respects the views of every student of the problems with which it deals. For that matter, I doubt that any proposal could ever fully satisfy everyone in this difficult area. But, it seems to me evident that this proposal, as President Johnson has said, "would responsibly meet the pressing need * * *." That need has never been greater in all our history.

If Congress acts favorably on this proposed constitutional amendment this year, it is possible that it would be ratified by 1966. I therefore earnestly recommend such action.
PRESIDENTIAL INABILITY

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

PRESIDENTIAL INABILITY

Article II, section 1, clause 6 of the Constitution authorizes the Vice President to act as President in the event of the President's inability to discharge the powers and duties of his office, and to act in that capacity "until the disability be removed."
The same Article is interpreted as vesting authority in the Vice President to decide whether Presidential inability exists, if the President is unable to do so, and authorizes the President to determine when his inability has ended.
The memorandum of March 3, 1958, between former President Dwight D. Eisenhower and former Vice President Richard M. Nixon, representing their understanding of the constitutional role of the Vice President as acting President in the event of Presidential inability, is consistent with the correct interpretation of Article II, section 1, clause 6 of the Constitution.
Attorneys General Herbert Brownell, Jr. and William P. Rogers have expressed the same views on the identical questions.

AUGUST 2, 1961.

Dear Mr. President: I have the honor to respond to your request for my opinion upon the construction to be given to the Presidential inability clause of the Constitution. Article II, section 1, clause 6 reads as follows:
"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, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

You request my opinion on these questions: first, whether when Presidential inability occurs, the Vice President under
Article II, section 1, clause 6 succeeds to the "Powers and Duties" of the Presidency or whether he succeeds to the "Office," i.e., becomes President and remains in the office even if the inability should cease; second, who determines whether the inability exists and who determines whether the inability has ended; and third, whether the memorandum of March 3, 1958, between former President Eisenhower and former Vice President Nixon, representing their understanding of the constitutional role of the Vice President as acting President, is a desirable precedent for this Administration to follow.

As shall be shown hereafter, the great majority of scholars and my two immediate predecessors have expressed the opinion that upon a determination of Presidential inability the Vice President succeeds temporarily to the powers and duties of that office, and does not permanently become President; and it is also their opinion that the Vice President may determine whether the inability exists. My immediate predecessors were also of the opinion that the President may determine when his inability has ended, and thereupon resume the discharge of the Presidential functions. For reasons to be discussed hereafter, I concur in their opinions. I also conclude that the understanding of March 3, 1958, is in keeping with the Constitution, and that the precedent set by it could appropriately be followed by this Administration.

I

In case of Presidential inability does the office itself or do merely the powers and duties of the office devolve on the Vice President?

For many years constitutional scholars have debated whether Article II, section 1, clause 6 was intended to transform a Vice President into a President upon the occurrence of the latter's inability. It will be noted that this clause contemplates four situations in which the Vice President may be called upon to act as President. In three situations, permanent exclusion of the President from the remainder of his term is obvious since these involved removal from office, death or resignation. The difference of opinion arises respecting the fourth contingency, viz: "Inability to discharge
the Powers and Duties of the said Office." Did the authors of the Constitution intend to exclude the President thereafter, despite his complete recovery, from resuming the discharge of his powers and duties? It may be noted that after this fourth contingency follow the words "the Same shall devolve on the Vice President." Do the words "the Same" refer to the office of President, or do they refer to "the Powers and Duties"?

It is my opinion that under Article II, section 1, clause 6 of the Constitution the Vice President merely discharges the powers and duties of the Presidency during the President's inability and this conclusion, as shall be shown hereafter, finds support in the following:

1. The records and history of the Constitutional Convention.
2. Debates in the Convention and ratifying conventions.
3. Consideration of other provisions in the Constitution.
4. The example and experience of the States in providing for succession.
5. The dictates of reason and established rules of statutory construction.
6. The great weight of constitutional authority.

These considerations will be discussed in order.

1. The records and history of the Constitutional Convention.

Without dispute, Article II, section 1, clause 6 nowhere expressly provides that the Vice President shall under any circumstances become President. Had the framers of the Constitution intended the Vice President in certain contingencies to become President, they would not have been at a loss for words. Reference to the records of the Constitutional Convention discloses that the framers of the Constitution never intended the Vice President in event of Presidential inability to be anything but an acting President while the inability continued.

Of the various written plans submitted for consideration at the Convention, only Charles Pinckney's draft offered May 29, 1787, specifically referred to Presidential disability. Article VIII of this draft provided in part that in case of the President's removal through impeachment, death, resignation
or disability "the President of the Senate shall exercise the duties of his office until another President be chosen * * *." 1

The House resolved itself into a Committee of the Whole to consider various proposals, but having made little progress on the question of the President’s inability, referred this proposal to the Committee of Detail which was then considering other matters. This Committee reported a draft on August 6, 1787, which contained Article X, section 2 relating to Presidential inability. It provided that in case of the President’s removal as aforesaid through impeachment, death, resignation, or disability to discharge the powers and duties of his office, “the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.” 2 On August 27, Mr. Dickinson remarked about the vagueness of this clause. "What," he said, "is the extent of the term ‘disability’ & who is to be the judge of it?" Unfortunately, his suggestion produced no clarification. 3

It will be noted that up to this point the official to act as President until the President’s disability was ended was "the President of the Senate," not the Vice President. Article X of the draft was then referred to the Committee of Eleven which reported on September 4. In its report provision was included for the first time for a Vice President, as distinguished from the President of the Senate 4 who was to be ex officio, President of the Senate, except on two occasions: when the Senate sat in impeachment of the President, in which case the Chief Justice would preside, and "when he shall exercise the powers and duties of the President," in which case of his absence, the Senate would choose a President pro tempore. The Committee of Eleven also recommended that the latter part of section 2 of Article X be amended to provide that in case of the President’s removal on impeachment, death, absence, resignation or inability to discharge the powers or duties of his office "the Vice President shall exercise those powers and duties until another

2 Id. 186.
3 Id. 427.
4 Id. 495.
President be chosen, or until the inability of the President be removed.”* He was not to become the President in either event.

On September 7, the Convention adopted an amendment to cover the vacancy or disability of both the President and Vice President providing that the Legislature may declare by law what officer of the United States shall act as President in such event, and “such Officer shall act accordingly, until such disability be removed, or a President shall be elected.”*

On September 8, the last clause of section 2, Article X was agreed to by the Convention, and a Committee of five was appointed “to revise the style and arrange the articles agreed to by the House” including those provisions dealing with inability.” Thus, as the proposed article came to the Committee on Style, it consisted of two clauses dealing with Presidential succession. The first related to the devolution of the powers and duties of the President’s office on the Vice President in certain cases including the President’s inability. The second authorized Congress to designate an officer to act as President in cases in which both the President and Vice President were disabled, had died, resigned or been removed. A temporal clause modified each main clause limiting the tenure of an acting President to the duration of the inability or until “another President be chosen” (first clause) or until “a President shall be elected” (second clause). Nothing in either clause said that the Vice President was to become President.

On September 12 the Committee on Style, condensing and combining the provision for Presidential inability, together with the provision for joint inability of both the President and Vice President, reported the clause as follows:*

“(e) 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, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring

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*2 id. 495, 499.
*2 id. 532.
*2 Ferrand, op. cit. supra note 1, 588-599.
what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive."

Madison crossed out the words "the period for chusing another president arrive" and inserted in their place "a President shall be elected."* In this form the clause was written into the final draft of the Constitution.

The Committee on Style had no authority to amend or alter the substance or meaning of the provisions, but merely to combine and integrate them as a matter of form.10 In this setting, the effect of what was done by it may be better understood by placing the provisions originally agreed to by the Convention side by side with the clauses as they were adopted by the Convention.

"Articles Originally Agreed to by the Convention

Article X, section 2: * * * and in case of removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

Article X, section 1: The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President;

As Later Reported by Committee on Style and Finally Adopted

Article II, section 1, paragraph 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;

* 2 id. 626. See also 2 id. 599.
10 Davis, op. cit. supra note 7, 11.
and such Officer shall act accordingly, until such disability be removed, or a President shall be elected."

Comparison of these provisions makes clear the intention of the framers of the Constitution. When the provisions were placed into the hands of the Committee on Style and Arrangement, they explicitly provided that in case of inability of the President, the Vice President was not to become President, but merely to "exercise those powers and duties * * * until the inability of the President be removed." When, therefore, the Committee on Style condensed the language and reported the provision to read in case of the President's "inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President," the exact meaning intended by the Convention was carried over to the revised language.

It has been argued by one school of thought that "the Same" as used in the succession clause refers to "Office," and therefore the office devolves on the Vice President who thereby becomes President. The other school asserts that "the Same" has reference to "Powers and Duties," and that the Vice President may merely discharge those powers and duties, but does not become President. Since a definitive answer is not to be found in any fixed rules of English usage, Professor Ruth C. Silva has concluded that the antecedent of "the Same" should be ascertained on the basis of the intention of those who framed and ratified the Convention. This is sound construction.

This interpretation is reinforced by other language initially agreed to by the Convention. If it were intended that the Vice President should act permanently as President, it seems unlikely that the language adopted by the Convention and sent to the Committee on Style would expressly prescribe a temporary period during which the Vice President shall exercise "those powers and duties," *vis*: "until another President be chosen, or until the inability of the President be removed."

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When we refer to the provisions before and after the Committee on Style had combined them, it appears that the Committee did several things: consolidated the two provisions into one and introduced the words "the same shall devolve on the Vice President"; omitted reference to "absence" as an occasion for operation of the succession rule; used the adverbial clause "until the disability be removed," only once instead of using it to modify each of the preceding clauses separately; substituted "inability" for "disability" in the clause referring to succession beyond the Vice President, possibly as being more comprehensive and covering both absence and temporary physical disability; and changed the semicolon after "Vice President" to a comma so that the limiting clause beginning "and such Officer" would refer both to the Vice President and the officer designated by Congress. Thus the evolution of this clause makes clear that merely the powers and duties devolve on the Vice President, not the office itself.

2. The debates in the Convention and in the ratifying conventions.

The debates in the Convention are not too illuminating on the question whether a Vice President was merely to act as President until the latter's disability was over or to become President. In support of the view that the debates demonstrate recognition that the Vice President's role was to be a temporary one while the inability existed, statements relied on are not squarely in point, but the inferences drawn are entitled to weight.

Thus, Professor Silva states: ** This assumption [that the Vice President is an acting President] is implicit in James Wilson's objections to the election of the President by Congress. The gentleman from Pennsylvania said that the Senate might prevent the filling of a vacancy by dilatory action, so that their own presiding officer could continue to exercise the executive function. Gouverneur Morris and James Madison likewise objected to this mode of election for a similar reason—the Senate might retard appointment of a President in order that its own presiding officer might continue to possess veto power. Such objections are without

** id. 10.
merit if the President’s successor was intended to become President for the remainder of the term.”

There is other evidence from which the intention of the delegates may be determined. Charles Warren reports that during the debates little enthusiasm was expressed for an officer such as the Vice President, that the discussion centered on his status as a legislative officer, and there was no discussion as to his succession even in case of the President’s death. However, Warren is of the opinion “the delegates probably contemplated that the Vice President would only perform the duties of President until a new election for President should be held; and that he would not ipso facto become President.” It seems fairly clear that if the delegates did not contemplate that the Vice President shall become President on the death of the President, but only perform the duties of the office, that they certainly did not intend any different result upon the President’s inability.

Discussion of the succession clause at the ratifying conventions was also singularly unenlightening.

Professor Silva, who has made a careful study of the matter, reports there is no record of discussion of the succession clause at the ratifying conventions except briefly at the Virginia Convention. George Mason objected to the clause because it lacked provision for the prompt election of another President in event of vacancy in both the Presidential and Vice-Presidential offices. Madison’s attempt to answer this objection indicated that he did not think that the designated officer in event of succession beyond the Vice President “would have that tenure which the Constitution guarantees to a de jure President,” but it does not appear that Madison had in mind the status of a Vice President who might be acting as President. What is of greater significance is that the delegates in the ratifying conventions always carefully distinguished between “the President” and “the acting President.” Reference was made to “the Vice President, when acting as President,” not “the Vice President when he be-

19 Id. 635.
20 Silva, *op. cit. supra* note 11, 11.
comes President.”18 Silva says that “nowhere in the debates of the ratifying conventions did a single one of the delegates use the latter expression.”17

The Federalist, in which Hamilton defended the proposed Constitution and explained in detail its provisions, is surprisingly silent as a whole on what was intended when a President suffers inability. However, at one point Hamilton defended the role of a Vice President over the objection that his position would be “superfluous, if not mischievous.” He urged that two considerations justified the Vice President’s position: one to cast the deciding vote in the Senate when they were equally divided; the other, that “the vice-president may occasionally become a substitute for the president * * *, and exercise the authorities and discharge the duties of the president.” 18

While these debates in the Convention and ratifying conventions appear to be inconclusive, generally they tend to support the argument that a Vice President or designated officer was never, in the view of the framers of the Constitution, intended to become President. If there was Presidential inability, the Vice President was to act only until the inability was terminated.19

3. Consideration of other provisions of the Constitution.

Reference to other provisions of the Constitution also supports the conclusion that in event of Presidential inability, the Vice President would merely serve as acting President.

For example, the Twelfth Amendment provides that if the House should not choose a President before March 4, "then the Vice-President shall act as President as in the case of the death or other constitutional disability of the President.” (Italics added.) It may be observed that this Amendment does not say that the Vice President will become President in this situation. From the underscored language, Warren has concluded that when the Twelfth Amendment was adopted, “its framers interpreted the Constitution as meaning that the Vice President should only act as President

18 id. 12.
17 id.
19 Silva, op. cit. supra note 11, 167.
in case of the latter's death * * *.” And from this it would necessarily follow that he would not become President in case of the President's inability.

Other provisions of the Constitution also consistently avoid language to the effect that the Vice President shall become President except in a single instance where this was the specific intention. Thus, Article I, section 3, clause 5 states that the Senate shall choose a President pro tempore, in the absence of the Vice President or "when he shall exercise the Office of President of the United States." Here again, the action of the Vice President is not described "as becoming President," but merely that he shall "exercise the Office." On the other hand in section 8 of the Twentieth Amendment, where it was intended that the Vice President shall actually become President, it is explicitly provided that if, at the time fixed for the beginning of the term of the President, the President elect has died, the Vice President-elect "shall become President." The same section provides, moreover, by way of comparison that in event the President has not been chosen before the time fixed for the beginning of his term, or if the President elect fails to qualify then the Vice President elect "shall act as President" until a President has qualified, and similar language is employed where neither a President elect nor a Vice President-elect shall have qualified.

This difference in treatment in various provisions of the Constitution taken as a whole convinces me that both the framers of the Constitution and members of the Congress engaged in drafting amendments to the Constitution have been in agreement that a Vice President "becomes President" only when precise language to that effect is used, and that it is not to be implied.

4. The example and experience of the States as a guide.
In attempting to ascertain the intention of the framers of the Constitution, it is helpful to know what the practice was in the Thirteen States when the Constitution was adopted. We would expect that the provisions of those State Constitutions dealing with succession in event of a

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* Charles Warren, op. cit. supra note 18, 687. As is shown hereinafter, however, "constitutional custom" has undoubtedly modified this original interpretation in the event of the President's death.
Governor's inability definitely influenced and shaped the thinking of the framers of the Constitution in determining what provision should be made in event of Presidential inability. Accordingly we may consider those State constitutional provisions as a guide in interpreting the corresponding succession clause in the Constitution of the United States.

In most of the States at that time, in event of the Governor's "absence" from the State or during his inability, provision was made for the temporary exercise of the Governor's powers by the succeeding officer. The Governor was not ousted; he remained the Governor in those contingencies, resuming the discharge of his functions upon his recovery. So too, today, with very few exceptions, State Constitutions expressly or impliedly provide that where the Governor is unable to exercise the powers and duties of his office, the officer next in line of succession shall discharge them, but only temporarily.

The inferences to be drawn from this review of State practice and experience relating to gubernatorial disability and its bearing upon the problem of Presidential inability have been summarized forcefully by Professor Joseph E. Kallenbach:

"* * * State experience reinforces the point observable in national experience that situations of various kinds can and do arise involving inability of the Chief Executive to exercise his powers and which require devolution of these powers for an indefinite period of time upon the officer next in line of succession. It shows that constitutional provisions on this point are, in effect, self-executing. It shows that devolution of power in these circumstances can be brought about by simple acquiescence of the incumbent when he is able to recognize his incapacity. He does not, by so doing, remove himself from office, but merely acquiesces in the

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1 Kallenbach says that currently 46 States have such provisions. Presidential Inability, House Committee Print, 84th Cong., 2d sess. 40 (Jan. 81, 1956). See also, Richard H. Hansen, The Year We Had No President (to be published soon). A fairly complete survey of provisions of State laws relating to disability of the Chief Executive of the States also appears in Presidential Inability, House Committee Print, ibid. 66 et seq.

operation of the constitutional rule that permits and requires
the succeeding officer to exercise the powers of the chief
executiveship. The officer named by the constitution or
laws as the one upon whom the authority to act as governor
shall devolve has no option but to exercise the powers and
duties of that office, even though his doing so does not oust
the incumbent from the office of governor permanently. His
duty to so act is an ancillary and conditional function of
the incumbent in the office next in line in the succession.
When and if the cause occasioning the temporary devolution
of power has ceased to be operative, there must be a resump-
tion of his constitutional powers and duties by the tempo-
rarily displaced Chief Executive. His assertion of his right
and capacity to reassume the powers and duties of his office
is ordinarily regarded as sufficient to restore them to him."

5. The dictates of reason and established rules of statu-
tory construction.

As between two different interpretations to be given a
constitutional provision, it is fundamental that one will be
adopted which avoids inconsistencies and results which are
harsh or absurd.

Inherent in the position that a succeeding Vice President
becomes President upon the latter's inability, is the fact that
the President must forfeit his office, if through no fault of
his own he suffers inability, however temporary it may be.
It is difficult to draw any such conclusion from the lan-
guage of the Constitution, or to imply one which carries with
it such grievous and drastic consequences, particularly where
the Constitution expressly declares only one way to remove
the President, and that is through impeachment.

The absurdity of such an interpretation is made even more
apparent when considered with the language of Article II,
section 1, clause 6 authorizing the Congress, in case of dis-
ability of both the President and Vice President to deter-
mine "what officer shall then act as President." It is claimed
by those who assert that the Vice President becomes Presi-
dent in event of Presidential inability, that the limiting
clause "until the Disability be removed, or a President shall
be elected," refers only to the clause immediately preceding
it, under which an officer designated by law acts as Presi-
dent when both the President and Vice President are dis-
abled, and that it has no reference to the first portion of the clause where the President alone suffers inability. It is therefore argued that the Vice President under the latter contingency takes office for the remainder of the term free of any limitation.  

This contention, if accepted, would create an inconsistency and disparity in treatment between the President and Vice President most difficult to explain on rational grounds. We would then have the anomalous result that the Constitution discriminates against the President who has been elected and favors one not elected to that office. Such a dubious construction may not be adopted.  

As was said in the 1881 debate on the subject: "What principle, what consideration of expediency or policy is it which forbids the President, when relieved of his 'inability,' from reassuming the office to which he was elected, which does not apply with at least as much force to the Vice-President who was not elected to it? I can imagine none."  

There is another apparent weakness in this argument. Assume that both the President and the Vice President were disabled. Under the clause providing for joint disability, if the President recovered before the Vice President, he could resume the responsibilities of his office. It obviously makes little sense to say that under the first clause where the President alone is disabled that he forfeits his office permanently, but that under the second clause where both he and the Vice President are disabled simultaneously, the President would not forfeit his office if he recovers first.  

The framers of the Constitution were wise and mature men. Absurd and illogical results, repelled by reason, have no place in the Constitution. Nor should an interpretation involving an anomaly be imported into the Constitution unless the language itself compels it; here, "there is no such compulsion."  

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34 Senator Charles W. Jones, 18 Cong. Rec. 142-149, 191-198 (1881).  
36 Crosskey, id. 107.  
37 Id.
6. The great weight of constitutional authority.

In the face of these arguments, it is not surprising that almost every student of the Constitution who was recently canvassed to express an opinion, agreed that in case of temporary Presidential inability, the Vice President succeeds only to the powers and duties of the office as the acting President, and not to the office itself; and in event of a seemingly permanent disability, the large majority of these scholars concluded the result would be the same because it is always possible that the disability may be removed. Both of my immediate predecessors, former Attorneys General Herbert Brownell and William P. Rogers concurred in the majority view. This view, in my opinion, is clearly right.

As against the arguments supporting this array of opinion, there are arguments on the other side expounded by relatively few scholars.

A major contention already noted is that the immediate antecedent of the words "the Same" in Article II, section 1, clause 6 of the Constitution is "said Office," and, therefore, a reasonable interpretation is that it is the Presidential office,

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68 Included in this group of distinguished scholars of the Constitution were: Stephen K. Bailey, Princeton University; Everett S. Brown, University of Michigan; Edward S. Corwin, Princeton, N.J.; William W. Crosskey, University of Chicago Law School; Charles Fairman, Law School of Harvard University; David Feilman, University of Wisconsin; Thomas K. Flanletter, Esq., New York, N.Y.; James Hart, University of Virginia; Arthur N. Holcombe, Harvard University; Mark DeW. Howe, Law School of Harvard University; Richard G. Huber, Tulane University; Joseph E. Kallenbach, University of Michigan; Jack W. Peltason, University of Illinois; J. Roland Pennock, Swarthmore College; C. Herman Pritchett, University of Chicago; John H. Roman, the Brookings Institution, and Arthur E. Sutherland, Law School of Harvard University. Presidential Inability, House Committee Print, 85th Cong., 1st sess. 49-52 (1957). *Id. 52-54.


69 Presidential Inability, Hearings before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 147, 148-149 (1958). On the other hand, former Attorney General Wayne MacVeagh would probably have supported the minority view. During Garfield's illness, MacVeagh, although agreed on the desirability of having Vice President Arthur act as President, felt that "Arthur's exercise of presidential power would be equivalent to Garfield's abdication." Silva, Presidential Succession, op. cit. supra note 11, 56. Unfortunately, we are not favored by any exposition on the subject by MacVeagh.
not merely the President's powers and duties, which devolve upon the Vice President."

Arguments to the contrary resting on established principles of statutory construction have been made in detail above and need not be repeated. Suffice it to say, Article II does not provide that the Vice President shall become President upon the latter's inability. Since it is a contradiction in terms to have at one moment two Presidents—the one disabled, the other in office—and for the other reasons mentioned, the contention that "the Same" means "said Office" must be rejected as lacking in merit.

Another argument made in support of the theory that it is the office of President which devolves, is that the Constitution vests executive power in the President, knows a single Executive, and by implication bars any one from exercising it other than one actually President. It is claimed that in recognition of this principle, the courts have denied any one the right to discharge powers and duties of the President which under the Constitution require his personal judgment.

But when the Constitution is viewed as a whole such an interpretation of the vesting clause is completely consistent with a construction which permits the Vice President to act as President while the latter is unable to perform the duties of his office. Thus it has been pointed out:

"* * * The restrictions laid down by the courts apply to the delegation of executive power by the President to his subordinates, and should not by analogy be extended to the devolution of this power in such a way as to defeat the purpose of the succession clause. The records of the Federal Convention give no indication that the framers of the vesting clause would preclude the possibility of an acting President in case of vacancy or inability in the Presidency. Their sole purpose in writing the vesting clause appears to have been the establishment of a single, as contrasted with a plural,
executive. The purpose of the succession clause seems to have been to provide a substitute for the President in certain cases, not to provide for the creation of another President. The rule is well established that the different clauses should be given effect and reconciled if possible. The conclusion is, therefore, that the clause vesting executive power in the President should be construed in such a way as to allow for an acting President, who will exercise executive power in case of the President's removal, death, resignation, or inability until the disability passes or another President is elected."

The strongest argument that can be made is that which springs from past practice. It is that when succession occurs by reason of death, the Vice President becomes President, and it is argued that the same result must necessarily follow in each of the other contingencies enumerated in the same clause, including "inability to discharge the Powers and Duties of the said Office." Indeed, it is this "constitutional custom" as it has been described, involving death of a President, which has created whatever constitutional doubts may be said to exist.

All seven Vice Presidents, who have succeeded to the Presidency upon the death of the President, have taken the Presidential oath and have been generally recognized as President of the United States. John Tyler was the first to establish this precedent when William Henry Harrison died in 1841, and the principle laid down by him was followed by six other Vice Presidents upon the death of the President in office. Although President Tyler's action might readily have been questioned had historical materials on the framers' intent been at hand, the fact remains that it has been relied on for the proposition that the Vice President becomes President when the elected President dies—a proposition scarcely to be questioned today. Corwin says in this connection:

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David Fellman, Presidential Inability, House Committee Print, supra note 22, 24-28.
Hansen, op. cit. supra note 21, 704.
"That Tyler was wrong in his reading of the original intention of the Constitution is certain. It was clearly the expectation of the Framers that the Vice-President should remain Vice-President, a stopgap, a locum tenens, whatever the occasion of his succession, and should become President only if and when he was elected as such. Tyler's exploit, however, having been repeated six times, must today be regarded as having become law of the land for those instances in which the President, through death, resignation, removal, or other cause, has disappeared from the scene."

As Corwin goes on to point out, it was the possibility that this precedent might be extended to cases of Presidential inability—permanently ousting the incumbent which deterred two Vice Presidents—Arthur and Marshall—from undertaking to exercise the powers and duties of the office of President during the prolonged illnesses of Presidents Garfield and Wilson, respectively. Neither Vice President wished to be regarded as a "usurper." This possible risk also may have led these former Presidents to minimize or deny their disability. Other factors, however, of political nature, were present in both cases.

The problem of succession to the Presidency was considered immediately after former President Eisenhower's heart attack in September 1955. Congress was not in session, and there was no immediate international crisis. On the basis of medical opinions and a survey of the urgent problems demanding Presidential action immediately or in the near future, Attorney General Brownell orally advised the Cabinet and the Vice President that the existing situation did not require the Vice President to exercise the powers and duties of the President under Article II of the Constitution. All concerned accepted this opinion, and a plan was worked out to enable the executive branch to function during the President's illness which included having former Vice President Nixon preside at meetings of the Cabinet and the National Security Council. On October 21, 1955, Mr. Brownell conferred with the President in his hospital room at Denver, and advised him of the legal basis of the ac-

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"Brownell, op. cit. supra note 80, at 196."
tion taken, and that no written authorizations were required to ensure that his previously established policies would be executed and that the Government activities would continue without interruption.\textsuperscript{41} Thereafter, informal discussions took place between the President and the Vice President concerning "what the Vice President's role should be in the event of a similar unfortunate occurrence, or any other happening which would disable the President temporarily at a time when presidential action was required."\textsuperscript{42} Moreover, when President Eisenhower was operated on for ileitis in 1956, it is said that Vice President Nixon stood by fully prepared to initiate, "as acting President, whatever action would be necessary in case of international emergency; for it was realized that the announced intention of the President to undergo a serious operation might entice a hostile foreign power to make some drastic move in the expectation of finding, at the critical moment, confused and uncertain leadership in the United States."\textsuperscript{43}

While the overwhelming weight of authority and the strongest arguments support the theory that the Vice President is merely an acting President during the latter's disability, the precedent established by Tyler and followed by six other Vice Presidents in taking the oath of President upon a President's death, coupled with the lack of a close relationship and understanding between the President and the Vice President, created sufficient doubt to deter both Vice Presidents Arthur and Marshall from discharging the powers and duties of the President's office during periods of Presidential inability. In the Eisenhower Administration, arrangements were made between President Eisenhower and Vice President Nixon, discussed hereafter, designed to provide continuing leadership in the executive branch of the Government in the event of the President's inability, and to make clear the constitutional legitimacy of the Vice President's action, should he be obliged to discharge the powers and duties of the office for the duration of the inability.

In my view, there is a clear constitutional distinction between the situation in which a President is permanently re-

\textsuperscript{41} id.
\textsuperscript{42} id. 202.
\textsuperscript{43} id. 202-203.
moved from office by death and the situation in which he holds office but is temporarily unable to exercise its powers and duties. In the former case, the precedents of several deaths in office have established that the Vice President succeeds to the Presidency. In the latter case, he cannot so succeed because the President, the individual chosen by the people to occupy the office of Chief Magistrate, is still incumbent. In view of this distinction, the fact that the Vice President succeeds to the office of President when the elected President dies does not establish the proposition that he becomes President when he merely exercises the powers and duties of that office during the incumbent's temporary inability.

II

Who determines whether the inability exists? Who determines whether the inability is ended?

I now turn to two subsidiary questions:

1. Who has the authority under the Constitution to decide whether inability exists; and

2. Who is authorized to make the determination that the inability is over?

These are important problems upon which scholarly opinion differs somewhat.

1. The large majority is of the view that the Vice President or other "officer" designated by law to act as President has the authority under the Constitution to decide when incapacity exists. Both of my immediate predecessors favored this.

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44 Silva, op. cit. supra note 11, 100-102; Davis, op. cit. supra note 7, 18; Senator Augustus H. Garland, 18 Cong. Rec. 139-141 (1881); Senator Elbridge G. Latham, 14 Cong. Rec. 917 (1883); Lyman Trumbull, 133 No. Am. Rev. 417, 420-422 (1881); Benjamin F. Butler, id., 431-433; Presidential Inability, House Committee Print, op. cit. supra note 22. Thomas K. Finletter, id. 27-28; Joseph E. Kallenbach, id. 45. Hearings op. cit. supra note 25. Sidney Hyman, id. 56-59; Roger P. Peters, id. 122; C. Herman Pritchett, id. 71; John H. Romani, id. 43-44.

The Constitution does not define inability, and it has been the subject of varying definitions, none authoritative. It has been suggested that as a matter of sound interpretation the definition of inability should cover all cases, permanent or transient, physical or mental, in which a President is in fact unable to discharge a power or duty required to be discharged in the public interest. (See Silva, id. 171). Most scholars are opposed to defining inability in any amendment to the Constitution or in legislation.
interpretation. Attorney General Brownell summed up the legal basis for concluding that the Vice President is the sole judge of a President's inability, where the President is unable to do it himself as follows:

"* * * This is so because the Constitution does not state who should determine the President's inability in the many circumstances in which, as the founders themselves must have foreseen, it cannot be the President himself. The Cabinet could not have been intended to judge the issue, since this body is not referred to in the Constitution. It is not the Congress, except by the negative sanction of impeachment and conviction for a wrongful attempt to exercise power. Nor is it the Supreme Court, because the question of presidential inability is hardly one which fits any type of jurisdiction conferred by the Constitution on that tribunal. But the power to determine the inability of the President rests in the Vice President not simply because the Constitution places it nowhere else. By a well-known principle of law, whenever any official by law or person by private contract is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises. Similarly, under the present Constitution, it is the President who determines when his inability has terminated and he is ready once more to execute his office."

There are conflicting views. One school of thought believes that the right to make the inability declaration belongs to Congress. Cooley argued that Congress may determine inability because the Constitution confers this authority in the "necessary and proper" clause, reason dictates it, the decision of Congress alone can be final, and English precedents involving Parliament and a few disabled Kings may be relied on in support of congressional action.

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* Brownell, op. cit. supra note 80, 204.
* Early authorities are cited by Silva, op. cit. supra note 11, 106-107. More recent authority will be found in note 58.
Persuasive arguments have been raised in opposition to the theory that Congress has the power to determine specific cases of inability or to provide by general law a method for deciding such cases. One is that since the Constitution expressly provides in Article II for succession when both the President and Vice President are disabled, it excludes the right of Congress to act in the case of Presidential inability only. This is an application of the familiar maxim in statutory construction, *inclusio unius, exclusio alterius.*

It is an argument favored by Attorneys General Brownell and Rogers, although the latter also stressed Professor Sutherland's contention that ending the President's duties by ordinary legislation would run counter to the doctrine of separation of powers. Apart from sound constitutional interpretation, there are practical considerations since "each act of Congress must have for its validity the concurrent action of the president." Authority is divided on this point. I concur in Mr. Brownell's judgment.

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49 Brownell, *op. cit.* supra note 30, 206.

50 *Hearings, op. cit.* supra note 31, 170, 176.

51 Butler, *op. cit.* supra note 44, 431. Cornelius W. Wickersham, Chairman of the New York State Bar Association Committee on Federal Constitution, expressing the views of the Committee, stated: "It is extremely doubtful whether Congress has power to deal with the matter without a constitutional amendment and clearly the ambiguity of the present provisions cannot be cured by act of Congress alone." *Hearings, op. cit.* supra note 31, 95.

52 Brownell, *op. cit.* supra note 30, 205.


Equally distinguished are those who currently assert that proposed plans of Presidential inability may be carried out by statute. Among these are: Everett S. Brown, Edward S. Corwin, William F. Crosskey, Charles Fairman,
2. There remains the difficult question: Who makes the decision where the parties involved are in disagreement that the President's inability is ended, and that he is ready to resume the functions of his office?

Unquestionably, those scholars who claim the Vice President becomes President upon the latter's inability would assert that the Vice President may not be divested of his authority by recovery of, or action taken thereafter by, the President. In my opinion, this view does violence to the letter and spirit of the Constitution, and would defeat the will of the people.

Attorneys General Brownell and Rogers were in agreement that the President could reclaim the discharge of the powers and duties of his office merely by announcing that his inability had terminated, and that he is ready now to execute his office.44 In my opinion this interpretation of the Constitution is clearly correct. The force of popular opinion, the people's sense of constitutional propriety, and the cooperation of Congress could be counted on to support the President's decision if he acted properly.

There is no complete agreement among scholars as to who determines whether Presidential inability exists, and who determines when it ends. In the opinion of my two immediate predecessors, and in my own opinion, while the Vice President may declare when the President's inability exists, it is the President alone who has the constitutional authority to determine when his inability is over. This is implicit in the fact that the Vice President would merely be serving as acting President in such a contingency, and that there is only one President in office. The President's conclusion that he is able to resume the discharge of the powers and duties of the office must of necessity be accepted as binding unless and until he is removed by impeachment proceedings. As was said by one constitutional scholar:45 "The Constitution recognizes but one method of removing the President, and that is by conviction on articles of impeachment."

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44 Brownell, op. cit. supra note 30, 204; Rogers, Hearings, op. cit. supra note 31, 175.
Is the understanding between President Eisenhower and Vice President Nixon a desirable precedent to be followed by this Administration?

Finally, there is before me the question whether the understanding between President Eisenhower and Vice President Nixon on Presidential inability is a desirable precedent for this Administration to follow.

On March 8, 1958, the former President and Vice President, in consultation with the Attorney General, reduced to memorandum form their understanding of the constitutional role of the Vice President as acting President. It declared:

"The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office."

It seems to me that this understanding is entirely consistent with the correct interpretation of the Constitution.

The introduction itself purports to bind only the prior incumbents of the office of the Presidency and Vice Presi-
PRESIDENTIAL INABILITY

dency. This is an appropriate technique which leaves subsequent administrations free, as they would in any event be, to follow or reject the precedent.

Section 1 states that in event of inability, the President would, if possible, inform the Vice President of his condition, in which case the Vice President would serve as acting President until the inability is over.

This provision contemplates that the President will voluntarily announce his own inability, if it exists, for the purpose of encouraging the Vice President to discharge the powers and duties of the office until the President has recovered. This section helps to remove the obstacle which caused responsible Government officials to refrain from acting in the Garfield and Wilson cases. No one can possibly accuse the Vice President of being disloyal or a usurper if he undertakes to serve as acting President upon the request of the President. This section embraces most of the cases of Presidential inability likely to arise.

Section 2 deals with a situation in which the President is unable to communicate with the Vice President. In that event, the Vice President may take action “after such consultation as seems to him appropriate under the circumstances.”

It will be noted that section 2 leaves the determination of Presidential inability in the first instance where the Constitution places it now—in the Vice President. There is one addition in section 2 which is absent from the Constitution—the Vice President may consult with other persons as seems to him appropriate.

Even though the Vice President need not under the Constitution consult any one, it is clearly wise and conducive to strengthening his position if he seeks advice from other persons before presuming to exercise the powers and duties of the Presidency. Since the Constitution is silent on the matter, no specific persons to be consulted are mentioned, and of course, in view of the latitude given, he might conceivably consult no one before he acted.

Section 3 states that the President may, whether he or the Vice President has declared the inability, determine when
it is over, and forthwith resume the full exercise of the powers and duties of the office.

Here again, the understanding represents what my two immediate predecessors and I regard to be authorized by the Constitution—that the President may regain the powers of his office without the concurrence of any other official or group if he is of the opinion that his inability has been removed. Attorney General Brownell has said: 6 "The Eisenhower-Nixon understanding, by providing, first, for the Vice President's determination of presidential inability and, second, for the President's determination of when that inability terminates, thus coincides perfectly with article II, section 1, of the Constitution as originally drafted in 1787 * * *." This was also Attorney General Rogers' opinion and it is mine too, without reservation.

Since this understanding may prove to be a persuasive precedent of what the Constitution means until it is amended or other action is taken, I would favor that the present Administration follow it. Cumulative precedents of this kind may be valuable in the future.

IV

Conclusions

In my judgment, there is no question that the Vice President acts as President in the event of the President's inability and acts in that capacity "until the disability be removed." I do not believe that the practice which has grown up to the effect that the Vice President "becomes President" in event of the death of the President creates any substantial doubt.

I believe also that there is no substantial question that it is the Vice President who determines the President's inability if the President is unable to do so; and that it is the President who asserts when the inability has ceased. These conclusions are supported by the great majority of reputable scholars who have examined the problem, as well as by my predecessors.

In this connection, it is important to note the development of the Vice Presidency in recent years, and the changes in

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6 Brownell, op. cit. supra note 80, 204.
that office which have come about, particularly in the past two decades. During this time the Vice Presidency has moved substantially from its anomalous status under the Constitution in both the executive and legislative branches towards the former. Recent Vice Presidents have been given significant executive responsibility and an important voice in the highest affairs of state. The working relationship between the President and Vice President has become increasingly close and, during the past Administration as well as the present one, the President has been concerned to keep the Vice President current and informed with regard to Presidential policies.

While one cannot predict with certainty that this trend will continue in future administrations, I regard it as altogether likely because, in an age marked by crisis, this course seems to be dictated by the necessities of our time. It is significant with regard to the problems discussed in this opinion because, in my judgment, it greatly reduces the possibility of an impasse between the President and Vice President, and thoughts in the public mind that the Vice President should be regarded as a potential usurper of office. It also is relevant because it greatly increases the practical capacity of the Vice President to act as President in the event of Presidential inability, whatever the cause.

I am of the opinion that the understanding between the President and the Vice President which I have approved above is clearly constitutional and as close to spelling out a practical solution to the problem as is possible.

Respectfully,

ROBERT F. KENNEDY.
Mr. CHERF. We are adjourned until 10 o'clock tomorrow.
(Whereupon, at 4:15 p.m., the committee was adjourned, to recon-vene at 10 a.m., Wednesday, February 10, 1965.)
PRESIDENTIAL INABILITY

WEDNESDAY, FEBRUARY 10, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10 a.m., pursuant to adjournment, in room 346, Cannon Building, Hon. Emanuel Celler (chairman of the committee) presiding.

Present: Representatives Celler, Rogers, Donohue, McCulloch, Poff, Tenzer, Grider, Whitener, and Chelf.

Also present: William H. Copenhaver, associate counsel; William R. Foley, general counsel.

The Chairman. The meeting will come to order for further hearing on House Joint Resolution 1.

Our first witness this morning is the Honorable Willard S. Curtin. The Chair wishes to announce that the very distinguished Attorney General Mr. Katzenbach will return to complete his testimony at 2 o'clock.

Mr. Curtin, we are very happy to have you.

STATEMENT OF HON. WILLARD S. CURTIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Curtin. Thank you, Mr. Chairman.

I believe my office has left copies of my statement here, so I presume you all have them.

Mr. Chairman and members of the committee, I much appreciate this opportunity to be heard in reference to this very serious question of Presidential disability, on which congressional action is long overdue.

Numerous authorities who have devoted a great deal of time to analyses of the processes under which our Government operates have been struck by the fact that our Constitution is silent on specific procedures to be followed in the event of a President's becoming gravely incapacitated during his term of office. This is a matter of longstanding interest to distinguished scholars who have undertaken studies of our unique kind of representative democracy. People in and out of Government, and notably Members of the Congress, over the years have questioned this apparent flaw in our Republic's structure.

Of course, the law does spell out the line of succession to a Chief Executive in the event of death. But it is mute with respect to a manner and method of determining the ability or inability of a President of the United States to discharge the powers and duties of his office in instances where a critical illness or a disability of possible
long-term duration may arise. Indeed, a President confronted by such misfortune of circumstances has no clear-cut instructions to which he can look for guidance under the language of our Constitution or of existing laws.

Article II, section 1, of the Constitution provides that the Vice President shall exercise the powers and duties of the President in event of the death, resignation, or disability of the Chief Executive, or his removal from office. To take care of further contingencies, a series of so-called Succession Acts were enacted by the Congress. The act of 1886 established a line of succession starting with the Secretary of State and going through the order of Executive Departments. On July 18, 1947, a new law was enacted to bring the Speaker of the House and the President pro tempore of the Senate in line of succession ahead of the Cabinet members. The philosophy behind this action of 1947 changing the line of succession was that the spirit of the Constitution intended clearly that the Chief Executive should be an elected official rather than an appointive one. With this conclusion of reasoning, I fully concur.

But the knotty question remains—who is vested with certain, sure authority to arrive at a determination of when is a President not able to discharge the powers and duties of his office? The answer is—no one, under existing processes.

I became interested in this problem soon after becoming a Member of the Congress, and pursuant thereto, I introduced a resolution for a constitutional amendment in the 85th Congress, and I have reintroduced the measure, with certain modifications, in each succeeding Congress. The last resolution that I so introduced was on January 6, 1965, and is House Joint Resolution 129.

This resolution would establish a unit to be known as the Presidential Inability Commission. The Commission would have the responsibility and authority to relieve the President or Acting President of the United States—

upon a determination that he is not able to discharge properly the powers and duties of the office of President, and after any such action, to restore the President or Acting President to the assumption of such powers and duties upon a determination within the same term of office that he is able to discharge properly the powers and duties of the office of President.

The aforementioned Presidential Inability Commission would be composed of eight members, as follows: First, the Chief Justice of the United States, who would serve as Chairman of the Commission, and who would have no vote in the proceedings of the Commission except in the case of a tie; second, the senior Associate Justice of the Supreme Court of the United States; third, the Secretary of State; fourth, the Secretary of the Treasury; fifth, the Speaker of the House of Representatives; sixth, the minority leader in the House of Representatives; seventh, the majority leader in the Senate; eighth, the minority leader in the Senate.

Five members of the Commission would constitute a quorum. Members of the Commission would serve as such without compensation. Any two members of the Commission could cause the Chairman to convene the group without delay by communicating in writing to him, stating that they have sufficient cause to believe that the President is unable to discharge properly the powers and duties of the office. The
Commission is then directed to seek competent medical advice as to the condition of the President and his ability to discharge properly said powers and duties. Should the Commission subsequently determine Presidential inability, it is bound to thence notify the House of Representatives and the Senate—if Congress is then in session—the President and the individual next in line of succession to the Presidency. Thereupon, the Presidential powers and duties would devolve upon the individual next in line of succession. The same series of steps is established for the President’s reassuming the powers and duties of the office if the Commission determines that the disability no longer exists.

I have examined with much interest various other resolutions which have been introduced on this same subject. They provide various methods of handling the problem, and they all have much merit. Any one of the methods proposed by the various Members of the Senate or of the House would serve to remedy an imperfection that for most of our national life has distressed authorities and scholars of American Government. In this day of challenge and stress, it is strongly advisable that the Congress clarify beyond any doubt or uncertainty the provision of the Constitution with respect to the execution of the duties of the President in the event of disability.

That, Mr. Chairman, concludes my statement on the matter. I would be glad to answer any questions any member of the committee might have.

The Chairman. The thrust of your argument is that there should be set up what you call a Commission on Inability of the President; is that right?

Mr. Curtin. That is correct, sir.

The Chairman. And that should be composed of the Chief Justice of the U.S. Supreme Court as Chairman, senior Associate Justice, the Secretaries of State, Treasury, and Members of the House and Members of the Senate—that is, the Speaker of the House and the majority leader and those identical matters of the Senate.

Mr. Curtin. Yes, sir.

The Chairman. We some years ago sent out a questionnaire to quite a number of political scientists, and some of them recommended exactly what you have indicated, but there was quite a paucity of those who answered the questionnaire. It was not quite universally accepted. However, we are glad to consider your point of view.

Mr. Curtin. Thank you, sir.

The Chairman. Are there any questions?

Mr. Whitener. Mr. Chairman, I would like to ask Mr. Curtin a question.

Under your proposal, there would be no implementing legislation available to the Congress, would there? This would be it?

Mr. Curtin. That is correct. This provides only for disability and the decision of the Commission would be final. It has nothing to do with the death of the President. It doesn’t in any way handle that problem.

Mr. Whitener. But insofar as your proposed amendment is concerned, if it is approved by the Congress, this would be it. Congress couldn’t clarify or do anything in the future, could they?
Mr. Curtin. Except that they could change the amendment by future amendments.

Mr. Whittener. Congress doesn't do that.

Mr. Curtin. They would start it by resolution through the Congress.

Mr. Whittener. So the amendment proposed (H.J. Res. 1) does leave the Congress in position to legislate with reference to the makeup of the Commission and to implement or do other things which may be necessary to carry out the amendment.

Are you so satisfied with this language that you think this should be the last word without any improvement by legislative act or otherwise or executing language in the legislative act?

Mr. Curtin. Well, sir, I don't say that mine is the only possible solution to the problem. It is one solution that I have suggested, sir. Many solutions have been offered. I do say, however, when Congress passes a resolution it should be final. I don't think there should be the ability to tamper with it in succeeding Congresses. I think we should solve the problem once, solve it finally and definitely.

The Chairman. You provide that the initiation of the inquiry should be by at least two members of the Commission?

Mr. Curtin. At least two members of the Commission; yes, sir.

The Chairman. And then there is notification to the House and the Senate. Suppose the House and Senate is not in session?

Mr. Curtin. Then there would be no such notification, sir.

The Chairman. Then if the House and Senate are not in session, the House and Senate would be bound, wouldn't they?

Mr. Curtin. Yes, sir.

The Chairman. Are there any further questions?

Mr. Whittener. Let me ask, in section 77 it is provided that the Commission shall seek competent medical advice as to the condition of the President and his ability to discharge properly the powers and duties of his office.

Suppose the President says, "I am not going to have any doctor down here looking at me, I am President of the United States," then what happens?

Mr. Curtin. If I might answer with another question, suppose we have—and certainly I hope it should never occur—but suppose we had a President that became completely mentally incompetent to the point he didn't know what was going on, and, as happens in so many cases where a person is in such a condition, they don't think anything is wrong with them, but believe the rest of the world is wrong.

Now, in those circumstances, somebody has to be able to go in and forcibly examine the President, and I think——

Mr. Whittener. Forcibly?

Mr. Curtin. I think this Commission should have the power to compel an examination, yes.

Mr. Whittener. Suppose the President says, "I am Commander in Chief of all the military, I will put them in front of the White House and the first doctor that tries to step in here I am going to tell my military people to resist."

Mr. Curtin. Then there would obviously be no need to call a doctor to examine him, because it would be obvious on the face of it that the President is mentally ill.

Mr. Whittener. During Andrew Johnson's time, there were many people that even went to the extent of bringing impeachment proceed-
ings, and later historians have shown he was a very great man and a lover of the Constitution.

Mr. Curtin. I don't think there was any question about that previous President Johnson being sane. I thought he couldn't agree as to what Congress thought was the proper procedure in dealing with the South.

Mr. Whitener. But they were so anxious to get him that two people suggested this, and then the President has every power that this Nation has to keep a doctor from examining him as long as he is President. Then do they proceed without a medical examination?

Mr. Curtin. I would think that in the event the activities of the President were such that it was quite obvious that, by his very actions, he was insane, they could proceed without such medical examination.

Mr. Whitener. Recently there was an American citizen forced to be put on an airplane, hauled into another State, and thrown into a mental institution because a psychiatrist he had never seen wrote a letter and said the man is bound to be incompetent.

Is that the kind of medical advice you think this contemplates?

Mr. Curtin. I think, sir, when you have a Commission made up of the leading officials of the United States, it would be unlikely they would get medical advice that was not the best that could be obtained.

Mr. Whitener. Suppose that was the only advice they could get. If the President puts the troops out there to protect himself, you say that is evidence of mental disability?

Mr. Curtin. All I can say, Mr. Whitener, to that is that somebody has got to decide whether he has a disability or not, and if it isn't done by doctors, any other procedure that you feel would be a better procedure to help this Commission arrive at this decision would certainly be agreeable to me, but obviously somebody has got to make a decision, because the President may be in such physical or mental condition that he could not make that decision.

Mr. Whitener. What does your amendment say about who would become President if there was no Vice President?

Mr. Curtin. This has nothing to do with that. This resolution assumes that there is a Vice President. It seems to me that is not a part of the disability law, because that is a situation where you have got the death of a President.

Mr. Whitener. All right.

The Chairman. May I ask this question?

Mr. Curtin. Yes, sir.

The Chairman. Suppose, God forbid, a President is captured by the enemy and held incommunicado for a long period of time. Would you call that inability?

Mr. Curtin. I am sorry, sir, a President that did what?

The Chairman. I said, God forbid, our President is captured by an enemy and held by the enemy for a rather long period of time. Would you call that inability?

Mr. Curtin. If he is not able to perform the duties of his office, that obviously would be a disability, yes.

Mr. Whitener. Would you need a doctor's statement on that?
Mr. Curtin. No, the doctor is only to help the Commission if there is any doubt in their minds as to whether or not the President is disabled.

The Chairman. But your proposal is more or less aimed at mental and/or physical disability?

Mr. Curtin. Yes, sir.

The Chairman. Would it cover the illustration I gave?

Mr. Curtin. I think it would, yes.

Mr. Whitener. Mr. Chairman, since you are asking the question about the proposition we had yesterday about the President about to go under anesthesia, I just wonder if this applies? Do you remember the line of questions?

The Chairman. Did you want to ask a question?

Mr. Whitener. We had some testimony yesterday about a situation where a President has gone out to a hospital and is going to have his appendix removed, and for the next hour he said ‘I am not going to be able to do my job, and some emergency might arise.’

Now, how will we take care of that under resolution?

Mr. Curtin. I would think there would be no need for the Commission to come into being under those circumstances. That is a very temporary matter of a few hours. It could certainly be done with the same procedure presently being used—for the President to say to the Vice President, ‘During the period I am under anesthesia, you handle the affairs of the Presidency.’

Mr. Whitener. Suppose he has gone out there for an appendix operation, and as a result of something that happened while he was undergoing surgery, and he signed this statement saying, ‘I am going to be gone for 2 or 3 hours and not able to perform my duties,’ if something happened during surgery to his mind and he never came out of it. Would he have, under your proposition, a temporary legal situation which couldn’t be unraveled if he did have a stroke or something while he was under surgery?

Mr. Whitener. Well, all of these are relative, sir. If he was disabled for 4 hours, it probably wouldn’t be necessary. If, as a result of anesthesia, something went wrong and he became mentally incapacitated for a week, the Commission could come into being. Whether it be 4 hours, 1 day, 2 days, or 3 days I say is a question of degree.

Mr. Whitener. Now, suppose this situation happens that you mention, that he contemplates at the most a 6-hour disability because of surgery, or a predictable cause, and that he doesn’t recover like he contemplates, and he is in a coma for a month.

Now, is it your thought that after the 6 hours are up, the Commission would then come in and make a determination, then 6 months later when he comes out of the coma, or 6 weeks or whatever it is, they sit again and put him back in office?

Mr. Curtin. Well, again I can only repeat, it has got to be a question that, after a reasonable length of time, if it becomes obvious that there is a disability, then any two members could activate the Commission.

If I could use a personal reference, we had a tragic circumstance in my own congressional district where a very healthy young lady went under anesthesia for what they thought was a minor operation, and she did not come out of the anesthesia, but was in a coma for about 8
weeks and then died. Obviously, if, God forbid, something like that happened to the President, somewhere in the course of that period of time, some member of the Commission is going to say, "This looks like it is a disability for which we should function as we are authorized to do," but whether it is going to be at the end of a day or a week is a matter of reasonableness.

Mr. Rogers. May I ask a question?

Mr. Curtin. Yes, Mr. Rogers.

Mr. Rogers. We have had a great deal about individual privacies, and, as you and I recognize, there is the doctor-patient relation involved.

Do you feel that this Commission set up by your section 3 or 4 of the bill would authorize calling in a doctor that the President may have been consulting to have him expose to this Commission the condition of the President?

Mr. Curtin. Sir, it seems to me when you are going to try to determine whether a man is disabled or not, you have got to have someone who can speak with authority. Obviously a doctor can speak with more authority on certain features of a mental or physical disability than a layman can. Somebody has got to be the one that triggers the matter.

Mr. Rogers. Most State laws, and I think the general proposition is that there is a confidential relationship between doctor and patient just the same as among lawyers. Now, do you propose under your amendment that when this Commission is set up that they have a right to have that?

Mr. Curtin. It happens all the time under the laws. In my State of Pennsylvania, if someone is thought to be insane, there is a commission set up to determine whether he should be committed or not, and that commission consists, in Pennsylvania, of two lawyers and a doctor. Now, that doctor can tell the court his findings.

Mr. Rogers. Yes; but suppose the man who is before the court has previously had a doctor that has treated him for many years, and has had the confidential relationship between the two. Do you, in Pennsylvania, permit that doctor to come into court and testify?

Mr. Curtin. Yes.

Mr. Rogers. As to his relation—

Mr. Curtin. Not as to any previous history, but he is authorized to conduct an examination at this particular time on this particular question and testify to the court his findings. He could have been the doctor for the last 10 years, but he can still do it.

Mr. Rogers. Don't you propose by your amendment that in the event you establish this Commission to determine whether you have the responsibility and authority in such manner to relieve the President or Acting President of his powers and duties upon the determination that he is not able to discharge properly the powers and duties of the office, and that after such action to restore the President or Vice President—in other words, you give certain authority to certain people to make a determination?

Mr. Curtin. That is right.

Mr. Rogers. As to whether or not a man is capable of carrying on his duties.
Mr. Curtin. That is correct. Somebody has got to make a determination, because the President conceivably could be in such mental condition that he could not make that determination himself.

Mr. Rogers. But you feel, however, that the question of the privacies that the President may have in connection with the examination—suppose he says to these groups who come down to examine him, "I will have no part of you, don't come on the White House grounds." Then what do you do?

Mr. Curtin. Then we are getting back to Mr. Whitener's question. It seems to me the refusal of the President could be in such manner as to very well indicate to the ordinary layman that he is mentally incapacitated. If he met a doctor at the door with a shotgun, or something like that, you would obviously think there was something just a little bit abnormal.

Mr. Rogers. Then if he should deny them the right to come in, and they go out and make this determination, then he is no longer President.

Mr. Curtin. That is right.

Mr. Tenzer. Congressman Curtin, under section 7 of your proposed amendment, do you not think that the best interests of the people of the United States would be served if you required the Congress to be called into session and pass upon or have some check or balance over the decision of the Commission?

Mr. Curtin. Well, let me answer that question by asking you one, sir. How is the Congress going to determine whether he has a disability or not—not by sitting over in the Chamber and discussing it. There has to be an examination of the President; does there not?

Mr. Tenzer. The Commission would render its report, but you would have the Congress of the United States, the elected officials of the people, voicing approval or disapproval of the report of the Commission or calling for further testimony.

Mr. Curtin. Well, sir, the section I have here does not call for the Congress to be called into session; it states that the report is relayed to the two Houses of the Congress, but I would see no objection to giving the Congress the right to pass on the decision of the Commission.

Mr. Tenzer. Well, the Congress presently does so in the event of an impeachment proceeding.

Mr. Curtin. That is right.

Mr. Tenzer. And they call upon the Congress.

Mr. Curtin. Well, they are the court and jury.

Mr. Tenzer. With regards to the question of presidential disability and succession, in order to preserve the original tenor and purpose of the Constitution, the final choice of a successor to the Presidency or Vice Presidency should rest with the Congress.

Mr. Curtin. Well, of course, an impeachment proceeding is somewhat different. There the House of Representatives acts as prosecutor and the Senate acts as judges.

Mr. Tenzer. I am aware of that.

Mr. Curtin. This proceeding is not that permanent.

Mr. Rogers. Well, don't you think that the man who has been elected President of the United States should at least have some opportunity to show somebody that he has the capacity to perform other than these men that you have outlined here?
Mr. Curtin. Certainly I would have no objection to the President being heard. I think he should be heard under those circumstances.

Mr. Rogers. But you don’t provide for him being heard, do you?

Mr. Curtin. Well, although it is not written down in words, he certainly would not stand mute during this whole proceeding unless he was in real bad shape.

Mr. Rogers. You put the Chief Justice of the Supreme Court and then the Associate Justice who may be of the opposite political party, then you have the Secretary of State and the Secretary of the Treasury, and there is even some question what their political affiliation may be at the present time.

Mr. Curtin. We can normally assume they are sympathetic with the President.

Mr. Rogers. Then you say the Speaker of the House, who could be the opposition party.

Mr. Curtin. Possibly, but then you have the minority leader, who obviously is of a different party than the Speaker of the House, so you have divided the parties in the House.

Mr. Rogers. But up to that point you have a possible 3 to 2 against the President.

Mr. Curtin. I don’t buy that—I don’t agree, sir.

Mr. Rogers. When you say you don’t buy it, suppose that the Chief Justice is of the opposite political party.

Mr. Curtin. Right.

Mr. Rogers. And that the senior Associate Justice is of the opposite party.

Mr. Curtin. All right, that is two.

Mr. Rogers. And as the Secretary of the Treasury was at one time with the opposite party. Let’s assume the Secretary of State and Secretary of Treasury are sympathetic with the President.

Mr. Curtin. That I think we can assume. He wouldn’t have members of the Cabinet unfriendly to him—not for long.

Mr. Rogers. All right, let’s assume the Speaker is of the opposite political party.

Mr. Curtin. Right.

Mr. Rogers. Then you get the Speaker, the majority leader, and the minority leader of the House. Then you get the President of the Senate, the leader and the minority leader in on this question of making a determination.

Mr. Curtin. Right.

Mr. Rogers. Now, don’t you envision that there is some possibility of some political implications that may arise in connection with it?

Mr. Curtin. No, sir; because this Commission is split right down the middle politically.

Mr. Rogers. Let me cite you the history of the political campaign of 1876.

Mr. Curtin. Yes, sir.

Mr. Rogers. Well, the question arose as to who got elected President, so they referred it over here to the Supreme Court, and the Supreme Court divided it according to political lines and gave it to the men of their party. Now, that is the Supreme Court that did that.

Now, after the War Between the States, do you imagine that Johnson, the President who succeeded Abraham Lincoln—if he had had
this group determine whether or not he was fit and able to serve as President— is there any question in your mind but what all that group would have found him insane because they thought that his actions were sufficient?

Mr. Curtin. As a matter of fact, sir, the makeup of the Commission was assuming a preponderance in favor of the President’s party, because I was assuming that the two members of the Supreme Court were nonpartisan.

But taking your assumption that they would be of a party that was opposite to that of the President, then you have got a commission that is made up 4 to 4.

Assume that the two members of the Supreme Court are of a party that is different than the President’s. That would be offset by their counterparts, the two people of the Cabinet who I think we can assume would be of the President’s party or would be very friendly to the President. That is 2 to 2.

You have got in the House the Speaker and the minority leader; they are opposite parties, so that is 3 to 3.

You have got in the Senate the majority and minority leader, so that is 4 to 4.

It is right down the middle, politically.

Mr. Rogers. The point I am trying to emphasize is, don’t you believe it to be dangerous for us to vest in the hands of, be it 5, 7, or 11 people, the determination of who is President of the United States, without some check on them?

Mr. Curtin. Well, again, sir, if I can answer that question, normally the Vice President is in the hospital at the time, and these Cabinet members that Mr. Curtin mentioned are so friendly to the President and may detest the Vice President. Then what happens?

Mr. Curtin. Well, again, sir, if I can answer that question, normally the Vice President is going to have the equal friendship of the Cabinet because of the fact that they are presumably the same party as the Vice President and it is the President’s appointees, if we are using a political—

Mr. Rogers. The point that I am trying to state and which I think you should consider is that with the selection of people that you have here, most of them are politically minded.

Mr. Curtin. If I can answer that, sir, if you go to the Congress, you are going to find every one of the Members of both Houses are politically minded.

Mr. Rogers. Yes; but as a group, in determining action that may be taken, I think there should be some check on people of this nature, regardless how motivated they may be, because I brought forward the two instances that happened after the death of Lincoln and how close they came to impeaching President Johnson.

Now, you don’t envision for 1 minute, if you look at the history at that time, that President Johnson would have had any chance if he had to go before a group of this nature, and then less than 10 years later you have a question of who was elected President, and you refer it over here to the Supreme Court and they divide it strictly on the political line.
Now, isn’t it dangerous to our philosophy to place in the hands of any group of men the proper determination of whether or not a man is in Congress? Going one step further, during the period of Woodrow Wilson, after he had a stroke in 1919 he was received by a group in the House and the Senate which were adverse to him. Now, if this group had been there, do you think they would—

Mr. Chielf. Would the gentleman yield?

Mr. Rogers. All right; go ahead.

Mr. Chielf. Along that line, is it or isn’t it true that the representation sent by the House and the Senate to interview the President were denied access to him?

Mr. Rogers. No; I think—

Mr. Chielf. Under the Wilson administration.

Mr. Curtin. If I could interrupt, my understanding is that Mrs. Wilson wouldn’t let them through the door.

Mr. Chielf. That is it. You wouldn’t want to bring the women down on your backs.

Mr. Rogers. But even then, if she wouldn’t let them in, do you think this group should go ahead and act because the wife wouldn’t let them in to see him?

Mr. Curtin. Again it is a question of relativity. I presume we are saying that 535 men and women are better able to determine the question than a commission of 7 or 8, or whatever it is. It is a question of can 10 people do the job better than 7, can a hundred do it better than 10, can 535 do it better than a hundred?

You speak of the Johnson impeachment proceeding of the last century. Now, there you had this impeachment trial, and certainly the President didn’t come up here to a completely impartial atmosphere. There was definitely high feeling involved.

Mr. Rogers. That is the point that I am getting at.

Mr. Curtin. That high feeling involved the whole Congress, so that conceivably a whole Congress could have definite opinions. It could not be completely impartial just as perhaps the Commission could not.

Now, I certainly would have no objection, and I am not trying to impose my thoughts on you, obviously, but I certainly would have no objection if you wanted the Congress to pass on the findings of the Commission. That would be perfectly all right with me, but somebody, somewhere along the line, has got to make a decision.

Mr. Whittener. I think what Mr. Tenzer was trying to point out was that in the other proposals the Congress has the right to make the final decision because the Congress is in theory, at least, more representative of the people, and in this modern time I think that if the authority would not be adequate, if the President were accused by some group of being mentally incompetent, and the Congress made the decision, the Congress could then invite the man over here to speak to the Congress and appeal. It could be televised and the people of the Nation could look at it, and if the man was competent, and it was apparent that he was competent, it would not only be apparent to Members of the Congress but would be apparent to the Nation. There would be very few Members of Congress, no matter how politically motivated they were, who would stand up and say the man was mentally incompetent and otherwise unable to carry on his work if the millions of people in the Nation who looked on him on television as he spoke to the Congress decided he was all right.
It seems to me that is the danger of this system here, because you could have a star chamber session, and then build up a record and send it up to Congress, and if we only had appellate jurisdiction and the poor President didn't have a right to come up and present such evidence as he wanted before the Congress, it just wouldn't be much of a trial. You wouldn't even treat a common bootlegger that way in Pennsylvania.

Mr. Curtin. There is merit to what you say, obviously, but I could call attention to the fact that I am sure you gentlemen all realize—and I am not a physician, I am just an attorney—while I have practiced law I have seen occasions where people who were mentally ill, badly mentally ill, have appeared before courts and have scintillated for about a half hour or so, but, of course, as soon as they get tired their disability becomes apparent. However, they can make a very fine speech if they are just set up for it, so, therefore, the fact that someone appears before a group of men and makes a good speech doesn't mean that he is not mentally ill.

Mr. Whitener. But you would let Congress have some authority in this resolution of yours, in this amendment, and then the Congress could say that the President would have a right to appear, but that if he did he would have to be submitted to interrogation by committees, Representatives of Congress, that this would have to be done in public. You could do many things, but your resolution wouldn't give Congress any right to do anything but sit up here and make speeches and say the Commission has done right or wrong.

Mr. Tenzer. In any event, Congressman Curtin, this would be a period of emergency, and in a period of emergency it would not be best to have the Congress in session.

Mr. Curtin. I would certainly agree to that, and I would have no objection to the bill amended, if the committee, in its wisdom, feels it is a good approach. I certainly have no objection to having the resolution amended so that the findings of the Commission would be subject to the approval of the Congress. That would be perfectly all right with me. But somewhere along the line somebody has got to start it, and I think a commission is the way it should be started.

The Chairman. Thank you very much, sir. We appreciate your contribution.

Mr. Curtin. Thank you, gentlemen.

Mr. Poff. May I express my commendation to the gentleman for his contribution on the matter and to ask if I have correctly interpreted his testimony to mean that while he is first interested in the proposal he has made, you would be glad to see this committee act expeditiously upon what has come to be pretty much a consensus of an approach which is somewhat different from your own.

Mr. Curtin. I certainly agree with that.

Mr. Poff. I thank the gentleman.

Mr. Chelf. In other words, anything is better than nothing—and that is what we have right now.

Mr. Curtin. Anything is better than what we have right now.

The Chairman. Our next witness is our colleague from Ohio, a new member, and we certainly welcome him here, the Honorable Rodney M. Love.

Before he addresses the committee, Mr. McCulloch would like to say something.
Mr. McCulloch. I would like to welcome this man to the committee. Judge Love is the new Congressman from the Third District of Ohio. facetiously I should like to say he comes from Dayton, which is the main suburb of the Fourth Congressional District of Ohio.

STATEMENT OF HON. RODNEY M. LOVE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Love. Thank you, Mr. Chairman, and thank you, Congressman McCulloch, for those very kind remarks. For one thing, since I am a newcomer here, Mr. Chairman, and in view of the very fine resolutions you have before you, may I be permitted, sir, to submit my written statement, without taking up any further time of this committee?

The Chairman. You have that permission.

Mr. Love. Thank you so much.

(The prepared statement of Congressman Love reads as follows):

TESTIMONY OF REPRESENTATIVE RODNEY M. LOVE, OF OHIO, IN SUPPORT OF HOUSE JOINT RESOLUTION 236, PRESIDENTIAL DISABILITY AND SUCCESSION

Mr. Chairman, members of the Judiciary Committee, I decided to submit House Joint Resolution 236 because I believe the U.S. Constitution is not only ambiguous, but defective, on the subject of presidential disability and that we, as a nation, have been extremely fortunate that our Presidents have been able to discharge their constitutional responsibilities. The office of Vice President was made vacant due to the tragic death of Mr. Kennedy and there has been no procedure for filling it. In support of the American Bar Association and the national forum which it sponsored, Senator Birch E. Bayh, of Indiana, and Representative Emanuel Celler, of New York, chairman of this committee, I submitted a bill of my own. I know the people of my district would want me to speak out in favor of such an amendment to the Constitution.

In my written testimony, I make no reference to history. This has been most carefully documented and repetition is unnecessary. I merely want to emphasize that prudence requires this representative body to act, now, to submit to the State legislatures, an amendment correcting a defect known to us for many, many years.

In addition to supporting the overall effort, I want to point out what I consider to be a danger, in the event a President would transmit to the Congress his written declaration that no inability exists. The Bayh-Celler resolutions provide that the President shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive department, or such other body as Congress may by law provide, transmits, within 2 days to the Congress, his written declaration that the President is unable to discharge the powers and duties of his office.

My question is, What could happen within that 2-day period, in the event an incompetent President resumed the duties of his office and issued orders affecting the security of the Nation? While I agree; the President should be able to regain the powers and duties of his office easily, when his inability ceases to exist, nevertheless, the Vice President should have time to file a written declaration with Congress, before the presumption in favor of the President's ability is restored.

To accomplish this, I have provided that the President shall resume the duties and powers of his office on the third day following the transmittal of such declaration to the Congress unless, prior to the end of the third day, the Vice President, with the appropriate consent of executive department heads, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. I use 3 days on the theory that the President's written declaration could be submitted on Friday and Congress might not be in session over the weekend.

I found no particular objection to the language that Congress shall immediately decide the issue, for it would seem to me that this means Congress
shall decide this important issue within a reasonable time. However, if this committee believes the word "immediately" is too uncertain, a 7- or 10-day provision certainly should not be objectionable, as provided in Mr. McCulloch's bill, House Joint Resolution 119.

Mr. McCulloch. Thank you very much.

Mr. Chairman, I should further like to say that Congressman Love was an able probate judge of Montgomery County, Ohio, the county of the late James M. Cox.

Mr. Love. Thank you, gentlemen.

The CHAIRMAN. Our next witness is Marion B. Folsom, Chairman of the Committee for Improvement of Management in Government, Committee for Economic Development. Is Mr. Folsom here?

Mr. Chief. Mr. Chairman, may I suggest a 10-minute recess while we are waiting on the next witness? I understand he is in the House and it will take about 10 minutes for him to get here.

The CHAIRMAN. Yes, the chairman will declare a 10-minute recess.

(Whereupon, a short recess was taken.)

The CHAIRMAN. The committee will resume.

Our next witness is Mr. Marion B. Folsom, Chairman of the Special Committee on Presidential Inability of the Committee on Economic Development. Unfortunately he is delayed in the Senate, appearing over there before a committee, and is on his way here, I understand, but in the interim, Mr. Paul, who represents Mr. Folsom, will start reading his statement.

Will you give your full name and title to the stenographer, please?

Mr. Paul. My name is R. Shale Paul. I am a professional staff member with the Committee of Economic Development, and with the Chair's permission I will read the statement exactly as Mr. Folsom has written it.

The CHAIRMAN. You may be seated, sir.

Mr. Popoff. Mr. Chairman, before the witness begins, may I ask if you would rather we reserve questions for Mr. Folsom, or are you prepared to respond to questions during the course of the reading?

Mr. Paul. I can respond to questions, sir. I think it would be more appropriate, inasmuch as Mr. Folsom will be here in 5 or 10 minutes, if you could reserve questions for him. He is prepared to respond. I certainly could, but he perhaps would answer them better than I.

Mr. Popoff. Thank you.

STATEMENT OF HON. MARION B. FOLSOM, CHAIRMAN, COMMITTEE FOR IMPROVEMENT OF MANAGEMENT IN GOVERNMENT, COMMITTEE FOR ECONOMIC DEVELOPMENT

Mr. Paul. The statement reads as follows:

"Mr. Chairman and members of the Committee on the Judiciary of the House of Representatives: My name is Marion B. Folsom. I am chairman of CED's Committee for Improvement of Management in Government.

1 The Committee for Economic Development is composed of 200 businessmen and educators. Its purpose is to conduct objective economic research, to support and promote economic education, and to formulate and publish recommendations, on major economic problems, that will contribute to growth and stability in the American economy, higher living standards and increasing opportunities for all Americans, and to strengthening the institutions and concepts essential to progress in a free society."
“Your invitation to testify on the vital subject now before this committee is much appreciated. In this, I speak both for myself and for those associated with me in the Committee for Improvement of Management in Government, as well as for the trustees of our parent body, the Committee for Economic Development.

“I believe that you have seen our CED policy statement on ‘Presidential Succession and Inability,’ published last month. In that understanding, I propose to limit my comments at this point to three subjects: First, identification of the organization I represent and a brief description of its procedures; second, the basic principles or criteria that we believe must be recognized in finding the best solutions for these difficult problems; and, third, our conclusions concerning the major issues in dispute, and the reasoning leading to those conclusions.

“The Committee for Economic Development was established in 1942. It consists of 200 trustees representing a broad spectrum of business and university leadership in the United States. These trustees have devoted much time and personal attention to the development of policy positions designed to encourage the economic well-being of the United States and of the free world. As a result, the policy statements they have produced—with the aid and advice of the best scholarly minds in the Nation—have been favorably received in influential quarters and have enjoyed broad public acceptance.

“About 2 years ago, several top officials and former officials of the Federal Government approached me and others active in CED, proposing that we apply the same approaches to improvement of our governmental institutions that we have used in formulating beneficial economic policies. On this basis, CED established the Committee for Improvement of Management in Government. The 25 CED trustees with most experience in government were appointed to it, and 10 additional members were added from outside CED to provide the broadest possible balance for our work. Four of our 35 members had served as heads of Cabinet departments, 5 had been Assistant or Under Secretaries, 13 chairmen or members of Federal regulatory or advisory commissions, and 13 were former bureau chiefs or directors, or special assistants to the President or to Cabinet members. In addition, we have benefited from the counsel of our Advisory Board of 15 members—men with wide experience in governmental affairs, as well as in university and business circles.

“The policy statement on ‘Presidential Succession and Inability’ is not a staff document, as such. It is the product of intensive analysis in a long series of discussions among our trustees and advisers, in which we were able to use the results of the American Bar Association studies and other excellent scholarly work to best advantage. In accordance with CED practice, the statement was then given thorough review by the CED Research and Policy Committee, which approved and issue it as the official CED position. Lists of both the Committee for Improvement of Management in Government and the Research and Policy Committee of CED are attached, together with our Advisory Board.

“I would emphasize the character of the organizations I represent; the care with which they have deliberated on the subjects that now

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2 A complete recent list of CED trustees is found on pp. 42-44 of the policy statement on “Presidential Succession and Inability.”
concern you; and the remarkable degree of unanimity among my colleagues on every major change required to make our constitutional system more perfect in matters of presidential succession and inability.

"Our consensus is probably due to the fact that our first effort—to find agreement on the basic principles to be observed—was successful. If I may, I would offer this quotation from our policy statement.

"This Committee is convinced that the issues of succession and inability are vital and must be faced by the Nation without further delay. We have sought in examine each alternative that has been seriously proposed, and to identify its advantages and disadvantages.

"In analyzing the alternatives this Committee has judged their pros and cons against these basic criteria:

"Continuity in the Presidential office.—In event of either death or inability of the President, there must be no break in the exercise of the powers and duties of the Presidency:

"Legitimacy.—Any transfer of the Presidential office or its powers and duties must be fully acceptable to Government officials and to the general public:

"Certainty.—No question of doubt should be permitted to arise as to who is exercising the powers and duties of the Presidency at any time—two men competing for Presidential authority would be disastrous for the Nation:

"Stability in policy.—There should be no sharp shift in policy or change of party:

"Speed and simplicity in procedures.—The procedures by which either the Presidential office or its powers and duties are transferred must be fast, efficient; and easily understood:

"Preservation of the separation of powers.—Whatever corrective action may be taken, it must not weaken our traditional pattern of separation of powers, particularly between the Presidency and Congress.

"The Committee is convinced that correct solutions must meet all these tests.

"Several provisions of the proposals now before you meet these criteria, and have our full endorsement. We agree, for example, that any vacancy in the office of Vice President should be promptly filled through nomination by the President with congressional confirmation. We agree, also, on the need of constitution authority for the President to assign the President powers and duties to the Vice President for limited periods in situations where both parties are in agreement on the necessity. We also concur in the view that major responsibility should be placed on the Cabinet in determination of presidential inability where the issue is in doubt; in fact, we would rely more heavily on this device than most current proposals have done.

"There are serious, perhaps fatal, weaknesses, however, in other provisions contained in proposals now before the Senate and the House of Representatives, when these are measured against the basic criteria considered by CED to be of paramount importance. Since the Constitution is likely soon to be amended, and since this Committee on the Judiciary of the House of Representatives appears to be a court of last resort in this matter, I must identify the weaknesses as we see them. It would not be difficult to revise the terms of proposals now before you to overcome the objections to them.

"The first weakness needing correction is in the provision placing primary responsibility on the Vice President in any finding of undeclared Presidential disability. We feel very strongly that the initiative in determination of an undeclared Presidential inability should lie with the Cabinet, and not with the Vice President. In other words, such determination should be by the Cabinet, the Vice President concurring," rather than by the "Vice President, the Cabinet concurring." Our reasoning rests upon repeated experience, for example during the Gar-
field and Wilson illnesses, showing that the Vice President is likely to be most reluctant to proclaim the Nation’s need for him to assume the Presidential powers and duties—no matter how urgent or obvious the necessity—so long as the President lives.

“The Vice President should never be forced to accept authority under conditions permitting unfair charges of usurpation against him, nor should his natural feelings of deference and loyalty to a disabled Chief Executive be allowed to absolve him from his proper responsibility. The Committee for Improvement of Management in Government takes a strong position on this point, perhaps because four of us were members of the Cabinet during one or more of President Eisenhower’s several periods of illness. If Members of the Congress were to visualize clearly the realities in cases of this kind, we believe they would conclude, as we have, that initiative should rest with the Cabinet, and not with the Vice President.

“Former Attorney General Brownell, appearing before the Senate Judiciary Subcommittee on Constitutional Amendments on January 29, 1965, agreed with our view that the Cabinet rather than the Vice President should have this initiative. He thought that the amendment as proposed might permit this, in practice, but we submit that any doubts in the matter should be removed through clarification of the proposed wording.

“Second, we oppose authorization for creation of any alternative group as a substitute for the Cabinet in determination of presidential inability, on grounds fully explored in our policy statement. The requirements of continuity, and of speed and simplicity, should be decisive. The Cabinet is best situated, through the intimate knowledge of its members concerning major issues of state, as well as by reason of their day-to-day working association with the President, both to judge presidential inability and to assess the urgencies in the national situation at any moment. The Cabinet, and only the Cabinet, is capable of the informed, instantaneous action that the circumstances may demand.

“A third weakness in current proposals concerns congressional confirmation of a presidential nomination to fill a future vacancy in the Vice Presidency. We believe this should be done through a joint session of the two Houses, requiring approval by a majority of all Senators and Representatives present and voting. We favor this method, as opposed either to confirmation by the Senate alone, or to approval by the two Houses acting separately, for three primary reasons: (1) The joint session corresponds to voting strength, State by State, in the electoral college; (2) Action—pro or con—would be more expeditious than could be expected through separate consideration by the two Houses or under normal Senate procedures; and (3) the Senate and the House of Representatives might be in disagreement, with most unfortunate effects.

“Ability to overcome a vice-presidential vacancy is an important, and in terms of historic frequency the most important, reason for amending the Constitution on this subject, and avoidance of unnecessary delay is in the national interest. We acknowledge that formal action in joint session would require establishment of rules of procedure for that body, but this would not seem to be an insoluble problem. I have noted with interest President Johnson’s proposal of January 29
that the device of the joint session be used in cases where the electoral college does not produce a majority.

"Fourth, and conceivably most serious of all, we are much concerned that the Nation avoid any possibility of doubt, dispute or delay concerning termination of any presidential inability. That is why we urge that this matter also be decided by the Cabinet, subject only to presidential concurrence. The amendment proposed last year opens—in our view—opportunity for confusion over who holds legitimate authority in the exercise of the powers and duties of the Presidency in some future time of trial and trouble.

"The principle of separation of powers among the three branches of Government appears to us to be eminently sound. We cannot agree that it is wise to place a possible future difference of opinion between President and Vice President over the termination of a presidential inability before the Congress for decision, especially if the result is to depend upon two-thirds majorities in both Houses.

"This subject deserves renewed attention and closest scrutiny. Under the language previously proposed, it would be possible for a President to terminate his own disability, against the judgment of the Vice President supported by the entire Cabinet and a unanimous vote of either the House of Representatives or the Senate, if only one more than one-third of the other body were to agree with the President. It would be easier to remove a President through the constitutional impeachment process than to prevent resumption of his powers and duties under this cumbersome system. We may hope that no such disagreement would ever occur, but some better arrangement than this should be made for the possibility—however remote it may now seem to be.

"Before fixing the proposed arrangement in our Constitution we should consider carefully the circumstances of the case for which the proposal is designed. Let us contemplate the situation when a disabled President asserts that his inability has terminated, whereas a majority of the Cabinet and the Vice President disagree."

If I could defer to Mr. Folsom, who is now here.

The CHAIRMAN. Mr. Folsom, we welcome you here. I am sorry that you have to make this sudden transition from the Senate to the House. I know you have had a busy morning. We know you to be a very dedicated and honorable public servant over the years as Secretary of Health, Education, and Welfare Department, and now a very honored gentleman in business. You are head of a very large establishment in my own State, New York, the Eastman Kodak Co., and for that reason I doubly welcome you here.

We are very happy to receive whatever contribution you might make to our considerations.

Mr. Chief. Might I say, so far as Mr. Folsom is concerned, his fame has preceded him here, he is known and respected by all Americans.

Mr. Folsom. Thank you very much. I am sorry I am late, but they held me over in the Senate on the health bill they are considering. They kept asking questions, so I couldn't get away.

The CHAIRMAN. Your able assistant started reading.

Mr. Folsom. Now, we must try to imagine what would occur if this issue were placed before the two Houses of Congress, considering the issue separately, calling for expert opinions, holding long hearings,
engaging in debates divisive of public opinion, and finally disagreeing between themselves.

While the issue remained in doubt, possibly for months, consider the effects upon the executive branch of our Government. The Vice President's authority over both foreign and domestic affairs would be severely weakened, especially if the Cabinet were divided in its convictions. The position of the two Houses of Congress would be quite uncomfortable, with press, television, and radio influencing public opinion. Congress, quite rightly, would wish to avoid hasty judgment, and this, in turn, would lead to extended delay. The resulting confusion might border on chaos, regardless of the condition of world affairs.

Such a solution would appear to violate every criterion we have found to be essential. It would certainly weaken continuity in the exercise of presidential powers and duties. It would cast doubt on the legitimacy and public acceptability of the office. It would create uncertainty and instability in policy. It provides the opposite of speed and simplicity in procedures, and it runs counter to the principle of separation of powers. We strongly reaffirm the merits of Cabinet decision on this delicate matter, subject only to presidential concurrence.

I realize that questions have been raised concerning the ability of a Vice President using presidential powers during a prolonged presidential inability to create and to fill Cabinet vacancies in order to strengthen his own position. Cabinet appointments, however, are subject to senatorial confirmation, and in the hypothetical case we have in mind it must be assumed that Senate approval of any changes would be given only after most careful consideration. Realistically, no Vice President under such conditions would wish to expose himself to criticism for attempted usurpation except under dire necessity.

Our negative view of some weaknesses—as we see them—in the proposals now before you should not cloud our affirmative position on many elements contained in them. We undertook to study this subject because of its prime importance, and in the hope and trust that the best, and wisest remedy may be found for each defect in our present system. The Constitution is not easily amended, nor should it be. The process requires the kind of earnest deliberation now being given by this Committee on the Judiciary, as well as by all other Members of both Houses of the Congress.

I would conclude by quoting a key paragraph in our CED policy statement:

The urgency of national action to resolve the doubts and uncertainties clouding presidential succession and inability cannot be overly stressed. Failure to correct the deficiencies will subject the Nation to risks and hazards that are avoidable. Prompt action is imperative.

(Members of the committee are as follows:)

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1 Now on leave from CBS in Government service.
2 Deceased, Oct. 19, 1934.
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† Now on leave from CED in Government service.

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The Chairman. Mr. Rogers.

Mr. Rogers. Mr. Folsom, has your committee considered whether or not the present proposal is sufficient to meet the uncertainties of conditions that may arise, such as, you might say, though it may provide for the assumption of the powers and duties of the President by the Vice President acting as the President, a situation wherein the Acting President falls into the same disability or inability as his predecessor? Has your committee given this any consideration?

Mr. Folsom. I think we mentioned it, but we didn't think we could provide for all contingencies. We think in that case, of course, we feel that the line of succession ought to be changed, too. We think you ought to go back to the system in use before 1947, in which succession would go from the President to the Secretary of State and down the line in the Cabinet, rather than the present arrangement.

In that case, a situation of that sort, there wouldn't be any specific constitutional arrangements for it and we might be in the same difficulty we are now, but it might be provided, of course, that the Secretary of State would assume the function the same as the President.

We haven't felt it necessary to provide for all contingencies that might arise, because we thought in this way we could take care of the principal items. And we would be much better off than we are now.

Mr. Rogers. Since your committee finds a need to change the present posture we are in because of the nuclear age, and since it is conceivable, though remote, that some situation like that might occur—

Mr. Folsom. Of course, you could provide for it by saying that where the Vice President also is disabled or can't operate that then the Secretary of State or whoever might be next in line would assume office, provided the majority of the Cabinet would agree. That could be included.

*Also member of Committee for Improvement of Management in Government.*
Mr. Rogers. You mean in the same proposal, that would appropriately fit the situation?

Mr. Folsom. The same proposal we have for the Vice President I think would fit in the case of the Secretary of State if he were the next in line.

Mr. Rogers. I note that your committee, Mr. Folsom, places a great deal of emphasis on the need to have the Cabinet or the members of the Cabinet act instead of the Vice President, in a certain case, in initiating the presidential inability provision, the declaration. Although you cite a reason in your prepared statement about the reluctance of the Vice President to act in a case like this, nonetheless can we not assume that a Vice President interested in the welfare of the Nation has as deep a concern as any Cabinet, and is certainly close enough to the situation and probably closer than any Cabinet member might be, especially when we consider the experience of today?

Mr. Folsom. Of course, we know in the past there has been great hesitancy on the part of the Vice President to do that, as in the case of the Wilson-Marshall situation and also the Garfield situation to which we called attention, but the way we think it would actually work out is that either the Vice President or some member of the Cabinet would bring the matter up for discussion, and if a majority of the Cabinet agreed and the Vice President agreed the change would be made. But we don't think the initiative should be left entirely to the Vice President.

Mr. Rogers. Well, it isn't under this proposal.

Mr. Folsom. No.

Mr. Rogers. You are changing it around, as I see it, to the Cabinet with the Vice President concurring, whereas it is the other way with the Vice President initiating.

Mr. Folsom. We think the initiative should come from the Cabinet because of the delicate position of the Vice President. If there is much doubt about the disability, he would be subject to criticism. Some people might say he was usurping the power or pushing himself ahead too much, and it would be very delicate for him to do that.

We compared the situation that might exist with that in a company, for instance, where we know a vice president would hesitate for a long time to push himself into the presidency, and we feel that in many a situation the Vice President would hesitate for a long time to do that. Then if he waited too long, he wouldn't accomplish it. If he acted too quickly, some people would say he is usurping his powers.

Mr. Rogers. Mr. Folsom, on the other hand, considering the experience of the past 4 or 5 years, must not we conclude that the Vice President has probably been closest to the situation and working so closely and intimately with the President that he would probably be more aware of any presidential inability than any other Cabinet member or the members of the Cabinet combined?

Mr. Folsom. No, I wouldn't say the Vice President is any closer than some members of the Cabinet. Some might be as close, but from my own experience in the Eisenhower administration I would say that some members of the Cabinet—as I think is true now—were closer to the President than the Vice President, and were more intimately acquainted with the operations of the Government.
Mr. Rogers. Hasn't the trend been to a closer relationship between the Vice President and the President?

Mr. Folsom. I don't think you would find it any closer than it would be, say, between the President and the Secretary of State and the Secretary of Defense, because they are in more frequent contact than the Vice President is.

Mr. Rogers. That may be so, but then wouldn't the knowledge of the disability—because this is what you seem to rely on in talking about their ability to work closely with him—together with the fact that you assume the Vice President might be reluctant to sort of impose himself, but it would appear to me that the ability to assess whether the President is suffering an inability or disability is more important, and I think the person who would be able to tell this most or recognize this quickest would be the Vice President, the person who is closest to the President.

Mr. Folsom. The way it works out is the President is actually in daily contact right now with the Secretary of Defense and the Secretary of State, every day, almost. They are very close to the situation and could certainly tell very easily whether he is slipping or not, whereas sometimes the Vice President wouldn't be brought into the discussion for quite a while, because he hasn't any regular specific duties that require him to see the President constantly as these other officers have. Anyhow, we are talking about the combined judgment of the whole Cabinet here, not just one or two of them. We want a majority of the Cabinet, and the Vice President also, but we are afraid that if the initiative is left to the Vice President there might be a delay in the matter which otherwise wouldn't take place.

Mr. Rogers. Thank you very much, Mr. Folsom.

The Chairman. Mr. Folsom, you say:

"A third weakness in current proposals concerns congressional confirmation to fill a future vacancy in the Vice-Presidency. We believe this should be done through a joint session of the two Houses, requiring approval by a majority of all Senators and Representatives present and voting * * *

As you know, we have never had any such proposition. We have never had a joint session where there would be any debate, for example, and I take it your proposal envisages some sort of debate.

Mr. Folsom. That is true.

The Chairman. The nearest approach to a joint session where there is convergence of the powers of the House and Senate is in impeachment where the House brings the indictment and then the House managers go over to the Senate and act as prosecuting attorneys, as it were. I know of nothing in the history of the country where there have been joint sessions other than those that involved formal hearings to hear the President's state of the Union message, or when we have visiting dignitaries from abroad, but other than that we have never had joint sessions where the Members of the Senate and the Members of the House could join in debate.

Now, if we have such a joint session, and I make these declarations in the hope that you can tell us whether your committee can evaluate the substance thereof—if we have these joint sessions, who would preside—the Speaker of the House, the President pro tem? Again would we have to recognize protocol and give deference to the Senators in a joint session of that sort, and what would a majority be? Would it
have to be the total of the combined numbers of the Members of both Houses—100 in the Senate, 435 in the House, making 535? Would it be one above half that amount to constitute a majority of a joint session?

Those are questions that are raising doubts in my mind as to a joint session. Why couldn't the same thing be accomplished by separate sessions? You say there may be difference or disagreement between one House and the other. That difference might still be registered if they were in joint session.

Mr. Folsom. We thought of all these items you mentioned. In the first place, we think this is such an unusual situation that we don't see why it cannot be held in a different way than has been usual. Now, we realize that you have to have rules of procedure which you don't have now, but we don't see why those rules of procedure cannot be adopted very soon after this amendment is effective, so that you could be ready for the emergency, if it ever arose.

We had in mind just a majority of the whole joint session. In that way, it would actually correspond, as I pointed out here, to the electoral vote so far as the States are concerned. We thought it would be a more representative situation than to leave it to the two Houses, acting separately.

The CHAIRMAN. You say a majority of those present and voting?

Mr. Folsom. Yes.

The CHAIRMAN. That would constitute a majority. It wouldn't have to be the total combined?

Mr. Folsom. No, a majority of those voting. We think the rules of procedure could easily be worked out, but they ought to be worked out ahead of time, of course. We do think this would be more expeditious than having the two Houses act separately.

The CHAIRMAN. You must also consider that the House is not a continuing body. The Senate is a continuing body. That would invade your idea very materially, because the House would have to pass rules every session, or every Congress, rather, because once you pass these rules they may be binding on the Senate forever, but they would not be binding on the House after the Congress had concluded.

Mr. Folsom. Well, you have to adopt rules every session.

The CHAIRMAN. Every Congress.

Mr. Folsom. You could just incorporate these in your other rules.

The CHAIRMAN. Well, that is not so easily done.

Mr. Folsom. Once these rules are adopted once, there wouldn't be much difficulty continuing them, along with your other rules.

The CHAIRMAN. You have no idea what happens when you consider the vicissitudes of the members with a change in conditions. We have this question brought up in every single Congress.

Mr. Folsom. Well, why would there be any discussion about it? Why would there be any disagreement on it? I don't see how there would be much disagreement with it once it had been decided on. It is not a controversial issue at all.

Of course, the other method would probably work out all right, but we think if you had the two Houses in disagreement you would have a lot of trouble. In a joint session the nomination would be settled once and for all.

The CHAIRMAN. If there is disagreement——
Mr. Folsom. The House would have many more votes, of course, than the Senate, and in most cases the House would determine it because of the greater numbers. We think, as a matter of fact, the House should be given more precedence or more weight because they are more closely in touch, since they are elected every 2 years, with public opinion than the Senate might be.

The Chairman. You don't say anything in your suggestion that the House should have any degree of paramountcy.

Mr. Folsom. No; but it actually works out if you take a joint session with the majority of 435.

The Chairman. In other words, you wouldn't take the majority of either House to act, but the majority of the total?

Mr. Folsom. The majority of the total.

The Chairman. Do you think the Senate would agree to that?

Mr. Folsom. Well, I don't know.

The Chairman. I don't know, either.

Mr. Folsom. Anyhow, that is our view. As to whether you would ever get it done or not, I don't know.

The Chairman. Well, you have had some experience with the Senate. You ought to know.

Mr. Folsom. On the other hand, we were considering also the proposal that it should be left to the Senate entirely, like all other appointments. Now we think the House ought to be brought into the picture.

Mr. Chief. I didn't hear that.

Mr. Folsom. We think the House ought to be brought into the picture, you see, and we didn't go along with the suggestion that the Senate alone would be confirming.

Mr. Rogers. Very wise. A most profound statement.

The Chairman. Mr. Donohue?

Mr. Donohue. No questions.

The Chairman. Mr. Dowdy?

Mr. Dowdy. You feel your proposal would bring it closer to the one-man, one-vote idea that seems to prevail at least in the Supreme Court, whether it does in the House or the U.S. Senate or not?

Mr. Folsom. No; I don't think it would be tied into the one vote.

Mr. Dowdy. It would be closer to it, though. The bigger States would have a bigger voice in the selection.

Mr. Folsom. Yes; that is true.

Mr. Dowdy. I was interested in what you brought up here as to the line of succession after the Vice President. Did you mean that that should be written into the Constitution?

Mr. Folsom. Oh, no; that could be handled by Congress, of course. That doesn't have anything to do with this constitutional amendment.

Mr. Dowdy. I just wanted to be sure I understood correctly.

Mr. Folsom. The Constitution provides, you know, for the Congress to take care of that.

Mr. Dowdy. There is one other point I would like to have your opinion on, Mr. Folsom. There are two different occasions—one is the selection of the Vice President, the other is whether there is a vote on when the President has recovered his capacity to act—two different times when the House or Senate either separately or jointly would be
called upon to vote, and the question has been raised as to whether those votes should be taken by secret ballot.

What do you think of that?

Mr. Folsom. So far as the inability, we don't think the Congress should be brought into it at all.

Mr. Dowdy. What if the President says, "Well, I am able to act, now," and the Vice President with the concurrence of the Cabinet members says, "No, you are not." Then somebody has got to make the decision.

Mr. Folsom. Of course, in our recommendation, that should be left to the Cabinet entirely. In that case, if the President has been disabled and the Vice President has acted, and the President thinks he is able to take over again and the majority of the Cabinet agrees, then that would settle it, and it shouldn't go to the House, whereas the resolution would go to Congress.

Mr. Dowdy. As I understand it, if the majority of the Cabinet agrees with the President that he has recovered his capacity to act, that would end it, under these proposals.

Mr. Folsom. Not under the Bayh proposal.

Mr. Dowdy. Well, I might be wrong. I was thinking that the only way the Vice President could question the President's determination that he has recovered his capacity to act would be with the concurrence of the majority of the members of the Cabinet.

Mr. Folsom. Yes; then it would go to the Congress.

Mr. Dowdy. Then it would go to Congress for a two-thirds—in other words, the Vice President would have to have two-thirds of the Members of each House agree with him.

Mr. Folsom. Yes.

Mr. Dowdy. Otherwise the President would return. Now, my question was whether or not that vote in the House and Senate should be by secret ballot.

Mr. Folsom. Do you have many votes with secret ballots now?

Mr. Dowdy. Not many, but—

Mr. Folsom. I don't think it should be, myself. I am just of that opinion. We didn't consider that at all in our committee.

Mr. Dowdy. Of course, I don't anticipate the time would ever come when we would have to do that.

Mr. Folsom. We don't think it ought to be brought to Congress at all.

Mr. Dowdy. But if it is.

Mr. Folsom. If it is, I still think it would be better. I don't see why you should have a secret ballot. It would be quite embarrassing, I know.

Mr. Dowdy. You feel if the Vice President has been acting and the President claims he is able, then the pressure would be brought on the Members of the Congress. We would hope the Members of Congress are not susceptible to bending to pressures, but in the event there might be someday such a situation—

Mr. Folsom. That is the reason we don't like to have a public debate on the thing, because we think it might go on for some time and be embarrassing and very unsettling to the whole country and the world. If you are going to have an open debate, you might as well go the whole way and have an open vote on it.
Mr. Dowdy. You would probably run into more danger there of unsettling conditions than in the election of a Vice President who has been nominated by the Vice President.

Mr. Folsom. Of course, we think that in most cases would be more or less automatic. Looking back in recent years I can’t imagine any situation where Congress would turn down the President on the appointment of a Vice President, since in recent years the President normally picks the Vice-Presidential nominee, anyhow.

Mr. Dowdy. The President could nominate anybody he wanted to and it would be automatically approved whether it was for the good of the country or not, and if the President nominated someone for Vice President, if it was for the good of the country, I don’t think there would be any question, under secret ballot he would be selected.

Mr. Folsom. I don’t think it would make much difference in that case.

Mr. Dowdy. Do you see any objection—and this is a question that has been raised—to our having a secret ballot? I believe you said it should be a joint session, and I see no reason for a great deal of debate about it, because it would simply be on the name the President sent over.

Mr. Folsom. No, but I would favor, still, an open vote on it. That is just my personal opinion.

Mr. Dowdy. That question has been raised.

Mr. Folsom. We didn’t discuss that at all in our committee.

Mr. Dowdy. Thank you.

The Chairman. Mr. Folsom, on page 7, you say:

Conceivably most serious of all, we are much concerned that the Nation avoid any possibility of doubt, dispute or delay concerning termination of any presidential inability. That is why we urge that this matter also be decided by the Cabinet, subject only to presidential concurrence.

You leave out the Congress entirely.

Mr. Folsom. Yes.

The Chairman. From a practical standpoint, and the pragmatic standpoint, don’t you think we would have some trouble in that regard, leaving out the Congress?

Mr. Folsom. Well, in this case if the President himself says he is able to continue and the Cabinet, who are in as close a situation as anybody could be, said they think he is, we feel it is an executive situation. It would open up a question of the separation of powers, to bring Congress into the executive situation. There is not a question of policy involved here; it is a question of fact.

The Chairman. Of course, you must remember that those who are to decide would be appointees of the President, namely the presidential Cabinet. Don’t you think there might be prejudice, therefore, in favor of the President if the sole responsibility for this determination rests with the Cabinet?

Mr. Folsom. I think you will just have to depend in all these cases on the judgment of the individual members of the Cabinet.

Mr. Dowdy. Will the gentleman yield?

The Chairman. Yes, sir.

Mr. Dowdy. On this very point, the Acting President, specially if he is acting for any length of time at all, might well replace the Cabinet with people who would support him.
Mr. Folsom. We have thought of that possibility. In the final analysis, if you find a Vice President wants to continue indefinitely by getting rid of the Cabinet and getting people he can dictate to, Congress can take care of the situation. In the first place, you have the impeachment, and in the second place you could deny appropriations for anything.

Mr. Dowdy. I haven't noticed Congress being prone to turn down appropriations since I have been here.

Mr. Folsom. If it is a question of getting his own Cabinet members, you would find if you cut out a few key appropriations he couldn't operate very well.

The Chairman. One of the reasons for having the Cabinet decide is to keep the power separate.

Mr. Folsom. It also would speed the situation up. If you are going to have any long discussion in Congress, it would get out, and, of course, the Cabinet members themselves might have discussion that wouldn't be quite so public as if you had a debate on it.

The Chairman. Of course, we don't have actual separation of powers. Congress does intervene in the case of an election of the President when none of the candidates get a majority of the electoral vote. There is no separation there. The House must make the determination, then, so there are cases where there is a converging of the powers.

Mr. Folsom. Yes, and of course quite a few people feel, also, that there are some restrictions that some of the Congress puts on the appropriations bills so there is not so much separation of power as there should be.

The Chairman. Mr. St. Onge?

Mr. St. Onge. No questions.

The Chairman. Mr. Tenzer?

Mr. Tenzer. I will defer to Mr. Gridler.

Mr. Gridler. Mr. Folsom, let's get down to an actual case. When President Eisenhower had his heart attack, under the Celler-Bayh bill as proposed, do you think that the Cabinet would have declared the President disabled if the procedure of having congressional concurrence and a declaration of reability were on the books? Do you think the Cabinet would have declared the President disabled?

Mr. Folsom. Well, of course in that situation, since he recovered so quickly so that he could carry on after a short time, I think that is a pretty good case where if you left the initiative to the Vice President he would have hesitated quite a long time before anything would have been done. I think in that case the Cabinet might have been more willing to take concerted action than the Vice President, but that is just a surmise.

In case he had been disabled, and the Vice President were in power for quite a while, the President saying later that he had recovered, I think if the Cabinet agreed it could have been settled very quickly.

Now, the other way, if the Vice President said that he didn't think the President had recovered, then it would have had to come to Congress. If either House failed to get the two-thirds—you see, on a little old one-third they could botch the situation. It would take a pretty small number of people who weren't as familiar with the facts as the Cabinet members were. The Cabinet members, you see, are really in
better shape to judge presidential ability to carry on than most members of Congress would be.

Mr. Gridir. Do you believe if the Cabinet had had the power to declare the disability terminated that they would be more likely to declare him disabled in the first instance than if this power had rested with the Congress?

Mr. Folsom. I doubt if that would make much difference. I think, judging by the people present when I was in the Cabinet, I would depend on their judgment in any case.

Mr. Gridir. Thank you.

The CHAIRMAN. Incidentally, since the Eisenhower incident was brought up, what about the Wilson case, where he lingered for months after a stroke, and the members of the Cabinet tried to do something but couldn't? Lansing, you may remember, wanted to take the lead to declare the President disabled, and yet he was compelled to resign, so there was a case where the Cabinet was helpless.

Mr. Folsom. In that case a number of them tried to prevail upon Vice President Marshall, but he refused to do anything about it. The responsibility in that case was up to Marshall. Of course, that was due to the fact that it wasn't clear in the Constitution what the situation was and how he could take over. If he took over, some people thought he might have to keep on indefinitely.

The CHAIRMAN. If the Celler-Bayh amendment was in effect at the time of the so-called relucrance of Marshall, I don't think that reluctance would have been present because he would have been backed by the Cabinet and would have been backed by a two-thirds vote of the House itself, and that would have removed his reluctance.

Mr. Folsom. We think in that case, in our proposal, if he had the backing of the Cabinet he would have taken over anyhow without the support of the Congress.

The CHAIRMAN. I can't conceive how you could say other than this, that the allegiance of the Cabinet is usually with the President. He is the man who appointed them. They are responsible unto him.

Mr. Folsom. In the Wilson case, I think you would find several Cabinet members who tried to get Marshall to take over, and they were all appointed by the President.

The CHAIRMAN. I say if he could be backed by a two-thirds vote of the House and the Senate, I don't think that reluctance would be present.

Mr. Chiefl. And that was sad, too, because, as memory serves me, President Wilson's disability lingered on for some 18 months, which was a horrible thing. The Lord has been good to this country.

Mr. Folsom. That is why we think you ought to have this amendment, one way or the other. Whether you go along with the Bayh amendment or not, we think it is necessary that something be done. We think you would get speedier action on our proposal.

Mr. Chiefl. In your statement a moment ago, Mr. Folsom, that the President at the various conventions more or less puts the nod, or should I say the touch of favoritism, or certainly lets he known his approval of his running mate, which is a very healthy thing, that doesn't detract from this situation at all. In my opinion, it is a very healthy thing, because I certainly want a friend in my corner if any-
thing happens to me, and I want a man in whom I have the utmost confidence in his ability, his know-how, and that sort of thing, so I think that this helps the situation rather than detracts from it.

Mr. Folsom. I agree.

Mr. Dowry. You must have been reading your history.

Mr. Currey. I have been reading history; yes, sir, since I was about "knee high."

Mr. Pope. This committee is engaged now in the writing of a constitutional amendment which will be submitted for ratification, and the purpose of that amendment would be to establish the machinery whereby the power of the President of the United States would be transferred to some other person by some other agency.

I make no apology as one of the authors of one of these bills for my defense of the President's office. I am jealous of his powers, and I want this proposal to be careful to safeguard his powers.

If there is a question of favoring the President or the Vice President, I will favor the President. It is the President in whom the people have reposed these powers. And I might add that I am not much impressed with the argument that the Vice President would be reluctant to initiate the action. I am not impressed because, first of all, if this were a part of the basic law of the land, it is difficult to imagine a Vice President who would be so weak as to fail to take appropriate action when, as the chairman has indicated, he anticipates that he would have the support of the Cabinet and potentially, if necessary, two-thirds of the two Houses of the Congress. If he is too weak to do so, then he doesn't belong in that job.

Now, having said that, I might say that your point about allowing the Cabinet to initiate the investigation—I prefer to call it the agitation—has already been taken care of apparently by an amendment made by the Senate Judiciary Committee.

I understand your proposal to be that the Cabinet initiate and the Vice President concur. The Senate has made it possible by adopting the language in the conjunctive which would make it possible for either the Cabinet or the Vice President to initiate the action.

Now, I am opposed to that change, and having said it once I will indicate again that I am prepared to make a compromise, if necessary, to get something done, because I want to see something done promptly, but I say I think that is unwise. I think it is unwise to proliferate that power to initiate the investigation in any way.

The Constitution itself, when it stated that the Vice President would assume the powers of the President, implied that the Vice President would be the man who would make the first decision about the inability of the President, and I think they were wise when they did so.

May I direct your attention to page 7 of your testimony. On pages 7, 8, and 9 you deal with the danger of delaying action by the Congress in the event the Vice President challenges the President's declaration that he is restored.

Now, here again I think that if there is to be congressional action, and if there must be some congressional delay that delay ought to favor the President rather than the Vice President.

Now, do you agree?
Mr. Forsom. Yes; I think I would, but we just don't like the idea of having any delay at all when there is some uncertainty during that period as to who eventually is going to be the President.

Mr. Popp. This is in line with the statement that you made on page 9 which called attention to the fact that the delay might be as long as several months. Your point, as stated on page 9, I think is well taken.

Now, do you think, then, it would be advisable, if this Congress decides that the Congress should have a hand in this decision, do you think it would be advisable to have a time limit on the congressional action?

Mr. Forsom. Well, I heard that discussed at the Senate committee the other day, and there was much discussion as to what wording to put in the amendment. Of course you know it was felt the language should be very general, and it would be difficult to decide on a particular time limit that might be appropriate in all conditions. They were debating whether it should be immediately, promptly, or how many days there should be, or what the interpretation should be, so I think if you are going to have anything at all, you would have to be definite as to the number of days, but I don't see how you could pick out a period of time that would be appropriate.

Mr. Popp. As I understand your statement, delay is objectionable. If delay is objectionable, then I would assume a time limit would be preferable.

Mr. Forsom. Well, of course the discussion seemed to indicate it would be very difficult to get prompt action, say a few days action.

Mr. Popp. Well, I understand, but I am asking the witness what he thinks about it, not the Senate.

Mr. Forsom. That discussion just backed up my feeling that any delay is unfortunate, and I don't think there would be the delay in the proposal we have. There might be delay in the discussion in the Cabinet itself, but once the decision was made there would be no delay at all. It would take effect immediately.

Mr. Popp. Now, in the bill which I introduced, I included the following language: "If the Congress within 10 days"—and the 10-day period I use simply as a symbol——

The Chairman. What section is that?

Mr. Popp. Section 5 of my bill. [Reading:]

If the Congress within ten days after the receipt of the Vice President's written declaration determines by two-thirds of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President. Otherwise the President shall resume the discharge of the powers and duties of his office.

Now, I think I need to explain what the effect of that would be. It would essentially give the Congress three choices. The Congress could act and vote favorably on the Vice President's challenge. The Congress could act and vote against the Vice President's challenge. Or, third, the Congress could fail to act at all and allow the 10-day period to expire, and if the Congress chose the third alternative it would be the equivalent of having chosen the second alternative and yet it would be a graceful manner of favoring the President without giving a positive offense to the Vice President who is then discharging the powers and duties of the office.
Now, how do you feel about that approach?

Mr. Folsom. Well, of course, the difficulty comes in case you don't get the two Houses to agree.

Mr. Poff. If the two Houses do not agree, the 10-day period expires and the President resumes his duties.

Mr. Folsom. Then you have the question raised of whether the President—during that time you would have discussion whether the President is fit or not fit, and we just don't like the idea of having all that being discussed openly during a period of that sort.

Mr. Poff. Could the gentleman suggest any way that we could keep that question from being discussed if the President ever left office because of inability? This is something inescapable.

Mr. Folsom. But if you are going to have the Congress in at all, I feel it would be desirable to have a time limit such as you suggest, rather than just leave it wide open. I would agree on that.

Mr. Copexhaver. Mr. Folsom, with regard to this issue of delay, if we do not have Congress in the picture at all and we have a situation whereby the Cabinet and the Vice President have acted to take away this power from the President, would you not have interminable delay on any choice of putting the President back in?

Mr. Folsom. Of course under the proposal you don't bring it to Congress when the Vice President takes over.

Mr. Copexhaver. I am saying keeping in mind that where we have the situation with a group of men who have already acted to take away the President's office, this same group of men would, under our proposals, have the burden of saying when he could go back. In other words, under your proposal there is no limit whatsoever. It may run to the end of the term. The idea of the Celler-Bayh proposal is to have Congress as a check, not from the standpoint as some people have discussed of perhaps aiding the Vice President, but as a check to protect the President, with the idea that two-thirds of Congress or all of Congress in open session, in open debate, are not going to vote irrationally or improperly.

Then, to go one step further, Mr. McCulloch said let's even try to cut the possible delay down, because in the Celler-Bayh proposal, as we possibly see it, if the Vice President were to fail to reconvene Congress, they being out of session, or if Congress chose to delay, interminably, themselves there would be no way to act within a period of months, shall we say. Under the Poff-McCulloch proposal, it would be in the interest of the Vice President to quickly reconvene Congress, if it were out of session.

Mr. Poff. They would have to act or fail to act, but either would have a consequence, and either consequence is designed to protect the powers of the President.

Mr. Folsom. Well, now, we feel, of course, that since the Cabinet is originally appointed by the President it is as concerned in protecting the President as Congress would be. The chief criticism of our plan is we feel the Cabinet would be too favorable to the President. We feel that you have to trust the judgment of the Cabinet in both cases. If you don't agree with that, the thing to do is to bring Congress
into it, but you have to realize the difficulty in case one House votes one way and one the other.

Mr. Poff. I will put one further pragmatic example, and then I am through with the question.

Suppose the CED proposal had been a part of the Constitution in 1861 to 1864. Do you suppose the Cabinet might have removed President Lincoln?

Mr. Folsom. If he was in a condition where he was very sick and couldn't carry on, they might.

Mr. Poff. Well, he wasn't overly sick during the course of the war, but I think all people are familiar with the hostility that existed between Lincoln and his Cabinet. I won't name names, but I think it is pretty well known.

Now, what would the Cabinet have done when Vice President Johnson became President following Lincoln's assassination if your CED proposal had been a part of the Constitution, bearing in mind that there had been no check whatever—and this is a government of checks and balances, isn't it—there had been no check whatever by the representatives of the people who sit in the two Houses of the Congress if the decision had been made by members of the Cabinet, who are not elected by the people but are appointed by the President?

The Chairman. They probably would choose one of their own members.

Mr. Folsom. Of course, as I said before, at that time Congress and everybody was antagonistic toward the President, and they wouldn't have done much to protect the President at that time. They were as antagonistic toward the President as the Cabinet was.

Mr. Chief. Mr. Folsom, I was very much impressed with your statement on page 3 that was presented here to the committee this morning, and I am going to read it back to you for the purpose of the record:

The policy statement on "Presidential Succession and Inability" is not a staff document, as such. It is the product of intensive analysis in a long series of discussions among our trustees and advisers, in which we were able to use the results of the American Bar Association studies and other excellent scholarly work to best advantage.

Then I come down to the bottom of page 3, and I would like to re-read this because this impresses me, sir, and it does show that you have given it a great deal of concern and an awful lot of spadework and hard work:

This committee is convinced that the issues of succession in inability are vital and must be faced by the Nation without further delay • • •

I might say, at this juncture, I buy this wholeheartedly. We must act soon, and it would be a sad day for America if 35 members of the bar, all lawyers, of this great committee, and those on the Senate side; if we can't come up, with the 30-odd bills we have got, with some sort of answer to this problem, then God help America.

To go back to the reading again:

We have sought to examine each alternative that has been seriously proposed, and to identify its advantages and disadvantages.

Then here is what I like very much, from your statement on page 4:

In analyzing the alternatives this committee has judged their pros and cons against these basic criteria:
Continuity in the presidential office: In event of either death or inability of the President, there must be no break in the exercise of the powers and duties of the Presidency.

I agree, sir.

Legitimacy: Any transfer of the Presidential office or its powers and duties must be fully acceptable to Government officials and to the general public.

Again I agree with this wholeheartedly.

Certainty: No question of doubt should be permitted to arise as to who is exercising the powers and duties of the Presidency at any time—two men competing for presidential authority would be disastrous for the Nation.

Once again I say, "Amen."

Stability in policy: There should be no sharp shift in policy or change of party.

Again I buy this, because you are reducing, as I see it, to an absolute minimum, troubles, headaches, heartaches—well, you know what I mean. Then we come to the last one:

Speed and simplicity in procedure: The procedures by which either the Presidential office or its powers and duties are transferred must be fast, efficient, and easily understood.

Again I think you hit the target right dead center. I think this is the problem. I do sincerely believe that this is the whole basic problem right here that I am going back into, that you have so very ably put.

Preservation of the separation of powers: Whatever corrective action may be taken, it must not weaken our traditional pattern of separation of powers, particularly between the Presidency and Congress.

Again, I buy this wholeheartedly.

Then you wind up by saying:

The committee is convinced that correct solutions must meet all these tests.

Sir, I think that that is a brilliant statement, and I want to compliment you, sir, for the work that you have done on this. I think that the country is blessed in having men of your caliber and your ability and your patriotism to do jobs of this kind. I know most all you catch is hell, but while you are alive and you can catch them, I am going to toss you some bouquets.

Mr. Folsom. Thank you very much, but the bouquets I think ought to go to our whole Committee for Improvement of Management in Government. We have a very able committee, men who have had wide experience in industry, heads of large companies, most of them, and yet have also had wide experience in government. On our committee there are three or four former Secretaries and several Under Secretaries. We have a former Congressman—

Mr. Chief. It reads like "Who's Who."

Mr. Folsom. We have a former Congressman, Mr. Eliot, who was Assistant Secretary of Labor for awhile, and we have a former Senator, so we have pretty broad experience in both fields.

Now, I might say that we realize that there are lots of differences of opinion on the different bills. We were hoping to contribute to the discussion, and our chief concern is that some action be taken. Now, if your committee and the Senate committee finally agree that
other plans than the one we suggest will answer it, we certainly would
go along 100 percent, because we know that you people have had wide
experience in many of these things, but we were looking at it from a
purely unbiased point of view and came up with these recommenda-
tions.

You will find in the work of our committee we try but do not insist
on being unanimous. We find if you try to be unanimous you water
it down, and yet you will find there are only about three or four dis-
sents among our whole committee.

We have complete confidence in the judgment of your two commit-
tees that you will come up with the right answer.

Mr. Chief. I would hazard the guess that we will come up with an
answer as best we can make under the circumstances. Naturally it
will not be the perfect answer, because even the Constitution, as great
as it was and written by men of the brains of Thomas Jefferson and
others, we have had to amend it 24 times to keep it alive, vital, breath-
ing, and active so I don't think we will come up with a perfect answer
here, but maybe we will come up with something that later can be
amended and through trial and error we can adjust or modify as the
case may be.

Mr. Folsom. We thought if you would keep in mind these criteria
which you just read, and which I think everybody would agree with,
whatever solution you come up with that will meet these tests we
think will be a pretty good bill.

Mr. Chief. Thank you.

The Chairman. Mr. Folsom, I want to say that I got a great deal of
satisfaction and got a great deal of help from this report on presi-
dential succession and inability put out by the Committee for Economic
Development, and we are very thankful to you for your very wise
comments and your very gracious manner. We want to thank your
committee and through you your trustees and nontrustees and all those
gentlemen named in the appendix to your speech. They constitute a
roster of the most brilliant and gifted talents from all walks of life
in this country.

Thank you again, sir.

Mr. Folsom. Thank you. I am glad to be here. I am awfully
sorry I was late getting over.

Mr. Chief. It is a pleasure to do business with you, sir.

The Chairman. The committee will adjourn until 2 o'clock, when
we will hear from the Attorney General and Members of Congress.

(Whereupon, at 12:30 p.m., the committee adjourned to reconvene
at 2 p.m.)

AFTERNOON SESSION

The Chairman. The committee will come to order.

The first witness this afternoon is the very distinguished friend from
Connecticut, Mr. John S. Monagan. We are very happy to hear from
you.
PRESIDENTIAL INABILITY

STATEMENT OF HON. JOHN S. MONAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

MR. MONAGAN. Thank you, Mr. Chairman and members of the committee. I am going to be very brief.

I have filed a resolution, House Joint Resolution 158. I appear in support of this resolution. It is comparable to many other resolutions which have been filed. I am not wedded to any particular language or provision, and I am not going to take the time of the chairman on any lengthy discourse. It seems to me that we have clearly set forth the fact and spent enough time on discussion and that the time for action is here. It is urgent, it is necessary, and therefore, I ask that the committee give consideration to the proposals that are before the committee, and that they make appropriate recommendations that will be acceptable to the Congress. In this way, we will be able to move forward with this very vitally needed change in the Constitution of the United States.

I ask permission, Mr. Chairman, to have included in the record at this point a statement, and an inclusion which I have filed with the committee.

The Chairman. That may be done.

Thank you very much.

Mr. Monagan. Mr. Chairman, and members of the committee, I believe that enough has been said and written in support of positive action on legislation to provide this Nation with an essential guarantee of continuity in the position of Chief Executive of our Government. I shall not take the time of the committee for any lengthy discourse on the merits of my bill, House Joint Resolution 158, and others which have been filed for this purpose. It provides for Presidential appointment of a new Vice President, when a vacancy occurs, and for congressional determination of Presidential inability.

Certainly, all of us have been talking far too long on this subject and we have thus contributed to delaying the action which we recognize to be not only essential but urgent.

I respectfully urge this committee to report out a resolution which would be acceptable to the House and, ultimately, to the legislative bodies of the States. I make this recommendation to you in the belief that in all quarters there is recognition of the need for action now and without further unnecessary delay.

I will, however, with your permission, as explanation of my bill, submit for the record a copy of a statement which I placed in the Congressional Record of January 26, 1965, and which also includes copies of newspaper editorials in support of the action which I advocate.
PRESIDENTIAL INABILITY

(The statement referred to is as follows:)

A PRESIDENTIAL SUCCESSION AMENDMENT

(Mr. Monagan asked and was given permission to address the House for 1 minute, to revise and extend his remarks, and include extraneous matter.)

Mr. MONAGAN. Mr. Speaker, I want to say, again, that Congress must face up to the responsibility of providing for the effective determination of presidential and vice-presidential inability and succession. For this reason I have again filed a bill—House Joint Resolution 188—a copy of which I attach herewith, and which I believe will eliminate in the future uncertainties that have been with us on too many occasions.

Weaknesses in the present provisions for executive succession were once more brought into sharp focus following the assassination of President Kennedy. The absence of provision for filling the vacant office of Vice President caused a period of international uncertainty which remained with us from November 22, 1963, to January 20, 1965. While these questions are not new to us—witness the Wilson inability—our most recent experience highlights the need for positive action during this session of Congress. We cannot afford the hazard of further delay.

All of us are aware, I am sure, that no less than eight Vice Presidents have taken over the office of President upon the death of incumbent Presidents since 1841. This means that for nearly one-fifth of the history of the country, the Nation has been without a Vice President.

The joint resolution which I have filed for action by the 88th Congress is similar to legislation which I proposed in the 88th. It provides that in the event of the removal of the President from office or of his death or resignation, the Vice President shall become President for the unexpired term. Within 30 days after such succession, the new President would nominate a Vice President who would take office upon confirmation by the House and Senate. A majority of those Members present and voting would be required for the confirmation. Similar action would be taken in the event of removal, death, or resignation of the Vice President. Should the President declare his inability to serve, he would be succeeded by the Vice President, and this succession would be automatic. In the absence of such declaration in writing, the Vice President could assume the duties and powers of Acting President with the written approval of the majority of the heads of the executive departments in office. Should there be controversy, it would be resolved by a majority vote of the Congress.

In the absence of a President and Vice President, the order of succession to the Presidency would be from the members of the Cabinet, as follows: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare.

Mr. Speaker, the issue of presidential and vice-presidential inability and succession is one of the most challenging before the Nation. It was of sufficient import to merit recommendation by President Johnson in his state of the Union message for action in this session.

In further support of my proposal, I include an editorial from the Meriden, Conn., Journal, of April 27, 1964. I also include an editorial from the Hartford, Conn., Times of January 16, 1965, on the same subject.

[From the Meriden Journal, Apr. 27, 1964]

PRESIDENTIAL SUCCESSION

A nation without a presidential backstop in the form of a vice president is a nation in danger of confusion and dismay in the event its chief executive is removed by death or incapacitated by illness or accident.

The United States today is in this position, lacking a Vice President and encumbered with a system of Presidential succession which would be bound to place an aged, possibly an infirm man at the helm.

To change the system, even if Congress can agree upon a plan, will be bound to take a great deal of time. Congress, giving its attention to other pressing matters, does not seem disposed to consider a matter which is possibly the most pressing of all.
Representative John S. Monagan, Democrat, of Connecticut, has introduced a joint resolution proposing an amendment to the Constitution which, he argues, would "fit current conditions as well as future uncertainties."

The Monagan bill provides, as at present, that in the event of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired term. Within 30 days thereafter, the new President would be required to nominate a Vice President who would take office upon confirmation by the House and Senate. A majority of those present and voting would be required for confirmation. Similar action would be taken in the event of removal, death, or resignation of the Vice President. The bill also would establish procedure for the Vice President to succeed the President as Acting President if the President were unable to serve. Should the President declare his inability to serve in writing the succession would be automatic; in the absence of such a declaration the Vice President could assume the duties and powers of Acting President with the written approval of a majority of the heads of the executive departments in office.

Should there be a controversy, it would be resolved by a majority vote of the Congress. In the absence of a President or Vice President, the order of succession to the Presidency would be from the members of the Cabinet in this order: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare.

The plan is simple; it seems to foresee every possible contingency. We like it better than any of the other plans offered to date.

The long process of amending the Constitution requires the approval of two-thirds of both Houses and ratification by the legislatures of three-fourths of the States. There is no feasible shortcut.

In the more than 6 months between now and the next election, anything could happen. President Johnson is not a cautious man, and in spite of the precautions erected around him, he often exposes himself in an unsafe manner, while mingling with crowds. He drives his car at high speeds when he visits his Texas ranch. Some years ago, he suffered a serious heart attack. He works long hours and gets a minimum amount of sleep. His life, it is apparent, is full of more than normal risks.

Next November, a new Vice President will be elected, and the country will breathe more easily. But the faults of the present system of presidential succession will remain.

Congress should approve a better plan of succession during the present session, and should start it on its way toward becoming a part of the Constitution. Representative Monagan’s bill should receive the attention which it deserves. He has done a real service to the country in proposing it.

[From the Hartford Times, Jan. 15, 1965]

PRESIDENTIAL SUCCESION

Congressman John S. Monagan, of Connecticut’s Fifth Congressional District, proposes an amendment to the Constitution that would guarantee the presidential succession in the President’s inability to serve.

Mr. Monagan’s proposal provides that the succession proceed through the Vice President to the members of the Cabinet in the order of seniority of their departments. A President could declare himself in writing to be unable to serve, or in the absence of such a declaration the Vice President could assume the duties of Acting President with the written approval of a majority of the heads of executive departments. Controversies, the resolution provides, would be resolved by a majority vote of the Congress.

It’s a good idea and has the advantage of being simple. It will probably be criticized for proposing a change from the present line of succession—Vice President to Speaker of the House—which keeps the office in the hands of an elected official, not an appointed one.

But Mr. Monagan says that there have been times (the Eisenhower administration, for example, when Sam Rayburn was Speaker) when the President and the Speaker were not members of the same party. A change of party in time...
PRESIDENTIAL INABILITY

of national crisis might be too upsetting for the country to endure. There's another objection to the Speaker as heir, too—the Speaker is usually an old man, for it takes many years for him to attain that office.

As for the Speaker being an elected official, there is the point that he is not elected President but only a Member of Congress. His fellow Congressmen, not his constituents, elect him Speaker.

This and other proposals to safeguard the succession should be explored thoroughly—now, while there is no hurry.

H.J. RES. 158

Joint resolution proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein). That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. Within a period of thirty days thereafter, the new President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority of those present and voting.

"Sec. 2. In case of the removal of the Vice President from office, or his death or resignation, the President, within a period of thirty days thereafter, shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting.

"Sec. 3. If the President shall declare in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. If the President does not so declare, the Vice President, if satisfied that such inability exists, shall, upon the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the office as Acting President.

"Sec. 5. Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President's inability has not terminated, the Congress shall thereupon consider the issue. If the Congress is not then in session, it shall assemble in special session on the call of the Vice President. If the Congress determines by concurrent resolution, adopted with the approval of two-thirds of the Members present in each House, that the inability of the President has not terminated, the Congress shall thereupon consider the issue. If the Congress determines by concurrent resolution, adopted with the approval of a majority of the Members present in each House, that the President's inability has ended, or (3) the President's term ends.

"Sec. 6. (a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President, shall act as President: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary
of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, and such other heads of executive departments as may be established hereafter and in order of their establishment.

"(2) The same rule shall apply in the case of the death, resignation, removal from office or inability of an individual acting as President under this section.

"(3) To qualify under this section, an individual must have been appointed, and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, or inability of the President and Vice President, and must not be under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon him.

"(b) In case of the death, resignation, or removal of both the President and Vice President, his successor shall be President until the expiration of the then current presidential term. In case of the inability of the President and Vice President to discharge the powers and duties of the office of President, his successor, as designated in this section, shall be subject to the provisions of sections 3, 4, and 5 of this article as if he were a Vice President acting in case of disability of the President.

"(c) The holding of the oath of office by an individual specified in the list of paragraph (1) of subsection (a) shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

"(d) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

"(e) This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

The CHAIRMAN, Congressman Shriver has submitted a statement for the record and it will be accepted.

(Statement of Hon. Garner E. Shriver is as follows:)

STATEMENT OF GARNER E. SHRIVER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS, TO THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman, I appreciate this opportunity to express support of the vital deliberations which this committee has undertaken in regard to the complex problems of presidential succession and disability, and vacancies in the office of the Vice Presidency. Most adult Americans recognize there is a need for congressional action after careful study of all proposals.

I have introduced a resolution (H.J. Res. 143) to amend the Constitution to clarify the latent ambiguities and the shortcomings of existing law. My proposal embodies the major recommendations of the "consensus" arrived at by the Conference on Presidential Inability and Succession sponsored by the American Bar Association.

Under the terms of my proposed amendment, the Constitution would provide that in the event of the permanent exclusion of the President from office; i.e., removal, death, or resignation, the Vice President shall succeed to the office for the balance of the unexpired term. This will have the effect of giving a legal basis to the precedent established by John Tyler.

In view of the growing importance of our Nation's second highest office and the recurrent history of vacancies connected therewith, it is highly desirable that that office be filled at all times. On 16 occasions, totaling more than 37 years, the office of Vice President has been vacant. In all, our Nation has been without a Vice President in excess of 20 percent of the time during its history. My proposal, if adopted, would amend the Constitution to provide that in the event of a vacancy, the President shall appoint a Vice President with the advice and consent of both Houses of Congress.

In connection with the paramount problem of disability, I propose that in the case of such an eventuality, the powers and duties, but not the office, shall be discharged by the Vice President for the duration of the inability or until the expiration of the President's term of office.

The President may establish his own disability by issuing a declaration in writing to that effect. Where he falls or is unable to do so the Vice President with the concurrence of a majority of the Cabinet or such other body as the
PRESIDENTIAL INABILITY

Congress may provide, are authorized to establish the fact of Presidential disability.

Similarly, the ability of the President to resume his powers and duties, may be established by his declaration in writing. If the Vice President and a majority of the Cabinet fail to concur with this decision of the President, the matter would be brought to the Congress for resolution.

History as well as commonsense indicate that we cannot insure against or be spared the sorrow of a fallen leader. We have it within our power, however, to remove the cause of great anxiety and apprehension that arises out of the uncertainties of the present law. Our failure to capitalize on the present opportunity will render meaningless the tragedies and near tragedies of the past and the sorrows of the American people who have inevitably flowed in their wake.

Mr. Chairman, this is a problem which your committee is well qualified to consider and to recommend a legislative solution. I commend this committee for launching these important hearings. Thank you for the attention you will give to the resolution which I have introduced.

The CHAIRMAN. Congressman Halpern.

STATEMENT OF HON. SEYMOUR HALPERN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HALPERN. Mr. Chairman, I want to thank you and the members of this very distinguished committee for the opportunity of appearing before you today.

The committee is engaged in considering a very important constitutional and political question. It is indeed curious, as the chairman has said, that Congress has for so long delayed effective implementation of the disability clause in the Constitution.

Here in the House I have introduced House Joint Resolution 183, which is identical to the measure proposed by Senator Birch Bayh and the able chairman of this committee.

This resolution providing for an amendment to the Constitution seeks to lay down certain procedures by which Presidential power and authority can always be realized in fact as well as in theory. It designates a method for filling the office of the Presidency in case of disability; and it determines the means whereby the Vice President will be chosen when that office is vacated.

There are, of course, a number of different proposals which have been put forward. The measure which I am cosponsoring meets the consensus of the American Bar Association and a great number of respected educators and public officials.

Whatever the remedy, we cannot expect to meet all the contingencies which may arise. Nor is this detailed prescription desirable. The authors have made no attempt, for instance, to actually list disabilities under which the President or Vice President is authorized to set the procedure in motion; there is no clause for the invitation of medical advice.

House Joint Resolution 183 sets a framework which leaves to the principals involved some very delicate decisioning if the awful question of disability arises. And I think this is wise and sufficiently protective.

Section 1 of the resolution affirms the so-called Tyler precedent which, if the President is removed from office, the Vice President accedes to the office of the President and the full measure of its power and authority.
Section 2 provides for the nomination and confirmation of a new Vice President when that office is vacated. I believe this solution is reasonable and just. There are those who would weaken the President’s authority to designate a successor; this argument fails to contend with the essential point, and that is the capacity of the means to provide continuity. Continuity, the constitutional questions of Presidential power during a term of office, must be the guiding principle. The Vice President, when the Presidency becomes vacant, should be able to provide that continuity to every possible extent. We can help to insure this by providing the President with the initial power to nominate the second person in line of succession.

Section 2 also provides that the people, indirectly through their chosen representatives, shall have a proper voice in the process.

Sections 3, 4, and 5 provide for the assumption of the powers and authority of the Presidency when the President becomes disabled. The clauses are sufficiently broad to cover all emergency situations, and they are elastic enough to permit personal judgment. Both the executive and legislative branches are brought into the decisioning. If a conflict arises concerning the ability of the President to carry out the duties and functions of his office, the Congress shall decide the issue.

Mr. Chairman, this important question has already undergone a great deal of study and analysis. It is a delicate issue. There is literally, no end to all the contingencies which can erupt. It would be wrong to put the Executive and the Congress in a straitjacket while attempting to deal with all potential dangers, thereby weakening the capacity of human judgment to work its way.

But it is most important that we end this period of awful uncertainty. The international situation is such that the country can no longer risk a potential power vacuum. We must act speedily to close the gap in our structure of executive responsibility.

Three times in our Nation’s history we have experienced circumstances of presidential disability. In each case the situation was somewhat different. The illnesses which struck General Eisenhower were temporary, and after a period of recuperation, the execution of the office was not impaired. President James A. Garfield lay near death for nearly 3 months in 1881, but dispute regarding the manner of succession prevented the proper functioning of the office until Mr. Garfield’s death.

Again, more recently, researchers have described the inability which struck President Woodrow Wilson: no one close to the President was disposed to act because of Mr. Wilson’s adamant refusal to consider a surrender of Presidential power.

Experience shows that conflicts will arise concerning the extent of incapacity and constitutional interpretation. The amendment which I support will provide a framework, an essential structure endowing those close to the President with the constitutional power to act. This is of paramount importance. We all know that executive appointees in so important a matter are understandably reticent about taking any action which the President opposes unless they are by law given that authority. And in these situations, in order to protect the Nation’s interests, they must have lawful sanction.

I am very encouraged by the widespread support which has greeted this proposal. The assassination of President Kennedy has awakened
the country to the need for enacting legal processes whereby executive power is sustained when tragic unexpectancies occur. We need to insure that the office of the President is always seconded by a Vice President. And we need a constitutional answer to presidential inability.

I am confident that the committee knows the seriousness of the problem, and will act responsibly to approve this proposal for a constitutional amendment. I think the States will give the proposal an early and affirmative action. There is nothing so fundamental to our system as insuring its permanence, and these troubled times certainly require that we leave no gaps in our structure of Government authority.

I want to thank you, Mr. Chairman, for giving me the privilege of appearing before you today and presenting by views on this very vital problem, and trust that this committee will approve the legislation before it.

The CHAIRMAN. Any questions?

Thank you very much, Mr. Halpern.

Mr. Halpern. Thank you, Mr. Chairman.

The CHAIRMAN. I will offer for the record the testimony of the Honorable William S. Moorhead of Pennsylvania. That will be accepted.

(The statement of Hon. William S. Moorhead reads as follows:)

Marquis Childs reminded us recently of Woodrow Wilson's wise words: "Men of ordinary physique and description cannot be President and live if the strain be not somewhat relieved. We shall be obliged always to be picking our chief magistrates from among wise and prudent athletes—a small class."

Wilson wrote those words when he was still at Princeton. He himself was to be the central figure some years later in a period of great uncertainty as he lay disabled in the White House unable to exercise or delegate the powers of his office.

We have seen a series of situations in recent years when the problem of presidential disability and succession made urgent action advisable. But the best that could be done were formal and informal agreements—some of doubtful legality—between the Chief Executive and the next in line of succession. It is of the utmost importance, therefore, that we act now.

House Joint Resolution 219, which I have introduced, is identical to House Joint Resolution 1, introduced by the distinguished chairman of this committee. These resolutions provide for a constitutional amendment under which the Vice President would succeed the President if the President died, resigned, or was removed from office.

But one of the main constitutional problems surrounding the accession of the Vice President to the Presidency, is whether the successor becomes Acting President or President for the remainder of the term. This confusion would be cleared up by this constitutional amendment. It makes separate provision for cases of death, resignation, or removal of the President, on the one hand, and disability on the other.

The desirability of having the office of Vice President filled at all times is obvious. The proposed amendment to the Constitution provides a procedure to insure selection of a new Vice President immediately after the former Vice President becomes President. It is a procedure that has the advantage of providing the new President with a Vice President with whom he can work harmoniously, yet it gives the people a voice in his selection through their elected Members of the Senate and the House.

Section 3 of House Joint Resolution 219 sets up a procedure by which a President may declare his own inability. It removes confusion as to whether the Vice President is Acting President or President, and thereby makes it easier for a President to make the crucial decision as to whether he himself is able or not able to continue the exercise of his duties. It also bolsters the Vice President in the public mind if a President indicates his trust in him by declaring his own inability in writing.
But there are other circumstances that might prevent a President from declaring his own inability. A stroke, a comma, or mental disability might mean that a President could not communicate to others a declaration of inability. Or he might refuse to acknowledge such a condition. Section 4 provides a logical, safeguarded procedure to deal with such circumstances.

But suppose a President recovers. When does he resume his duties? Section 5 provides the procedure and it also averts a situation in which a President might want to resume his duties when he was not really capable of doing so. In this case, appropriately, the ultimate responsibility rests with the Congress.

But suppose that there were no Vice President and, as determined by existing public law, either the Speaker of the House of Representatives, or the President pro tempore of the Senate were Acting President, there would be no Vice President to act under the provisions of section 5. Because of this possibility, I would suggest a slight revision of section 5. It should provide that whenever a President, desirous of resuming his duties, notifies Congress in writing that he inability exists, he shall resume his duties unless the Vice President "or other Acting President" (adding those words in quotes), with the written concurrence of executive department heads, declares the President unable to discharge his duties. Then, if the Congress, by a two-thirds vote of both Houses, determined the President unable to resume his duties, the Vice President "or other Acting President" (again adding the words in quotes) would continue to discharge those duties.

Mr. Chairman, I reiterate my belief that it is imperative we act now to resolve the uncertainties of existing law dealing with presidential succession and disability. This constitutional amendment would, in my view, deal effectively with the problem.

The Chairman. The committee is adjourned until Tuesday at 10 o'clock.

(The following matter was received for the record:)


Hon. Emanuel Celler, Cannon House Office Building,

Dear Chairman Celler: I appreciate your invitation to testify before the committee on House Joint Resolution 224. As I assume you have a long list of witnesses, I do not intend to take up the time of the committee. You may simply put me on record as favoring any solution which may be worked out to the problem of succession to the Presidency.

I believe it is high time that some change is made in our previous haphazard system of placing the highest responsibility in our Government in the hands of any individual, and therefore lend my total support to this resolution.

With every kind regard, I am Sincerely yours,

John H. Dent, Member of Congress.

Statement of Hon. Edward J. Derwinski, of Illinois, Before House Judiciary Committee in Support of H.R. 3702, Providing for Presidential Inability

Mr. Chairman, the bill which I have introduced in this session of Congress (H.R. 3702) to provide for the case of inability of the President or Vice President or interim successor is, I believe, a nonpartisan solution to a problem of grave national stature, with which the public is seriously concerned. It is a simple solution to the problem which, in my opinion, cannot wait for the adoption of a constitutional amendment.

My bill would create a six-man permanent Commission that on its own motion or on request, may initially determine the existence of a presidential inability, sending a copy of its initial determination of this fact to the Speaker of the House and to the Vice President or person in the position of Vice President. Upon receipt of this copy, the Vice President is directed to assume the powers and duties of the office, whereupon the House, by majority vote, refers the matter to the Senate for final determination by two-thirds vote. Failure of either the House or the Senate to so determine ends the matter, but if the Senate so determines, the Vice President continues to perform the powers and
duties of the office for either the remainder of the presidential term or until the Senate determines the inability to have ended, whichever occurs first.

Our present President has suffered at least one major heart attack, and President Eisenhower had periods of inability for the same and other reasons. I realize there are numerous proposals before your committee on this subject and that a matter of this technical and possibly explosive nature deserves the fullest consideration in order to arrive at the most practical solution. I am confident that this committee will give this matter thorough attention and provide the most constructive solution to the problem.

**Statement of Hon. Abraham J. Multer (Democrat, of New York), in Support of H.R. 830, To Provide a Method for Determining Presidential Disability, and for Other Purposes**

Mr. Chairman, I am pleased to share with this distinguished committee my views on the formulation of legislation to secure continuity and stability of executive leadership in the event of presidential disability.

Mr. Chairman, ever since the Philadelphia Convention in 1787, many practitioners and students of government have been concerned about the ambiguity of one word in article II of our Constitution. Article II, section 1, clause 5 states, in part, that, "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 * * *." The central word of concern in this clause is the word, "inability." The earliest concern about the meaning of the word was expressed at the Constitutional Convention, when Delegate John Dickinson, of Delaware, contending that the word was "too vague," appropriately asked: "What is the extent of the term 'disability' and who is to be the judge of it?" Today—almost 178 years later—this committee meets to raise the same question and to attempt to resolve the same fundamental problems which it implies. The only difference is that, today, the urgency for a sound solution is made more manifest by reason of critical events in the American experience.

Let us take a look at some of these events. There are two of an especially "classical" nature. The first event evolved out of the circumstances in the aftermath of the shooting of President James A. Garfield. Garfield was cut down by an assassin's bullet on July 2, 1881, and lay stricken for a period of 80 days before death finally came on September 19. Shortly after Garfield was wounded, many in Government—including some of Garfield's Cabinet—urged Vice President Chester A. Arthur to assume the powers and duties of the Presidency; but these urgings sparked a controversy which centered on the question of whether the assumption of these responsibilities implied also the assumption of the office itself. Some held that if Arthur assumed these powers, he would in fact become President; and that Garfield would be unable to regain office if he subsequently recovered. Because of the allegedly doubtful legality of taking over the functions of the Presidency when the President was alive, plus the fear of creating the impression of being a usurper, Arthur refused to act.

Another event, with somewhat parallel circumstances and implications, took place in 1919-21 with the disability of Woodrow Wilson. During the last 18 months of his second administration, Wilson suffered two strokes and was left generally unable, physically and mentally, to discharge the functions of his office. Vice President Thomas R. Marshall was urged to assume the powers and duties of the office, but troubled by the same doubts that assailed Chester Arthur nearly 40 years before, he refused to act. Once again, the question loomed large: "Is the assumption of the powers and duties of the office of President tantamount to the assumption of the office itself?"

This vexatious question was raised once more in the last decade when President Eisenhower suffered illnesses in 1955, 1956, and 1957. I need not document the circumstances of these occasions, for we can all recall the danger that can be sensed when a President is incapacitated, particularly in the nuclear age. After his last ailment, President Eisenhower and Vice President Nixon made an agreement with respect to presidential disability. This kind of understanding has been repeated in the two succeeding administrations. Such arrangements governing the transfer of power in the event of the unexpected raise serious questions of a constitutional nature which cry out for an answer in this matter of
presidential disability. Article II of the Constitution is unmistakably clear in its intent:

"* * * the Congress may by law provide for the case of * * * 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 should be elected." The Constitution does not tell us how to determine presidential disability; nor does it tell us how to return the powers and duties of the office to the President after his disability. But this great document did make it incumbent upon future lawmakers to grapple with and solve this problem.

Let us therefore act with dispatch in this session of Congress. Let us act for two reasons: (1) so that there will be no question as to the exact nature of the transfer of power; and (2) so that the decision regarding this transfer will be judicious and circumspect.

I was delighted to see that the President, in a recent message to Congress, urged action in this matter of presidential disability by calling for a constitutional amendment. In this message, he stressed that, while "we are prepared for the possibility of a President's death, we are all but defenseless against the probability of a President's incapacity by injury, illness, senility, or other affliction." I could not agree more with this observation. Reacting in the same way to this deficiency in our system of Government, I introduced on January 4 of this session a bill—H.R. 830—to remedy this problem. I submit that this bill would give effect to the goals enunciated in the President's message, and I, therefore, urge its consideration.

Basically, H.R. 830 provides a method for determining presidential inability.

First, a simple majority of the House of Representatives would request the Senate, in the form of a resolution, to determine whether the President is unable to discharge his responsibilities. Upon adoption of the resolution, it would be forwarded to the Chief Justice of the Supreme Court, who would immediately convene the Senate in a special session for the purpose of determining whether the President was disabled.

Second, if two-thirds of the Senators present and voting determine that the President is unable to discharge his responsibilities, the Senate would, by a resolution of two-thirds of those present and voting, direct the Vice President to serve as Acting President for the duration of the period that the President is disabled.

Implicit in this method of determination is the idea that the Vice President would act as President during the disability period; he would not be President. We could thus eliminate the problem faced by Vice Presidents Chester Arthur and Thomas Marshall, who feared that discharging the powers and duties of the Presidency implied irrevocable assumption of the office.

This bill also provides a solution to another question that has long been asked: How does the President go about regaining his office once he has recovered from his disability?

First, a majority of those present and voting in either House of Congress would adopt a resolution directing the Chief Justice of the Supreme Court to convene a special session of the Senate. The purpose of this Senate session would be to consider revoking its previous determination of presidential disability.

Second, if two-thirds of the Senators present and voting determine that the President is able to discharge his responsibilities, the Senate would declare, by a resolution adopted by two-thirds of those present and voting, that the powers and duties of the office of the President are restored to the President.

Mr. Chairman, when an amendment to the Constitution is under discussion, utmost caution must be exercised with respect to its language and intent. This responsibility demands insight and foresight of a nature possessed by those who met in Philadelphia to draw up the law of the land many years ago.

I urge that the proposed amendment under consideration anticipate the needs of future generations. For this reason, I should like to point to another facet of H.R. 830, specifically that portion which deals with the disability of the Vice President, or any other individual acting as President.

Certainly, the Vice President is just as mortal a man as is the President. He is generally subject to the same illnesses which could afflict a President. Appropriate steps should therefore be taken to protect this Nation in the event of the disability of a Vice President, or any other individual who acts as
President. In H.R. 836, I suggest that the methods of determining this disability and restoring the powers and duties of the Presidency be the same as those applying to the President.

Let us not be incomplete in our efforts to assure proper presidential leadership. History warns us that since 1841 a total of eight Vice Presidents have had to assume the powers and duties of the Presidency after the death of the President. I strongly urge that we include in any constitutional amendment a provision governing the transfer of power to another who would act as President in the event that a Vice President becomes disabled while discharging the duties of the office.

The objective of H.R. 836 is unquestionably in accord with that enunciated in the President’s recent message. Above all, however, I strongly recommend that pertinent and realistic improvements be made in this matter of disability. Without improvements we are a horse-and-buggy government in the jet age.

(Whereupon, at 2:20 p.m., the committee adjourned, to reconvene at 10 a.m., Tuesday, February 16, 1965.)
TUESDAY, FEBRUARY 16, 1965

HOUSE OF REPRESENTATIVES,

COMMITTEE ON THE JUDICIARY,

WASHINGTON, D.C.

The committee met at 10 a.m., pursuant to adjournment, in room 346, Cannon Building, Hon. Frank Chelf presiding.

Present: Representatives Celler, Chelf, St. Onge, Hungate, Tenzer, Conyers, Grider, Gilbert, Poff, Moore, Lindsay, MacGregor, Mathias, Hutchinson, and McClory.

Also present: William R. Foley, general counsel; and William H. Copenhaver, associate counsel.

Mr. Chelf (presiding). We are a little late, so I guess we had better get with it.

The first witness scheduled this morning is the Honorable Robert T. Stafford, Representative from Vermont, then the Honorable Don Fuqua, of Florida.

STATEMENT OF HON. DON FUQUA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Fuqua. Mr. Chairman and members of the committee, I want to thank you for the opportunity to appear before the Committee on the Judiciary this morning in behalf of the resolution that I have introduced, House Joint Resolution 250, which is a companion measure to those introduced by the chairman of this committee and others proposing an amendment to the Constitution of the United States relating to the succession of the Presidency and Vice-Presidency in the case where the President is unable to discharge the powers and duties of his office.

The Constitution of the United States has left unsolved the problem of how the presidential duties and powers are transferred in the event a President becomes incapable of administering the duties of his office. This is particularly true in the event that the President does not understand and realize he has become incapacitated. Study of the problem indicates that there has long been an awareness of the lack of clarification by the Constitution, but, as of this time, it is a matter left unresolved.

Most recently, the assassination of President Kennedy saddened us deeply and also emphasized the importance and the need of a Vice President being in a position to quickly and assuredly take hold of the reins of Government as they fall from the hands of a faltering President.
There is a great urgency at such a time, but it could very well be just as pressing in the event of a President’s incapacity to execute the powers and duties of his office. Our country has been most fortunate to never have experienced national chaos caused by the uncertainty and anxiety of the Nation being without responsible and capable leadership. Not that I would even anticipate there ever being such circumstances, I feel very strongly that there is a great need for clarification in the Constitution of the question at hand. This is so very true in our day when time is of essence to a degree greater than ever before since only the pressing of a mere button can result in hostile conflict that did take days to come about in years gone by.

Our Nation has a unique concentration of power and responsibilities in the office of the President since in most nations these are shared by two or even three officials. The President’s active leadership is most essential to the effective operation of the Government in every respect—domestic affairs, military leadership, foreign affairs, and even a leadership for Congress to perform its own role properly. Therefore, in this light, every effort toward bringing about the smoothest type of transition with as little uninterrupted exercise as possible of presidential powers and duties is most desirable and greatly needed.

In the effort to amend the Constitution for clarification of the provisions relating to succession to the Presidency and delegation of the responsibilities of that office, I introduced House Joint Resolution 250 and humbly request that you give it and the provisions set forth in it favorable consideration.

In giving my support to such an amendment to our Constitution, I feel it is most important to emphasize my belief that in instances where the Vice President would have to carry out the provisions of the proposed amendment, it is most important that congressional approval serve as a check and symbolize popular participation and for establishment of legitimacy of the actions taken. This country has been blessed to not have the overzealous men we have seen in other nations who usurp the rightful leadership of their governments. However, it is always our desire to protect our Nation and its citizens from any actions which would result in a deterioration of the excellent and fine Government established by the forefathers of the Nation.

It is for this reason that I so strongly recommend that whatever resolution is approved by the committee that it provide for this “check and balance” system we know is important to the proper administration of our Government for the good of all concerned.

Mr. Chelf. Thank you very much, Congressman. We very much appreciate your interest not only in your bill, but in the other bills that have been introduced.

Are there any questions, gentlemen?

Mr. Poff?

Mr. Poff. Do I understand that your bill is identical to House Joint Resolution 1?

Mr. Foyda. Yes; that is my understanding.

Mr. Poff. Now, as I understand the fifth section of House Joint Resolution 1, when the President believes that his disability has ceased, he may resume the Presidency upon transmittal to Congress of a written declaration to that effect, and he will resume the Presi-
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dency unless within a 2-day period the Vice President and majority of the Cabinet, or such other body as Congress may appoint, challenges the President's decision to return, in which event Congress can act on the challenge.

If it upholds the challenge by two-thirds vote, then the Vice President continues to discharge the powers and duties of the office.

Now, has the gentleman considered what might happen if Congress delayed acting on the Vice President's challenge?

Mr. Fuqua. Let me say to the distinguished gentleman from Virginia, whose knowledge of constitutional law I regard very highly—

Mr. Pooff. If I may interrupt, I reciprocate that statement.

Mr. Fuqua. I recognize, and I understand that this has been a question that has come before this committee, and that maybe the word "immediately" should be inserted. Let me say that if in the judgment of this committee they felt this was necessary, I would certainly not object. I recognize in writing constitutional amendments that maybe we can't be as specific as we can in writing statutory acts. I would not object to language that would have the effect to immediately summon Congress into session, but I can see some problems that might occur if Congress were not in session at the time and had to be called back.

However, this country through the years has worked on somewhat of a harmonious relationship in matters as great as this, and I feel that Congress would not hesitate to come back into session in time of such an emergency.

Mr. Pooff. I might state to the gentleman that the Senate Judiciary Committee has changed the language to read "immediately proceed to decide." I am not certain that that clarifies the situation greatly, but I have suggested the possibility of imposing a time limit within which the Congress should.

My bill is alike in all particulars except that the Congress would be instructed to act within a 10-day period on the Vice President's challenge. If it acted and upheld the challenge, then the Vice President would continue to discharge the duties of the office. If it failed to uphold that challenge, then the President would resume the power and duties of the office, and if the Congress failed to act within a 10-day period, the President would resume the discharge of the powers and duties of his office.

Now, I suggest that this approach makes it easy for the Congress to uphold the powers of the President without giving a positive offense to the Vice President merely by failing to act at all within a 10-day period.

I also suggest that written in that frame, the language imposes upon the Vice President—if he cares to remain in office—the burden of calling Congress back into session if it should not be in session at that time, so I hope the gentleman gives some thought to that alternative, and if he should see fit to do so, maybe lend his endorsement.

Mr. Fuqua. Well, I certainly recognize the gentleman's judgment and also that of the great Judiciary Committee. Not being a lawyer myself, I am in the somewhat awkward position of arguing constitutional law with such authorities as sit on this committee. I certainly would not oppose anything that might clear up this point. I recog-
nize that this could be a problem, that there could be something, suppose with the rules of the Senate as they are now, they engaged in extended debate as they have been known to in the past, and there also could be other delaying tactics should we get involved in this type of situation. I am not sure that the gentleman's 10-day period would correct this, unless it would necessitate the taking of a vote within this time, and then this would necessitate cutting off debate should there be extended debate, and so forth.

I can see if we want to get real specific in anything you pass you can always come up with circumstances that might not be covered in it.

Mr. Poff. Well, I appreciate what the gentleman has said, and yet I suggest that cloture would be imposed in the Senate by precisely the same vote as required to uphold the Vice President's challenge.

I thank the gentleman.

Mr. Chief. Do any other members care to question?

Mr. MacGregor. By the fact you see fit to introduce a constitutional amendment, you feel the problem should be attacked by the amendment route rather than by the statutory route.

Mr. Fruha. Very definitely. I feel our Founding Fathers, not realizing some of the complications that could result—as I said in my testimony, I think this country has been blessed that we have not had a chaotic situation exist that could leave doubt and uncertainty to who was ruler of this country.

I think it is a very serious problem that should be coped with in the best possible way.

I am interested as to the real specifics of my amendment; I am certainly not wedded to any of them that they must be this way or I would oppose the bill.

I think very constructive suggestions have been made this morning, and I think this committee is going to give all realms of thought on this matter their deliberate consideration.

Mr. MacGregor. Would it be your feeling that the statutory approach, lending itself more readily to change from time to time by the Congress, certainly more readily than the constitutional approach, would make the statutory approach less attractive than the constitutional amendment approach?

Mr. Fruha. I certainly feel that way. I think there might be certain implementations of the amendment by statute, but I think we should get something in the Constitution, rather than have the statute come up at some time when we do have a crises and with emotionalism and anxiety we might pass something we regret later on. I think this is a serious problem, and I think it should be dealt with by the constitutional amendment approach.

Mr. MacGregor. Thank you, Congressman.

Mr. Chief. Mr. Hungate.

Mr. Hungate. You favor, I take it, the two-thirds vote to override the President's declaration that he is again able as opposed to a majority vote?

Mr. Fruha. I think this should remain in the bill, and I think that this is a question that I hope we never get confronted with, as is presented in section 5, but I think it should be clear rather than having 51 percent in favor of something that we definitely need two-
thirds in favor. We must have support for whoever is in power in this particular instance, and I think the Members of Congress will acquaint themselves with the facts as they see them, and I think it should be a two-thirds vote.

Mr. Hungate. So if 65 percent found him disabled, he would still not be disabled?

Mr. Fuqua. Well, we are getting into picayune figures right now. Also if 49 percent, the other way, felt like he was not—I think a two-thirds vote in the Congress, we require for constitutional amendments requiring three-fourths of the States. We are dealing with a serious question that shouldn't be decided by just a simple majority. I think it is a graver question and that it should be decided by a larger group of people.

Mr. Hungate. Thank you.

Mr. Cheift. Are there any other questions?

Mr. Mathias?

Mr. Mathias. I wonder if the gentleman would comment on whether he sees any dangers in the fact, that for the first time we depart from the democratic principle that the Vice President of the Republic shall be elected, and instead replace the choice in the hands of the President, which is contrary to all the precedents in our history.

Mr. Fuqua. I recognize the gentleman's concern, and I somewhat share it, but I don't know of any other method that we could go about this. We asked for the President to nominate, then it is confirmed by a majority of the Congress elected and responsible to the people. I don't think it would be quite fair, and it would be time consuming to try to hold a national election for the single purpose of electing a Vice President. We are all aware of the increased cost of campaigning, and where both parties have to get together and hold a convention and make a selection.

In general practice in the past in most conventions, the two most recent political party conventions, I think it is generally assumed that the nominee of the party decided who would be his running mate, and even though they both did have to go to the electorate, I don't think we are really departing as much from precedent as we might think we are.

Mr. Mathias. Reserving that point for just a moment, let me suggest that the Constitution today provides that when there is a vacancy in the Presidency or Vice-Presidency by failure to obtain a majority, the House of Representatives proceeds to elect, so that we do have a precedent in the Constitution for an election by the Members of Congress as being the nearest thing to a full-fledged national election.

Now, do you feel that this method of providing for a vacancy would be appropriate in this circumstance?

Mr. Fuqua. Well, I think certainly the President in power I assume would select someone from his party. Then if you get into the situation where the Congress was controlled by the opposition party, as we have had in recent years, then this could complicate matters even more so, so I think this gives more stability and continuity to the vice-presidential office by having the President selecting. He still has to go to the Congress, and Congress does not have to vote to approve him
if they don’t think he is the man best qualified for the job, so we still have recourse in the Congress, and I think are still exercising our constitutional responsibilities.

Mr. Mathias. You and I were both here in the last Congress when we lived through the very unhappy and tragic days of November of 1963.

Do you really believe that any request that had been made by President Johnson in the shadow of that tragedy would have been refused by the Congress? In other words, do you think the Congress is going to be unduly critical or even reasonably critical of the President’s choice in a matter of this sort if it is exercised during a period of tremendous national stress?

The same would be true during a period of wartime, or during some crisis in the Nation’s history which leads the emotions of the people and the emotions of the Congress to consolidate so completely behind the national leader that his word becomes law.

Mr. Fuqua. Well, let me say to the distinguished gentleman that I recognize that there is probably strong feeling in support of a President during times of national emergency. However, there is provided in section 2 the possibility that Congress does have the right—whether they exercise this right or not—to not confirm the nominee of the President. If we want to be a rubber stamp, that is our privilege, but we do have the right not to be a rubber stamp.

Mr. Mathias. Well, isn’t the question here not the privilege of the Congress to make mistakes, but the duty of Congress sitting here in a moment of relative national calm to provide against mistakes, and the duty of this committee to examine all these possibilities?

I just wondered if you agreed that there was such a possibility.

Mr. Fuqua. There is such a possibility, and I can think of a number of individuals—relating to this same experience—where possibly, if President Johnson had nominated them, they might have been turned down by the Congress.

I am sure that anybody holding that high office would certainly use good judgment and select someone they thought acceptable to the Congress, but I could name many individuals who would have been rejected by the Congress should he have decided to select them.

Mr. Mathias. I thank the gentleman. I know that the gentleman understands that my questions are not directed at the offering that he has made here today, but the necessity I believe exists that this committee should examine very fully all aspects of a very serious national problem.

Mr. Chief. Congressman, let me say this to you, sir, that for a man that isn’t an attorney you have made a very brilliant presentation and one that I think anybody can understand.

Mr. Fuqua. Thank you, sir.

Mr. Chief. Are there any other questions of the witness?

Mr. Conyers. May I ask this one question of the distinguished gentleman?

Mr. Chief. Mr. Conyers.

Mr. Conyers. Would you have any objection to a method that would deal with this problem by statute rather than constitutional amendment, if it embodied the same substantive proposals as found in your resolution?
Mr. FUQUA. Let me say to the gentleman from Michigan that I think this is a serious problem that should be dealt with. We have been blessed by not having some events happen that I think could have happened and I visualize could have happened.

I think the best approach is by a constitutional amendment. However, if it could be resolved by statute, then I would be interested in seeing what the statute did contain. As we are well aware, statutes can be changed within a Congress the same way as constitutional amendments, but it is a little longer route by constitutional amendment, and something a little more permanent and definite than by statute. I think a constitutional amendment is the best approach. This is my opinion. I would like to look at a statute before I gave any affirmative support.

It is a serious problem that should be dealt with, and I think the best way to do it is through a constitutional amendment.

Mr. CONYERS. Thank you.

Mr. CHIEFLY. Are there any additional questions?

Thank you, Congressman Fuqua.

Mr. POFF. Mr. Chairman.

Mr. CHIEFLY. Yes.

Mr. POFF. The gentleman from Vermont, Mr. Stafford, scheduled to be heard earlier, is absent on official business. May I request that his statement be inserted in the record at this point?

Mr. CHIEFLY. Without objection, it will be so ordered.

(The statement is as follows:)

STATEMENT OF HON. ROBERT T. STAFFORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VERMONT, ON PRESIDENTIAL DISABILITY AND SUCCESSION

The legislation which I have introduced (H.J. Res. 248) is identical with other measures now before you on the subject of providing for a constitutional amendment pertaining to presidential disability and succession.

I do not say the methods provided in this particular resolution are the only ones which should be considered. But I feel strongly that immediate consideration must be given to this question and action must be taken by this Congress.

It seems to me there has been enough talk about the lack of provisions in our Constitution to provide this great country continuity of leadership in the event of presidential death, resignation, or disability. It is time we acted to do something about this void.

After study of all the various proposals which have put forth on this subject, it is my feeling that the resolution which I have introduced provides the best approach.

The important thing, however, as I said, is to get action and I hope this committee will give us the opportunity to vote on this matter on the floor of the House. Thank you.

Mr. CHIEFLY. Mr. Martin Taylor, Esq., chairman of the Committee on Federal Constitution of the New York State Bar Association.

I will call on my distinguished colleague from New York, Mr. Lindsay, to introduce him.

Mr. LINDSAY. Mr. Chairman and members of the committee, it is indeed a pleasure to have before the committee my constituent, Mr. Martin Taylor, chairman of the Committee on Federal Constitution of the New York State Bar Association. I just wish to say that Mr. Taylor is one of the most distinguished lawyers that we have in New York State. His reputation is of the highest, and his knowledge of constitutional law is well known throughout our country.
Mr. Taylor has testified four times before the Senate on this subject which we are considering, and he has been a member of the bar for 52 years.

Thank you, Mr. Chairman.

Mr. CHEIRU. Thank you, Mr. Lindsay.

Proceed, Mr. Taylor, if you please, sir.

STATEMENT OF MARTIN TAYLOR, ESQ., CHAIRMAN, COMMITTEE ON FEDERAL CONSTITUTION, NEW YORK STATE BAR ASSOCIATION

Mr. TAYLOR. Well, after that introduction, I am afraid to expose my ignorance.

The CHAIRMAN. Have you a printed statement, Mr. Taylor?

Mr. TAYLOR. No; I haven't.

This committee, since 1956, has been considering this question. On the whole, we have taken the position that it should be done by a broad general statement in accordance with the former constitutional practice.

The CHAIRMAN. May I ask you to raise your voice a little bit? It is rather hard to hear you.

Mr. TAYLOR. Surely.

The basic theory is that the implementation or the detail should be contained in an act of Congress, and that the fundamental power should be stated in very simple terms.

I quote, in support of that and not just expressing my own view, from the very first hearings on what was then 139 before the Senate, a very brief statement which was quoted from John Marshall. He said, in substance, that detail should not be in the text of the Constitution.

At the same hearing, the Deputy, now Attorney General, stated the same thing. He said implementation is a matter for act of Congress; detail should not be in the text of the Constitution, and he added the further thought that if for any reason it subsequently turned out to be not the best method of doing it, or even a debatable method of doing it—as, for example, in the succession law which has been changed—that it was better not to phrase the detailed terms in the text of the Constitution.

To the same effect, and at the same hearing, Mr. Powell, then president-elect and now president of the American Bar Association, in substance made the same point.

I suggest it to this committee, as a matter of policy for you. All a committee can do is make suggestions as to at least their view on a question of constitutional law.

If I might go back for just a second, I forgot to speak of one thing that I meant to. House Joint Resolution 1 has two things in it. One is the provision for filling a vacancy in the Vice-Presidency. I think there has been pretty general approval of that idea, but I think there are one or two points about it that perhaps have not been wholly explored.

It doesn't seem to cover the period between election and inauguration. Since it is designed to provide for emergency, why not cover the whole period of emergency.

It speaks of a vacancy in the office. I am not sure. Perhaps someone could tell me what that means.
Then the third point about it is it couldn't be equally applied to the Vice President, or rather, to put it the other way, let's suppose that the President were disabled and the Vice President is then performing the duties of the office—not holding the office. Would there in turn be the power to have an alternate?

To go back to the other question, in addition to the expressions of what I call the broad outline theory, I also have the late Senator Kefauver and Keating, who both advocated that idea, and the late Senator Kefauver, as you know—and especially the chairman of this committee who worked with him on trust matters—was an extremely experienced lawyer, and he eventually came to that idea that it should be in the very simplest form.

Now, at the later hearing in March 1964, Mr. Katzenbach and Mr. Powell advocated what was Senate Joint Resolution 1, but they did not do it on the ground that they had changed their idea as to the fundamental way to do it; they did it on the ground of expediency, that since 1787 until now nothing has been done, it is better to do this.

But I think the argument about that is that since we have waited so long, isn't it better to do it in accordance with what has been heretofore the accepted constitutional practice?

Now, to take just a minute to expand that a little bit to show what has taken place in the past, I am going to read through just a few of these sections of the Constitution. In article 1, the legislative section, section 4, which gives the States the power of fixing the place of election, that has implementation in Congress. Of course the general broad provision at the end, "make all laws necessary and proper," some people have argued is broad enough to cover inability, but whatever it may be, it is in Congress, and of course the end of the very paragraph that we are talking about, the succession provision, is left to Congress, so that it seems logical to say that inability should equally be left to Congress. There is power given, "such regulations as Congress shall make."

In article IV, which governs territories, there is again power to make regulations respecting territories and the quartering of troops—which is perhaps a bit old, but it is still in the manner prescribed by law.

Of course, the 13th amendment as to slavery is left to legislation, and representation, 14th, is legislation, and the suffrage amendment—all of those have implementation left to Congress. The Prohibition Act was left to Congress, the Women's Suffrage Act was left to Congress, and 20th, the terms of President, and so forth, and then finally in the recent District of Columbia, "Congress shall have power."

This proposed amendment now seems to be the only one where the detail is set forth in the text of the Constitution.

Now, on the actual provisions of it, I don't know that a lawyer should be asked to pass on these questions of policy, but these are some ideas that occur as to the actual provisions of it.

In the first place, the whole necessity or the whole purpose of facing this situation is because, among other things, it might need to be done quickly. This doesn't seem to accomplish that.

There are so many steps. In the first place, there is the declaration in writing by the President. Isn't it perfectly obvious that any tribunal, whether the Senate or Congress, would act? Is it necessary to put in the text that the President has to put it in writing? Is it
'thinkable that anyone would ignore a communication from the President who said, "I am not fit to perform my duties?"

Then you get the second step, that the Vice President will. Historically, of course, that is quite different from the functions of the Vice President as they were originally contemplated, and it has been argued that the Vice President is in a difficult position because he may be deterred by reluctance, as was the case of Marshall in the illness of President Wilson, he may be ambitious, but in any case has to make a decision that affects his own position, and certainly if there is conflict between the President and the Vice President, which might be wholly the result of a physical or mental condition—it is not necessarily a criticism, but it might be a fact—then what he has to do is to concur with the majority of the Cabinet, and something similar to that takes place when the President himself or somebody else thinks he is not able to resume the duties. There we go through it again, the President does it, the Vice President with the concurrence of the executive officers, the Cabinet, and then it is even said this must be done within 2 days.

Well, I know of no provision in the Constitution which orders the President or the Vice President or the Cabinet to do anything in 2 days, and I am stressing the point of detail in the Constitution.

Then finally—and I say this with great reluctance to you gentlemen here—"Congress shall immediately decide the issue." Now, there is a question there which I think you will consider as to whether that doesn't violate the principle of the separation of powers. Isn't the determination of the ability of the President to perform an office an executive act? Is that a legislative act? I raise that question.

The CHAIRMAN. Will you yield at that point?

Mr. TAYLOR. Beg pardon?

The CHAIRMAN. Will you yield a moment?

Mr. TAYLOR. Surely.

The CHAIRMAN. There are places in the Constitution where there is directly or indirectly a violation of the separation of powers, particularly where, for example, in the event of some doubt as to the election of the President by the electoral college, the Congress must intervene. That might be deemed violation of the principle of separation of powers.

In the matter of impeachment, where the Congress itself brings indictment and a trial is had in the Senate, that also might be deemed a violation of the separation of powers, so that we have already in the constitution a converging of the two powers—the legislative and the executive.

Mr. TAYLOR. I quite agree. Since you raise the point for discussion, I was conscious that it had been done, whether it wants to be done, or whether it should be done in a rather expanded form.

In impeachment it was necessary because there was no machinery for doing it at all. In other words, Congress, if you please, took the place of prosecuting attorney and raised the issue. Then they had to provide the tribunal to try that issue.

The CHAIRMAN. With all due deference to your views, isn't there some necessity here for action, expeditious action when it is time for us to act, and if this is the practical way of doing it shouldn't we do it even if it does, in a way, violate that separation of powers?
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Mr. TAYLOR. Well, I would answer that by saying that if that is necessary, these other things, the detail of working out are in the text of the Constitution. If it were done by an act of Congress in pursuance of a broad enabling power, then it wouldn't be necessary to do that.

Let's say, for the sake of argument, that an act of Congress simply said the commencement and termination of inability should be made by a majority of the Cabinet. Then you wouldn't need any of that, would you? In other words, there might be a variety of ways, and Congress might do it as a legislative act creating the power to do it, rather than making the decision.

The CHAIRMAN. Do you mean by that we may not need a constitutional amendment?

Mr. TAYLOR. Oh, no, I don't mean that at all. If I can digress for a moment, there has been great disagreement of opinion as to whether an amendment was necessary or not. I think there is a completely practical answer to that. Many people have taken the view that you must have a constitutional amendment, and surely the issue is going to be raised. Therefore, since it is, I think the answer is to have a constitutional amendment.

The CHAIRMAN. I think that was your position when you submitted a statement to this committee in 1957, was it, or 1956?

Mr. TAYLOR. Something like that, that is right. I think that is the practical answer to it, because while a great many professors and students have thought that the general enabling or final clause of the power of Congress are broad enough to do that, you can avoid the whole issue by having the amendment, and it might be raised at a time when it was critical.

The CHAIRMAN. I take it from what I have heard that the thrust of your argument is that we need a constitutional amendment, but we might not bog down the Constitution with so much detail. That is what you are arguing?

Mr. TAYLOR. That is it.

The CHAIRMAN. And the detail might be filled in by congressional act after the Constitution is amended?

Mr. TAYLOR. Well, that has been discussed both ways. There are suggestions made that an act of Congress should be passed at the same time, or rather the steps taken to do it. The arguments about that fall into two different categories. The one theory is that if you have the machinery created now, if you have an act of Congress, you on the one hand have difficulty getting ratification of the amendment because some people in different States might not like the implementation of Congress, or the other view is that if it were just left to Congress without specification at this time that probably that would be more likely to succeed in terms of getting ratification. That is a political question that you are much more skillful about than I am.

Mr. CHEFF. Do you have any other questions, Mr. Celler?

The CHAIRMAN. No, that is all right.

Mr. CHEFF. Are there any other questions?

Mr. Poff? Mr. Chairman, the distinguished witness is suggesting that there were omissions and that these might be supplied.
Doesn't this run counter to your first suggestion that you don't want to load the Constitution down with details?
I suggest it might require some rather elaborate language to cover all of the possible cases that might result between the time of the election and the inauguration date.
In addition, we must think of the possibility of disability of either or both the President-elect and the Vice-President-elect in that period.

Mr. Taylor. Yes.

Mr. Poff. If we are going to deal with one case, we ought to deal with all if we pursue your suggestion to its logical extremity, and I suggest this would indeed complicate and enlarge the language.

Mr. Taylor. It wouldn't be complicated if you just cover the one thing with the period between election and inauguration.

Mr. Poff. I wanted to explore with you one other point that you raised, and I am glad you raised it because I think it ought to be explored for purposes of legislative history.

You asked if anyone could define the word "vacancy," and that word ought to be very carefully and precisely defined during the course of these hearings.

Mr. Taylor. I agree.

Mr. Poff. Now, I am one who does not believe that the word "vacancy" should include a state of permanent disability. There are legal scholars who feel otherwise. For my own purposes as an author of one of the bills, I intend the word "vacancy" as used in that bill to include the death of the President, or the impeachment of the President, or the resignation of the President, and specifically not to include permanent disability of the Vice President.

Now, however, I would like to discover what the gentleman had in mind.

Query: Would a vacancy occur if the Vice President's whereabouts became unknown for a period of time?

Given the case of the Vice President flying to London in an airplane and the airplane suddenly disappearing as airplanes sometimes do, would that constitute a vacancy?

Here I think you reach the point of what is reasonable and what is not reasonable. I do not believe that a responsible President would assume that his whereabouts being unknown for a period of one day or two days or three days would constitute a vacancy, but when you reach the point of a month, two months, or three months, then the question does arise.

Mr. Cellar. Suppose he is captured by an enemy—God forbid—and he is held incommunicado for a lengthy period of time?

Mr. Poff. A very good point, and it has precedence in history. Mr. Booth, you know, first intended not to assassinate President Lincoln, but to kidnap him, and indeed made an attempt to do so, which failed.

Mr. Taylor. Isn't it answered in the text? "Vacancy in the office."

Now, I think all of these proposals have been made over the years. In the case of inability it is not the office that is vacant. It is the power and duties that are taken over, not the office. Doesn't that answer your own question?

Mr. Poff. Well, it does partly, but I wonder if the gentleman has any view on the case that the chairman put and the case that I put. Would a period of a month during which the whereabouts of the Vice President were unknown constitute a vacancy?
Mr. Taylor. In other words, if that could be filled, it would be drafting something such as saying if the Vice President was, what, unable to perform the duties of the President? I don't know how you would phrase that.

Mr. Poff. I don't either. I just raise the question so it can be given some thought. I might say I appreciate the gentleman's testimony.

The Chairman. Doesn't it boil down to this, that you just can't possibly write a perfect constitutional amendment here?

Mr. Taylor. That we are all agreed about.

The Chairman. It just can't be done. Frankly, we have been wrestling with this thing not only in this session, but the last session, and it goes back for many years. We have had so much trouble with it that at one time we just threw up our hands in despair.

At the expense of repetition, we had sent to quite a number of political scientists a series of questions so that we could get some enlightenment on this subject from those who had the expertise, and we were more hopelessly confused after we got the answers than before we sent out the questionnaires, because there was utter lack of unanimity, and complete variety of opinions of these experts.

If the experts can't agree, I don't know how we can fashion that which would be as perfect as, shall we say, the Ten Commandments. I don't know how we can do it.

Mr. Taylor. Why don't you go back? Doesn't that drive you back to the thing that if you do it by act of Congress you have the opportunity to change it if it turns out to be impractical?

The Chairman. There is a lot in what you say.

Mr. Taylor. It doesn't solve the problems but offers a formula to try to solve them.

The Chairman. Many argue that way.

Mr. Taylor. Supposing, for example, the Succession Act had been written in the text of the Constitution, with the variety of alternatives, with different steps, where you have seen in the last few years wide difference of opinion as to the Succession Act. Well, you would have the power to change it. Why not have it in the case of inability?

The Chairman. We have changed that Succession Act I think about three times in our history.

Mr. Taylor. That is right.

Mr. Chief. Are there any other questions?

Mr. Moore?

Mr. Moore. I have no questions, Mr. Chairman.

Mr. Chief. Mr. Lindsay?

Mr. Lindsay. I will simply express thanks to the distinguished witness for his contribution.

Mr. Chief. Mr. MacGregor?

Mr. MacGregor. No questions.

Mr. Chief. Mr. Mathias?

Mr. Mathias. No questions.

Mr. Chief. Mr. McClory?

Mr. McClory. I would like to ask the gentleman a few questions. As I understand this proposed amendment, which is in various forms before the committee, it is divided into two parts. One is the subject of the selection of a Vice President in the case of a vacancy
in the office of the Vice President, and the other has to do with the subject of disability.

Would you not say that insofar as the subject of selection of a Vice President in the case of a vacancy in the office of the Vice President, it is not too difficult to phrase that in proper constitutional, brief language.

Mr. Taylor. Yes.

Mr. McClory. The difficulty we encounter is when we get into the subject of disability or inability in which it is necessary to spell out details which occur under those situations, particularly where the disability is not recognized by the President himself. Is that correct?

Mr. Taylor. That is right.

Mr. McClory. Now, has the New York Bar Association taken a formal position on this subject?

Mr. Taylor. Yes. It advocated and has advocated that it should be done by simple amendment, giving Congress the power to make the determination. At the time of the hearings on what was then Senate Joint Resolution 139, we filed a report which I will leave here, in which we said we preferred the simple amendment, but that if something could be drafted along the lines of what was then 139 that the committee would not oppose it.

Mr. McClory. That was at the last session of the Congress?

Mr. Taylor. Yes; the last session.

Mr. McClory. I have been going through the various resolutions and bills in this session, and I don't think there is any bill in the present Congress which embodies the recommendations you are suggesting.

Mr. Taylor. I think that is right.

Mr. McClory. My attention has been drawn to a proposed constitutional amendment recommended by the New York Chamber of Commerce. Are you familiar with that language?

Mr. Taylor. No; what does that say?

Mr. McClory. If you don't mind, I will read it; it is three very short paragraphs.

Amend the Constitution to provide:

1. That the Vice President in case of the inability of the President shall succeed to the powers and duties of the office of President but not to the office itself.

2. That the determination of the commencement and termination of such presidential inability shall be as the Congress by law shall provide.

3. When a vacancy occurs in the office of the Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of the Congress meeting in joint session, shall then become Vice President for the unexpired term.

Mr. Taylor. Would you read the part about inability again?

Mr. McClory. That any determination of the commencement and termination of such presidential inability shall be as the Congress by law shall provide.

Mr. Taylor. That I am familiar with because I wrote it.

Mr. McClory. That, in substance, is the form of the constitutional amendment.

Mr. Taylor. That is right.

Mr. McClory. Not the precise language, but the form and substance that you would recommend to the committee for recommendation to the Congress.
MR. TAYLOR. It just happens I drafted it.

MR. MCCLORY. I think that your position is echoed by the minority leader of the Senate, Senator Dirksen.

MR. TAYLOR. That was recently so stated in the newspapers.

MR. MCCLORY. I am inclined to the same point of view as you have expressed here to the committee.

MR. TAYLOR. Up until last year it was approved by the American Bar Association, the City bar and State bar, Senator Keating, and Senator Kefauver, and now I see in the paper Senator Dirksen.

The CHAIRMAN. Will the gentleman yield?

Of course, House Joint Resolution 1 has been approved by the American Bar Association.

MR. TAYLOR. Yes; I understand that, but that reverses the position that it took last year.

MR. MCCLORY. Thank you, Mr. Chairman. I have no further questions.

MR. CHELF. Mr. Gilbert?

MR. GILBERT. I have no questions; thank you.

MR. CHELF. Mr. Hungate?

MR. HUNGATE. Mr. Taylor, do I understand that you do favor a constitutional amendment?

MR. TAYLOR. Oh, yes.

MR. HUNGATE. Which would make clear the power of Congress and you would leave the details to statute.

MR. TAYLOR. That is right.

MR. CHELF. Mr. Tenzer.

MR. TENZER. No questions; thank you.

MR. CHELF. Mr. Grider?

MR. GRIDER. No questions.

MR. CHELF. Thank you, Mr. Taylor. It has been very enlightening. You have been most helpful to the committee. The next witness is scheduled at 2 o'clock this afternoon, so we will recess until 2 o'clock.

(Whereupon, at 11:13 a.m., the committee recessed until 2 p.m. the same day.)

(The following was received for the record:)

NEW YORK STATE BAR ASSOCIATION, COMMITTEE ON FEDERAL CONSTITUTION

Report on proposed constitutional amendments on presidential inability and successor Vice President (S.J. Res. 35 and 139)

The committee has reviewed Senate Joint Resolutions 35 and 139, together with much of the testimony with regard thereto before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary.

The committee is firmly agreed on the following points:

1. It is urgent that there should be an amendment to the Constitution of the United States providing more explicitly for the accession to the office of President by the Vice President in the event of the death, resignation, or removal of the President, and for the accession of the Vice President to the powers and responsibilities only of the President in the event of the President's inability. We consider that the language in Senate Joint Resolutions 35 and 139 with respect to this, is satisfactory.

2. It is urgent that there should be an amendment to the Constitution providing for the selection of a successor Vice President to hold that office whenever that office shall be vacant. With respect to this, the committee agrees in principle with those provisions of Senate Joint Resolution 139 which provide for the appointment of such a successor Vice President by the President by and with the advice and consent of both Houses of Congress. The committee sug-
gests, however, that to accomplish this result, and to take care of certain situations not now covered by paragraphs 1 and 2 of Senate Joint Resolution 130, those paragraphs be revised and proposed as a constitutional amendment in the form set forth in the appendix to this report.

3. There is an urgent necessity for a constitutional amendment which shall provide for the determination of the inability of the President to act and for the steps to be taken in the event that this should occur.

The committee believes it would be wiser to follow Senate Joint Resolution 25, which in effect delegates to the Congress the responsibility for adopting legislation to deal with this problem, than to proceed, as in Senate Joint Resolution 130, to set forth in precise detail the method of determining inability and the provision for dealing with it. In support of the flexible delegation of authority set forth in Senate Joint Resolution 25, the committee cites (a) its belief that sound constitutional practice calls for broad enabling powers and simplicity in constitutional provisions, leaving the detail to implementation by the legislative branch, and (b) its concern lest setting forth the detail in the proposed amendment will, in fact, create rigidities which may not be adapted to the precise situation when it arises and can only be corrected by a further constitutional amendment.

The committee is unanimous in its conviction as to the urgency that the Constitution be amended so that the dangerous uncertainties with respect to the Presidency which now exist shall be ended. The committee believes that we cannot afford to continue to live in the modern world with constitutional machinery on vital points full of so many uncertainties and gaps. In the event that the recommended or any other comparable procedure should be agreed upon by the Subcommittee of the Judiciary Committee for the determining of the inability of the President to act and for the steps to be taken in the event that this should occur, or if any such procedure should be later adopted by the Congress, the committee will give the decision its wholehearted support. The committee of course expects to be open-minded in its consideration of any such decision, even though varying from this committee's suggestions, in the earnest hope that a satisfactory solution to a very critical problem will be found at an early date.

Respectfully submitted,

Martin Taylor, New York City, Chairman; Theodore Pearson, New York City, Secretary; Ernest Angell, New York City; William O. Breed, Jr., New York City; Bruce Bromley, New York City; Porter R. Chandler, New York City; William Tucker Dean, Ithaca; Howard M. Holtzman, New York City; R. Keith Kane, New York City; Randall J. Leboeff, Jr., New York City; Ernest D. Leet, Jamestown; George Lindsay, Jr., New York City; John E. Lockwood, New York City; Henry S. Manley, Strikersville; William L. M. Reese, New York City; William J. Rennert, New York City; Harrison Tweed, New York City; Cornelius W. Wickersham, Jr., New York City.

April 17, 1964.

Appendix

Sections 1 and 2 of the proposed constitutional amendment set forth in Senate Joint Resolution 130 provide as follows:

"SECTION 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. Within a period of thirty days thereafter, the new President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority of those present and voting.

"Sec. 2. In case of the removal of the Vice President from office, or of his death or resignation, the President, within a period of thirty days thereafter, shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting."

While endorsing, as a matter of urgent priority, a constitutional amendment embodying the principles set forth above, the committee believes that it should be redrafted to take care of the following points:

(a) Section 1, as presently drafted, does not cover the situation of the death or failure to qualify of a President-elect, an eventuality which very nearly happened at the time of the attempted assassination of President-elect Franklin
D. Roosevelt. The existing 20th amendment provides that in such a case the Vice-President-elect shall become President. However, such an assumption of office by the Vice-President-elect would not come under either the "removal," "death," or "resignation" of a President as set forth in the first sentence of section 1 of Senate Joint Resolution 139; and a Vice-President-elect thus assuming the Presidency would not be able under Senate Joint Resolution 139, as presently drafted, to nominate a new Vice President.

(b) Section 2 of Senate Joint Resolution 139 likewise does not cover the case where a Vice-President-elect dies or fails to qualify before Inauguration Day. The President should be empowered under such circumstances to nominate a new Vice President.

It is suggested that both of the above eventualities, and possibly others not presently contemplated, should be covered by providing broadly for nomination of a new Vice President whenever that office is vacant.

(d) Sections 1 and 2 of Senate Joint Resolution 139 provides that the nomination of the new Vice President must be made within 30 days. Situations might occur (for example, in case of sudden temporary illness) where the President might fail to make the nomination within 30 days, and a nomination made on the 31st or 32nd day might be claimed to be invalid. The committee believes that it would be preferable not to impose a specific time limitation which might cause such complications.

The committee accordingly suggests a constitutional amendment providing for the appointment of a new Vice President in substantially the following form:

"SECTION 1. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President for the unexpired portion of the then current term.

"SECTION 2. Whenever the office of Vice President is vacant, the President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority vote of those present and voting in each House."

AFTERNOON SESSION

Mr. Chelfy (presiding). The committee will come to order, please. The next witness is Judge Michael A. Musmanno. Judge we will hear first from Mr. Mathias, and then hear from you next.

The Honorable Charles Mathias, a member of the committee representing the great State of Maryland.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Mathias. Mr. Chairman, the opportunity to appear before the Judiciary Committee in support of House Joint Resolution 264 is very much appreciated. The warmth with which I support this resolution proceeds not so much from pride of authorship in House Joint Resolution 264, but rather from the very grave reservations that I feel about House Joint Resolution 1. In explaining the proposal contained in House Joint Resolution 264 I must state my reasons for strongly opposing the provisions of House Joint Resolution 1.

I approach this dual task with some sense of the temerity involved in being critical of a joint resolution offered by the distinguished chairman of the Judiciary Committee, endorsed by the American Bar
Association, and approved by the Judiciary Committee of the U.S. Senate. Such criticism is often dismissed as mere nit-picking. But the dangers that could assail the Republic, if we make an error in judgment in this matter, are so grave that I must speak freely and fully on the doubts that I feel concerning the proposed changes in the Constitution.

I have three basic objections to the succession provisions of House Joint Resolution 1. The first of these is suggested by a comment on the nature of American Government made by the Honorable Robert F. Bradford, former Governor of Massachusetts, who said:

In no other country in the world does the word "citizenship" mean what it means here. The American is a citizen, not a "subject," not a "national," and not a slave of the State. Every American is an individual with rights as an individual proclaimed by the Declaration of Independence to be "unalienable," guaranteed by the Constitution to be secure; rights which he can maintain even against the Government itself.

The happy state of our Nation described by Governor Bradford exists because the Constitution guards against the abuse of power by men and by institutions of government.

Our Constitution is effective in preserving freedom because the Founding Fathers anticipated and provided against the worst that could be expected of men.

The Constitution does not assume that good men will always occupy public office and will always act in accordance with the highest motives. On the contrary, the Founding Fathers examined the possibility that the exact opposite might more frequently be the case.

For example—Benjamin Franklin is quoted by James Madison in his Journal of the Constitutional Convention—June 2, 1787:

Sir, there are two passions which have a powerful influence on the affairs of men. These are ambition and avarice; the love of power, and the love of money. Separately, each of these has great force in prompting men to action; but when united in view of the same object, they have in many minds the most violent effects. Place before the eyes of such men a post of honor, that shall be at the same time a place of profit, and they will move heaven and earth to obtain it. The vast number of such places it is that render the British Government so tempestuous. The struggles for them are the true sources of all those factions, which are perpetually dividing the nation, distracting its councils, hurrying sometimes into fruitless and mischievous wars, and often compelling a submission to dishonorable terms of peace.

The Constitution seeks means to interpose legal safeguards between the weakness, the temptations and the evil of men and the injury they might do the State. We do the same in private life when we ask an honest debtor to execute a mortgage or an honorable man to state his promise or covenant in writing.

By permitting the President to name a Vice President, House Joint Resolution 1 operates on the opposite principle, assuming that a President will always be enlightened and disinterested in naming a Vice President. While this optimism reflects well on the 20th century's opinion of itself in contrast to the pragmatic 18th century estimate of human frailty, it may not be a prudent basis for constitutional law.

Congressional confirmation of a vice-presidential nominee would be only a mild check and, in my judgment, would be a mere formality in a period of national emotional stress. Most of us who were here in the last, dark days of November 1963, would confirm that almost any such request made by President Johnson would have been favor-
ably received by the Congress in our desire to support and stabilize his administration.

Giving the President exclusive power to nominate a Vice President has been justified by a false analogy to the broad discretion allowed a modern presidential nominee to express a preference for his running mate. But a presidential nominee and an incumbent President are very different men—even if they inhabit the same mortal frame—and they may be moved by very different motives. A President, secure in the White House, will have undergone a metamorphosis from his earlier self, the anxious candidate insecurely and temporarily occupying the presidential suite at the Blackstone or the Mark Hopkins during the climax of a national convention.

If the presidential nominee really is allowed a personal choice of running mates, he will seek a candidate to complement his own candidacy and to strengthen the ticket. He will want an attractive, vigorous, and patently able associate. The electability of the vice-presidential candidate is a form of accountability for the head of the ticket. By way of example, recall the probable motives of Senator John F. Kennedy in choosing Lyndon B. Johnson for his running mate and consider whether the same motives would have been decisive with President John F. Kennedy.

The public today is all too ready to impugn the motives of a President dealing with his Vice President. It is hinted that a President is constantly tempted to relegate the Vice President to a subordinate role in political life. In my own recollection these allegations have been made about President Eisenhower, President Kennedy, and President Johnson. If such motives are credible in daily governmental relations, how much more would they be present in the selection of an heir and successor.

Couple this presidential motivation to the provisions of House Joint Resolution 1 with respect to presidential inability and the considerations that might move a President to nominate a respectable, but pallid, Vice President are real enough to demand examination. If the heir-apparent is to gain certain powers of deposition as well as natural succession, a President may indeed hesitate in seeking a vigorous and aggressive Vice President. Such a danger would not have escaped examination by the framers of the Constitution and should be considered by those who propose to amend it.

In contrast, House Joint Resolution 264 would fulfill the commanding necessity of our dangerous age for a secure succession and would meet some of the objections to House Joint Resolution 1.

It provides for an election in the most democratic manner practicable, by the immediate representatives of the people.

It insures harmony in the executive branch by requiring the concurrence of the President in this choice.

Of course, Madison's Journal can be quoted against it also. The founders questioned whether the Legislature should elect the Executive and thereby gain a dominance.

Tuesday, September 4th • • • Mr. Sherman said the object of this clause of the Report of the Committee was to get rid of the ineligibility which was attached to the mode of election by the Legislature, and to render the Executive independent of the Legislature. • • • Mr. Gouverneur Morris said he would give the reasons of the Committee, and his own. The first was the danger of intrigue and faction, if the appointment should be made by the Legislature.
But this objection was swallowed in the 12th amendment and in this case seems less dangerous than the alternatives of House Joint Resolution 1.

It is closer in principle to the concepts of the Constitution and would be safer in practice.

I shall not speak at length on the presidential disability provisions of House Joint Resolution 1. I recognize the desirability of some firm understanding with respect to this matter and I am cognizant of the Attorney General's opinion that only by constitutional amendment can we be sure of universal acceptance of any scheme for the temporary relief of a President from his constitutional duties.

Yet so much depends on the personality of the parties, the practices of this generation and the climate of the time that I would prefer a more flexible arrangement, such as the custom established by President Eisenhower and followed by President Kennedy and President Johnson. But when separated from the President's selection of a Vice President the disability provision of House Joint Resolution 1 is shorn of some of its disquieting features.

At first glance the concept that a Vice President and a Cabinet might use the powers conferred by the disability provisions of House Joint Resolution 1 to intrigue against the President seems too foreign to our system to be of real concern. Yet a reading of American history makes this seem a more present danger than would otherwise be supposed. It is interesting, if unpleasant, to speculate on the uses to which Salmon P. Chase might have put the power to question the competence of Abraham Lincoln. The paralysis in Government that could ensue from a cabal to depose the President could be more damaging to the national welfare than the President's personal disability.

Not the least of such danger is the loss of prestige of the Presidency that could result from an abortive attempt to remove the President. If a Vice President were joined by even a small fraction of the Cabinet in an effort to declare the President incompetent, the news would soon be public property and a dialogue would ensue that could sound like an echo of "You are old, Father William"—I am sure, Mr. Chairman, you remember how that refrain went:

"You are old, Father William," the young man said,
"And your hair has become very white;
And yet you incessantly stand on your head—
Do you think, at your age, it is right?"

"In my youth," Father William replied to his son,
"I feared it might injure the brain;
But now that I'm perfectly sure I have none,
Why, I do it again and again."

If this inability portion of House Joint Resolution 1 is to be embodied in a favorable report by this committee, I hope, at least, Mr. Chairman, that the phrase which is employed, "the heads of the executive departments" will be more accurately defined in the text, and also that the grammatical propriety of referring to a majority of them as "a body" will be given the committee's usual careful consideration.

I thank you, Mr. Chairman.

Mr. Celler. Mr. Celler, have you any questions?

The Chairman. I take it that in the event of inability in the function of the President or the Vice President, you have an election, is that it?
Mr. Mathias. An election by the Congress. This would be in the case of a vacancy, not of disability.

The Chairman. That could likely happen within a short time after a regular election or a short time after an inauguration, and we would then be confronted with the turmoil, excitement, and expense of another election. Is that correct?

Mr. Mathias. No, sir; the election would be held by the Congress. The Congress would elect a Vice President.

The Chairman. I didn't read your bill. I was referring to the statement that is on page 3.

Mr. Mathias (reading):

Provides for election by the most practicable manner by the immediate representatives of the people.

That would be the Member of Congress acting subject to Presidential veto to take care of the situation when there is a President not in harmony with the political views of the majority in Congress.

The Chairman. Do you dismiss rather cavalierly the idea that the President usually selects his running mate prior to election, but you feel he shouldn't have that right, as it were, after the election?

Mr. Mathias. Well, sir, with all due respect I would say I haven't treated that cavalierly. I have treated it, I think, in a practical manner, because you can't properly analogize the position of the President living in the White House, surrounded by all the panoply and power, and who has a different outlook on life, undoubtedly—and history I think sustains this—from the man who has just received the requisite number of votes in a great national convention and who may feel some of the uplift of living in the White House, but he isn't quite there yet and still has the great hurdle to cross—that is, to get the requisite number of votes from the people.

The man he chooses to run with him will be chosen from motives which may be substantially different from those of the incumbent President who is picking his official heir and successor. I think this is a question of human understanding.

Mr. Celler. I apologize for the use of the word "cavalierly." I think I was ill advised.

But suppose you have a Congress with a majority of members of a party different from that of the President, and the Congress would have to elect a Vice President. They might conceivably elect a Vice President of a party different from that of the President.

Mr. Mathias. This undoubtedly is not an easy question, and it is one that we can't brook with any easy answers, but I think that we have occasions within the Congress itself in which minority members are elected to certain positions, positions within the structure of the legislative branch, it is true. I think that experience would dictate that the Congress could rise to this responsibility.

I also believe that we are practical men and, as the distinguished chairman of this committee knows from his long and honorable service here, practical ways of doing things are developed by practical men. Although my service during President Eisenhower's administration was limited to a very brief period, the chairman will recall that there was a practical working arrangement between the majority leadership in the Congress and the White House during the Eisenhower days by which the White House would indicate that certain alternatives were
acceptable, and some were unacceptable, and within that framework usually there was legislative success in discharging the responsibilities of the Government toward the Nation.

I think that this is a much closer analogy to what could happen in electing a new Vice President than by saying that the presidential nominee is the same as the President, and the choice should be the same. I believe that if we were in this kind of a situation where the President was of one party and the majority in Congress was of the other party that the leadership in the Congress would have some informal consultation with the President, and that there would be an understanding and a meeting of the minds as to the unacceptable kind of people whom the President would veto, and that the Congress would make a choice which was good for the country as well as acceptable to the President. But I think the important thing is that the initiative comes from the representatives of the people.

The Chairman. Do you think if the President happened to be a Republican and the majority of Congress were Democrat, even applying the criteria that you mentioned that the Democrats in Congress would elect a Republican?

Mr. Mathias. Well, I think—

The Chairman. Or vice versa?

Mr. Mathias. Or vice versa. I think, of course, they would, because this would be clearly the intent of the amendment which gives the absolute veto on the choice to the President, and I have no doubt that just as the Congress, during the Eisenhower days, accepted certain legislative measures which were identified with the Eisenhower administration, and which had the Republican tag——

The Chairman. You must remember it is a little different when it comes to legislation, when it comes to the personality of the Vice President, because the Vice President conceivably is a potential President, and the party in power might see a means by which they could take over the reins of government if their man should become President.

Mr. Mathias. But there is an analogy that I think is true and which takes into consideration the chairman's thought. The Congress, seeing that it could not have a Democratic Vice President, would elect a Republican Vice President, because that is the only choice left to them.

Mr. Poff. If I understand the line of the chairman's question, what he is really saying is that this proposal, after all, may not be a more democratic form of electing a Vice President. In the first place, whatever under-the-table agreements might be arrived at, the election is going to occur in the Democratic caucus or in the Republican caucus, and that is less than the Congress and certainly it is a minority of the Members of Congress when you consider only the leadership of the Congress acting in concert with the President, so I am inclined to agree with the point the chairman is making that this would not be a more democratic approach.

It would be, I am afraid, in practical application a more autocratic form.

Mr. Mathias. Well, I certainly would disagree very strongly with that point of view, because I think to say to one man; "I give you the authority to nominate your official heir" is more autocratic than to say
to a committee of 5 or 10 or 50 Members of the Congress, however many it may be: "get together as a committee and elect a Vice President."

Mr. Poff. I would agree with the gentleman if the bill did not also provide that both Houses of Congress would have to confirm a nomination made by the President, and while the gentleman dismisses the parallel drawn with the present system of the presidential nominee naming his vice-presidential running mate, I think the analogy is a good one and ought not be dismissed lightly.

I repeat, perhaps the use of the word "autocratic" is inadequate, but I say it would be less democratic in some respects than if the procedure were followed as outlined in the bill before us.

The Chairman. One more question, if I may, and I want to assure the gentleman from Maryland I have the highest respect for his point of view. I know that he has always given grave and careful study to whatever is said.

On page 4 you speak of the unhappy episode between Salmon P. Chase and Abraham Lincoln.

If any mischief could occur, Congress would always have the check-rein because of its power of impeachment, is that not so?

Mr. Mathias. Well, sir, the power of impeachment is there, but it is a limited power. As I recall the words of the Constitution—and I don't have them before me—the power is in case of treason and certain other misdemeanors, high crimes and misdemeanors.

The Chairman. That could mean almost anything. I don't think Andrew Johnson was guilty of any crime or so-called misdemeanors except as that term was defined by Stevens and his cohorts. It is as broad as a barn door, and it is purely political in nature, so that Congress could move in or barge in almost any time it wishes under the guise of so-called high crimes and misdemeanors.

Mr. Mathias. I am happy that in the course of the Republic we have had so little occasion to further define "high crimes and misdemeanors." It would be my feeling, though, that the precedents, such as they are, would scarcely support impeachment on the ground of a disagreement as to the state of health of the President, and this is what this would come right down to.

A man could come in and swear on a stack of Bibles that he felt the President was so unwell as to be unable to discharge the duties of his office. As long as that man kept his own counsel, it would be pretty hard to say he wasn't acting from conscience, and I think it would be difficult to impeach him on this ground.

Mr. Chief. Mr. Poff?

Mr. Poff. Just one or two other questions.

I might say, parenthetically, I hope nothing I said would be interpreted as being critical, because I think the gentleman has made a real contribution to our thinking on the subject, and my repartee was intended to provoke further exploration of it.

Mr. Mathias. I think the gentleman from Virginia knows the high regard I have for his able mind, and I am flattered that he is probing in this way because, if I may say so, this matter has been handled with great speed by the other body.

Mr. Poff. I notice the gentleman didn't use the word "cavalierly."

Mr. Mathias. Not even to the gentleman from Virginia.
Mr. Poff. Seriously, I would like to inquire about your bill, House Joint Resolution 264. I see you use mandatory language, requiring the man who is acting as President to convene the House and the Senate in joint session, but you haven’t indicated any time limit in which this must be done. Do you think that might be a problem?

Mr. Chiefs. It seems that the gentleman has indicated by his language here the person discharging the powers and duties of the President shall have the right to veto any selection made by the House of Representatives and Senate acting in joint session, but such veto must be exercised within 3 days.

He has a limitation on the veto, but, like you, I feel the other seems to be dangling somewhat.

Mr. Mathias. As one of the witnesses said before the committee this morning, it is unwise to load too much detail into the constitutional language. Certainly the implication is that this be done as soon as practicable, but considerations of wartime conditions or difficulties of travel, or whatever the nature of the circumstance might be at that time would affect the time limit, and for that reason I didn’t specify a time.

I would think that there ought to be at least an understanding in the legislative history that the President or the person acting as President would move as promptly as was practicable.

Mr. Poff. As a matter of academic interest, why did you use the time limit of 3 days instead of the customary 10-day limit on veto?

Mr. Mathias. Well, this is a matter of some urgency, and I thought probably there would have been a considerable amount of consideration and discussion by the time Congress acted. I think the gentleman from Virginia used the term “under the table.” I don’t think it would necessarily be under the table, but there would be a good deal of public discussion going on about the thing and the President, after all, isn’t going to have to mull this over for an indefinite amount of time. The 10-day limit for legislative vetoes comprehends the necessity for some research on the part of the executive branch and the pressure of business and the pile up of a large number of bills, all things which are not present in this situation.

I will be frank with the gentlemen, I picked 3 days as a purely arbitrary period of time. There is nothing sacred about it, but it seems to me you don’t need as long for this as you do for the legislative veto.

Mr. Poff. The language you employ in connection with the newly elected Vice President is always or nearly always “act” or “acting.” Do you intend by that to give some different status to a Vice-President-elect in this manner than to a Vice-President-elect customarily, or would he enjoy the same status?

Mr. Mathias. I think he would enjoy the same status as precedent in history has given to successors in the executive branch throughout our whole national life.

Mr. Poff. I think the gentleman has performed a very useful function, and I sincerely appreciate his help and advice.

Mr. Chiefs. Mr. MacGregor?

Mr. MacGregor. No questions.

Mr. Chiefs. Mr. Hutchinson?

Mr. Hutchinson. Mr. Chairman, I would like to ask Mr. Mathias a couple of questions.
Mr. Mathias, how do you envision the candidates will be selected from 190 million people out of whom this joint convention of Congress is going to choose the Vice President?

Mr. Mathias. Well, let me say as a preamble to the answer that I have suggested a joint session of Congress as the elective body, as the group of electors. There is nothing magic about this. This could be done by each House meeting separately in its own Chamber.

I think, however, that a joint session would provide a more normal atmosphere for making the very choice that your question raises. The atmosphere would not be unlike the situation in one of our great national conventions in which the convention has before it, so to speak, the entire population, the entire adult population of the Nation, but, as a practical matter, we all know that the choice is limited to a relatively small group of persons who have qualified themselves by their life and actions for consideration, and I think the same would be true in this case, with the further limiting factor which the distinguished chairman of the committee has mentioned, that you are going to be pretty nearly bound to the political party of the incumbent in the White House.

Mr. Hutchinson. Now, assuming that the congressional majority was the same as the incumbent in the White House, what you are saying is that you think that his suggestions to the majority caucus would carry great weight in that caucus, and in effect perhaps he would be nominating a candidate for consideration?

Mr. Mathias. I think history leads to that conclusion, and I certainly think the President would be a very weak party leader if he weren't able to arrange that that were so. But the fact of the matter is that the power to initiate the nominating and electing would be with the representatives of the people. This would come from the wellspring of the country. It would not come in what I conceive to be the autocratic manner of descending from the White House. It would rise from the people to the heights of government.

Mr. Hutchinson. But the Executive under the present wording of your resolution would have it within his own power to fix the time for such a joint convention and, as a practical matter of politics, do you suppose that he wouldn't convene the Congress until he had arrived at some kind of an understanding with the majority caucus?

Mr. Mathias. Well, now, sir, I think that is entirely possible, and I think you are getting around to the very kind of consideration that I think we ought to be having on this bill, and that is that we ought to probe the probable motives and actions of the people who will be the principal actors in this kind of unhappy drama, and I think that this is possible. But I would say to you that I would prefer to take my chances with that kind of a situation than I would by simply giving the President the autocratic power to nominate his successor and official heir, and I think that the very fact that he has to go through this kind of manipulation, the very fact that he is forced to deal with the leadership in Congress, the very fact that he may have to tack on his course will, in itself, be assurance that an acceptable and proper candidate will be forthcoming rather than the fact that he can merely sit in the White House and send one name down to the Capitol and say, "Boys, take it."
MR. HUTCHINSON. But under the provisions of Resolution 1, where he would send a name down and say, "Take it," he would still have to deal with the party leadership in Congress making sure that they would take it.

MR. MATHIAS. But let me say I believe that the range of the consideration that he would have to give to the opinions of others would be considerably narrowed when he is the prime initiator of this movement.

MR. HUTCHINSON. Another question of just a practical consideration, Mr. Mathias.

Do you really think that the Senate of the United States would happily support a proposition like this calling for a joint convention approach in which it must be conceded that the relative weight of every Senator is drastically reduced?

MR. MATHIAS. Well, of course, under the existing provisions for electing a President in case of vacancy by failure in a regular election the Senate doesn't have any vote at all, so this is giving them more play than they would have in the contingency already provided by the Constitution.

MR. HUTCHINSON. Yes, but under the present revisions of the Constitution, in the election of a President by the House of Representatives, each State has only one vote, so the situation isn't, as I see it, just the way you described.

MR. MATHIAS. It is not entirely parallel, but the Senate does not play a part in that.

MR. HUTCHINSON. That is true.

The CHAIRMAN. If I might ask one question.

MR. CHEESE. Yes, sir.

The CHAIRMAN. I take it when there is an election by the Congress of a Vice President by the majority of those present and voting, in the Constitution wherever the Congress selects a President, the vote is by States. You wouldn't have it by States, would you?

MR. MATHIAS. No, sir; just a simple majority.

The CHAIRMAN. It is also in the States by secret ballot. That is, they have a ballot box, and they have blank ballots, as I understand it, and each Member from each State votes but doesn't register his vote because his vote is by States. You wouldn't have anything like that?

MR. MATHIAS. No, sir. Let me say I have not gone into any of that detail here. I think it could very properly be provided by the Congress in implementing such a provision, but my own view would be that you could have—if a secret ballot were desired—one ballot box with the votes for your particular candidate and under rules that would be prescribed by the joint session for its own conduct.

The CHAIRMAN. Suppose the Congress doesn't give a majority to the nominee of the President. Would the President then have the right to offer another nominee?

MR. MATHIAS. Of course, the President would not under this arrangement, strictly speaking, be having a nominee, but let us suppose that the President has let it be known that he would prefer someone who would not receive a majority. Certainly this would be part of the informal negotiation which I think would inevitably take place, and there would be no limitation on the President's informal suggestions as to the people that he would prefer to see become Vice President.

The CHAIRMAN. Thank you.
Mr. Chelf. Mr. St. Onge?
Mr. St. Onge. No questions.
Mr. Chelf. Mr. McClory.
Mr. McClory. I think the gentleman has made a clear distinction between the motives which exist between when a President selects a running mate in a convention and the motives which would be present under circumstances such as we are considering here where there is a vacancy in the office of the Vice President.

With regard to that part of the bill, would this veto be an absolute veto, or would it be subject to being overridden by the House?
Mr. Mathias. No, it would be an absolute veto. I don’t think you would want to impose upon the President a Vice President who was totally repugnant to him. I think you would have to give the President an absolute veto in this case.

Mr. McClory. With regard to your statement, on page 4 of your testimony where you question the wisdom of the detailed provisions in House Joint Resolution 1 insofar as the subject of disability is concerned, you indicate that if the selection of a Vice President is in accordance with your recommendations that you are not concerned about those details.

Mr. Mathias. Well, let me say again that I am somewhat motivated in the testimony I have given today by a rereading of Madison’s “Journal of the Constitutional Convention,” and by the very probing examination that was made by the members of the Constitutional Convention into the probable human reaction to exposure to situations in which power was at stake, and I think we can profit a great deal by the example of the Constitutional Convention in being very careful as to what we are doing here, because we are touching upon the exercise of tremendous power, probably in times of great emotion, great national emotion, and I think we owe it to ourselves, both to our ancestors and our posterity, to deal very deliberately with this subject.

I am reluctant, of course, to attack or oppose a suggestion which comes to this committee with such a fine pedigree as House Joint Resolution 1, but I do feel in this situation we have got to examine it very, very carefully.

Mr. McClory. We have heard other testimony. We heard testimony this morning, for instance, with respect to the form of the Constitution and the advantages which occur with a brief statement which is then supplemented by appropriate legislation, and I would gather from your paragraph that you would favor the shorter or briefer statement in the Constitution, with the flexibility that would be present, then, through legislation.

Mr. Mathias. That is right. To be more specific in my answer to the gentleman’s previous question, I think that the combination of giving a President the power to nominate his heir and, at the same time, giving the heir at least a part of the power to depose the President, sets in play some of the very classic situations which the framers of the Constitution would examine most carefully for their analysis of what the probable human reaction would be, and I think this is one of the dangers of House Joint Resolution 1, that you are doing two things which will have opposite reactions, and I think they could be explosive, given the right combination of circumstances and personalities and conditions.
Mr. McClory. In other words, if we recommended House Joint Resolution 1 and the States ratified it and it didn't work the way it was intended, then the problem of a complete new constitutional amendment would arise instead of a simple amendment of a statute which the Congress could take action on promptly.

Mr. Mathias. That is precisely correct.

Mr. McClory. That is all, Mr. Chairman.

Mr. Chief. Mr. Tenzer?

Mr. Tenzer. The question was answered about the absolute veto, and I understand your position on that.

When you selected 3 days within which to exercise the veto on the part of the person discharging the duties and functions of the President, you were thinking in terms of speed and dispatch for disposing of the problem.

Mr. Mathias. That is right.

Mr. Tenzer. Do you envisage any such delay that might be occasioned by the joint session adopting its own rules?

Mr. Mathias. Yes; I think there could possibly be such delay and, of course, as the chairman of the committee has indicated, you might have a further delay from the situation that the person elected by the Congress, by the joint session, might not be acceptable to the White House, and you might have two or three go's at this thing before you arrived at some candidate who was acceptable at both ends of Pennsylvania Avenue.

Mr. Tenzer. Might I ask a further question of the witness?

This question was raised with earlier witnesses, and I would like to have your views on the question as to who would preside at such joint session.

Mr. Mathias. The Speaker would preside. That had been my contemplation.

Mr. Tenzer. So the statement is this is the legislative intent we are developing here.

Mr. Mathias. Yes.

Mr. Tenzer. Would you put that in the amendment?

Mr. Chief. It is in the bill, in section 2:

The Speaker of the House of Representatives shall preside • • •

Mr. Tenzer. I am sorry.

Mr. Mathias. Line 13 on page 2.

Mr. Tenzer. Would the problem of delay in the adoption of rules be cured by the possibility that each of the Houses would meet separately?

Mr. Mathias. Well, that could create its own delays, and I believe that you would have a more efficient system, a more democratic system—notwithstanding the objections suggested to the Senate's participation—I believe you would have a situation that would be better understood by both the participants and by the country at large in having a joint session, which would be the electoral college for this purpose.

Mr. Tenzer. I appreciate the reply, because if there were to be a selection by the Congress, I would prefer a joint session, myself.

Thank you.
Mr. Chair. Mr. Conyers.

Mr. Conyers. Thank you, Mr. Chairman.

I would like to inquire of our colleague how strongly he feels that his proposed resolution must look toward a constitutional amendment, and whether or not through statutory legislation we might accomplish the same thing?

Mr. Mathias. Well, I have examined the Constitution closely on this question, and I think that you can at least make a good argument that we are already vested with the authority to supply this deficiency in our system by statute, but I am guided to some extent by the testimony which we had the other day from the Attorney General of the United States, and by other eminent legal authorities that the state of the law is such that it will be only a constitutional amendment which will gain us the universal kind of acceptance which would be so necessary in this situation where the command of the Armed Forces depends on this, and you must have the unquestioned obedience of the Armed Forces to the unquestioned civil authority. All of these questions are of such tremendous importance that if there is any doubt expressed by eminent authorities, such as the Attorney General, I think we have got to resolve those doubts in favor of certainty, and certainty is only provided by a constitutional amendment.

Mr. Conyers. Thank you very much.

Mr. Chair. Mr. Grider?

Mr. Grider. I would like to ask the gentleman from Maryland a couple of questions.

It seems to be implicit in section 1 of your amendment that in the event the President-elect were to die before his inauguration, that the Vice-President-elect would assume the Presidency.

My question is whether or not that is the prescribed procedure and, if so, where do you find that authority?

Mr. Hutchinson. Isn't it in the 20th amendment?

Mr. Mathias. I will yield to counsel for that.

Mr. Copenhagen. It says in section 3 of the 20th amendment:

If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President.

Mr. Grider. That sure answers that question.

Mr. Mathias. It shows you how dependent we are upon the very valuable legal staff which serves this great committee.

Mr. Grider. I would like to ask you one other question. You have become rather technical in setting forth the contingencies under which the office of Vice President would become vacant—for example, in the event of the assumption by the Vice President of the office of President.

I would like to ask the gentleman what the advantage is in delineating all the different contingencies under which the office would become vacant? Why would it not be desirable to simply say when the office of the Vice President becomes vacant?

Mr. Mathias. Perhaps the gentleman might refer to the line to which you have reference.

Mr. Copenhagen. It is line 3; isn't it?

Mr. Grider. Beginning on the second page, line 3, “because of the death or removal from office,” and so on, all the way down through line 13.
Mr. Mathias. We adopted that language in drafting this proposal which is fairly parallel to the existing language in the Constitution, and perhaps counsel might read from the Constitution the relevant articles.

Mr. Copenhaver. Article II, section 5, I believe talks about the death or removal from office of the President.

Mr. Mathias. I think the only intervention here would be the death of a Vice-President-elect from the standard language of the original portion of the Constitution.

Mr. Chief. Are there any other questions by counsel?

Thank you very much, Mr. Mathias. We certainly do appreciate your interest in this matter. You have been a great help not only by your contribution today, but by your previous diligent attendance and the very searching questions which you have propounded.

We were to hear next the Honorable Edward Roush from Indiana. Is Mr. Roush in the room?

If not, will the Honorable Michael A. Musmanno, justice of the Supreme Court of Pennsylvania, come forward.

Let me say that we are glad to have you here, and appreciate your attendance today. Your fame has preceded you in many parts of not only this land but in many, many others.

Mr. Musmanno. Thank you very, very much. May I proceed?

Mr. Chief. Yes; please do.

STATEMENT OF HON. MICHAEL A. MUSMANNO, PENNSYLVANIA SUPREME COURT JUSTICE

Mr. Musmanno. Mr. Chairman, as a student of proposed amendments to the Constitution of the United States for over 30 years, I prepared a constitutional amendment on presidential inability and succession, together with provisions on the office of the Vice President. At my request, this constitutional amendment was introduced in the Senate by the distinguished Senator Pastore, under Senate Joint Resolution 34, and in the House by my friends, Congressmen Holland, Fulton, and Moorhead under House Joint Resolution 118, House Joint Resolution 154, and House Joint Resolution 220, respectively.

I now formally withdraw these Senate and House joint resolutions from the consideration of Congress because I firmly believe that your constitutional amendment, Mr. Chairman, House Joint Resolution 1, which coincides with Senator Bayh's amendment, Senate Joint Resolution 1, ideally meets the situation which has aroused the fears of the Nation for decades.

What happens if the President is disabled to the extent that he ostensibly cannot perform the duties of his office? Under Senate Joint Resolution 1 and House Joint Resolution 1, the President may declare his own disability or, if conditions make this impossible, the Vice President, with the concurrence of the majority of the President's Cabinet, may announce the disability. When the President's disability ostensibly ends, he will, on his own declaration, resume his presidential duties. If a majority of the Cabinet, plus the Vice President, believe the President still to be disabled, the Congress will decide the issue.
Under my plan, now withdrawn, the issue would have been decided in the first instance—except, of course, when the President himself declared a disability—and throughout, by the Senate and House Judiciary Committees, sitting jointly. After reading the President’s message of January 28 on the subject, I saw at once how the plan he recommends is far superior to mine and I so stated when I testified before Senator Bayh’s committee, and withdrew Senate Joint Resolution 34 from its consideration.

No one is better qualified to speak in this field than President Johnson. This subject deals directly with the office of Vice President which he has held, and the office of President to which he has been elected by the people for 4 more years, after a year of presidential achievements approved by the people with a majority only rarely equaled in the history of the Nation. No one entered on presidential duties more qualified by experience and training in Government than President Johnson. He speaks now from 30 years’ loyal and extraordinarily able service in the sphere of responsibility which you are now considering. He has faith that the Vice President and the President’s Cabinet—and this is not restricted to the present Vice President and the present Cabinet, but to all Vice Presidents and Presidents’ Cabinets in the future—will ably, conscientiously, speedily, and justly resolve the question of presidential inability, should it ever arise.

I believe that the President speaks wisely when he says that the matter of the Vice President temporarily acting as President should be left to those who are closest to the President, his own official family. Who could be better informed on the President’s condition, his program, pending projects, the State of the Nation, than those with whom he works daily and those who enjoy his fullest confidence? Who, therefore, would be in a better position to reassure the Nation of a continuing fulfillment of the President’s plans during a temporary disability than those very persons who are his immediate lieutenants? It would be a blunder, in my view, to entrust the problem of a temporary presidential successor to any other body, as, for instance, the judiciary, as has been suggested, or to a so-called neutral commission, as has been recommended, or, even to Congress itself, a plan which has been advanced.

Nothing could be more distressing to the American people than to have the question of presidential disability become what might seem to be a State trial with 535 persons sitting as a jury. Of course, if there should be a situation, which I cannot bring myself to believe could ever happen, where there would be an impasse between the President and the Vice President, plus a majority of the Cabinet, as to whether the President should or should not assume his duties after a temporary disability, then Congress naturally would be the inevitable body to cut the Gordian knot of any extended controversy between the President and the Vice President.

We have arrived at too mature a stage as a representative democratic nation, standing before the world as the mightiest republic of all time, to assume that there could be such a breakdown in our executive department, where responsibilities reside in matters of this character, that the contretemps would need to be sent to the legislative department. However, since we are now amending the Constitution, not only for the next 10 or 20 years, but for hundreds of years, it
is well that even the most unimaginable contingency should be pro-
vided for, just in case it should happen.

Nor do I agree that the matter of temporary succession to the
Presidency should be regulated by statute rather than by constitu-
tional amendment. I remember, Mr. Chairman, when I testified
before the late Senator Kefauver's committee on this subject in 1958,
there were those who opposed a constitutional amendment on the
ground that it would take too much time for adoption and ratification,
whereas a statute could be whipped through immediately. It is now
7 years since 1958 and that statute has not yet been whipped through.

We are dealing here with constitutional powers, the most serious,
solemn and potent of them all, the Executive Office, and nothing
less than a constitutional amendment should effect a change which
could deal with the very destiny of the Nation.

Moreover, a constitutional statute, no matter how carefully drawn,
could be attacked on constitutional grounds and its interpretation
would become a matter of judicial interposition. During the pendency
of such legal proceedings, the Ship of State, even in the midst of an
international tempest, which could threaten the very survival of our
Nation and its people, would be without a constitutional hand at the
helm. The very thought of such a possibility is frightening. Un-
fortunately, it is more than a possibility. In these days of almost
daily international crises, the dread hypothesis could be almost a
likelihood.

With regard to Senate Joint Resolution 1 and House Joint Resolu-
tion 1, I have but one suggestion. Section 2 reads that Congress shall
elect the Vice President nominated by the President, but there is
no time limit on this confirmation process. If Congress should in-
formally disapprove the President's choice but not vote on it, the
vice-presidential office could remain unfilled indefinitely. I respect-
fully suggest for your consideration that there should be added to
section 2 the following:

If Congress does not elect such nominee within thirty days, the President
shall submit another nominee and repeat individual nominations until Congress
elects a Vice President.

In my constitutional amendment I took up the subject of the Vice
President's office per se. On another occasion I should like to be
honored with an opportunity to speak on that subject before this
distinguished committee. However, I believe that subject can wait
until this present more pressing issue is decided.

I thank you, Mr. Chairman, for your courtesies and consideration.

Mr. Cerier, Judge, your statement has been most revealing and
soul searching, and I can say to you certainly as a listener you have
impressed me very much, especially on three points—all of it in par-
ricular, but specifically the following three points.

On page 2 you said:

I believe that the President speaks wisely when he says that the matter of
the Vice President temporarily acting as President should be left to those who
are closest to the President, his own official family. Who could be better in-
formed on the President's condition, his program, pending projects, the state
of the Union, than those with whom he works daily and those who enjoy his
fullest confidence?
I think that that is, if not the crux, certainly a part of the fear that most of us have had with respect to the designation of his successor.

Then again, Judge, on page 3 you stated inevitably if there was confusion, if there was doubt, if there was suspicion, the Congress naturally would be the inevitable body finally and lastly but certainly definitely the people’s representatives to step in.

Mr. Musmanno. Yes.

Mr. Chelf. Then again on page 4—and I was very much impressed with this—you said:

I remember that when I testified before the late Senator Kefauver’s committee on this subject in 1958, there were those who opposed a constitutional amendment on the ground that it would take too much time for adoption and ratification, whereas a statute could be whipped through immediately. It is now 7 years since 1958 and that statute has not yet been whipped through.

That is the understatement of all time.

I personally want to thank you, Judge, for your kindness and consideration in coming here. I knew that you would have much to contribute to this subject matter.

Mr. Celler?

The Chairman. No questions.

Mr. Chelf, Mr. MacGregor?

Mr. MacGregor. No; but we thank you very much for your appearance, Judge Musmanno. I have no questions.

Mr. Musmanno. Thank you, Congressman.

Mr. Chelf, Mr. Hutchinson?

Mr. Hutchinson. Judge, I take it in the last paragraph of your statement you indicated that you are not withdrawing future consideration of your suggestion that the President have the power to assign duties to the Vice President. In your proposal here, you say:

The Vice President shall assist the President, and the President shall assign to the Vice President such duties as he sees fit.

Mr. Musmanno. Yes, Congressman.

Mr. Hutchinson. Now, in withdrawing consideration of this amendment at this time, you are not repudiating that concept, are you?

Mr. Musmanno. I am not repudiating that concept, but being very realistic, I feel that the Congress would not go into that subject at this time. Probably the majority of Congress feels that it is important that the subject of presidential inability and succession be definitely disposed of now, and I would not want—no matter how passionately I feel on his other subject—to have the first part of the constitutional amendment jeopardized by a lingering discussion on the subject of vice-presidential responsibilities and duties.

In a word, I believe it is a mistake that the Vice President should be in the legislative department, because he has no function there except to preside over the Senate, as of course this committee well knows. He is a timekeeper, a metronome. He has no voice. Vice President Nixon indicated that in 8 years he only voted eight times—one a year—and with a Vice President of tremendous abilities and energies such as we have, fortunately, today, it seems to me a waste of great talent to have him merely presiding over the Senate. I would like to see him in the executive department where he would be well used constitutionally, but I say I have some fears about the discussion of that subject at this time.
Mr. Hutchinson. Thank you, Judge.

Mr. Chelf. Mr. McClosky?

Mr. McClosky. No questions.

Mr. Chelf. Mr. Tenzer?

Mr. Tenzer. No questions.

Mr. Chelf. Mr. Conyers?

Mr. Conyers. No questions.

Mr. Chelf. Mr. Grider?

Mr. Grider. None; except to thank the Judge.

Mr. Musmanno. Thank you.

Mr. Chelf. How about counsel?

Mr. Copenhafer. Judge, on page 3 you make the statement:

It would be a blunder to entrust the problem of a temporary presidential successor to any other body * * *

With regard to this statement, are you again suggesting that in House Joint Resolution 1 we should not permit Congress to have the opportunity to appoint a body other than the Cabinet to pass on the question of disability?

Mr. Musmanno. I do feel that way, and I am afraid that the resolution as drawn might permit Congress to designate some other body, and I think that would be a big mistake.

Mr. Copenhafer. Then you go on in the next paragraph and state that it would be distressing to the American people, in a sense, if the issue were to become a state trial with 535 persons—meaning Congress—sitting as a jury.

Would you also then mean to say that you would be opposed to the provision in section 5 of House Joint Resolution 1 which gives Congress the final authority to challenge the Vice President's statement which indicates that the President's disability remains after the President says it no longer remains?

Mr. Musmanno. No. You will find on page 3 that I do say that if it becomes necessary, then Congress naturally would be the inevitable body to cut the Gordian knot of any extended controversy between the President and the Vice President.

I do not believe that we will ever reach that state, because there is a certain constitutional morality that is respected by members of the Cabinet and those holding responsible offices under our democratic republic. I don't think we would ever get to that point, but if we should, as I said, we are amending the Constitution not for 10 years or 20 years, but for hundreds of years, and we have that in reserve as the last resort in the last analysis to solve this problem.

I don't think this problem will ever arise, but if it should, we have no fear but that it will be properly disposed of in accordance with the ideals of this great democracy of ours.

Mr. Copenhafer. Now as a final question, keeping in mind your statement about granting Congress the right to preclude any period of too long delay in deciding this issue—your reference to cutting the Gordian knot—and also on the fifth page where you set out an alternative for filling the office of the Vice-Presidency, have you had an opportunity to examine House Joint Resolution 3 or House Joint Resolution 119, which were proposals which provided that Congress be handed this issue of a contest between the President's statement and the Vice President's statement on whether the President is or is
not disabled under section 5, that Congress must act within a certain period of time, and if they do not the President automatically returns to the powers and duties of his office? Would you care to comment upon that?

Mr. Musmanno. I don't think there should be any limitation placed upon the time within which Congress must act in the event we reach that stage, but I thought you were going to comment on my humble suggestion that section 2 be amended, that if Congress does not elect such nominee within 30 days, the President shall submit another nominee and repeat individual nominations until Congress elects a Vice President. Here I do see perhaps a slight possibility of embarrassment.

Suppose Congress informally is not impressed with the vice-presidential nominee, but yet does not want to vote him down. They simply do nothing, and there is no way of compelling them to do anything.

Mr. Copenhaver. I might say as counsel, speaking personally, I feel much more strongly about the other situation, because I see too many opportunities for political machinations occurring in section 5 of House Joint Resolution 1 whereby the Vice President who has in one way or another usurped the office of the President might fail to reconvene Congress, or Congress delay for an indefinite period of time in passing upon the President's disability, so I feel strongly about the need for a time limit there.

I might say I personally agree there ought to be a time limit in section 2. However, I would follow the same analogy whereby the Congress has 30 days to pass upon it. If it fails to pass upon it within that 30-day period, then the nominee of the President shall become Vice President.

Mr. Musmanno. I would say, Mr. Counsel, that constitutionally under this proposed resolution the Congress would be compelled to come into session even without the call of the President.

Mr. Copenhaver. There is no way they could be called in when they have adjourned. You see, what I am trying to do is draw a sort of reverse analogy of how it operates.

Going back to disability, I could see a situation arising where there is real doubt in the Congress as to which statement or set of facts to accept—the President's that he no longer is disabled or the Vice President's that he remains disabled—and there may be a close question. It is not a question of whether he is out, is unconscious, and Congress very frankly not wishing to be a buckpasser, but being in sincere doubt, and respecting both men, would instead of voting and upholding the President or voting and upholding the Vice President, say, "Since we have this doubt, this doubt shall be passed in favor of the President by our refusing to vote within the time period," with the President returning to his office.

Mr. Musmanno. It is your thought that the Acting President could defer any possibility of being ousted by not calling Congress in session. Is that the fear you are expressing?

Mr. Copenhaver. He could delay.

Mr. Musmanno. Well, my thought is that—and I don't have the wording of the resolution before me, but it indicates that Congress shall then meet the issue.
Mr. COPENHAVER. According to the newly revised Senate proposal that says Congress shall immediately proceed to consider, which is about as open as you could get.

Mr. MUSMANNO. And you feel that Congress could not, under that language, convene without the call of the President?

Mr. COPENHAVER. No.

Mr. MUSMANNO. I would say that since this constitutional amendment is complete in itself that it would necessarily amend any other part of the Constitution which would call for the convening of Congress by the President. This would be one of those extraordinary situations where Congress would need to convene automatically.

Mr. COPENHAVER. Of course I might come back—and I don’t wish to prolong this—I could come back and say naturally I am trying to envision a situation with a hostile Congress, and assuming that Congress could prolong its discussion indefinitely. By the same token, Congress may not wish to reconvene, even assuming your statement was correct about the power to recall.

Mr. MUSMANNO. I feel that there should be some expression in the amendment that Congress shall proceed within a certain chronological time.

Mr. CHELF. Mr. Foley, general counsel.

Mr. FOLEY. In the light of your comment with regard to the office of the Vice-Presidency, I would like to call your attention to the language inserted in sections 4 and 5 as submitted by the Senate, that whenever the Vice President and a majority of the principal officers of the executive departments, or such body as Congress may provide, transmits to the President of the Senate—and it goes on—and then in 5 we use the same language, whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives, and then goes on.

I would like to ask you this. In the light of that language, we have only one President of the Senate and he is the Vice President of the United States; is that not so?

Mr. MUSMANNO. That is true.

Mr. FOLEY. So that the Vice President would be writing to himself as the President of the Senate in both section 4 and section 5.

Mr. MUSMANNO. When the President of the Senate is absent for any reason, the President pro tempore—

Mr. FOLEY. Oh, but this constitutional amendment refers to the President of the Senate, and article I, section 3, says:

The Vice President shall be the President of the Senate.

Mr. MUSMANNO. Very well. Even under that interpretation I see no impediment, and certainly no constitutional obstacle, because very often an individual holds two offices under our form of government. This applies to the State as well as the Federal Government, and there is no reason why the Vice President can’t address a communication to the President of the Senate who physically happens to be himself.

Mr. FOLEY. You feel that that language doesn’t need clarification?

Mr. MUSMANNO. I don’t think so.

Mr. CHELF. Judge, we had a similar situation on the State level in Kentucky. Some few years ago, the then Governor of the State of Kentucky saw fit to resign as Governor, so that the then Acting
Governor of Kentucky, or Lieutenant Governor, could become Governor.

He sat down and he wrote himself a letter, literally wrote himself a letter, "My dear Governor: I hereby tender my resignation," as of such and such a date, and signed it by his name, and when he did that he delivered it to himself from his left hand to his right hand and it became official. Then the Lieutenant Governor became Governor, was sworn into office, and promptly appointed my friend to the Senate of the United States; so it has been done—let's face it.

Mr. Musmanno. And upheld constitutionally?

Mr. Cheff. Yes; it survived court test.

Mr. Musmanno. I might say in another department of government, Congressman Cheff, that a judge may sit as a law judge, and then sit as an equity judge, although it is the same judge speaking. He is acting as law judge, and then will say, from the bench, "I will now sit in equity"—but it is always the same judge, the same knowledge, the same office, but he is sitting in two capacities.

Mr. Cheff. Exactly. Down in Kentucky, we have the county judge who sits as county judge. Then he says, "I am now sitting as juvenile judge," and he changes, literally changes colors right at the same bench at the same time.

Mr. Musmanno. I think it is extremely well that we question all these things as we go along, but I, myself, do not see any constitutional impediment or danger in Congressman Celler's proposed constitutional amendment.

Mr. Cheff. Are there any additional questions by any of the members?

We will adjourn until tomorrow morning at 10 o'clock, when the Honorable Lewis Powell, Jr., president of the American Bar Association, will testify at 10 o'clock, and the Honorable Herbert Brownell, former Attorney General of the United States.

(Whereupon, at 3:28 p.m., the committee adjourned until 10 a.m., Wednesday, February 17, 1965.)
PRESIDENTIAL INABILITY

WEDNESDAY, FEBRUARY 17, 1965

HousE or REPORTATIvEs,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10 a.m., pursuant to adjournment, in room 346, Cannon Building, Hon. Emanuel Celler (chairman of the committee) presiding.

Present: Representatives Celler, Feighan, Chelf, Rodino, Donohue, Hungate, Tenzer, Conyers, Grider, Jacobs, McCulloch, Poff, Cramer, Lindsay, MacGregor, Mathias, Hutchinson, and McClory.

Also present: William R. Foley, general counsel; William H. Coppenhaver, associate counsel.

The CHAIRMAN. The committee will come to order for further consideration of House Joint Resolution 1 and similar bills relating to presidential disability.

We have two distinguished witnesses this morning, the Honorable Lewis Powell, president of the American Bar Association, and the former distinguished Attorney General of the United States, the Honorable Herbert Brownell, who are both interested in the American Bar Association's activities.

I want to say at the inception that I personally, and I am sure the members of the Judiciary Committee found the brochure and the various other publications of the American Bar Association very enlightening and very helpful in giving us an understanding of this very difficult subject on presidential disability.

We are very happy this morning to welcome both of you gentlemen. We will first hear from President Powell of the American Bar Association.

STATEMENT OF LEWIS F. POWELL, JR., PRESIDENT OF THE AMERICAN BAR ASSOCIATION

Mr. Powell. Mr. Chairman and members of the committee, first may I thank the committee on behalf of the American Bar Association for the courtesy that the committee and its chairman have extended to the American Bar Association, its officers, and its committee.

We have had a very close relationship which we have cherished and appreciated very much.

This morning, Mr. Chairman, I will review briefly the interest of the American Bar Association in this subject. I have a prepared statement which I think has been distributed to members of the committee. I will summarize that, in the interest of saving time.
PRESIDENTIAL INABILITY

I will be followed by Mr. Brownell, who is chairman of the association committee on this subject. Mr. Brownell will deal with the merits of House Joint Resolution 1, and then we will both be available to try to respond to questions.

I would like for the record to show that Mr. Edward Kuhn, who is president-elect of the American Bar Association, is also here today. He was a member of this committee last year.

The interest and concern of the American Bar Association and, indeed, of this committee, go back many years. It finally became apparent to us 2 years ago that everyone was in agreement that there was a need to do something about the problem of presidential inability and vice-presidential vacancy. There was no argument as to the need. The difficulty was that constructive action had been frustrated, since the need first became evident in 1881, by diversity of opinion as to the proper solution.

In the hope that possibly we could develop some sort of general consensus in this area, the American bar assembled a conference in Washington in January 1964 of persons who had demonstrated expertise in the field. The list of the conferees who took part in this conference is set forth on page 3 of my written statement.

We met for 2 days and 1 night. We had a luncheon which was attended by Chairman Celler and other members of the Congress. I think it is fair to say that when we started out there were almost as many views as to how best to solve this problem as there were conferees.

At the end of the second day, we agreed on a consensus containing a statement of principles which we thought would solve both of these problems. That consensus is set forth on pages 4 and 5 of my statement.

I should emphasize that the consensus is a statement of principles rather than a definitive draft of a constitutional amendment, and yet the principles in the consensus of the American Bar Association have been embodied in House Joint Resolution 1.

Following that conference in January, this matter was presented to the house of delegates of the American Bar Association, which is the representative body of the association, as I am sure all of you gentlemen know. The house unanimously approved the consensus and also authorized the creation of a special committee, which is now chaired by Mr. Brownell.

The purpose of the committee was to try to educate the public generally as to the need and to develop support for action on these two matters.

As a part of that program, we held a national forum in Washington in May 1964. Congressman Celler and a number of other distinguished leaders participated. Former President Eisenhower addressed the gathering, which included representatives of leading national organizations representing a broad spectrum of thought. Also attending were representatives of the State bar associations from across the country.

Former President Eisenhower’s statement was quite a dramatic demonstration of the need for action.

Following that forum, we went to State bars across the country, and as of today a majority of the State bar organizations have endorsed the
American Bar Association consensus which, as I have stated, is consistent in principle with House Joint Resolution 1.

I would like to add just a word, Mr. Chairman, about the situation in the States. I am sure it is known quite well to members of this committee, but there are some 47 State legislatures in session this year. There will be only five in session in 1966 that will not meet this year. Of course, a great many meet every year.

The legislative situation in the States suggests that unless we can get an amendment to the Constitution on its way fairly early this year, there will be no opportunity to consummate such amendment through ratification by the States until, perhaps, 1967.

I would like to conclude, Mr. Chairman, and members of the committee, if I may, by reading just the last page of my written statement commencing at page 8.

As I have said, the vital need is for a solution of these grave problems of presidential inability and vice-presidential vacancy. There have been extensive discussions whenever history has dramatized the need. Indeed, no subject relating to our constitutional structure has received more study. It seems to us that the time has now come for action.

It is not necessary, as the distinguished experts assembled by the American Bar Association agreed, that we find a solution which is free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.

It is the hope and strong recommendation of the American Bar Association, which we know is shared by this committee, that past differences can be reconciled and that a solution be initiated by this session of the Congress.

We urge that the solution be in the form of a proposed constitutional amendment such as House Joint Resolution 1. We believe that the principles of House Joint Resolution 1, which are supported by the American Bar Association and by a considerable body of the most knowledgeable scholars in the field, are sound and reasonable, and are consistent with the basic framework of our Government. In short, we think House Joint Resolution 1 and its counterpart in the Senate is an acceptable solution to the grave problems of presidential inability and vice-presidential vacancy.

We respectfully commend House Joint Resolution 1 to this committee, and urge that the Congress act promptly so that the proposed constitutional amendment may be submitted to the States for ratification at the earliest practicable time.

Thank you, Mr. Chairman.

The CHAIRMAN. We will put your formal statement into the record, if you wish.

Mr. Powell. Thank you.

(The formal statement of Mr. Powell reads as follows:)

Mr. Chairman and members of the committee, my name is Lewis F. Powell, Jr., I am president of the American Bar Association and practice law in Richmond, Va. I appreciate your invitation to appear here today—as a representative of the American Bar Association—to discuss the problem of presidential inability and also the related question of filling the office of Vice President when a vacancy occurs. I am pleased to have with me today Herbert Brownell, of New York, former U.S. Attorney General, and now chairman of the American Bar Association Special Committee on Presidential Inability and Vice Presidential Vacancy.
In my statement I will trace the history of the American Bar Association's interest in the subject of presidential inability and vice-presidential vacancy. Mr. Brownell will discuss the substance of the pending legislation, House Joint Resolution 1, which we strongly support.

I wish to commend Chairman Celler and this committee for your long interest in the problem of presidential inability and vice-presidential vacancy. This committee has grappled with these problems for many years, and has been a leading force in developing public awareness of the need for solutions. The study undertaken by your committee in 1955 and 1956 focused attention, not only on the difficulties inherent in the subjects themselves, but also upon the difficulties involved in obtaining agreement upon any single solution.

We are pleased that you are now having committee hearings and intend to act promptly. We believe the time has come when a consensus exists, and when action by the Congress is eagerly awaited.

The death of President Kennedy directed the entire Nation's attention to the vacancy in the Vice Presidency and to the chaos which might have existed had the President been disabled seriously.

As in past years when crisis has occurred in the presidential office, the American people became acutely aware of the necessity of assuring uninterrupted continuity in Executive leadership. But this awareness may die down again, as it has done following other crises, unless appropriate action is taken promptly.

Congressional leaders, constitutional scholars, and many others have long been in agreement as to the need. The problem—which in the past has always frustrated action—has been the diversity of opinion as to the proper solutions.

In an attempt to develop a consensus among scholars and students of this subject, the American Bar Association in January 1964, convened a conference in Washington on presidential inability and vice-presidential vacancy.

Attending the conference in Washington were Herbert Brownell, president, Association of the Bar of the City of New York, and a former Attorney General of the United States; John D. Feerick, attorney, New York; Paul A. Freund, professor of law, Harvard University; Jonathan C. Gibson, chairman, Standing Committee on Jurisprudence and Law Reform, American Bar Association; Richard H. Hansen, attorney and author, Lincoln, Nebr.; James C. Kirby, Jr., associate professor of law, Vanderbilt University, and a former chief counsel to the subcommittee on Constitutional Amendments, Senate Judiciary Committee; Ross L. Malone, past president of the American Bar Association, and a former Deputy Attorney General of the United States; Charles B. Nutting, dean of the National Law Center; Walter E. Craig, president, American Bar Association; Sylvester C. Smith, Jr., past president, American Bar Association; Martin Taylor, chairman, Committee on Federal Constitution, New York State Bar Association; Edward L. Wright, chairman, House of Delegates, American Bar Association, and myself.

The 2-day deliberations of this exceptionally well qualified group were intense and thorough. Proposals of the existing and past Congresses were reviewed in detail. At the conclusion of the deliberations, a consensus statement was made. Although there was not complete agreement by each conference on all points of the final consensus, there was general agreement of the statement.

The conferences considered both inability and vice-presidential vacancy in terms of broad principles. On the question of action to be taken in the event of the President's inability, it was the consensus of the conference that:

1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

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

4. The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.
5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress.

On the related question of presidential succession, it was the consensus that:

1. The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The consensus was reviewed thoroughly by the association's committee on jurisprudence and law reform. The committee members agreed unanimously in recommending favorably the consensus to the association's house of delegates on February 17, 1964. The house of delegates thereupon adopted a resolution recommending that the Constitution of the United States be amended in accordance with the principles of the consensus.

In the past, the failure to reach acceptable solutions to these problems has been due primarily to the failure of experts to agree upon a single satisfactory solution. Widespread public apathy has also been a contributing factor. With these thoughts in mind, and believing that the organized bar had a special responsibility in an area involving the continuity of government itself, the American Bar Association established a Special Committee on Presidential Inability and Vice Presidential Vacancy.

In May of 1964, the special committee sponsored a national forum on the subjects of "Presidential Inability" and "Vice Presidential Vacancy." The program of the national forum featured a panel discussion by eminent constitutional authorities, including Chairman Cellar of this committee. Former President Dwight D. Eisenhower addressed the forum, and emphasized the potential seriousness of the situations relating to his illness.

This forum was attended by major national business, labor, education, civic, and professional groups, as well as by Members of Congress and the news media. As a result of the national forum, many of the participating groups informed their members of the problems which exist and helped focus national attention on obtaining a workable solution.

The American Bar Association, in cooperation with State and local bar associations throughout the country, has continued an active educational campaign to stimulate public interest and understanding. Having participated in this effort personally, I can assure this committee that there is widespread interest and a genuine anxiety over the present constitutional void.

We have studied the schedule of State legislatures and find that 47 of the 50 State legislatures meet in 1965. Thirty-eight States are required to ratify an amendment to the Constitution. Since the legislative sessions of many States are of limited duration, it is essential that an amendment be sent to the States promptly if it is to be ratified this year or by early 1966. Each day's delay reduces the chances of early ratification. If the requisite number of States do not have an opportunity to act this year, it cannot be ratified until 1967.

A majority of State bar associations has endorsed a constitutional amendment embodying the principles of House Joint Resolution 1, and will actively seek ratification by the State legislatures.

The vital need is for a solution of these grave problems of presidential inability and vice-presidential vacancy. There have been extended discussions of these problems whenever history has dramatized the need for solutions. Indeed, no subject relating to our constitutional structure has received more study. I suggest that the time has now come for action.

It is not necessary, the distinguished experts assembled by the American Bar Association agreed, that we find a solution free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.
It is the hope and strong recommendation of the American Bar Association, which we know is shared by this committee, that past differences be reconciled and that a solution be initiated by this session of the Congress.

We urge that the solution be in the form of a proposed constitutional amendment such as House Joint Resolution 1. We believe that the principles of House Joint Resolution 1, which are supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field, are sound and reasonable, and are consistent with the basic framework of our Government. In short, we think House Joint Resolution 1, and its counterpart in the Senate, is an acceptable solution to the grave problems of presidential inability and vice-presidential vacancy.

We respectfully commend House Joint Resolution 1 to this committee, and urge that the Congress act promptly so that the proposed constitutional amendment may be submitted to the States for ratification at the earliest practicable time.

The Chairman. Are there any questions?
Mr. Hungate?
Mr. HUNGATE. I will pass.
The Chairman. Mr. Tenzer?
Mr. TENZER. I want to thank the witness for his contributions made to our deliberations.
The Chairman. Mr. Conyers?
Mr. CONYERS. No, sir.
The Chairman. Mr. Jacobs?
Mr. JACOBS. I wish to concur in Mr. Tenzer's comment.
Mr. Powell. Thank you very much.
The Chairman. Mr. Poff?
Mr. POFF. I take pardonable pride in the fact that the chairman of the American Bar Association is from Virginia. I think we are indebted to him, and I am sure we will be able to call him later, if need be, to help us in connection with any language difficulties we may encounter in implementing the principles about which there seems to be a general consensus.
Mr. Powell. Thank you, Mr. Poff.
The Chairman. Mr. Lindsay?
Mr. LINDSAY. Mr. Chairman, I would just make this comment. I hope Mr. Powell does not think because of the absence of cross-examination that means that there is not keen interest in the work that you have done, the memorandum you have prepared, and the legislation that you are supporting. The fact is you have done such a good job of advising the country and educating this committee, I think most members of the committee are very familiar by now with the particular measures that you are sponsoring.

There will be disagreement in details and methods, of course, but I do think the American Bar Association has done a service in pulling this thing together and without the use of your good offices we would be going in too many different directions, I fear.

I think you have supplied the pole around which more people can gather than not. Were it not for the efforts the ABA has made, and other bar groups, such as the Association of the Bar of the City of New York, I am not sure we could really come to agreement on a definitive proposal here, or the language. It would be very difficult, indeed.

Mr. Powell. Thank you, Mr. Lindsay. I certainly did not wish to
leave the impression that the ABA is the only bar that has been quite active in this. The Association of the Bar of the City of New York has made a conspicuous contribution. The New York State Bar Association has studied this at great length.

Mr. Lindsay. I would be interested in hearing your comment on the statement made by Senator Eugene McCarthy the other day in the Senate in which he said he had studied this matter at some length and had finally reached the conclusion that only the simplest general statement should be made in the Constitution and the rest done by statute, that the Constitution shouldn't be burdened—the old argument that the Constitution shouldn't be burdened with detailed, precise instruction.

Mr. Powell. I would be happy to comment on that, Mr. Lindsay.

As a matter of fact, at one point that was the position of the American Bar Association. Indeed, I myself testified in support of that before the Senate subcommittee several years ago, and yet after we came out of the intensive 2-day and night sessions that I have referred to, I had been completely won over to the different approach.

I think reasonable men can differ on this, quite obviously. Yet in view of having made the transition myself, as I have spoken on this subject around the country, when I have had an opportunity to talk to a member of a State legislature, I have asked him what he thought about the alternate approach, whether the State legislatures had rather see the package or had rather leave it to the Congress.

Everybody is in agreement you must resolve the basic question as to whether the powers and duties or his office pass, but from there on the question is whether you leave it to the Congress, or whether you provide within the framework of the Constitution itself, the mechanics of dealing with the disability issue.

I think I can say, without any exception, that the members of State legislatures with whom I have talked have preferred the approach of House Joint Resolution 1. I think they would rather have a more definitive statement of what is proposed to be done, what the solution really is.

Mr. Lindsay. What was it that swung you over from your original position? I take it your original position was that there would have to be a constitutional language change but that it could be done with a sentence or two, and from then on it would be statutory.

Mr. Powell. I don't think many people differ from the view that an amendment to the Constitution is certainly desirable. There are experts who will contend that it isn't necessary, but unless you have an amendment to the Constitution to resolve what is briefly referred to as the Tyler precedent, which relates to whether or not there would be an assumption of the powers and duties only rather than the office, that issue would be unresolved and would be subject to legislation.

I haven't read Senator McCarthy's statement, but I assume he would resolve that by constitutional amendment.

Mr. Lindsay. I am not clear whether he was lending full backing to Senator Dirksen's position.

Mr. Powell. Which would leave to congressional action the details as to who determines disability and how the end of disability is deter-
mined, and the like, but it was on this latter point that we spent so much time in the deliberations we had here in Washington in the January meeting. The fact that Congress had gone for all these years without solving that particular problem caused some doubt as to whether or not if it were left wide open Congress would reach agreement on it.

The Chairman. We had a distinguished judge here who testified yesterday to the effect that numbers of people feel that a simple congressional statute might be sufficient. He countered by saying he heard that 7 years ago, but nothing was done with reference to the passing of a simple statute, and therefore while he felt that a statute might be sufficient 7 years ago, he has realized now Congress was so slow in enacting to that little degree that it is quite essential a constitutional amendment be adopted.

In any event, I take it from your remarks that we have nothing in the Constitution now which directly or impliedly speaks of an Acting President.

Mr. Powell. That is correct.

The Chairman. To dispel any doubts, you feel that at least there should be a constitutional amendment?

Mr. Powell. I certainly do, Mr. Chairman. I have heard very little dissent from that view.

The Chairman. Mr. Lindsay.

Mr. Lindsay. In the State legislatures that you were talking to, did you get the impression it would be more difficult to have ratification of a general simple statement rather than the omnibus language?

Mr. Powell. Mr. Lindsay, I would put it the other way around. My own judgment is that State legislatures are anxious to have an opportunity to fill this constitutional gap, and if I had to guess, I would guess they would go along with the simple type of amendment.

Yet there is no doubt in my mind, from the conversations I have had, and they haven't been comprehensive. I spoke on Presidential inability in Michigan, in Oklahoma, in Florida, and several other places—a typical comment would be that we would like to see the ground rules laid down in the amendment so we know what we are voting on, and that they thought that would be preferable and more likely to receive enthusiastic support from the State legislature. I have discussed this with my people in Virginia, also. They would prefer to see the basic ground rule spelled out as to who determines disability, how, and when it ends.

The Chairman. Mr. Mathias?

Mr. Mathias. No questions.

The Chairman. Mr. Hutchinson?

Mr. Hutchinson. No questions.

The Chairman. Mr. McClory.

Mr. McClory. There wasn't any particular form of proposed constitutional amendment that you discussed in Michigan, or with any other State legislative groups—when you talked about the package? You weren't talking about language, but about the structure of the proposed constitutional amendment?

Mr. Powell. The way we have presented this around the country, Mr. McClory, is in terms of the consensus that was developed during the Washington conference and which was approved by the house of
delegates of the American Bar Association. That is set forth on pages 4 and 5 of my statement.

This consensus is expressed in terms not of legal language, precisely, but in terms which in substance have been embodied more precisely in House Joint Resolution 1.

In other words, this consensus did cross the bridge of spelling out the procedure with respect to disability.

Mr. McClory. Is the main difference for the alteration of your opinion from the short form of constitutional amendment to the more expanded form as contained in House Joint Resolution 1 that it has a better chance of ratification?

Mr. Powell. That is one of the reasons, but I think I could fairly say that the arguments of scholars whom I respected in fact won me over after a couple of days.

Mr. McClory. What do you think of the proposition that by adding detail, you encourage disagreement with regard to each detail that you add? Do you think there is anything to that point?

Mr. Powell. Well, I think certainly that is fairly arguable. On the other hand, if you leave it in the posture of a blank check, I wonder whether you don't raise even more questions.

Mr. McClory. Do you think that leaving the subject of commencement of disability and determination of commencement of disability in the hands of Congress would be denominated a blank check which people would generally oppose?

Mr. Powell. That is my determination, and it may not be an apt one. I think there is a real concern when you talk to thoughtful people, and the question that is asked me more often than any other single question is in view of the obvious need to do something about this, why haven't we done something. The very fact that since the Garfield illness for 80 days in 1881, the Congress and lawyers and constitutional scholars have tried to solve this problem and never have been able to reach agreement, I think causes uneasiness that unless we settle it now definitively the same state of disagreement as to how to settle it might continue.

Mr. McClory. You wouldn't question that if there is a simple statement of constitutional authority giving Congress the right to determine the commencement and the termination of the period of disability that Congress would have legislative authority to embody that in statutory law, do you?

Mr. Powell. No.

Mr. McClory. So that actually the form of the constitutional proposal which you urged earlier is not objectionable from a constitutional point of view?

Mr. Powell. No, sir.

Mr. McClory. I think that is all, thank you.

The Chairman. Mr. Powell, have you got a copy of House Joint Resolution 1?

Mr. Powell. I think I have; yes, sir.

The Chairman. On page 3, line 4, there was some question about the use of the word "immediately," and some thought, some testimony was taken to the effect that there might be some time limit there placed
up on Congress rather than the use of the word “immediately” which might be deemed to be indefinite, and it was thought by I think Mr. McCullough—am I right, Mr. McCulloch—that it might be changed to 10 days?

Mr. McCulloch. That is correct. I am of the opinion that there is no unanimity on the meaning of the words “shall immediately decide.”

The Chairman. Have you any comment on that, Mr. Powell?

Mr. Powell. Mr. Chairman, first let me say that the American Bar Association consensus does not deal precisely with this question, so I think I could start out by saying that certainly this sentence in its present form and some insertion of a precise time limitation both would be within the spirit of our consensus.

Having said that, I would add my own thought which is that I would prefer to leave it, I think, in its present form. I shy away a little bit from an arbitrary deadline there. It might sometimes present difficulty.

The Chairman. Ten days in an emergency may be very long, where in an ordinary, peaceful time, in times that are not ruffled, it might be short, and you think maybe “immediately” might be the better term?

Mr. Powell. I would prefer it, I think.

Mr. McCulloch. Mr. Chairman, would the chairman yield a moment?

The Chairman. Yes.

Mr. McCulloch. I read in the press that the Senate Judiciary Committee has further amended the language to some such words as “immediately proceed to decide.”

As I recall, we had some language in one of the most famous of our most recent Supreme Court decisions where they say that political subdivisions shall proceed with all deliberate speed.

I think that the language of the Senate gives a greater possibility of delay than the bill proposed by me. I am of the further opinion that we should always keep in mind that any delay of any consequence by any protracted debate denies, if the facts are as we presume them to be, the President from assuming his constitutional duties. He is being denied the right to act during this period of deliberation.

The Chairman. If the gentleman will yield, should not the thrust of this constitutional amendment be more or less favorable to a President?

Mr. McCulloch. Exactly, Mr. Chairman, because we withhold from the Chief of State in this country a right which is given to him by the Constitution, and which has been further implemented by vote of the people.

The Chairman. With that preamble, then, wouldn’t it be better to have the word “immediately” so that Congress would be compelled to make a decision one way or another to relieve the uncertainty, which would be to the advantage of the President?

Mr. McCulloch. Mr. Chairman, I am fearful that I do not believe that the word “immediately” has a fixed and definite meaning, and it certainly doesn’t mean to me in this text that it means today or tomorrow or the next day, if there is proper debate in both Houses of the Congress.
I have had Mr. Copenhaver, one of the staffmen, do a good deal of research on this matter, and I would be glad, if the chairman please, if he would make a comment or two at this time.

The CHAIRMAN. Certainly.

Mr. COPENHAYER. Mr. Powell, a question to you with regard to a situation where the Vice President and the Cabinet have taken away the powers and duties of the office of the President from him—for one reason or another—assuming it to be a proper action.

We also must consider the situation when we may have a Congress hostile to the President.

Now, with an open ended provision as it now exists in House Joint Resolution 1, are there not two possibilities for prolonged delay? One is if the Vice President fails to recall an adjourned Congress, and the second is for a Congress—assuming it may be hostile—to prolong indefinitely the consideration of the issue of the President’s continuing disability.

Furthermore, isn’t there a possibility that Congress, receiving a statement from the President that he is no longer disabled, and a statement by the Vice President that he remains disabled, could actually become involved in doubt as to which is the more reliable or accurate statement?

Doesn’t the provision of Mr. Poff and Mr. McCulloch which includes a time limit present a better out, because what it says is if Congress does not act within a certain number of days the office automatically reverts to that of the rightful holder, the President?

This would require the Vice President to reconvene Congress if he wishes to have his statement acted upon, but also gives Congress a triple option. It can act and uphold the Vice President, but it must within a certain period of time—it can’t delay. It can act and uphold the President within the required time or, if the Congress is honestly in doubt as to which of the two statements to accept, it might rightfully remain inactive and permit the office to return to the rightful holder under the Constitution.

Mr. POWELL. I think, Mr. Copenhaver, that those are all possibilities that certainly could happen. I would suppose—and I think all of us must have this in mind, that on an issue as vital to the welfare of the country as whether or not a President has recovered from disability and should go back, that the whole structure of our Government would be under the most intensive public scrutiny, and I would think it quite unlikely that the Vice President or the Congress would in those circumstances fail to act responsibly. I do not believe the Congress or the Vice President would deliberately engage in delay to keep the Vice President in power.

Mr. POFF. If I may pursue that line of questioning, Mr. Chairman, this has been my line of questioning throughout.

I don’t believe that counsel intended to suggest that delay would necessarily be bad. Rather, I think, he intended to suggest that delay might be purposeful and proper.

Mr. Powell. Purposeful and what?

Mr. Poff. And proper.

May I illustrate what I mean by citing an analogy. We now have the Reorganization Act which was a departure in the field of government in many ways, which permits the Executive to present to the Congress a plan for the reorganization of one of the executive agencies.
After the receipt of that plan by the Congress, the Congress has a specified time—namely, 60 days—within which it must act negatively if it opposes the plan of reorganization, and if it fails to act negatively, then the plan of reorganization becomes effective at the end of the 60th day.

Now, the analogy, I think, is apparent. Section 5 of my bill, to repeat in part what counsel has said, gives the Congress three alternatives. It allows the Congress to act on the Vice President’s challenge affirmatively, in which case the Vice President will continue to discharge the powers and duties of the office.

Secondly, it allows the Congress to act negatively on the Vice President’s challenge, which permits the President to resume the discharge of the powers and duties of his office.

Third, it permits the Congress, if it considers it wise to do so for any reason, to sit in an inactive state for 10 days, at the end of which the President would resume the discharge of the powers and duties of his office.

Now, I feel and I believe your testimony indicates you feel that the effect of this amendment should be to preserve and protect the powers of the President of the United States elected by the people of the United States.

Mr. POWELL. Yes.

Mr. POFF. I suggest the procedure outlined in section 5 of my bill does precisely that. It makes certain that if there is any congressional delay, that delay will act in defense of the President.

Now, if that delay is deliberate and proper, or accidental and improper, the effect is the same. It protects the President of the United States.

On the other hand—and I am making this statement simply to provoke a comment—House Joint Resolution 1 as it has been amended by the Senate in section 5 permits delay.

Now, is this a correct summary, and what would be your comments concerning the philosophy involved?

Mr. POWELL. Well, I certainly agree with your basic premise, Mr. Poff, that this whole procedure ought to be weighed carefully in favor of preserving the office of the elected President of the United States, and I think serious consideration should be given to any suggestion that is directed toward that end.

As I stated at the outset in my discussion of this particular question, the American Bar Association hasn’t given me any instructions on this precise point, and I don’t think I could fairly say that I myself have considered it meticulously and maturely.

My disposition has been, however—I knew the point had been raised—my disposition has been to wonder whether there might not be some times when the issue of whether or not the President had recovered was a very difficult one. For example, it might come up at a time when the Congress was not in session, and a 10-day period might indeed be too brief in which to enable you to get everybody back here and get into the record what evidence you felt might be necessary to enable the Congress to make a decision.

Mr. POFF. May I say, in response to that I recognize entirely the validity of the point you make, and the 10-day period is an arbitrary period which might be lengthened or shortened. It was suggested only to invite debate.
In response to the other point you make, however, I call attention to the fact that we are talking about a period of time in which the Vice President is the Acting President—he is in office discharging the powers and duties of the office.

Now, if the Congress happens not to be in session during that period of time, isn’t the Vice President likely to call the Congress into session if he knows, as he would know under section 5 of my bill, that the Congress must act affirmatively in order to uphold his end?

I suggest that he, as a matter of self-interest, if none other, would immediately call Congress into session, and if it takes 15 days to do that, I would be glad to see the 10-day period changed to 15 days.

Mr. Powell. I think it ought to be perfectly clear that there must be a mechanism to call Congress into session immediately.

The Chairman. Under the Constitution, the President can call Congress into session.

Mr. Powell. It would have to be the President or the Vice President, if he were exercising the powers and duties of the President.

The Chairman. In other words, the Acting President would have to call the Congress into session under section 5.

Mr. Powell. Yes, sir.

Mr. Poff. Mr. Chairman, pardon me for interrupting counsel. He had another question he wanted to put.

Mr. Copenhaver. I just wanted to propound one more question along the same line.

Assuming the difficulty which we have to assume, the simple case is clearly where there is no doubt where the President is able to resume office, where there would be no objection to that, or the case where the President is still unable to resume office and the Vice President, as the Acting President, makes his declaration and Congress so acts.

Taking the case where there is sincere doubt, I ask, Mr. Powell, which is better for the welfare and the prestige and the respect of the Nation—a situation where Congress being in sincere doubt permits the 10 days to elapse and the President resumes office, or a case where the Congress, being in sincere doubt, becomes involved in interminable delay, which it could under the existing language of House Joint Resolution 1, going on for a period of weeks or longer without coming to a conclusion, because there is nothing in House Joint Resolution 1 which will force them to come to a decision.

Mr. Powell. I think the only thing I would add, Mr. Copenhaver, is that what you are talking about is important, and I think reasonable people can have differences on these thoughts. I think I have expressed mine.

I would add, and this is the framework in which this entire discussion must be considered, that section 5 doesn’t present this issue we are talking about, inasmuch as the Vice President and a majority of the Cabinet or heads of the executive departments conclude that the President is still unable, and that is a very serious decision.

I think it must be assumed that the Vice President or a majority of the Cabinet, who are presumably the people who know the President best and are the most intimate political associates of the President, would be extremely reluctant to invoke this issue unless the situation were manifestly serious.
Mr. Copenhafer. I certainly agree with you, Mr. Powell. I might just state in history there are no cases of this. In studying Wilson’s administration there was a period of 20 months or so when the President was completely incapacitated at times and at other times was doing some business, people went in and talked to him and he seemed quite able to carry on, so these periods occur.

Mr. Powell. They certainly can.

Mr. McCulloch. I should like to ask one question, Mr. Chairman. What real objection do you find for listing a definite time within which the Congress must act, otherwise the President resumes the full powers and duties of his office?

Mr. Powell. Mr. McCulloch—

Mr. McCulloch. For instance, 15 days, 10 days, any period we could agree upon?

Mr. Powell. I think the inflexibility of that worries me a little, Mr. McCulloch, yet as I have stated earlier I think this point, while important, is not a critical point.

In other words, I personally would accept a resolution of this point either way. My preference would be in the language of the resolution we are discussing here, “shall immediately decide the issue,” rather than try to pin it down because there is no magic in either 10 days or 15, and yet I think I have made it clear that so far as I personally am concerned, I would not regard this as an issue of principle.

Either way here would be quite acceptable to me personally, although I prefer the present language.

Mr. McCulloch. If the resumption of the Presidency was under such conditions that the President really wasn’t able to carry on his duties, there would be nothing under either House Joint Resolution 1 or 3 or 119 to prevent the Vice President and the Cabinet from immediately thereafter taking the action authorized by the resolution, is there?

Mr. Powell. I think the answer to your question is yes, but I am not really sure of the references that you mentioned, Mr. McCulloch. You referred to several other resolutions.

Mr. McCulloch. The first, No. 1, is the Celler resolution, No. 3 is my distinguished colleague’s, Mr. Poff, and 119 is the resolution that I offered.

I raise these questions because in talking with both lawyers and laymen there just is not real agreement of the meaning “shall immediately proceed” or “shall immediately decide.”

If I could anticipate the very distinguished witness, Mr. Brownell, I would like to say I like this sentence:

The right of the President to resume the full powers and duties of the office to which he was elected is basic to the integrity of our electoral system and our form of government. The absence of such a right clearly stated and beyond reasonable dispute is the basic defect in the constitutional provision on this amendment.

Mr. Poff. If I might be permitted one final comment, I believe that those who are worried about the 10-day cutoff period are concerned primarily that a filibuster might develop in the other body which might not be altogether pure in its motivation.
Now, if that is the fear, let me speak to that fear in this way. It requires two-thirds vote in the Senate to invoke cloture. This happens to be exactly the same vote that would be required to uphold the challenge of the Vice President, so I say that that fear is not well grounded.

The CHAIRMAN. Mr. Donohue?

Mr. DONOHUE. No questions.

The CHAIRMAN. Mr. Cramer?

Mr. CRAMER. No questions.

The CHAIRMAN. Thank you very much, Mr. Powell. We thank you for coming down here, and we certainly are very grateful to you as head of the American Bar Association for your very splendid contribution to this subject. We appreciate your coming.

Mr. Powell. Thank you, Mr. Chairman. It has been a great privilege to appear before this distinguished committee. Thank you all very much.

The CHAIRMAN. The next witness is our former distinguished Attorney General, Mr. Herbert Brownell, who has always appeared here with a great deal of profit to this committee.

Prior to your statement, I think Mr. Lindsay wishes to make a statement.

Mr. LINDSAY. Mr. Chairman and members of the Judiciary Committee, it is a great privilege and honor for me to introduce to the committee the distinguished former Attorney General of the United States, Mr. Herbert Brownell, not only as a member of this committee but also as a former executive assistant to Attorney General Herbert Brownell, it is a personal privilege for me to do this as well.

Mr. Brownell has served a recordbreaking term, or near recordbreaking term, I think, of 5 years as Attorney General of the United States, from January of 1953 to November of 1957.

Thereafter, he resumed the practice of law, rejoined the distinguished New York firm of Lord, Day & Lord, and in the years 1962 through 1964 was president of the Association of the Bar of the City of New York.

Unless my recollection is wrong, it was under Mr. Herbert Brownell's leadership and personal direction that the first submission to the Congress was made on the subject of presidential disability, and indeed the basic drafts that we are now considering are all modeled after that first draft that was offered to the Congress by Attorney General Brownell.

I think that the record is clear, also, that the excellent informal written arrangement that all Presidents and Vice Presidents have followed since the original agreement was entered into between President Eisenhower and Vice President Nixon during the period of Mr. Eisenhower's illness, was also the draftsmanship of the witness that we are now privileged to have before us, so it is a great honor, indeed, for this committee to have before it once again this distinguished lawyer and public servant.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Brownell.
STATEMENT OF HERBERT BROWNELL, CHAIRMAN OF THE AMERICAN BAR ASSOCIATION'S SPECIAL COMMITTEE ON PRESIDENTIAL INABILITY AND VICE-PRESIDENTIAL VACANCY

Mr. Brownell. Mr. Chairman, members of the committee, I appreciate those introductory remarks by the chairman and my own Congressman, Congressman Lindsay, and if I may say a personal word, some of the most interesting hours of my life have been spent in this room, in this chair.

Some have been lively, but always profitable to my way of thinking, and I really am delighted to be back and appear this morning, as I think has already been mentioned, as chairman of the Special Committee of the American Bar Association on Presidential Inability and Vice-Presidential Vacancy.

I know that my committee members would want me to say that they join with me in expressing our appreciation of the opportunity to participate in these climactic hearings on Chairman Celler's House Joint Resolution 1 and the other resolutions on the same subject that are presently pending before the committee.

I call these hearings climactic because they really, when you look back, bring to a climax a 10-year study that has been made by this committee and one of its subcommittees of a great unsolved constitutional problem that faces the Nation—which is how to insure orderly transition of the powers and duties of the Presidency in the event the President is unable to discharge those powers and duties, and how to insure that a Vice President shall be available at all times for that purpose.

I think it is fair to say, too, that these hearings can be called climactic, also, because they were carried on during a period of such grave and tragic occurrences affecting the Presidency. I refer, of course, to the heart attack and subsequent illnesses of President Eisenhower during his terms of office, and the assassination of President Kennedy, so that surely no further argument is needed to demonstrate the critical nature of the problem or the virtual necessity for its speedy solution.

I recall that about the middle of 1955, I think it was, Mr. Chairman, before the somber events to which I referred, Chairman Celler alerted this committee to the advisability of a study and analysis of this problem, and instituted a staff study in consultation with the American Political Science Association which made a very constructive contribution. And then in January 1956, President Eisenhower instructed me as Attorney General to make a study of the problem in its broadest aspects, and some of you, I think, may recall—the older members of the committee—the excellent research study conducted under the auspices of Dr. Ruth Silva, with advisory assistance from Dr. Corwin, of Princeton, and Dean Griswold, of Harvard Law School, which eventuated.

These two studies, the one of this committee and the other in the Department of Justice, had been completed by the spring of 1957, and the results were then distilled in hearings before a subcommittee of this committee in which I was privileged to appear in April of 1957.

I think it is fair to say that public concern for a solution of this problem has steadily increased since that time, and is today evidenced
on all sides as this committee brings to a close its orderly comprehensive and scholarly study that began here 10 years ago.

As President Powell of the American Bar Association has indicated, our national forum on presidential inability and vice-presidential vacancy was held last May, with broad representation from business, labor, agricultural, civic, patriotic and welfare groups. It convinced us that thoughtful public opinion favored submission to the States of a constitutional amendment.

Before commenting and responding to questioning on the specific provisions of House Joint Resolution 1 and other bills before the committee, may I state that the 10-year study of this problem in which most of you committee members have participated from time to time, and the concurrent discussions in the Senate and by private groups have developed that there is very broad agreement on various aspects of the problem, and in particular four that I would like to mention.

First, that the need for prompt action is overwhelming and recent tragic events have made it clear that failure to act would be recklessly gambling with the stability of our Government.

The second point of substantial agreement I think is that modern analysis of the history of the original Constitutional Convention has produced substantial agreement among scholars that it was in fact the intention of the Founding Fathers that in the event of presidential inability the Vice President should be only Acting President and only during the term of that disability.

Third, no real difficulty has, in our history, attended the determination of when or whether a President is unable to perform the duties of his office, but rather the crux of the problem is to insure that the Vice President can take over with unquestioned authority for a temporary period when the President's inability is not disputed, and that the President can resume that office once he has recovered.

The fourth substantial point of agreement that has developed as a result of these studies, is that a constitutional amendment is needed to solve the problem.

Now, with these four points having received such widespread acceptance, and since I have previously testified before your committee in detail regarding the history of paragraph 6 of section 1 of article II of the Constitution, I think it might be advisable and save your time if I confine my remarks at this point to the specific provisions of House Joint Resolution 1.

As you know, these specific provisions have been endorsed by the President. They are in substantial accord with Senate Joint Resolution 1 by Senator Bayh. As President Powell pointed out, they encompass the substance of the so-called American Bar Association consensus and we believe that they apply the proper constitutional principles to the solution of the problem under discussion.

Section 1 serves to place, in separate sections in the Constitution the provisions about removal from office, death, or resignation of the President, on the one hand, and disability of the President, on the other. And since the confusion and ambiguity has resulted from the original language of section 1 of article II treating them in one section, this separation is clearly advisable. The provision in section 1 for accession of the Vice President to the office of President in case of removal, death, or resignation of a President is, I believe,
really noncontroversial and follows the precedent set first by Vice President John Tyler on the death of President Harrison, and followed without exception at the time of the death of other Presidents throughout our Nation's history.

If I may skip for a moment section 2, we come to 3 and 4, which deal with the commencement of disability. There is apparently substantial agreement among those who have expressed an opinion on the matter that the President should in any event have express constitutional authority to declare voluntarily at any time that he is unable to discharge the powers and duties of his office, whereupon such powers and duties shall be discharged by the Vice President as Acting President.

A typical situation that is covered by this section is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad and might be out of reliable communication with the White House for a short period.

In these cases the President's voluntary declaration, I believe, could cover either an indefinite or a specified period of time, and could specify a particular hour of commencement of the Vice President's role as Acting President. It is abundantly clear that the Vice President in this case would serve only as Acting President and only during the continuation of the disability, so that the reluctance we have found in the past which has deterred Vice Presidents from stepping in—notably in the Garfield and Wilson episodes—for fear that they might be charged with usurpation of the Presidency is very effectively diminished.

I might add, I think that section 3 would cover most instances of inability which would be encountered in the future.

Section 4 is designed to cover the rare but dangerous situations where the President is unable to declare his inability. Typical of these would be a situation where the President was unconscious, or where he was mentally ill. When one considers the strong light of publicity which surrounds every event at the White House, and certainly in time of crises, the facts of such situation would undoubtedly be known to the public, and action of the kind provided for in section 4 would not only be condoned by public opinion but I think it would be welcomed.

Section 4 provides that the Vice President with the written concurrence of the heads of a majority of the executive departments, or such other body as Congress may by law provide, may transmit to Congress his written declaration that the President is unable to discharge the powers and duties of his office and shall immediately assume such powers and duties as Acting President.

Here again I think it is abundantly clear that the Vice President would step in only as Acting President and only for the period of disability.

My interpretation of this is that two courses of action would be possible. One, the Cabinet could notify the Vice President when a majority of its members believes the President's inability was sufficient for a devolution of power to the Vice President, and in this instance I point to the fact that in the past Cabinet members have always notice-
fied the Vice President when a President has died, so that this custom would under this provision be extended to the case of disability, and the Vice President must, under the plan, of course, have a concurrence of the majority of the Cabinet. The other possible line of action would be, alternatively, that the Vice President might take the initiative, but in this case also written approval by a majority of the Cabinet would be required.

Now, the reasons favoring the plan set forth in section 4 are apparent and have been detailed in previous testimony before this committee.

Briefly, they are, first, protection against usurpation. I have already mentioned that in the Garfield and Wilson cases, the Vice President hesitated to step in for fear of charges of usurpation of power if he acted alone. Some scholars argue that under the present Constitution, if the Vice President stepped in, he automatically became President—not Acting President—for the balance of the 4-year presidential term, even if the President plainly recovered. This, of course, has heightened the fear of charges of usurpation and of unseemly struggles for presidential power.

My own experience, I might interject here, as a Cabinet member at the time of President Eisenhower’s heart attack leads me to the conclusion that the public rightly regards the members of the Cabinet as strong adherents of the President who can be counted on in acting with the Vice President, to help insure that no ill-considered action to transfer the powers and duties of the Presidency, even for a temporary period, would be taken. And, as a final check, of course, strong favorable public opinion, as you gentlemen know from your own experience, is requisite for the operation of any constitutional arrangement.

Now, secondly, among the reasons for support of section 4, the constitutional principle of separation of powers between branches of our Federal Government is maintained, and no door is opened for undue pressure on the executive branch from any other branches of the Government. But you will notice that provision is made in section 4 to care for any unexpected future situations where the Vice President-Cabinet joint action might no longer be desirable, in that Congress may provide by law for another type of machinery to achieve the temporary transfer of power to the Vice President.

Since it is a constitutional amendment and not a statute we are considering, and thus must make provision for the long term and for unforeseen situations, I endorse the language giving Congress this authority and have little concern that Congress would in the future flout public opinion which has through the years supported the constitutional doctrine of separation of powers.

Now, there is a third point that I would like to mention in connection with section 4, and that is that certainty and prompt action are, so far as possible, built into this proposal. You will recall, of course, that during the 10-year debate on presidential disability culminating in these hearings, many plans have been advanced to have the existence of disability decided by different types of commissions or medical experts, by the Supreme Court, or by other complicated ad hoc procedures. But upon analysis it has been found, I think you would all
agree, that they all have the same fatal flaw, and that is that they would be time consuming and divisive.

Now, what do I mean by that? We certainly would assume that at any time where section 4 is called into play, that itself would indicate that there is a national crisis, so that any substantial delay in reaching a decision or any public airing of evidence before a deliberative body which might act with a split vote would at best intensify the crisis and degrade the Presidency, and, at the worst, immobilize the orderly functioning of our Government with catastrophic consequences in time of a world crisis.

So in closing my comments on sections 3 and 4, on the commencement of disability, I would just say this. I don’t want you to understand that I think all conceivable situations are covered, or that the solution adopted is in all respects perfect, because I don’t think that any mechanical or procedural solution will provide a complete answer if you assume hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. But I do believe, and our American Bar Association consensus concludes that the combination of the judgment of the Vice President and a majority of the Cabinet members furnishes the most feasible formula in consonance with our basic constitutional principles.

An analogy that has crossed my mind is this, to say it in other words. I visualize people sitting around trying to determine what is the cause of airplane accidents at an airport where they have had some terrible accidents and a lot of near-misses. They have called in all the engineers and the knowledgeable people and are trying to decide what to do, and they find out that most of the near-misses have come from one particular set of circumstances, and that they could cure 90 percent of that by changing one runway, or by one particular procedure.

Now, I am sure there would be somebody in the group that would say, “Well, what about this situation on another one of the runways?” and another would say, “Well, let’s not do it piecemeal, let’s have a long-term program that will cover every conceivable kind of accident that can occur at this airport.”

I think if you were sitting on that body you would say, “Well, let’s, for goodness sake, take care of that 90 percent of the problem and do it right away before the next near-miss or the next accident occurs.”

That is what I think I would do, and how much more important it is, of course, in the situation we are discussing here for the orderly transition of the powers of the Presidency of the United States. So I say it doesn’t cover every conceivable situation, but I believe it covers, in consonance with the basic constitutional principles, at least 90 percent of the cases we could reasonably foresee.

Now we come to section 5, dealing with the termination of the disability. This section makes clear that the President may at any time transmit to Congress his written declaration that no disability exists, so with the exception of the extreme case that I will mention in a moment, such declaration restores the President to the full exercise of the powers and duties of the Presidency, and such declaration could terminate the period of disability whether it commenced by voluntary action of the President or by action of the Vice President and a majority of the Cabinet.
I believe it could properly be interpreted to take effect either at the end of a 2-day period or at a later specified date and hour. Of course, if it was agreed upon by the President and the Vice President, it could take effect at any earlier time specified therein.

Now, the right of the President to resume the full powers and duties of the office to which he was elected is basic to the integrity of our electoral system and our form of government, and the absence of such a right, clearly stated and beyond reasonable dispute, is the basic defect in the present constitutional provision on disability.

The extreme exception to the normal procedure covered by section 5 arises when the Vice President and the majority of the Cabinet transmit to Congress within 2 days a written declaration that the President is unable to discharge the power and duties of his office. I think no President in his right mind would issue his declaration unless he was confident that he was able to function as President, and the fact of his temporary disability would have been well known to all, so that only in the case of the President's mental illness can I visualize the extreme exception arising.

In such event, the duly elected representatives of the people in the Senate and House would immediately decide, as set forth in section 5, the outcome of the constitutional crisis, and unless both Houses by two-thirds vote taken separately decide that the President is unable to discharge the powers and duties of the office, the President shall resume them, and I believe this means two-thirds of those Members of each House present and voting, a quorum being present.

The CHAIRMAN. Would you allow a question at that point?

Mr. BROWNELL. Certainly.

The CHAIRMAN. This bothers me a little bit. The Constitution provides that only the President can call a Congress into session. I take it that in the case of disability the Acting President who has the duties of the President—the Vice President who is Acting President, who has the duties of the President—could also call the Congress into session. If he refuses to do so, our recourse, of course, would be impeachment; but if Congress is not in session, how could we impeach?

Mr. BROWNELL. Well, I think as in so many other situations that could be presented, we must rely on public opinion to force Government officials to act if they are really recalcitrant. I take it in two bites. One is, I have always found in my experience that men under the pressure of national or international crisis do act responsibly, but if the occasion arose when they didn't, I think public opinion would force them to do it, or destroy their usefulness as public officials thereafter.

Mr. TENZER. Would the chairman yield for a moment and permit a question at this point?

Could that be solved by adding to section 5 a provision that when such a message is transmitted to the Congress, Congress shall be convened by the Acting President?

Mr. BROWNELL. I suppose he could still, if he were the kind of rogue we are talking about for the moment, refuse to follow that express provision, but such a provision certainly would make clear if he had any doubt about his power—which I don't think he could under the cases cited to this committee by Attorney General Katzenbach—but
if that would in your opinion make it clearer, I would see no objection to such a provision.

Mr. HUTCHINSON. Mr. Chairman, if you would yield for a question.

Mr. Brownell, could not the constitutional amendment itself provide under such circumstances that the Congress would automatically convene within, say, 48 hours?

Mr. BROWNELL. It could.

Mr. HUTCHINSON. And not require the Acting President to take any action at all?

Mr. BROWNELL. It could.

The CHAIRMAN. Proceed, Mr. Brownell.

Mr. BROWNELL. I have been asked to comment on a proposal to insert in section 5 a specified number of days within which Congress should act. The American Bar Association has not stated a position on this point. I understand in this connection that Senate Joint Resolution 1 by Senator Bayh, which is identical to Chairman Celler's House Joint Resolution 1—at least when they were introduced—has been amended to provide that "Congress shall immediately proceed to decide the issue."

If Congress is not in session at the time, as I mentioned a moment ago, I believe this language would operate to convene the Congress on call of the Acting President, and you would have this implied power to convene a special session to implement section 5.

Now, as I see it, in favor of leaving the time flexible—in other words, to use the word "immediately"—is the impossibility of covering all eventualities: Is Congress in session or out of session? Is it holiday time, or the closing days of a political campaign? Does a national crisis exist? If the specified time is too short for proper action by the Congress which will command public support, would unnecessary confusion be created? All those questions arise, and perhaps favor the flexible form. The argument in favor of inserting a specified time, as I understand it, is that it puts a termination date on the period of uncertainty which would undoubtedly ensue if a conflict between the President, on the one hand, and the Vice President-Cabinet group, on the other, arose.

Before I state my own personal position on it, let me expand on that a little bit more. There is precedent in the Constitution for putting in a specific provision of this kind. I think the Constitution provides that when Congress sends a bill to the President, he has 10 days within which to act, and if he doesn't act the bill becomes law without his signature, so there is nothing out of keeping with past practice in this regard.

The question comes to my mind as to what would happen if you took 11 days rather than 10, or 16 days instead of 15, to convince the public that the right action was being taken. Suppose the President's doctor said the President will be all right in 11 days. Probably the public would want to wait for the 11 days before Congress acted, and Congress itself would want to. There are all that variety of problems that are involved, and of course in the Constitution—I think it is in amendment 12—there is already provision that the Congress must act immediately in a case where it is being called upon to elect a President because of failure of the voters to cast a majority vote, a majority electoral vote for one candidate, so you have precedent on that side in the Constitution.
I would express the personal view that public opinion would force speedy action, as speedy as was wise under the circumstances, assuming that Congress was obviously filibustering or delaying for some non-public reason, so that I would say the more flexible language, without a specified time limit would be entirely adequate, but I add that the insertion of a time limit would not do violence to the principles which the American Bar Association consensus encompasses.

I deferred comment until now on section 2 of Chairman Celler's bill, which provides whenever there is a vacancy in the office of Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses. In my opinion, it is advisable to provide in the same constitutional amendment which deals with the question of presidential disability a provision that when the vacancy occurs in the Vice-Presidency steps shall be taken immediately in the manner to be defined in the amendment to fill the vacancy in the Vice-Presidency for the unexpired term. This would minimize the risk that our Nation will be faced with a situation where neither the President nor the Vice President is available. We are all familiar with the fact that at the regular quadrennial national conventions of our political parties, it is the practice of the conventions to turn to the newly nominated presidential candidate to ask him to choose the vice-presidential candidate subject to convention approval. Under House Joint Resolution 1 the President would likewise choose his second in command, subject to congressional approval. In this way the public would be assured that the Vice President would be of the same political party as the President, and would be someone who would presumably work in harmony with the basic policies of the President.

I am aware of the fact that suggestions have been made that the new Vice President should be chosen by the electoral college and, in theory, this plan has merit. As I point out in the written statement—I don't think it is necessary to review it here—this solution has certain practical hazards that I think make it distinctly unpreferable to the procedure that is set forth in House Joint Resolution 1.

In closing, I merely say this: I want to congratulate Chairman Celler and the members of the committee on the care and comprehensive nature of their 10-year study on this problem of presidential disability. I think the time has come to submit a constitutional amendment to the States, and that is the opinion of the American Bar Association for whom I am privileged to speak today. As President Powell pointed out, since the legislatures of practically all the States are now in session, and only a small number convene in 1966 for unrestricted sessions, it might well save 2 years in obtaining the necessary ratifications if action in the Congress would be completed very promptly, but I want to emphasize that I feel that deliberate action in the case of constitutional amendments is always required, and I believe in this case that deliberate action has properly characterized your consideration of the matter under discussion. We urge a speedy culmination of your public spirited endeavors that you have exhibited to date in meeting a most critical national problem.

The CHAIRMAN. Mr. Feighan?

Mr. FEIGHAN. No questions.

The CHAIRMAN. Mr. Rodino?
Mr. Rodino. No questions.
The Chairman. Mr. Donohue?
Mr. Donohue. No questions.
The Chairman. Mr. McCulloch?
Mr. McCulloch. No.
The Chairman. Mr. Poff?
Mr. Poff. Yes, Mr. Chairman.

I have two lines of questioning which have previously been explored, but which I think the witness should address himself to.

The first question deals with section 2, and the definition of the word "vacancy." First, may I say that as an author I intended that word to apply only to resignation, death, or removal of the Vice President, and that it should not apply to permanent disability of the Vice President.

I will ask the witness, first of all, if that is his interpretation of the definition of the word "vacancy" in that context?

Mr. Brownell. Yes, it is.

Mr. Poff. Secondly, may I ask this hypothetical question? Suppose the Vice President were en route to London by air, and the airplane should crash in the Atlantic Ocean and the whereabouts of the Vice President would remain unknown for a season of time. Do you feel that the period of time in which the whereabouts of the Vice President were unknown should properly constitute a vacancy within the intention of section 2?

Mr. Brownell. I am inclined to think there is a practical answer to that question, outside of the language of it, that you can imagine what a search would go on, and in this age of instant communication how rapidly the question could be solved—perhaps even more rapidly than it would take for anyone in Washington to move—so that I don't consider that that would be a serious problem.

Mr. Poff. Well, I will pose one other possibility. Suppose the Vice President were kidnapped for a period of time, during which his whereabouts were unknown.

Mr. Brownell. You mean at a time when he is Acting President?
Mr. Poff. No, when he is acting as Vice President. That is what section 2 contemplates, a vacancy in the Vice-Presidency.

Mr. Brownell. Oh, I see what you mean. No, I don't think that would constitute a vacancy.

Mr. Poff. Well, suppose his whereabouts remain unknown for a month?

Mr. Brownell. I think that if the President felt that there was a national crisis that required action he could, under those circumstances, take action.

Mr. Poff. What would happen if in a month and a day the Vice President's whereabouts became known?

Mr. Brownell. I don't know.

Mr. Poff. Well, may I say that I think the gentleman answered the questions as well as they can be answered. In your formal statement, you said it is absolutely impossible to cover all foreseeable contingencies, and we just have to deal with that 90 percent area of the spectrum.

Mr. Brownell. Right.
Mr. Poff. Now may I direct your attention to section 4, which has been amended by the Senate Judiciary Committee to read in part as follows:

Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmits to the President of the Senate 

In the testimony before this committee, the author of the Senate bill, Senator Bayh, testified that the effect of this language was to empower either the Vice President or a majority of the members of the Cabinet, or a majority of the members of such other body as the Congress may appoint, to initiate the action.

Now, contradistinguish the initiation of the investigation, on the one hand, from initiation of discussion of a possibility of disability, on the other. In your testimony you made reference to the fact that truthfully any of the three might. My question, sir, is it wise to grant this rather extensive power to a group of people as distinguished from one person?

In further explanation of the import of my question, I suggest that the framers of the Constitution clearly implied that it would be the Vice President who would initiate the action in the event of presidential inability.

Would you care to respond to the question?

Mr. Brownell. Well, I would have two comments to make on this. One is based on my own personal experience at the time of President Eisenhower's heart attack. At that time it would be very hard for me to say who initiated the discussions as to whether or not the President was able to act, there was such close working relationship between the Vice President and the Cabinet, and I would think that same thing would be true at any time in the future, and that it would be a matter of little moment as to whether the Vice President telephoned the Secretary of State first, or the Secretary of the Treasury telephoned the Vice President first. The people involved would be acting in a period of national crisis. Probably there would be hourly bulletins from the medical people, and statements would be made in the press, television, radio, and whatnot, so that it isn't as though someone were stirring up the problem—the problem would be present in the minds of everybody in the United States, and I think that, in order to avoid any technical question as to who should start the discussions, it is wise to leave it flexible so that either a Cabinet member or the Vice President could initiate discussion of the matter.

Mr. Poff. But I asked in the premise of my question to distinguish between the initiation of discussion, on the one hand, and initiating the procedure envisioned in section 4, on the other.

Mr. Brownell. In other words, who would prepare the document, who would sign it, and to whom would he take it?

Mr. Poff. Who would prepare the document, who would sign it, and to whom would he take it?

Mr. Brownell. I would think that that is a rather technical distinction. Undoubtedly the Justice Department would prepare the papers, and the action would be taken at a joint meeting of the Vice President and the Cabinet members. It might not even be a matter of public knowledge as to who signed first. That particular point would fade into insignificance in getting the group action.
Mr. Poff. Well, this leads me into two subtitles of the question. One is would your answer be the same as applied to "such other body as Congress might appoint"?

Mr. Brownell. Yes, I think so. I think we must assume that the Congress would act responsibly in the matter.

Mr. Poff. Now a next subtitle. Do you think your answer bears the full light of the searchlight if applied to the Lincoln Cabinet?

Mr. Brownell. Well, I think we must always realize that there is the possibility in any Cabinet there would be a single individual or a couple of individuals who may be out of sympathy with the majority of the Cabinet, but I don't see that that would change the situation any. In fact, I think that is why the House Joint Resolution 1 provides for a majority of the Cabinet and not for unanimous action of the Cabinet, just to take care of that kind of a situation where one particular member of the Cabinet might be entirely out of sympathy with the national administration.

Mr. Poff. Well, I am not sure that I disagree with all you said before you finished your last statement, but by the same token I am not certain I agree with all you said in your last statement.

Now, then, by way of summary, is it true that you feel, as a philosophical matter, there is really no great difference between the original version of the Senate bill and the amendment of the Senate bill so far as it applies to the question of who shall initiate the investigation, setting in motion the procedure envisioned in section 4?

Mr. Brownell. That is my opinion.

Mr. Poff. I thank the gentleman, and may I add I think the gentleman's testimony has been brilliant and has reflected an insight into the problem which we have come to expect from the gentleman in his long period of public service.

The Chairman. Mr. Lindsay?

Mr. Lindsay. Mr. Chairman, I am sure Mr. Brownell would not want to leave the witness chair without having one or two questions from his Congressman.

I have a feeling that when we get to executive session the sticking point on this would be in this area that was being discussed by my colleague from Virginia on the time period. That includes the possibility of filibuster, it includes Congress not being in session, and maybe some other things.

House Joint Resolution 1 goes off on the assumption that in the event there is a disagreement between the President and the Vice President as to whether the President is disabled or is unable to perform his functions, that should the Vice President assert himself and take over as Acting President, he will continue in that status unless Congress reverses him, in effect.

Now, this is the area where I think we are going to have the biggest difficulty when we get down with a sharp pencil to write this thing.

In House Joint Resolution 139, which is my own bill—you don't need it before you, but this language would be familiar to you. I think—the reverse is provided. Here it is immediately provided in section 4 of my bill, as it is in House Joint Resolution 1, that as soon as the President says, "I am OK," that statement immediately bring back to him all the powers and duties of the office. So far we are even in each of the bills on that point.
The proposal that I introduced, which has been considered by others before House Joint Resolution 1, then goes on to say, “But if the President,” et cetera, “with the written approval of the majority of the heads of the executive departments,” and so forth—“transmits to the Congress a declaration that in his opinion the President’s disability has not terminated, the Congress should thereupon consider the issue.”

That is the language in this particular one. It goes on to say if Congress is not then in session, it shall assemble in special session on the call of the Vice President. Then it goes on—

If the Congress determines by concurrent resolution adopted with approval of two-thirds of the Members present in each House that the inability of the President has not terminated—

Putting it in the double negative, as it were—

thereupon, notwithstanding any further announcement by the President, the Vice President shall assume the discharge of such powers.

In other words, it is only in that event does the President lose power, and our original objective, as stated by my colleague from Ohio and as you stated in your opening remarks, is to protect Presidential power at all cost, if possible.

Then in this same bill there are three double-checks even on this step, should the Congress take it, which would put the Vice President in a position of being Acting President. It goes on to say the Vice President shall then assume the powers of the Presidency, assuming Congress reversed the President on two-thirds vote, unless one of three events occur: (1) That the Acting President proclaims that the President’s inability is ended—in other words, the Vice President makes his own decision on that—(2) the Congress determines, by concurrent resolution adopted with the approval of a majority of the Members present in each House, that the President’s inability has ended, or (3) the President’s term ends.

No. 2 is the significant one here, because here is the only proposal that we have under consideration that gives any powers to the Congress to initiate in this area. In other words, if there is a wrangle between two power groups—one in the Cabinet and the Vice President; on the other hand, the President—this proposal here would, first of all, not allow powers to devolve upon the Vice President until Congress decided that the President is wrong that he can act and the Vice President is right that he can’t act.

Then, too, Congress reserves to itself a power we would never have, unless we write it in, to later decide this question by itself, if it has to.

So that you may have full knowledge of where this stands with the Attorney General, I put this question to him when he testified as to whether he would have any objections to this kind of reservation of power by Congress, and I gathered that there wasn’t any real objection. Maybe I am overstating it, or perhaps I haven’t stated it clearly. It was one perhaps that he would want to consider more—perhaps that is better stated. He did not see any immediate objection to it.

I am wondering what is it that led the bar association people to reverse the original thinking of how Presidential power should move in this case.
Mr. BROWNELL. Well, first let my say it is obvious from your remarks that you have given very careful consideration to this whole area of this problem. I am glad, first, that you brought us back to this question of the insertion of a particular time, say a 10-day period, here, because there was one thing that I wanted to say that I neglected to say in answer to a previous question, and that is I think that the flexible provision that is in there now is in there out of careful consideration of the powers of Congress in the matter, that when you put in the 10-day provision you really limit the power of Congress.

Now, if the Senate and House decide that that is what they want to do, as I mentioned before and I think President Powell of the ABA also mentioned, it would not do violence to the principles we support. I think that is the basic reasoning for the insertion of the specific time limit in there.

Mr. LINDSAY. If I could interject there, the time factor becomes relevant only in connection with the importance of preserving Presidential power; correct?

Mr. BROWNELL. Yes; that brings it to the other part of your comment.

Mr. LINDSAY. This language overcomes that problem by retaining Presidential power in the absence of affirmative act, two-thirds of the Members of Congress voting.

Mr. BROWNELL. I think, myself, it is better to have that power of Congress a reserved power in case of some unforeseen reason this doesn't work out. I think it is a little more true to the doctrine of separation of powers to leave the initial functioning here in the hands of people in the executive branch, but that we should—as is provided in all of these bills, I believe—have some residuum of power in the Congress to set up another method if, in fact, this one doesn't work.

I would hesitate myself to give the initiating power to Congress right at that point.

I don't know whether that answers your question or not, but I think there is a distinction in principle there.

Mr. LINDSAY. The key question that is troubling me is why is it desirable, when the Vice President should make his declaration, to rig this in such fashion that he continues as Acting President in power rather than—if there is a dispute between the President and Vice President—retaining power in the hands of the President?

Mr. BROWNELL. I think that it could be done either way. I am inclined to think the reasoning back of the present language of House Joint Resolution 1, and certainly was in our thinking, is there is a presumption that the Vice President should continue during that period because it has been proved beyond a shadow of a doubt that the President was unable to act up to that point, and I would think that the country would want to have some definitive act occur to be sure that the President was able to come back, so that I think it is perfectly reasonable to leave the Vice President in that very brief period.

Mr. LINDSAY. The only problem with that is it may not be proved, because the only proof is the Vice President's say-so, backed by a majority of the Cabinet, and that means that should the Congress get into a hassle on the subject and filibuster, that means that the President for all that period has lost power to control, and cannot take it
back, when there is clear dispute between the President and the Vice President as to the President’s ability to function.

I would have thought, and the reason I stuck to this language here, the reason I stayed with it was that I had reached the conclusion that if there was a difference between the President and the Vice President that the burden of proof should be on the Vice President, and that the Presidential power should be retained by the President if he says that he is in a position to act.

Now, the bills introduced by the chairman of the committee and by Senator Bayh, following the American Bar Association’s suggestions, have reversed this, and I am still not clear in my mind as to the reasons. I don’t quite get it as to the reason for the reversal.

Mr. Jacobs. Would the gentleman yield?

Mr. Lindsay. Yes.

Mr. Jacobs. Mr. Brownell, along the line of this inquiry, how soon, in your opinion, would the Congress not have acted to support the Vice President to the effect that the President will resume his powers?

Mr. Brownell. You mean interpreting the word “immediately”?

Mr. Jacobs. No; I mean in interpreting the word “otherwise,” the 12th from the last word in section 5. In the one instance, I assume “otherwise” to imply two possibilities, (1) that a vote is taken which did not produce a two-thirds majority, and (2) that no vote is taken.

My question is: In your opinion, how soon would a vote not have been taken to support the Vice President’s contention to the effect that the President would resume his constitutional powers?

Mr. Brownell. Well, there is no mathematical answer to that, and that, of course, is one of the reasons the suggestion has been made that a definite time limit should be put in, and we would have to give the answer that lawyers so often have to give, and that is it would depend on all the circumstances of the case.

If the medical people, for example, had said no answer to this question can be given for 15 days, I think it would be reasonable to say that certainly during that 15-day period the time would not have arrived, or something of that sort. It is, however, impossible to give a mathematical answer.

Mr. Jacobs. If I may be permitted a further question, the only problem I see is that the President of the United States sits in the White House and says, “It has been 15 days, now, and Congress has not decided, so I believe I should resume my powers today, or on the 20th, or the 30th.”

Mr. Brownell. That is conceivable.

Mr. Jacobs. I thank the gentleman.

Mr. Donohue. Would the gentleman yield?

Mr. Lindsay. Yes.

Mr. Donohue. Assuming Mr. Brownell, Congress sustained the declaration of the Vice President that the disability of the President had not terminated, the Vice President would continue exercising the powers and duties. Then a month later the President again states, “My disability has ceased.”

Would you go through the same procedure again?

Mr. Brownell. I would think so.

Mr. Donohue. And that could go on from month to month.

Mr. Brownell. Theoretically that is possible.
Mr. Lindsay. Well, I suppose that the single reason for placing power in the hands of the Vice President on his declaration, supported by the Cabinet, even when the President disputes it is that it assumes that commonsense and history would dictate that there be no such major move within the Cabinet or on behalf of the Vice President unless something is seriously wrong with the President, and if there is something that is seriously wrong with the President, he is not really in a position to say, "Well, I am OK," and therefore during this period of decision the Congress is debating, filibustering, or whatever they are doing on it, and in that period of the decision the Vice President—as to whom there is no health question—should act. I guess that must be the reasoning.

Mr. Brownell. I endorse that statement. I think there is more continuity, in other words. It might prevent the offchance of jumping back and forth.

Mr. Lindsay. I will be frank in saying it troubles me a little bit. I could see how you could have critical periods where the President was in an acute state of depression over world affairs, or anything else, where some people might conclude he couldn't act, but he is still the President. He is still the President, and although there could be argument as to his mental capacity, he should be able, I would think, to declare his own ability to act and retain the power unless he be reversed by Congress rather than have the question decided in favor of the Vice President and the majority of the Cabinet unless the Vice President is reversed by Congress. I am troubled by this.

Mr. Brownell. If I may add one comment, I think that basic to this whole discussion is the fact that in all the instances up to date in our history, the fact of whether or not the President was unable to act was never a real worry. That is even more so today perhaps than, let's say, in Garfield's time, because in the white heat of publicity on the White House, on Walter Reed Hospital, so to speak, the facts in 99½ percent of the cases would be very well known, so that if anyone tried to act irresponsibly it would be shown up very soon.

I think that we really are talking about a question of mental incompetence, because under any other set of circumstances that I can see, public opinion would be such that anyone who challenged it arbitrarily would be destroyed so far as his public career was concerned and go down in history as a usurper, and everything in our history indicates caution under these circumstances.

I think we must come back to the central point that the problem illustrated by history is not so much as to when the President becomes unable to act, or whether he is able to act, but whether we have set up machinery that is workable to accomplish the transfer under that factual situation.

Mr. Lindsay. I wonder if I might put one final question on this point, because it is going to give me a good deal of trouble in my own mind, and already has.

Do you see any practical area of risk or danger in reversing House Joint Resolution 1 to retain power in the hands of the President where there is a difference between the President and Vice President, as I have it in my own bill here? Is there any area of risk in that?

Mr. Brownell. I wish I could just say yes or no, right off the handle, but I really can't, because of this. House Joint Resolution 1
provides that when the Vice President and the Cabinet act, they must do so within 2 days. That to me would indicate that the President would not come back with his full authority during that 2-day period, that there is a feeling that if he did act irresponsibly that the Vice President and the Cabinet should have a short period there in which to call the question to the attention of the Congress.

That, in other words, indicates that very serious doubts exist about the disability of the President. No question has been raised as to the disability of the Vice President and a majority of the Cabinet has sided with the Vice President.

During the period while Congress had the matter under consideration, I would be inclined, on balance, to let the Vice President continue during that time because it is always within the power of the Congress to restore the President to the full exercise of the powers and duties of his office.

Mr. LINDSAY. I would like to thank our distinguished witness. I believe this was a brilliant performance, and a very clear piece of testimony.

Mr. CHIEF. Are there any question, Mr. MacGregor?

Mr. MacGregor. Mr. Brownell, I would like to direct your attention for a few moments, if I may, to those portions of section 4 and section 5 of House Joint Resolution 1 which contain the language “such other body as Congress may by law provide.” Why do you feel this is necessary?

Mr. Brownell. In my original testimony before this committee, or subcommittee, some years ago, I took the position that it was not necessary to have that expressed in the Constitution.

We had the meeting which resulted in the American Bar Association consensus, and there was considerable view expressed at that time—and I believe Senator Dirksen, for one, has expressed it recently—that the whole matter should be left to Congress, that constitutional amendment should merely say that this could be done in such manner as the Congress deems advisable.

The discussion boiled down to the fact that the real reason for this language which you mention is it is conceivable that the plan set forth in the Constitution might not work, and that there should be reserve power in the Congress without the necessity of going through the process of another constitutional amendment to have some other system set up to replace the one set forth in the constitutional amendment.

I was convinced by that discussion that it is wise to have that reserve power there in such manner that it would not be necessary to go all though another constitutional amendment if the original proposal did not work.

Mr. MacGregor. Should the Vice President-Cabinet joint action proposal not work, what body or bodies do you, sir, presently have in mind that Congress might designate to participate in this performance?

Mr. Brownell. Well, I myself think it will work, and I have never come to a point where I have developed an alternate plan. I doubt that time ever comes, but I think the principles that should govern—if the time does come—should be first that the initiation machinery should be in the executive branch in consonance with our principle of separation of powers between the branches of the Federal Government.
and, secondly, that it should have certainty and be one which would not call for a long period of time in which to make the decision, because inmedicacy would be of major importance.

Within that framework, it is possible another alternate plan could be developed.

Mr. MacGregor. My question was designed to lead up to an eventual point, Mr. Brownell, and I am of course familiar with the fact that there have been suggestions that a commission be established, or that the nine members of the U.S. Supreme Court constitute this other body, but the question that has been in my mind during the last couple of days is one of language, and if you have House Joint Resolution 1 before you, I would like to direct your attention to lines 14, 15, and 16 on page 2, under section 1, and to ask you whether or not in your opinion—under the language as now drafted in House Joint Resolution 1—if the Congress did designate another body, unanimity would be required, or only a majority?

Mr. Brownell. I think in such case the Congress could by law provide for it either way.

Mr. MacGregor. I am wondering whether you feel that the language of the constitutional amendment inhibits that power of Congress in any way?

Mr. Brownell. No, I do not.

Mr. MacGregor. I have reference to the fact that the language on line 14 refers to the written concurrence of a majority of the heads of executive departments. The next word is “or”, and then there is no “of”—or of such other body. In other words, it appears from the language as drafted here that we are precluding, or might be thought to be precluding the Congress from providing that a majority of such other designated body might act.

It appears to me here that we may be compelling unanimity of views of, let’s say, the nine men on the Supreme Court. This does not trouble you as far as language is concerned?

Mr. Brownell. No, I would be content to leave it as it is, but I see no objection to the clarification that you propose.

Mr. MacGregor. Thank you, Mr. Brownell. I, too, have found your testimony helpful to the committee.

Mr. Chief. Mr. Mathias?

Mr. Mathias. I have found in the course of these hearings that I have been playing the somewhat unenogenous role of the Jeremiah, and I am interested in that your testimony has relied to a great degree on the very healthy and happy relationships which apparently existed within the Cabinet during the Eisenhower administration, and upon the fact that experience in past history has given clear medical evidence of the existence of some disability on the part of the President when it has existed.

But I have believed that we ought to follow the example of the Constitutional Convention and examine the hypothetical cases in which the happy circumstances does not exist, and perhaps the unhappy or unhealthy circumstance would prevail, and I am reminded in connection with the colloquy with the gentleman from New York of several recent books that have been written about the illness of the late Defense Secretary, James Forrestal, who apparently underwent a rather long mental decline before he finally left office. I think it is
entirely possible that in the context of tensions in office today this same sort of debility could attack the President, so I would like to pose a double-barreled question, the first half of which is if there were such a long period of mental debility, such as Mr. Forrestal suffered, in which some of his colleagues observed certain eccentricities which others did not, would there be a danger—in your judgment—of a Cabinet intrigue, which could be dangerous to the overall stability of the Government, in view of the point made by the gentleman from Virginia that any member of the Cabinet has the opportunity under this provision to initiate action?

Then I would like to put to you the second half of the question, that if by providing in this single amendment for the fact that a President nominates his official heir and successor who has the power to initiate—you give that heir and successor powers of deposition of the man who is nominating him—are you not creating some danger there that the best possible man for the job may not be chosen?

These I put to you together because I think you have to approach them in the same context.

Mr. Brownell. Well, as to the first point, it is theoretically possible for a Cabinet member to be a mischief-maker, a Machiavelli, a plain overambitious office seeker—

Mr. Mathias. That is not unknown in our history.

Mr. Brownell. (continuing). Ruthless and unprincipled, but I think it would be stretching things quite a bit to think that a majority of the Cabinet would be in that category, and it takes a majority plus the Vice President to act under the section that we are talking about.

Mr. Mathias. If a single member were to initiate this kind of action and could persuade the Vice President that this was his golden opportunity, and they got one or two others to go along, it might not be a majority, but you could develop a cabal that would be very dangerous to the stability of the Government, it seems to me.

Mr. Brownell. Yes, I think you could say a columnist might start it, a television commentator might start it, a Governor of a State might start it, a lobbyist might start it—there are all sorts of ways in which the matter could come under public discussion, but the protective provision is that there must be a majority of the members of the Cabinet and the Vice President under the white heat of intense publicity before any action, as distinguished from discussion, can be taken.

Mr. Mathias. Of course, it is true that anyone could start it, but the fact is that this amendment gives official sanction to a group of people who are defined as the heads of executive departments, which not only gives sanction but actually places them under some responsibility to start it, and this would give me some concern.

Mr. Brownell. As to the other point, now, that was whether we might always expect the man chosen or nominated by the President to be the best man available—

Mr. Mathias. This is a question where I think you have to look into the presidential mind, and here you have the analogy made that we give the President this power because he had it when he was nominated by his party, and because he virtually had the choice when he was sitting as presidential nominee and being consulted as to his wishes before the convention nominates the Vice President. Of course, there you have a certain accountability of his action, because he has to im-
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Immediately go before the country and sustain his choice of Vice President, and he would naturally seek to complement his own strength by a strong Vice President.

But in this amendment we are saying that the President could not only choose a man who in the event of natural succession becomes his heir, but who by virtue of this machinery is charged with the responsibility actually to oust the President under certain circumstances, and in the case of mental disability—such as the Forrestal illness—he would oust him under conditions which might require very subjective decisions, and in which medical evidence might not be clear.

Now, would not a President be somewhat influenced by this possibility under the circumstances that could exist?

Mr. Brownell. I think our Government has come to a position in modern times where it is almost essential for a President who wants to go down in history as a great President to have a Vice President who is able, public spirited, and an effective public servant, the job has become big. In each administration, more and more authority, power, and duties seem to be placed upon the Vice President, so that I think to counteract the points which you raised—and reasonably raised—you have a very strong self-interest on the part of the President to select the best possible man, and we must keep that in mind in weighing and trying to figure all the motives that would go into such a choice.

We have what I think is the sensible protective measure in that Congress, in case an irresponsible nomination is made, can block it.

Mr. Mathias. I particularly appreciate the last statement you made. I think it is a contribution to the political thinking of the country and should stand as a landmark or guide for action of people who might be placed in this position. I sincerely hope that the gentleman is right and I am wrong in the judgment of history.

Mr. Chief. Mr. Hutchinson?

Mr. Hutchinson. I have only a single question.

Mr. Brownell, is there any legal ambiguity in this phrase "heads of the executive departments," and should not the Congress be directed or authorized by statute to indicate—for instance, by Secretary of State, Secretary of the Treasury, and so on—who is intended?

Mr. Brownell. My experience as Attorney General leads me to think that this is sufficiently clear to avoid any real risk.

I notice that the companion Senate amendment has been changed to read "principal officers of the executive departments." I see no objection to the use of that language, because either one of these is quite clear when you take all of the bodies of Federal statutes into consideration as to who is meant.

Mr. Hutchinson. The modern Cabinet popularly is thought of as consisting of such persons, perhaps, as the Ambassador to the United Nations, and some others in addition to the heads of the old line executive departments, but this language is intended to restrict this function to those executive heads, as such, and not the entire Cabinet in its popular sense?

Mr. Brownell. That is correct. It is not intended to include those who, let's say, are given Cabinet status although they are not technically members of the Cabinet.
Mr. Hutchinson. Thank you.

Mr. Chief. Mr. McClory?

Mr. McClory. I want to add, Mr. Brownell, the fact that you have given a most convincing and helpful statement. You have answered most of the questions I had for you. I would like to add this one question, however, because it has arisen here both with respect to the earlier recommendations of the American Bar Association, and a question which is now arising in the other body as to the form of the amendment, and I would like your opinion as to whether or not—if the provisions for the declaration for the commencement and termination of the period of disability were embodied in the Statute, with the constitutional provision merely authorizing the Congress to act in that way—there is any constitutional question or objection to the office of the Presidency, or the exercise of powers by whoever happens to be in authority at that time. Is there any constitutional question or objection that you have to the alternative form?

Mr. Brownell. I myself believe that the experts in the field largely have come to the conclusion that the alternative proposal to leave everything to a statute would open the door to a plan which did not protect properly the constitutional principle of separation of powers, and that in the original Constitutional Convention and throughout our history that separation of powers has been deemed so important that it belongs in the Constitution.

Mr. Chief. Mr. Hungate?

Mr. Hungate. General Brownell, I direct your attention to section 5 dealing with the question where presidential disability has been established and he seeks to return to the duties of his office. As I understand this, the Vice President and the majority of the Cabinet might believe that he was still incompetent, and it could be that 65 percent of the Congress would believe he was incompetent and yet he would, with the concurrence of 35 percent of the body, resume his office.

I am just wondering about the use of the two-thirds rather than the majority. I notice in House Joint Resolution 139, which has been discussed before, Congress is given some initiative. It is to be determined in that case by majority vote. I wondered what your thoughts were on the distinction between the two-thirds requirement as opposed to a majority requirement.

Mr. Brownell. I think the reasoning back of the two-thirds was for the legislative branch to upset the action of the executive branch under these circumstances there should be very definite feeling in the Congress that they should move into the situation. I think that is the basic reasoning behind the two-thirds rather than the majority.

Mr. Hungate. Thank you very much.

Mr. Chief. Mr. Tenzer?

Mr. Tenzer. Would it be your view that the suggested instances of irresponsible action and intrigue would fit into that area of 10 percent that we would be unable to cover in a constitutional amendment, and that perhaps these situations may never arise that call for immediate action?

Mr. Brownell. Yes.

Mr. Tenzer. I also would like to congratulate the distinguished member of the bar from New York and the distinguished former At-
torney General for the concise manner in which the testimony was rendered, particularly the clarity of his answers, and his patience as well.

Mr. Brownell. Thank you very much.

Mr. Chief. Mr. Jacobs?

Mr. Jacobs. I would simply like to thank Mr. Brownell for helping us today.

Mr. Chief. We will adjourn—

Mr. Brownell. May I say, before you adjourn, I am delighted to see you again. You were my first congressional conferee when I came to Washington, and I remember very well the tremendous help that you gave.

Mr. Chief. I look upon it with a great deal of pleasure, and it has certainly been to my gain—I may say that. Our friendship, and the fact you have come here today proves to me once again—if there was any doubt, and certainly there has been none—that you are a great American in my book. You made an outstanding Attorney General.

I want to apologize profusely for not having been here when you began your statement, but I have hurriedly read through it, and on page 83 I notice the four musts that you recommend there.

1. The need for prompt action is overwhelming and recent tragic events have made it clear that failure to act would be recklessly gambling with the stability of our Government.

I want to say I could never possibly agree with you more than that. I think that is the crux of the whole thing, truly I do.

Mr. Brownell. I do, too.

Mr. Chief. There is no doubt about it. Even if we act and do something that is wrong, we still ought to try; we ought to make an attempt. Later we can modify, change or amend, or correct it. I think only time will prove just which method would be the right one and maybe do the job but, overall, I want to agree with you heartily and thank you profusely for coming. It is always a pleasure to see you, and God bless you.

Mr. Brownell. Thank you.

Mr. Chief. We will recess until 2 o'clock.

(Whereupon, at 12:25 p.m., the committee recessed to reconvene at 2 p.m.)

AFTERNOON SESSION

The Chairman. The committee will come to order.
Is there anyone else here beside Mr. Horton?
Mr. Horton. Mr. Robison is here, too.
The Chairman. We will hear you, Mr. Robison.

STATEMENT OF HON. HOWARD W. ROBISON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Robison. Mr. Chairman, and members of the committee, I am pleased at the opportunity to be here before your committee in order to express my strong support of your current effort to find an acceptable and workable solution to the vexing problem of presidential inability.
During my 7 years of service in the Congress, the lack of any formal procedure for dealing with such an emergency situation has become of increasing concern to me, and for the past three Congresses, I have introduced legislation to deal with the problem.

As you are aware, the Congress has failed to act, to date, in dealing with this problem because of a continuing argument over two points. First, whether article II, section 1 of the Constitution now gives the Congress the authority to deal with the problem by simple statute or whether a constitutional amendment is needed.

Secondly, whether or not a constitutional amendment is needed, what procedure or means should the Congress provide for determining presidential inability and its end of duration. Therefore, I should like to speak to the nature of the action I believe we should take.

First, to allay any possibility of challenge or illegality, I believe a constitutional amendment should be enacted.

I believe, however, and favor strongly, that such an amendment must be simple and clear in its intent and should not include the mechanism for determining presidential inability. Such an amendment is House Joint Resolution 294 which I have introduced in this Congress and which provides:

In case of the removal of the President from office, or his death or resignation, the said office shall devolve on the Vice President until the inability be removed. 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 be President, or in the case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in case of inability, until the inability shall be earlier removed. The commencement and termination of any inability shall be determined by such method as Congress shall by law provide.

The language of this amendment has been approved by the American Bar Association and many other interested organizations and, in addition, it is substantially the language which the then-Deputy Attorney General, Mr. Katzenbach, strongly supported in hearings before the Senate Judiciary Committee in 1963 and 1964.

The CHAIRMAN. Of course, he has changed his point of view now.

Mr. ROBISON. Well, I understand he may have, but he certainly made a strong statement at that time pointing out to us the lack of wisdom in loading the Constitution down—and I am quoting him, now—"by writing detailed procedural and substantive provisions into it."

The CHAIRMAN. Well, he takes the position now that from the practical standpoint, in view of the fact there is such an overwhelming consensus for a constitutional amendment, he feels he has to bow down to the inevitable and accept the constitutional amendment idea.

Mr. ROBISON. I favor the constitutional amendment, too, Mr. Chairman. I want to make clear that I do, but I think the procedures and methods to determine inability and so forth, should be prescribed by a separate statute, and I would like to speak to that point now, if I may.

As I said, I think that the specifics of the method for determining the inability and its termination should not be "frozen" into the Constitution thus making them extremely hard to alter if, in the future, we find that a constitutionally provided method is faulty.
Now, as to the method I believe worthy of consideration, I respectfully direct your attention to the provisions of House Joint Resolution 293 which I have introduced in this Congress. My plan declares that the determination of inability of the President or Vice President is a political decision based upon the best, most impartial, and nonpartisan expert medical opinion available and that there should be an agency or instrumentality of Government, in which the minority party should have representation, created for the purpose of determining the inability of the President and the termination of the period of disability.

It proposes the creation of a Commission on Presidential Disability composed of the Secretaries of State, Treasury, and Defense, the Speaker of the House, and the President pro tempore of the Senate, and the majority and minority leaders of both the House and Senate, with the Vice President, or the Speaker, if there is no Vice President, being the nonvoting Chairman.

I shall not labor you with other details of my proposal, except to say that it does, in my view, provide for nearly all of the contingencies, including the presidential declaration of his own inability and of its end, the power of the Commission to declare the President unable to perform his duties, and it also empowers, Mr. Chairman, the Commission to issue a declaration that the President is alive in the face of circumstances which might lead to a presumption of his death. I feel the latter contingency is important in view of the perilous nuclear-threatened world in which we live.

Though I believe in my plan, I am not particularly wedded to its details but I do strongly believe that congressional action on this subject should be in the form of a constitutional amendment plus a separate statute, the first giving us the legal basis for acting and the second outlining the methods for dealing with the problem.

There might also be a temporary benefit to this approach. The legislation setting up the Commission would take effect as soon as enacted—it would be available for our use in case it was needed during the interim before a constitutional amendment was ratified by the necessary two-thirds of the States. Though it would not, at this point, be based on the authority of an actual constitutional amendment, its provisions would have far more validity in the event of emergency than the present informal agreements between President and Vice President which have existed for the past several years and which have rested, I think, on an extremely doubtful premise that an emergency problem could be so handled.

Mr. Chairman, I deeply hope this committee will approve the constitutional amendment plus legislative method approach, but whatever your decision, I expect to support it because I firmly believe that we must take action this year to block the existing loophole in our constitutional and governmental structure.

I thank the committee for permitting me to testify before it today.

The CHAIRMAN. The main objective of your bill is to set up this Committee on Disability of the President.

Mr. ROBINSON. Yes, sir. I think the difference in it as compared to others is that it does bring into the decisionmaking process representation from the minority party, whichever party that may be at the time, because I do think that what we would face would be not just a factual or medical situation, as I said, but also in the nature of a political
decision in which the people of the United States ought to be able to participate to the fullest extent possible through their representatives.

The CHAIRMAN. Who would be in control of this Committee so far as votes are concerned—the executive or the legislative? I think the legislative would be in control would it not?

Mr. Robison. Well, the Secretary of State, Treasury, and Defense, 6 to 3, Mr. Chairman, the way I read it, with the legislative being in control.

The CHAIRMAN. You have 10 members, haven’t you? Five legislative—

Mr. Robison. Well, the Secretaries of State, Treasury, and Defense, Speaker of the House and President pro tempore of the Senate, majority and minority leaders of both the House and Senate—there is the extra four—with the Vice President or the Speaker, if there is no Vice President, serving as nonvoting Chairman.

The CHAIRMAN. Would the Chairman have a vote?

Mr. Robison. The Vice President would serve as Chairman, but as a nonvoting Chairman to eliminate the possibility that his vote might be questioned in certain aspects, as I am afraid we may always have a problem here.

The CHAIRMAN. So that really is nine votes, and the legislative would have five out of nine.

Mr. Robison. In section 4(a), page 3, my bill says:

After so convening, the Committee may, by a vote of not less than five of the members thereof, issue a declaration that the President is unable to discharge the powers and duties of his office.

The same procedure would apply for determining the end of the period of disability.

The CHAIRMAN. Of course, in our history we have had some very peculiar situations develop, like in the Johnson administration where the legislative branch was in absolute control. If you had this, they would be in control of the Commission beyond any particle of doubt.

Mr. Robison. Well, Mr. Chairman, in defense of that situation it strikes me that these people are elected officials as compared to the appointive representatives from the executive offices or of the Cabinet as has been suggested in other plans, and I think there is something to be said for this approach.

The CHAIRMAN. Counting again—I am getting a recount—I think you have six from the legislative branch. We left out the President pro tempore of the Senate.

Mr. Robison. There are six, Mr. Chairman—there are six.

The CHAIRMAN. There are six, not five. There would be a predominance of the legislative branch of Government. There would be six votes of the legislative branch and three of the executive branch.

Don’t you think that is a rather strong preponderance in favor of the legislative branch, in spite of the fact that those men are elected by the people?

Mr. Robison. Well, as I said earlier, Mr. Chairman, I am not wedded to this sort of a mix, but I do feel quite strongly that there should be a mixture of legislative as well as executive officials serving on whatever commission or committee is eventually agreed upon.

The CHAIRMAN. Don’t you think that the members of the Cabinet are rather closer to the President than the members of the legislative
branch and because of the closeness would probably evaluate better the physical and mental condition of the President? They come in more or less daily contact with him. We members of the legislative branch only meet the President intermittently.

Mr. Robison. Well, you and I do, sir, but, on the other hand, the majority leader of the Senate, for instance, the Speaker, the Vice President—who would be a member of this Commission even though he wouldn't vote, he would be the Chairman, and as presiding officer would convene it for purposes of discussion—these men are in presidential contact perhaps not as intimately as a Cabinet officer, but I would suspect almost nearly so.

The Chairman. It wasn't always the case that the Chief Executive had weekly—as is the case now—dealings or conferences with the leaders of the House and Senate. That has not always been the case, so that members of the legislative branch were not always in as close a contact with the Chief Executive as the members of the Cabinet.

Mr. Robison. That is true, Mr. Chairman, but from where I sit I would not foresee a change in the situation. I think it is going to go on with even a closer association, probably, than we have now.

The Chairman. You are more interested in the Commission idea rather than those who compose the Commission?

Mr. Robison. Yes, basically.

The Chairman. Are there any questions?

Mr. Tenzer. Mr. Robison, you mentioned in your opening statement that the American Bar Association endorsed, or if I recall correctly, supported your proposal. I would like to call to your attention that this morning there appeared before this committee the distinguished president of the American Bar Association, Lewis Powell, Jr., and the former Attorney General, Herbert Brownell, chairman of the American Bar Association Special Committee on Presidential Inability and and Vice Presidential Vacancy, and they both endorsed and recommended the principles of House Joint Resolution 1.

Mr. Robison. Mr. Tenzer, if I may reply to that, my statement says the American Bar Association has endorsed my proposal. I did not mean to imply that they have not perhaps changed their position.

Mr. Tenzer. In other words, if they endorsed it in 1963 or 1964 and today have changed their view in the light of perhaps the fact that they had this session in 1964 where they arrived at a consensus after hearing testimony of distinguished constitutional lawyers and deans of law schools and others who dealt with the question, and they arrived at a consensus which was set forth in their statements before this committee today.

Mr. Robison. I hope my previous answer will suffice. As I said, I did not mean to imply that they still endorse it now. They have in the past, I think it still has merit, and I am here to suggest it to you as being an approach which I for one still favor.

The Chairman. Mr. Copenhaver.

Mr. Copenhaver. Mr. Robison, I might say that even if the approach is adopted as contained in House Joint Resolution 1, your basic scheme could still be utilized.

Mr. Robison. Yes, it could.
Mr. COPENHAKER. Since House Joint Resolution 1 provides for Congress to set up an alternative body, through legislation you could still put forward your Commission.

Then two other minor points. I see from your bill that besides the Commission proposal you provide that if a President himself declares his inability that he shall automatically regain that upon his own declaration, which is different from the proposal in House Joint Resolution 1 where that could be impeded or stopped by a declaration of the Vice President and the Cabinet.

Mr. ROBISON. That is correct.

Mr. COPENHAKER. You must have some reason for that.

Mr. ROBISON. It stems, I would suppose, from my own thought that if the President is going on his own to declare his inability, which is going to be a most difficult personal decision to make in the context in which we are thinking about it, then he ought to have the same opportunity to declare that, in his judgment at least, the inability has terminated.

Mr. COPENHAKER. The other point, Mr. Robison, is in reading over your proposal, I gathered that you intended that this Commission would operate to declare the disability, or the end of it, of not only the President but someone acting as President.

Mr. ROBISON. Yes, that is correct.

Mr. FOLEY. If that were so, you might run into the problem, Congressman, that under the Succession Act as it is today, it would be the Speaker. If we had a vacancy in the office of Vice President, there is one member of the Commission gone. The Speaker could become Acting President, so there is the second member gone.

Mr. ROBISON. Well, Mr. Foley, I have not addressed myself to the problem of succession which at least in my view, is a separate problem. It is equally serious, and I hope you will take action on it, too, but I assume what we are talking about here could be eliminated by whatever steps you take in that direction as well.

Mr. FOLEY. You probably wouldn't have the problem with the Speaker, because if he did accede to the Presidency, he would have to resign and the committee would elect another Speaker of the House.

Mr. ROBISON. Yes.

The CHAIRMAN. Thank you very much, Mr. Robison. We appreciate your coming. We need all the enlightenment we can get on this problem. You have been very helpful. You have been very helpful.

Mr. ROBISON. Thank you very much.

The CHAIRMAN. Our next witness is the distinguished Representative from the State of New York, again my own State.

STATEMENT OF HON. FRANK J. HORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Horton. Thank you, Mr. Chairman, for giving me this opportunity to be heard on this very important subject. I, too, want to take this occasion to commend to you, the chairman of this committee and the other members of this committee, for taking this up as one of the first matters of the 89th Congress.

Mr. Chairman, the wave of public concern about presidential inability and succession has swelled and subsided in past years with
each real or impending break in Executive continuity. The necessity of correcting constitutional and statutory insufficiencies in this area appears to me to be self-evident.

Inasmuch as the committee already has heard considerable testimony relating to these needs—testimony which I feel is cogent and persuasive—I shall confine my comments to a brief discussion of the constitutional amendment, House Joint Resolution 274, that I am proposing. The resolution seeks to clarify the Constitution and to minimize future uncertainty and confusion when a President becomes permanently or temporarily incapacitated.

Leading the list of imperatives is the necessity of keeping the Vice-Presidency filled. No more time should elapse between the vacancy and subsequent occupancy that now prevails when it is necessary for our Vice President to assume the Presidency. Events move too swiftly to allow this important post to go unfilled.

We need to fill that gap with procedures that are immediate, uncomplicated, and self-implementing. Section 1 of my proposal provides that in the event of death, resignation, or removal of the President, the Vice President shall succeed to the Office for the unexpired term. Section 2 authorizes the President to nominate a person who, upon confirmation by a majority of the Congress, would become Vice President for the unexpired term. I favor this technique as it assures an unchanged administration and respects popular feeling through the people's elected legislators. In fact, the combined action of the House and Senate nearly duplicates our electoral systems since it parallels electoral college composition.

Intimately connected with the subject of presidential succession is the much thornier and less tangible problem of presidential disability. Presidents Eisenhower, Kennedy, and Johnson have handled the physical or mental incapacitation issue on a personal agreement basis with the man next in line of succession. These private pacts have been made necessary by the absence of statutory provisions and precedents and the urgency of answering some basic questions not covered by our Constitution.

What happens when a President is incapacitated for some reason and is unable to perform his duties? Can the Vice President act in his place? Under the terms of my resolution, the powers and duties, but not the office of President, shall be assumed by the Vice President in that instance.

Who determines whether the President is incapable of acting? My measure provides that the inability of the President may be established by a declaration in writing of the President. In the event the President fails or is unable to declare himself incapacitated, it may be established by the Vice President with the concurrence of a majority of the Cabinet or by such other body as the Congress may provide.

Who decides when the President has recovered? The ability of the President to resume his powers and duties also would be established by his declaration in writing.

This is an aspect of my measure I wish to emphasize. Section 3 provides:

If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President until the President declares in writing that no inability exists.
I have worded my proposal to provide that the President may resume his duties and power immediately upon declaring his inability at an end. With the assurance that the President may regain his role as easily as he relinquished it, I believe he would be more inclined to call on the Vice President when the necessity arises.

Should the Vice President and a majority of the Cabinet or such other body as Congress shall provide not concur in the end-of-disability decision of the President, the matter would be resolved by the vote of two-thirds of both Houses of Congress. If the House and Senate failed to act promptly, the President would automatically resume his powers and duties 10 days after declaring the termination of his inability.

I also believe this aspect deserves special emphasis. By writing such a 10-day rule into the language of this constitutional amendment, we can forestall any future possibility of a congressional impasse withholding the President from the powers and duties of his office. This is a critical concern. If the Presidential powers and duties are to be withheld from the President in the event of inability to discharge them, then I feel the action would be affirmed by a two-thirds majority of Congress in the most expeditious fashion possible.

Mr. Chairman, we are all aware of the human tendency to put off seeking solutions of distasteful prospects. We realize, too, how fortunate we are that brief interruptions in Executive power have not halted our democratic machinery. We should not and need not continue to press our luck. A sudden and potentially disruptive force can strike unexpectedly at the heart of Government. Commonsense and patriotic purpose demand that prompt and thorough action be taken to deal with both presidential succession and inability.

Thank you.

The Chairman. I notice that your bill is very much like the provisions contained in the bill of the distinguished gentleman from Ohio, Mr. McCulloch.

Mr. Horton. Yes, sir.

The Chairman. And it only differs in substance from House Joint Resolution 1 since you provide for the 2 days and 10 days.

Mr. Horton. Yes, sir.

The Chairman. Are there any questions?

Mr. Copenhaver. Mr. Horton, isn’t there one other difference which hasn’t been mentioned, in that in yours—like Mr. Robison’s—the President’s voluntary declaration of inability shall be overturned purely by the President’s voluntary declaration of the overcoming of that disability, since section 5 of your bill only comes into action if the Vice President and the Cabinet were forced to declare the President’s disability?

Mr. Horton. That is right, and I commented, of course, in my statement on that, that in accordance with my resolution, the President, upon the disability terminating, could resume the office upon a statement in writing unless the Vice President feels that he is not competent, in which event the Vice President would then have the burden cast upon him to so inform the Congress that the inability had not ceased, and he would also have to have a majority of the Cabinet in order for him to make this presentation. Then the House and the Senate would have to pass on it.
The Chairman. We are very grateful to you, Mr. Horton. We are very happy to have had you here, and we will take deeply into consideration your views as well as the views of the other Members of the Congress.

We have two Members who have asked to appear but have not appeared today. They shall be permitted to submit their statements for the record. Congressman Randall and Congressman Edwards.

(Congressman Randall’s statement is as follows:)

Statement of Hon. William J. Randall, a Representative in Congress from the State of Missouri, Filed With the House Judiciary Committee on House Joint Resolution 265 and Other Presidential Disability Amendments

Mr. Chairman, my presidential inability amendment, House Joint Resolution 265, is modeled on that of the gentleman from Ohio, Mr. McCulloch. Rather than dwell upon the exact wording of its five sections, I offer the following considerations which I urge the committee to take into account as they perfect a final constitutional amendment.

First, the two sections pertaining to permanent accession of a Vice President to the Presidency and to procedures for filling a vacancy in the office of Vice President should be reported favorably to the House for immediate action. The need for them is clear and the procedures established seem equitable from almost any point of view. Moreover, they are self-contained improvements which are desirable regardless of the disposition of any other proposals related to presidential inability.

Second, the section which permits the President to declare himself unable to discharge his constitutional powers and obligations should be reported favorably, but with some important qualifications respecting the termination of such inability. Either the President should have an absolute right to declare a self-proclaimed disability terminated and immediately resume the powers of his office, or the procedures under which he might be denied further exercise of the office should be specified in greater detail than in most of the proposals before the committee.

Third, if this committee decides it appropriate to report provisions giving some person or agency other than the President the right to declare or to terminate a presidential inability, it should adhere strictly to one of two courses of action.

One course would delegate the authority for promulgating precise procedures for such declarations to a representative and responsible public body such as the Congress of the United States. This approach would permit adaptation to changes in the structure and powers of government without ratifying cumbersome additional constitutional amendments, yet it would give constitutional sanction to the principle that, from time to time, Presidents may have to step down from office involuntarily because of physical or mental inability.

The other course would be to perfect a full set of procedures for use in disability proceedings. In my judgment, if the actual procedures are to be established by constitutional amendment, they must be thorough and comprehensive. They must be meticulously designed to cope with every conceivable problem which might arise in connection with presidential disability.

The draft amendment reported to the other body by its Judiciary Committee does not meet this criterion of comprehensiveness. I would respectfully urge the committee to adopt at least the modifications proposed by a member of the committee, the gentleman from Ohio, and incorporated in the provisions of my resolution. They have the dual virtue of setting time limits within which Congress must decide the issue of who is President and of avoiding a situation in which two men could claim authority to act as President. Moreover, I would urge the committee to search diligently for additional modifications to the proposed amendment. A lengthy controversy in the conference committee in 1965 is preferable to a serious constitutional crisis some years hence.

The Chairman. This will terminate the hearings on the presidential inability bills. The record will remain open for a reasonable time so that members and others shall have an opportunity to submit their comments.
We still have the possibility that the Attorney General, Mr. Katzenbach, may wish to appear. He has agreed to submit some suggested amendments in pursuance of the request made by certain of the members of him.

Mr. Foley, will you contact Mr. Katzenbach so that he will have the benefit of those suggested amendments.

Unless there is something else to come before——-

Mr. LINDSAY. As I recollect it, our colleague, Mr. Poff, felt strongly that he had additional questions he wanted to ask the Attorney General.

The CHAIRMAN. Yes, I used the possibility. If any members want to question him further, they will have the privilege, of course, and he stands ready. I spoke to him only the day before yesterday on that matter, and he said he would be very happy to appear if we wished, and would await our call if we want him.

Mr. McCORY. Mr. Chairman, are you stating any time, at present, within which written statements or letters or communications might be received?

The CHAIRMAN. Yes, the record will remain open for that purpose.

Mr. McCORY. You are not establishing a definite time now?

The CHAIRMAN. I said reasonable time. You can be the judge of that, and I will abide by your views.

We will now adjourn.

(Whereupon, at 2:37 p.m., the committee adjourned.)

(The following matter was received for the record:)

PROPOSED LEGISLATION ON REAPPORTIONMENT OF CONGRESSIONAL DISTRICTS

(By the Committee on Federal Legislation, Association of the Bar of the City of New York)

THE PROPOSED BILL

H.R. 2836, 88th Congress, 1st session (1963) (Representative Celler), would amend section 22 of the Reapportionment Act of June 18, 1929, as amended (2 U.S.C. 2a), to provide in a recast subsection (c) that, beginning with the 93d Congress (1973), each State shall have a number of congressional districts equal to the number of Representatives to which the State shall be entitled (i.e., no at-large representation), and each district “shall at all times be composed of contiguous territory, in as compact form as practicable, and no district “shall contain a number of persons, excluding Indians not taxed, more than 15 per centum greater or less than the average obtained by dividing the whole number of persons in such State, excluding Indians not taxed, as determined under the then most recent decennial census, by the number of Representatives to which such State is entitled under the apportionment made upon the basis of such census.”

The bill further provides that “any establishment of congressional districts in any State pursuant to the preceding subsection (c) shall be subject to review, at the suit of any citizen of such State, by the district court of the United States for the district in which such citizen resides; and any court before which a case involving the establishment of such districts may be pending shall give precedence thereto over all other cases or controversies, and if such court be not in session, it shall convene promptly for the disposition thereof.”

1 After the decision in Wesberry v. Sanders, 376 U.S. 1 (1964), discussed infra, Representative Celler was reported to favor making his bill “effective 2 years from now,” New York Times, Mar. 19, 1964, p. 17, col. 4.

2 H.R. 7343, 88th Cong., 1st sess. (1963) (Representative Mathias) would permit a 20-percent variation from the average and would require at-large elections of Representatives from a State if the Director of the Bureau of the Census determined that that standard was not met in any congressional district therein.
The history of the Federal legislation on election of Representatives by districts is summarized (with citations to the statutes involved) in hearings on H.R. 841 and others before Subcommittee No. 3 of the House Committee on the Judiciary (87th Cong., 1st sess., ser. 6, 70 (1961) (memorandum from Legislative Reference Service, Library of Congress), and in the dissenting opinion of Mr. Justice Harlan in Wesberry v. Sanders (370 U.S. 1, 20, 42-44 (1963)). The first act passed by Congress which called for election of Representatives by districts was enacted in 1822, at which time, although 17 States were already electing their Representatives by districts, the remaining 9 States elected all their Representatives at large. In the act of 1842, Congress apportioned Representatives among the several States according to the latest census and provided for the election of Representatives in States entitled to more than one Representative by “districts composed of contiguous territory.”

The act of 1930, which provided for the seventh census, omitted the requirement that Representatives be elected from districts, but a provision for districts composed of contiguous territory was reinstated in the act of 1982. The act of 1872 repeated that provision and added the requirement that each district contain “as nearly as practicable an equal number of inhabitants.” The last provision was continued until 1901 when Congress added the requirement that the districts be “compact,” so that the law then provided that Representatives “shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.” That provision remained in force until the Reapportionment Act of 1929, which omitted it, and it was again omitted when the act of 1929 was subsequently amended.

ENFORCEMENT PROCEDURES

Although there appears to be a wide area of agreement among those without partisan interest in the outcome of a particular apportionment in favor of reenacting some criteria for apportionment of congressional districts, for a long time there has been substantial disagreements as to the enforcement provisions which such a statute should contain. Several possibilities have been suggested:

1. No enforcement provision and reliance upon the good faith of the State legislatures to bring about compliance with the statutory provision.
2. Reliance upon private citizen litigation as in H.R. 2836.
3. Enforcement by Congress by refusing to seat Representatives from a State which violated the standards for apportionment specified by Congress.
4. Enforcement by Congress by giving Congress the right to redistrict when State districting violated the standards for apportionment specified by Congress. See report of American Political Science Association, Committee on Reapportionment, reprinted in Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary (80th Cong., 1st sess., 20-29 (1949)).
5. Requiring election at large where the congressional criteria were not followed by the States.

As far as congressional enforcement is concerned, the question of redistricting has twice come before the House of Representatives in the form of contested election cases. In Davidson v. Gilbert (1001), (Rowell, “Digest of Contested Election Cases in the House of Representatives, 1780-1901,” at 605-606 (1901), the House of Representatives Committee on Elections held it to be “not politic” to deny a seat to a candidate on the ground that the district which elected him was illegally constituted. In Persyn v. Sanders (1910), (Rowell, “Digest of Contested Election Cases in the House of Representatives, 1901-17,” at 43-49 (Moore ed. 1917)), the House took no action, despite a committee recommendation that a Virginia redistricting act be held void as violating the reapportionment law. Wesberry v. Sanders (370 U.S. 1 (1964)), has now eliminated any doubts as to the right of the courts to review congressional districting, thus rejecting the views expressed in Colegrove v. Green (328 U.S. 549 (1946) (minority opinion), that the courts should decline to exercise jurisdiction in congressional districting cases either because districting is a “political question” or as a matter of equitable discretion. Wesberry has accordingly made it clear that the State legislatures and Congress do not have jurisdiction over districting matters to the exclusion of the judiciary. Finally, Wesberry established that there is a constitutional requirement that, within a State, congressional districts must be “as nearly as practicable” equal in population in order to comply with what the Court concluded was the constitutional mandate that “one man’s vote in a congressional election is to be worth as much as another’s” (376 U.S. at 7-8).
H.R. 2836 attempts to provide an objective standard as to permissible variations in population to guide legislatures in establishing congressional districts. The Wesberry decision recognizes that "it may not be possible to draw congressional districts with mathematical precision" (Id. at 18). The Court might well be disposed to sanction some variations between districts in order to take account, for example, of such factors as area or natural boundaries and would doubtless give considerable weight to a congressional determination of permissible variations, which might then have the salutary effect of forestalling litigation over smaller variations. However, in view of the pronouncements in Wesberry, it would seem highly doubtful that a variation of as much as 15 percent from the average—which could mean a 30-percent variation between districts from the average—is permissible. As to review of congressional districts established under the proposed legislation, we think that the House of Representatives Committee on the Judiciary, to which the bill was referred, should consider making it expressly clear whether or not the jurisdiction to review conferred on the U.S. district courts is intended to be exclusive and to preclude review by the State courts. See General Investment Co. v. Lake Shore & Mich. S. Ry. (290 U.S. 201, 280-88 (1922)); (Hart and Wechsler, The Federal Courts and the Federal Systems* 373-74 (1953)).

CONCLUSION

We support the approach taken by H.R. 2836 of providing standards for congressional districting, including a specified permissible variation in population to operate as guides to State legislatures and perhaps having the effect of reducing the amount of litigation. In the first instance, the legislatures, of course, should adhere to the standards specified by Congress with due regard to the Wesberry decision. The possibility of judicial review within the framework of those standards may then produce a fairer overall result than if the matter remained entirely with the political branches of Government.

Respectfully submitted.


JUNE 1, 1964.

PRESIDENTIAL INABILITY

A second report on this subject by the Committee on Law Reform of the New York Chamber of Commerce

The Constitution of the United States leaves unsolved one problem, the proper solution of which may be vital to the safety of our Republic. The problem is how the presidential duties and powers are transferred in the event a President becomes incapable of carrying out the duties of his office, particularly in the case where he does not understand that he has become incapacitated. Although there has long been an awareness of this problem, and although it has brought forth a multitude of studies and proposed solutions, it is as yet unresolved. It came to the fore during the disability of President Garfield in 1881, and again in 1919 and 1920 during the illness of President Wilson. Most recently it arose during the illness of President Eisenhower. In each case the Vice President was faced with a dilemma. There was a need to exercise leadership, yet a fear of usurping Presidential powers or even the office itself. These instances pointed out the need of a definite procedure and guideline by which the Vice President

* In his dissenting opinion in Wesberry, Mr. Justice Harlan commented upon existing congressional districts as follows: "In the last congressional election, in 1962, Representatives from 42 States were elected from congressional districts. In all but five of those States, the differences between the populations of the largest and smallest districts exceeded 100,000. A difference of this magnitude in the size of districts the average population of which in each State is less than 500,000 is presumably not equality among districts 'as nearly as is practicable,' although the Court does not reveal its definition of that phrase" (370 U.S. at 20-21); see also id. at 49 (appendix giving size of largest and smallest districts in each State) (22 Cong. Q. 354 (1904)).
might assume the duties of the Presidency during the President's incapacity and thereafter relinquish such duties. It was also realized that there was a need to provide expressly that the Vice President, during any such disability of the President, would assume only the powers and duties of the office of the President, and not the office itself, thus perhaps permanently ousting the elected President.

The recent assassination of President Kennedy has again emphasized the importance of a Vice President's quickly and assuredly picking up the reins of government as they fall from the hands of a faltering President. The urgency may be just as pressing in the case of a President's incapacity as in the case of death, but a Vice President and the Nation have no guidelines in such a case.

**Basic Questions Under the Present Constitutional Provision**

The present constitutional provisions relating to succession to the Presidency are found in section 1 of article II which states:

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

The basic questions which the Constitution leaves unanswered are these:

1. Who, or what body, is to decide that a President is unable to discharge the powers and duties of his office?

2. What is the proper procedure for declaring that a President's incapacity has been terminated?

3. Does the Vice President assume the Office of the Presidency in the event of presidential incapacity, or does he become Acting President, assuming only the powers and duties of the Office?

4. Does the problem of succession in the case of disability require constitutional amendment, or can it be resolved by legislation?"

**Special Agreements**

Recognizing the problem thus presented, President Eisenhower concluded a memorandum of understanding with Vice President Nixon as to the procedure to be followed in case the President should become incapacitated. Similarly, President Kennedy and Vice President Johnson entered into such an agreement. These agreements were to be effective, however, only during the terms of office of the parties concerned. In substance, these agreements provided that if possible, the President would inform the Vice President of any inability, and the latter would serve as Acting President for the duration of the inability. If the President were unable to communicate his disability, the Vice President, after such consultation as seemed appropriate, would decide the question and assume to serve as Acting President. In either case the President would decide when the disability had ended.

These agreements could serve as no more than an emergency device pending a permanent solution. Not only are these agreements temporary in nature, but they do not cover the case of a mentally ill President who insists that he is well.

**Proposed Solutions**

It is almost unanimously agreed that there is a need for a more permanent solution, but there are almost as many proposed solutions as there are people considering the matter. The Committee on Law Reform has studied these alternate proposals, and the New York Chamber of Commerce on January 11, 1961, adopted the first report of this Committee. The report recommended that the provisions of the Constitution of the United States relating to the death, resignation, removal or incapacity of the President, be amended to provide (1) that the Vice President, in case of incapacity of the President, shall succeed to the powers and duties of the office of the President, but not to the office itself; and (2) that the determination, commencement, and termination of such presidential incapacity be by such method as the Congress, by law, shall provide.

The recommendation of the Committee on Law Reform was preceded by, and partially based on, work in the same area by the bar associations. Reports were published by the Committee on Federal Legislation of the Association of the
Bar of the City of New York, the New York State Bar Association, and the American Bar Association. The recommendations of all three were in substance the same as the recommendations of the Committee on Law Reform.

In 1962 the American Bar Association reaffirmed its prior stand in support of such an amendment, and recommended interim legislation pending adoption of the proposed constitutional change. Later in 1962 the Committee on Federal Legislation of the Association of the Bar of the City of New York issued a report which took cognizance of the fact that its prior recommendation was consistent with the position of the American and New York State Bar Associations. It also reaffirmed its prior stand and again endorsed the recommended amendment.

More recently, on January 20 and 21, 1964, the American Bar Association convened the conference on presidential inability and succession. In addition to the many prominent lawyers who constituted the conference, several Members of Congress participated in the discussion, including Senators Keating, Hruska, and Bayh, the first two being members of the Senate Judiciary Committee, and the latter being chairman of the subcommittee on Constitutional Amendments of that committee, and Representatives Celler and Wyman, the former being chairman of the Judiciary Committee of the House. The conference issued a report stating the general consensus of those attending. The American Bar Association, through a special committee, is now working toward the implementation of such consensus by a constitutional amendment.

The proposal is to amend the Constitution as follows:

"(1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

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

"(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress;

"(4) In the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term; and

"(5) When a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term."

This proposal varies from the prior recommendations of the bar associations and of the chamber of commerce. The major points on which it varies are:

"(1) It would put into the Constitution the procedure, subject to any express right of Congress to legislate in the area, for determining the incapacity of the President and the termination thereof, rather than leaving this wholly to be supplied by Congress in the form of legislation; and

"(2) It provides that when the office of Vice President falls vacant, it shall be filled by nomination of the President with the approval of Congress."

RECOMMENDATION OF THE COMMITTEE ON LAW REFORM

Except as to the provisions for filling a vacancy in the office of Vice President, this committee prefers its original proposal, which would leave entirely to Congress the procedure for determining a President's incapacity and recovery. This would allow flexibility for any future changes and at the same time would provide enough protection from partisan politics, since any such legislation would need either the approval of the President or the vote of two-thirds of Congress to override a veto. The Committee on Law Reform does not consider this difference as vital, however, and it believes that this more recent proposal is acceptable. The fate of all proposed reform in the past has been that it faltered when its supporters disagreed on the form that the change should take. It is important that this proposal not meet the same fate.
As to the second change concerning filling a vacancy in the Vice-Presidency, the committee agrees that this is desirable and endorses it fully. At a time such as the present, it is highly desirable to fill immediately the vacancy left when a Vice President dies or steps into the Presidency. The second highest office in the land should not be left vacant for any extended period of time.

In the opinion of the committee it is essential that there be a clearly defined procedure and line of succession in the case of the Inability of a President. The committee also believes that a constitutional amendment is necessary in this regard so that the validity of the procedure may not be called in question at a time of crisis. The United States has been fortunate in the past, but in the present day of instant communication and constant tension we cannot afford a situation in which we would be without a Chief Executive. The committee urges that this matter be resolved with all due speed. The Committee on Law Reform therefore, as an acceptable alternative, supports the plan recommended by the American Bar Association. It is assumed that any ambiguity in the proposal will be corrected in its ultimate implementation, and the form of such implementation will make abundantly clear that the Vice President becomes President in case of death, or resignation of the President.

The committee, therefore, recommends the adoption by the chamber of the following resolutions:

"Resolved, That the New York Chamber of Commerce recommends that the present provisions of the Constitution of the United States relating to the death, resignation, and removal, or inability of a President, be amended to provide:

"(1) that the Vice President, in case of the inability of the President, shall succeed to the powers and duties of the office of the President, but not to the office itself;

"(2) that any determination of the commencement and termination of such presidential inability shall be as the Congress, by law, shall provide;

"(3) when a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

"Further resolved, That the New York Chamber of Commerce recommends that as an alternative to the above proposal the Constitution of the United States be amended to effect in principle the proposals of the American Bar Association; and

"Further resolved, That interim legislation of the nature recommended by the American Bar Association in 1962 be enacted pending adoption of the proposed constitutional changes."

Respectfully submitted,

Attest: John T. Gwynne, Secretary.

(The above report was adopted by the chamber at its regular meeting on April 10, 1964.)

THE PROBLEM OF PRESIDENTIAL INABILITY

New York Chamber of Commerce, New York, N.Y.

In at least one respect the Constitution of the United States is inadequate in that it does not clearly provide for the orderly transfer of the powers of the President in the event of the inability of a President to exercise the responsibilities of his office.

This problem has been the subject of concern on several occasions in our country's history. It was brought to the fore in 1881 because of the disability of President Garfield. It was the subject of discussion, and hearings, in 1919 and 1920 as a result of the illness of President Wilson.

More recently, the illnesses of President Eisenhower focused attention on the possibility that a President may become incapacitated for some length of time, and that there was no clear and specific procedure in the Constitution, or in law,
PRESIDENTIAL INABILITY

for the determination of presidential inability, or for the temporary assumption of the presidential powers and duties by the Vice President, or for determining when a President's inability had ended.

During the past several years a number of resolutions have been introduced in the Congress aimed at establishing a procedure for the orderly transfers of presidential power in the event of his inability. Congressional committees have studied the problem, and public hearings have been held.

To this date, however, there have been no concrete results. Perhaps this can best be explained as a reflection of the reluctance of Congress to pursue the matter during the term of a President, and in the absence of a specific crisis demanding action.

Yet the issue remains, and it becomes increasingly serious because of the growing importance of the Presidency and also, perhaps, because of the greater hazards to which a President is now exposed.

It is quite imperative that the United States have a clearly defined pattern of succession to the powers of the President so that, in the event of the inability of a President, this Nation is not without duly elected leadership. We should avoid the possibility of having to decide important constitutional issues at the time of some future crisis. This is an opportune time for the Congress, and the people, to resolve the question.

THE BASIC PROBLEM

The present constitutional provisions relating to succession to the Presidency are found in section 1 of article II which states:

"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, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

The basic questions which the Constitution leaves unanswered are these:

1. Who, or what body, is to decide that a President is unable to discharge the powers and duties of his office?
2. What is the proper procedure for declaring that a President's inability has been terminated?
3. Does the Vice President assume the office of the Presidency in the event of presidential inability; or does he become Acting President, assuming only the powers and duties of the office?
4. Does the problem of succession in the case of disability require constitutional amendment, or can it be resolved by legislation?

PRESIDENT EISENHOWER'S PROGRAM

Following his serious illness, and in the absence of a formal, legal procedure for the devolution of presidential power, President Eisenhower announced that, in the event of his permanent disability, he would resign as President, and the Vice President would then assume the powers and duties of the office.

To cover other instances of possible temporary inability, the President and the Vice President concluded a memorandum of understanding in March 1958, which provided that, in the event of his inability, the President would, if possible, so inform the Vice President and he, in turn, would serve as Acting President until the inability had ended. If however, the disability was such as to preclude the communication of the fact of inability by the President, the Vice President himself, after such consultation as seemed to him appropriate under the circumstances, would decide upon the devolution of the powers and duties, and he would serve as Acting President. In either case the President would determine when the inability had ended, and when he would assume the full exercise of the powers and duties of his office.

This memorandum of understanding was intended to apply only to the terms of office of President Eisenhower and Vice President Nixon. The President directed the Attorney General to study the problem further, and to recommend a permanent solution.

THE PROPOSAL OF THE ATTORNEY GENERAL

In this report to the President, which the President approved and transmitted to the Congress, the Attorney General recommended amendment of the Constitution to provide—
1. That, in case of the removal, the death, or the resignation of the President, the Vice President shall become President for the remainder of the term.

2. That, when a President declares in writing that he is unable to perform the duties of his office, those duties shall be assumed for the period of the disability by the Vice President, who shall have the title of Acting President.

3. That, if a President does not make such a declaration, and the Vice President is satisfied as to the disability of the President, the Vice President, with the approval in writing of a majority of the Cabinet, will become Acting President.

4. That the Vice President step out of the office, and the President takes over, when the President declares in writing that he is able to resume his duties.

This administration program, as well as other proposals which had been offered, failed of enactment in the Congress. Principal points in dispute were whether a constitutional amendment was required, or whether the issue could be resolved by legislation; and over the determination of which individual or body should have the final power to determine if a President were disabled and unable to perform his duties, and, conversely, when, after disability, a President is again able to assume his office.

ACTIONS OF THE BAR ASSOCIATIONS

Expressing great concern that there is a defect in the Constitution relating to presidential succession, particularly in these times when a possible presidential inability might result in profoundly serious consequences, the Committee on Federal Legislation of the Association of the Bar of the City of New York, the Committee on the Federal Constitution of the New York State Bar Association, and the Committee on Jurisprudence and Law Reform of the American Bar Association have all undertaken studies of the problem and have published reports in which similar conclusions are presented.

The associations have all recommended that article II of the Constitution be amended to provide—

1. In case of the inability of the President, that the Vice President should succeed only to the powers and duties of the office, and not to the Presidency itself; and

2. That the commencement and termination of any inability should be determined by such method as Congress shall by law provide.

These recommendations seek to remove the constitutional ambiguity presently existing as to the status of the Vice President; and to provide that the procedures for determining the commencement and termination of inability shall be established by legislation, thus retaining the broad character and flexibility of the Constitution.

The committee of the State bar association endorsed as "second best" the proposed constitutional amendment, Senate Joint Resolution 40, which would specify in detail the procedures for determining inability, or termination of inability. The city bar association similarly endorsed the procedures outlined in this measure, but it believes that these should be spelled out in a statutory enactment. The bar association presented a proposed bill which would, by legislation, provide a method for determining the commencement and termination of presidential inability.

In essence, the method suggested provides that, if the President is unable to declare in writing that he is disabled, and the Vice President is satisfied that the President is unable to discharge the powers and duties of his office, he shall, with the written approval of a majority of the heads of the executive departments, assume the powers and duties of the office as Acting President.

Subsequently, the President would be able to resume his office if he makes a public announcement in writing that his inability has terminated. However, if the Vice President is not satisfied that the President's disability has terminated, he may, with the written approval of a majority of the heads of the executive departments, transmit this declaration to the Congress which shall then make the determination. If by concurrent resolution, approved by two-thirds of the Members present in each House, the Congress upholds the Vice President, he shall then continue to serve as Acting President until he proclaims the President's inability to be ended; or the Congress, by concurrent resolution, determines that the President's inability has ended; or the President's term ends.
RECOMMENDATION OF THE COMMITTEE ON LAW REFORM

The office of the President is unquestionably the most important office in the United States, and, perhaps, in the world today. This has been increasingly apparent in recent years, particularly in the area of foreign policy where the President, in his person and in his actions, has assumed such critical and public importance.

In the opinion of the committee on law reform, it is essential that the United States have a clearly defined pattern of succession to the office of President so that, in the event of the inability of the President to perform his duties, this Nation will not be without duly elected leadership. This will require clarification of existing constitutional provisions.

The recommendation of the committee is designed explicitly to provide that the Vice President, in the case of presidential inability, becomes Acting President, assuming only the powers and duties of the Presidency. He does not succeed to the office of President, in which case the devolution of the office would be permanent for the remainder of the term. The recommendation would clearly define in the Constitution the status of the Vice President and would guarantee that there will be no question concerning the resumption of power by the President at the termination of his inability. The present language of the Constitution leaves grave doubts on this matter.

The committee on law reform believes that it is desirable that these constitutional questions be resolved at the earliest possible date. The committee suggests, moreover, that this is a most appropriate moment for the Congress to initiate such a resolution by way of a proposed constitutional amendment, inasmuch as a new administration is about to take office.

The committee therefore recommends the following:

Resolved, That the New York Chamber of Commerce recommends that the present provisions of the Constitution of the United States relating to the death, resignation, removal or inability of the President, be amended to provide (1) that the Vice President, in case of the inability of the President, shall succeed to the powers and duties of the office of the President, but not to the office itself; and (2) that the determination, commencement and termination of such presidential inability be by such method as the Congress, by law, shall provide.

Respectfully submitted.

Attest:

JOHN T. GWYNNE, Secretary
NEW YORK, N.Y., December 14, 1960.

The above report was adopted by the chamber at its regular meeting on January 11, 1961.

STATEMENT BY HON. JEFFREY COHELAN, OF CALIFORNIA, IN SUPPORT OF A CONSTITUTIONAL AMENDMENT REGARDING PRESIDENTIAL DISABILITY AND SUCCESSION

Mr. Chairman, the problems of presidential succession and presidential disability have long needed constitutional clarification and I appreciate this opportunity to testify in support of the constitutional amendment which I have joined you in sponsoring.

The facts themselves speak persuasively to the need for soundly based but immediate action.

Eight of our thirty-five President have died in office. On 16 different occasions, totaling more than 38 years in the brief history of our country, we have been without a Vice President. Eight Vice Presidents succeeded to the Presidency, while seven died during their terms of office, and one resigned.

Of the four Presidents who served the United States from 1932 through November 1963, two (Franklin D. Roosevelt and John F. Kennedy) did not live out their terms; one (Dwight D. Eisenhower) suffered a serious heart attack; and one (Harry S. Truman) was the object of an attempted assassination.

In past years the office of Vice President has been subject to more ridicule than respect. But such is not the case today. The Vice President is not only the ever-possible successor to the Nation's highest office, he has become a highly important ambassador, traveling thousands of miles on behalf of the President. He is a member of the Cabinet and of the National Security Council. He is Chairman
of the National Aeronautics and Space Council, and he has major responsibilities in our wars on poverty and discrimination.

There is ample evidence that the United States needs a Vice President at all times; that this person must be fully acquainted with both foreign and domestic policy and prepared to assume the Presidency on a moment's notice. Yet there is no provision in our Constitution for filling this office when there is a vacancy. The problem of presidential disability poses potentially greater and more difficult problems.

On two occasions, either as a result of tragic accident or illness, we have had Presidents unable to carry out their duties for prolonged periods of time. President Garfield lingered between life and death for 80 days after he was shot by a disgruntled officeholder. During this period he performed only one official act—the signing of an extradition paper. There was a crisis in foreign affairs, but only routine business was transacted.

President Wilson's serious illness of nearly 2 years presented the country with even more serious problems. Following his stroke in 1919, some 28 bills became law without his signature. The Cabinet met unofficially from time to time on the call of Secretary of State Lansing, but when President Wilson learned of the meetings he forced Lansing to resign, believing that Lansing was plotting to oust him.

In both of these cases of disability, the Vice Presidents were urged to act as President. But both Arthur and Marshall declined fearing they would deprive the President of his office should he recover.

Without clear authority, provided by law, it cannot be expected that future Vice Presidents will act differently if a President is disabled, yet clearly the leader of the free world must have a healthy, sure and steady hand at the helm of state.

On at least two other occasions, we have had Presidents unable to carry out the full duties of their office for shorter periods of time. President McKinley lived for 8 days after he was shot, during which time the business of government came to a standstill. President Eisenhower's heart attack hospitalized him for 6 weeks, during the first week of which he was able to make few decisions.

It is a strange irony indeed that we are prepared and amply so, for a President's death or impeachment, but that we are defenseless against his injury, illness, or senility. The events of the last two decades alone, however, show us all too clearly how quickly disability can strike.

Mr. Chairman, this constitutional amendment which I have joined in sponsoring is both practical and effective. It recognizes that total protection against all conceivable situations is not possible but it guards against the most serious and striking omissions of our present system. It establishes a firm framework, grounded as it should be in the Constitution, but it leaves certain final decisions which must be based on the facts of the time to the elected representative of the people.

My bill also provides, Mr. Chairman, for a return to the Presidential Succession Act of 1886 whereby in the horrible possibility that both the President and Vice President should be disabled or killed, succession to Acting President would be from the Cabinet, beginning with the Secretary of State.

This is in no way a reflection against the present distinguished Speaker of the House. It is rather a recognition of certain critical problems.

Would the Speaker resign his position to act as President if the President were temporarily disabled? Could he then return as Speaker? Couldn't the Speaker be of an opposing political party? What effect would this have on the continuity of an administration's policy? After all, during 8 of the last 18 years the House of Representatives has been controlled by the party opposing that of the President. Succession could thus result in changed party control of the entire executive branch.

Does the Speaker have the constitutional authority to assist the President as the Vice President does? Can the Speaker properly prepare for the awesome responsibilities of the Presidency while fulfilling his own major responsibilities as Speaker of the House of Representatives?

I earnestly hope, Mr. Chairman, that your committee will act favorably on returning the line of succession to the Cabinet where it resided for 61 years. I also hope you will act favorably on President Johnson's thoroughly merited proposal for reform of the electoral college.
But most important, Mr. Chairman, I urge that your committee correct the blindspots—the avoidable risks and hazards—that have impaired our Constitution for nearly 176 years. I urge that this constitutional amendment be adopted so that Presidential disability and vacancy in the office of Vice President will no longer threaten our future. I urge that this amendment be adopted to assure the orderly continuity in the Presidency that is imperative to the success and stability of our country and our form of government.

STATEMENT OF HON. HENRY B. GONZALEZ, U.S. REPRESENTATIVE FROM TEXAS

Mr. Chairman, I am deeply appreciative of this opportunity to express my views to your committee on a matter of profound constitutional significance—the absolute necessity for keeping filled at all times the office of the Vice-Presidency of the United States.

This office is the second highest in our land. Its occupant stands constantly on the threshold of the most responsible, most powerful, most respected, and most difficult job in the world—the Presidency of the United States.

The Vice President must, like the President himself, be a man of great character, experience, and ability. He must have the capacity and the stature to carry the dreadful burden which may be thrust upon him at any time by a wholly unforeseen, unpredictable, and uncontrollable tragedy.

There is no need to labor this point. Surely in these times it is obvious enough to every citizen that the Vice-Presidency is an office of enormous importance.

What is not so obvious is why we as a people, so justly proud of our free Government, our constitutional system, and our political commonsense, have done nothing for 1½ centuries about filling this office when it becomes vacant.

This is not some refined constitutional abstraction to be debated only by political philosophers. It is not some technical flaw to be corrected to cover some remote contingency.

Nor is it a controversial issue. There is no need for a pro and con discussion about the need to fill the office. Everybody agrees there should be a Vice President at all times.

Yet, in the 176-year history of the United States, the office of Vice President has been vacant on 16 separate occasions. Eight times the Vice President has moved into the White House to succeed a President who died in office. Seven Vice Presidents have themselves died in office, and one vacated the office through resignation.

For more than 37 years—over one-fifth of the total span of our national history—the second highest office in the land has been unoccupied.

The purpose of House Joint Resolution 53, which I introduced, is to make certain, through an amendment to the Constitution, that this office is never again left vacant for a long period of time. My resolution provides a method for filling this great office whenever a vacancy occurs. It eliminates the necessity of waiting for the next presidential election.

President William Henry Harrison died 1 month after taking office. For the next 3 years and 11 months, there was no Vice President. For more than 3 years and 10 months there was no Vice President after the assassination of Abraham Lincoln. William R. King, elected Vice President as running mate to Franklin Pierce, lived for only 6 weeks or so after his inauguration, so the Vice Presidency was unoccupied throughout virtually all of the Pierce administration. For 3 years and 9 months, President Truman had no Vice President. On two occasions, after the assassinations of Presidents Garfield and McKinley, there was no Vice President for almost 3½ years.

These are not new statistics. They have been cited many times.

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These are not new statistics. They have been cited many times.

But I do not hesitate to refer to them again because each time we think about them, they become more frightening, indeed, more terrifying, and we are reminded anew of the fact that we have taken no steps to prevent the recurrence of these conditions.

Many times, too, we have thought about and talked about the fact that the country has never at one time been deprived of both its President and Vice President.

I do not know whether this has been just blind luck or the hand of providence. I do know that we have tempted fate long enough.
The proposed amendment to the Constitution incorporated in House Joint Resolution 53 has just one purpose: to guarantee to the people of the United States that the office of Vice President will at all times be occupied.

This resolution does not go beyond this single objective. It thus avoids such related but much more controversial and complex issues as presidential inability and electoral reform. These are extremely vital matters, but in the interests of absolute clarity, I think they should be considered separately.

Despite the importance of its substance, my resolution is easy to understand, straightforward, and uncomplicated. Furthermore, the change it proposes in our fundamental law would assure the use of thoroughly democratic procedures in filling the Vice Presidency when a vacancy occurs.

My proposed amendment states that if for any reason the Vice Presidency is made vacant more than 30 days prior to the expiration of the term for which the Vice President was elected, the person discharging the powers and duties of President shall nominate someone to fill this vacancy. The appointee must then be confirmed by a majority vote of Members of the Senate and House of Representatives meeting in joint session, with each Member having one vote.

As we know only too well from our own experience, a vacancy may result from several causes. The President may die, be removed from office, or resign, in which case the Vice President would vacate his own office to serve as Chief Executive. Or, of course, any of these things may happen to the Vice President himself with the same result as far as his office is concerned.

My proposed amendment would cover all of these contingencies. It would even cover the possibility of something happening to the President-elect or the Vice-President-elect.

Like every other conscientious Member of Congress, I try to be as objective as possible in reaching decisions about the flood of legislation which always confronts us. Many of us, I am sure, are inclined to be especially thoughtful, even critical, about any measures we ourselves introduce and for which we are therefore directly and solely responsible.

I have gone through this highly personal mental process with reference to House Joint Resolution 53. I have no reservations whatsoever about it. The reasons for its approval are overwhelming, and I cannot think of a single rational argument that can be directed against it.

It is not enough to hope and pray, as we all do, that this amendment, if adopted, will never be used. More strongly than any mere words or arguments, our political history attests to its past need, and our sense of prudence warns us that it may be needed again.

I strongly urge prompt and favorable action by this committee on House Joint Resolution 53 so that Congress and the several State Legislatures may move with all possible speed toward its final enactment.

CONSTITUTIONAL PRINCIPLES AND SECTION 2 OF H.J. RES. 1 (VACANCY IN THE OFFICE OF THE VICE PRESIDENT)

Statement by Laurence G. Kraus, Belvedere-Tiburon, Calif.

The presidential succession amendment (H.J. Res. 1) projects the illusion of flexibility. The thesis of section 2 is that after the amendment is effective, Congress can legislate controlling procedures; meanings are purposely left open.

But in the pursuit of flexibility, principles have been forgotten. Likewise, too little attention has been paid to existing constitutional restrictions.

There are several issues.

First. Are the principles that underlie the historic American use of the secret ballot by elected Representatives (Congress) “minutiae”? Does abiding by them mean cluttering up the amendment with details? The answer is simple. The framers put these principles in the Constitution. They specified voting by secret ballot in congressional elections of executive branch leaders as a necessary safeguard. Yet section 2 reverses these principles; it drops their precedent.

Second. Section 2 merges “confirmation” and “election” to the office of the Vice-President. Selection of executive branch leadership, in effect, is treated as a matter of legislative branch “advice and consent.” In the blurring of this distinction, constitutional precedents on the importance of voting method (vis-a-vis elections and confirmation) are, again, neglected.
Third. The theory of section 2 that decisions on procedures should be left to future Congresses is dangerous. The framers were alert to the peril that would prevail if procedures for election of executive branch leaders could be changed. Political disturbance might charge through this loophole.

There are but three choices in the treatment of these issues.

One is the choice, I believe mistaken, of section 2. It excludes, essentially, the secret ballot (though this devastating omission is, perhaps, not meant). Nevertheless, section 2 overlooks the interlocking checks and balances of the Constitution, particularly in the provisions that control separate House and Senate votes.

The second is a compromise of sorts. Section 2 could require that Congress vote in joint session. In a joint session, the Constitution would not restrict rules or statutes (as it does in the House and Senate when they act as separate bodies). This would keep open the possibility that even if the secret ballot is not mentioned specifically, the precedents of the Constitution which treat secret ballot voting in congressional elections of executive branch officers might be followed. Yet, this would be no more than a possibility. Moreover, the political pitfalls in establishing rules for a joint session are numerous. Thus, this choice only leads to a question. For what reason is "substance" being postponed?

If the answer is "flexibility," section 2 does not provide it.

The third requires revising section 2. It should be changed to read "by a majority vote by secret ballot of both Houses of Congress." This is the line the framers took.

The following develops the facts that underlie these choices:

A. Article II, section 2, paragraph 2 limits legislative branch "advice and consent" to "officers of the United States whose appointments are not herein otherwise provided for." The office of the Vice President is therein excepted from congressional votes of confirmation. The Vice President is elected.

B. There are constitutional and congressional precedents that apply when Members of Congress vote on electing someone to presidential or vice-presidential office. Given essentially the same set of circumstances that will be covered by the presidential succession amendment (vacancy in executive branch office, and final word on the election of a new officeholder by Congress), the framers set a requirement of voting by secret ballot in article II, section 1, paragraph 2. This specification was repeated in the XIlth amendment of 1804. These provisions are touched by the failure of the electoral college to produce a majority.

(Exhibit A hereto is a report by the Legislative Reference Service of the Library of Congress on the procedures followed when the House elected President Adams in 1825. This report proves the use of the secret ballot.)

C. Article I, section 5, paragraph 3 says "the yeas and the nays of the Members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal." This provision refers to "each House" (not to a joint session). It should be noted that by specifying voting by secret ballot in article II, section 1, paragraph 2 (item B above), the framers made this 20 percent clause inoperative in said election. Yet, when as in section 2 of House Joint Resolution 1 voting method is not specified, the 20 percent clause applies. The secret ballot, per section 2, would be, in fact, excluded for purposes of voting in either the House or the Senate. In contested decisions, 20 percent or more of a division is expected.

D. The founders of this Republic were realists. They knew where to set the balances that made the Constitution what it is. They were not purists who flinched at the hard competition of power: In their rules for open voting and accountability on tangible issues, they were quite satisfied that bills and resolutions be resolved by countervailing pressures.

But on decisions of leadership—no.

The intangibles of leadership were, they said, too sensitive. When policy and direction are tied to personality and instinctive judgment, voting must be accurate in terms of conscience, not the weighing of power nor representative accountability.

The secret ballot means that when the totals are announced, no one can be sure how anyone else has voted, despite intentions announced before the voting. It means the uncommitted elector, the representative in the middle whose vote swings the election, votes freely.
E. A new President taking office as the successor to a dead President is politically exposed. Rather than rallying to his leadership, Congress might seek to dominate him (President Andrew Johnson, Senator Thaddeus Stevens, and impeachment). In leaving each successive Congress free to establish its own procedures on how section 2 should be implemented, House Joint Resolution 1 preyed on this weakness. It forces a quick showdown on a newly elevated President's nomination for Vice President (or even before that in deciding in both House and Senate on a joint session, and then in establishing joint-session rules). Section 2 of House Joint Resolution 1 makes the procedures for selection of a new Vice President either meaningless or divisive. If the section is changed to specifying voting by secret ballot, the selection will be meaningful.

1. The circumstances of meaningless confirmation are clear. Unwilling to risk presidential disfavor, Congress might play the part of a rubberstamp in passing on the President's nominee. Yet, the Vice President is a potential world leader.

2. The circumstances of divisiveness are varied. For purpose of specific illustration, presume House Joint Resolution 1 was the law of the land. Then presume that:

(a) The Democratic Convention of 1900 nominated a Kennedy-Humphrey ticket instead of a Kennedy-Johnson ticket. This ticket was then elected.

(b) Vice President Humphrey, with a political base in the liberal wing of the Democratic Party, succeeded to the Presidency on President Kennedy's death. The election of 1904 was 11 months away. The most pressing national issue was civil rights (a sectional issue).

(c) With the new amendment operative and the Vice-Presidency vacant, President Humphrey would be obliged to make an almost instant decision on whom he should nominate. He could not wait for consensus to develop.

(d) Anticipating the coming national election, the Republican leadership would recognize that if Congress refused to confirm President Humphrey's nominee, the new President would be significantly discredited. Enter motivating factor No. 1.

(e) The southern democrats would be quick to recognize that they could reverse the momentum for passage of the Civil Rights Act by likewise discrediting President Humphrey. Enter motivating factor No. 2.

(f) President Humphrey would recognize that the outcome of the congressional showdown would control the character of his Presidency, as well as his prospects for reelection. He would be forced into immediate and drastic use of presidential power. Enter motivating factor No. 3.

(g) A coalition would form. The showdown would become a transaction in power. With "viva voce" voting, deals can be made. Votes can be bargained for and delivery can be checked.

(h) The tactical advantages of the showdown would lie with the congressional opposition. They need never announce their true objectives.

(i) Conclusion—House Joint Resolution 1 (sec. 2) makes a political effort to discredit a newly elevated President at the onset of his Presidency eminently practical. The dangers to the national interest that underlie such divisiveness at a time of changeover in the Presidency are not hard to imagine.

3. A firm requirement of voting by secret ballot will reverse the circumstances cited above. The selection can be made meaningful. Voting method controls the underlying forces in any election.

(a) President Humphrey will nominate as Vice President a Democratic leader who can win secret ballot confirmation. The specification of a secret-ballot vote requires that the nominee be a man of superior qualities and unassailable character who stands to win a majority of the votes, freely given, of Members of both the House and the Senate.

(b) Coalitions will not form because of the secret ballot. Party or regional loyalties cannot be polled. No one can be sure how anyone else has voted. Votes cannot be bargained for because delivery cannot be checked.

(c) Endorsements and commitments will be made much as lapel buttons or bumper strips are shown in any public election. But the secret ballot grants independence to those in the middle. It frees the judgment of those who find it hardest to choose.

The ultimate issue of section 2 of House Joint Resolution 1 is American confidence in the secret ballot.

Section 2 does not need flexibility. It needs a restatement of the confidence that has existed in the secret ballot since its principle was incorporated in the Constitution by the framers.
In part this is an issue of awareness. For the use of the secret ballot in American politics has had its ups and downs. Of late, the curve is in a strong upturn (specifically, the independent use of secret ballot voting in leadership decisions in the caucuses and conferences of both Republicans and Democrats, and in both the House and the Senate).

Voting method has been debated in Congress. Exhibit "B" hereto is a partial transcript, taken from Gates & Seaton's Register of Debates in Congress, of a debate in 1829 on the issue of confidence in the secret ballot, and on the meaning of constitutional provisions on voting method. The dialog of 1829 can be helpful in directing the dialog of 1905.

The following is taken from the remarks of Congressman Bartlett of the 21st Congress: (Gates & Seaton's transcriptions are in the third person.)

"The possibility of • • • on the one side • • • while no evil is shown to exist on the other, was, of itself, a good reason against altering the present mode of election. He should therefore vote against the resolution and against every other which, like this, went to alter what experience had proved to be attended with no evils, for the sake of introducing new-fangled and untried expedients, which carried mischief in their aspect."

For some, it appears, the congressional use of the secret ballot, and the principles behind it, have become the untired and the suspect.

Congress has no grounds for being suspicious of the secret ballot.

**EXHIBIT A**

**THE LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, WASHINGTON, D.C.**

**PROCEDURE FOLLOWED BY THE UNITED STATES HOUSE OF REPRESENTATIVES IN CHOOSING THE PRESIDENT IN EVENT NO CANDIDATE HAS RECEIVED A MAJORITY OF THE ELECTORAL VOTE**

Amendment XII to the U.S. Constitution provides that in case of a tie or if no candidate has a majority, the House of Representatives chooses the President by ballot from the candidates, not exceeding three, having the highest numbers of electoral votes. A majority would be at least 260, since the total electoral vote is 331.

Only once since adoption of amendment XII in 1804 (and once under the original Constitution, article II section 1—election of Jefferson in 1801) has the duty devolved on the House to elect a President. This occurred in connection with the election of 1824. On February 9, 1825, when the electoral votes were counted by the President of the Senate in the presence of the Senate and House in joint session, the vote declared for President was as follows:

<table>
<thead>
<tr>
<th>Electoral votes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>For Andrew Jackson, of Tennessee</td>
<td>99</td>
</tr>
<tr>
<td>For John Quincy Adams, of Massachusetts</td>
<td>84</td>
</tr>
<tr>
<td>For William H. Crawford, of Georgia</td>
<td>41</td>
</tr>
<tr>
<td>For Henry Clay, of Kentucky</td>
<td>37</td>
</tr>
</tbody>
</table>

| Majority or vote necessary to elect | 201 |

The House then, on February 9, proceeded to elect a President from among the three highest candidates. Each State had one vote and the result was as follows:

<table>
<thead>
<tr>
<th>Votes</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>For John Quincy Adams, of Massachusetts</td>
<td>12</td>
</tr>
<tr>
<td>For Andrew Jackson, of Tennessee</td>
<td>7</td>
</tr>
<tr>
<td>For William H. Crawford, of Georgia</td>
<td>4</td>
</tr>
</tbody>
</table>

John Quincy Adams was thus elected President.

The following rules of procedure in election of the President by the House had been previously adopted by the House on February 7, 1825:

"1st, In the event of its appearing, on opening all the certificates, and counting the votes given by the electors of the several States for President, that no person has a majority of the votes of the whole number of the electors appointed, and
the result shall have been declared, the same shall be entered on the journals of this House.

"2d. The roll of the House, shall then be called, by States, and, on its appearing that a member or members from two-thirds of the States are present, the House shall immediately proceed, by ballot, to choose a President from the persons having the highest numbers, not exceeding three, on the list of those voted for as President; and in case neither of those persons shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President, without interruption by other business, until a President be chosen.

"3d. The doors of the Hall shall be closed during the balloting, except against members of the Senate, Stenographers, and the Officers of the House.

"4th. From the commencement of the balloting, until an election is made, no proposition to adjourn shall be received, unless on the motion of one State, seconded by another State; and the question shall be decided by States. The same rule shall be observed in regard to any motion to change the usual hour for the meeting of the House.

"5th. In balloting, the following mode shall be observed, to wit:

"The Representatives of each state shall be arranged and seated together, beginning with the seat at the right hand of the Speaker's chair, with the members from the state of Maine; thence, proceeding with the members from the states in the order the states are usually named for receiving petitions, around the Hall of the House, until all are seated;

"A ballot box shall be provided for each state;

"The Representatives of each state shall, in the first instance, ballot among themselves, in order to ascertain the vote of their state, and they may, if necessary, appoint tellers of their ballots;

"After the vote of each state is ascertained, duplicates thereof shall be made out, and, in case any one of the persons from whom the choice is to be made, shall receive a majority of the votes given, on any one ballot, by the Representatives of a state, the name of that person shall be written on each of the duplicates; and, in case the votes so given shall be divided, so that neither of said persons shall have a majority of the whole number of votes given by such state on any one ballot, then the word 'divided,' shall be written on each duplicate;

"After the delegation from each state shall have ascertained the vote of their state, the Clerk shall name the states in the order they are usually named for receiving petitions; and, as the name of each is called, the Sergeant-at-Arms shall present to the delegation of each two ballot boxes, in each of which shall be deposited, by some Representative of the state, one of the duplicates made as aforesaid, of the vote of said state, in the presence, and subject to the examination, of all the members from said state then present; and, where there is more than one Representative from a state, the duplicates shall not both be deposited by the same person.

"When the votes of the states are thus all taken in, the Sergeant-at-Arms shall carry one of the said ballot boxes to one table, and the other to a separate and distinct table;

"One person from each state, represented in the balloting, shall be appointed by its Representative to tell off said ballots; but, in case the Representatives fail to appoint a teller, the Speaker shall appoint:

"The said Tellers shall divide themselves into two sets, as nearly equal in number as can be, and one of the said sets of Tellers shall proceed to count the votes in the one of said boxes, and the other set the votes in the other box;

"When the votes are counted by the different sets of Tellers, the result shall be reported to the House, and if the reports agree, the same shall be accepted as the true votes of the states; but, if the reports disagree, the states shall proceed, in the same manner as before, to a new ballot.

"6th. All questions arising after the balloting commences, requiring the decision of the House, which shall be decided by the House voting per capita, to be incidental to the power of choosing a President, shall be decided by states, without debate; and, in case of an equal division of the votes of states, the question shall be lost.

"7th. When either of the persons from whom the choice is to be made shall have received a majority of all the states, the Speaker shall declare the same, and that that person is elected President of the United States.

"8th. The result shall be immediately communicated to the Senate by Message; and a committee of three persons shall be appointed to inform the President of the United States, and the President elect, of said election."
On January 16 and 17, 1829, the House of Representatives engaged in its most articulate debate on the issue of how elected representatives should elect their officers. The following Resolution was proposed by Representative Wickliffe:

"Resolved that the following be added to the Standing Rules of the House: All elections of the House of Representatives shall be by viva voce, by a call of the names of the members, alphabetically from the roll."

The debate on this Resolution 135 years ago is of timeless significance and quality. The words then spoken on the floor of the House of Representatives could well be spoken on the floor of any representative body today. They are of inestimable value to anyone who wants to understand the American system of politics.

The House of Representatives rejected the Resolution by a vote of 97 to 92. It accepted the counsel of the few surviving members of Thomas Jefferson's political generation and upheld the established Jeffersonian principles of voting procedure.

Selected parts of the debate, which is reported in full in Gales & Seaton's Register of Debates in Congress, follow:

"Mr. Wickliffe of Kentucky, the sponsor of the Resolution, said a Representative 'exercises a delegated trust, for which he is responsible to those who have clothed him with the power of voting. In voting, by the members of this House, in the choice of its officers and agents, the influence of public opinion is as important, and it should be as respectfully obeyed, by the Representative, as upon the expediency of any act of Legislation. Instance the election of a Speaker, to preside over the deliberations of this House, with the power to appoint its committees, and charged with the disbursement of two or three hundred thousand dollars of public money, in the payment of the members, and other expenses incident to our legislation, with no responsibility to the Government but its high character. A vote in his election may be of much more importance to the community, to the dignity and character of our Government, than in the passage of a law or resolution. The Constitution under which we legislate has secured to the people, upon the request of one-fifth of their Representatives, the important right of having the votes of their Representatives spread upon the Journal, on any question, however unimportant in its effect or consequences. Yet, (said Mr. W.) we, by the rule or practice of our House, choose to shield ourselves from responsibility, for the votes we give, in the elections of important public officers and agents, by hiding from our constituents within the lids of the ballot box.

"What are the objections to the proposed change? I have heard, in conversation, but one. There may be others: more, I have no doubt will be urged. It is alleged that, by a viva voce vote, the members will give offence, or may incur the displeasure of the Speaker, or the candidate for office, against whom he may vote. I will not allow myself for a moment to suppose that a Representative of forty thousand freemen, or one who is fit to represent forty thousand freemen, does not possess independence and moral firmness enough to aow for and against whom he votes; and the man who is elevated to the dignified station of presiding over the deliberations of the House of Representatives of the United States, who would permit his indignation or revenge to be exerted against a member, because he preferred another for the station, is unworthy the confidence or respect due to the office he fills or the titles of gentlemen. The member who would, from the dread of such indignation, sacrifice his independence, is destitute of that manly feeling and moral courage which ought to characterize, and I trust ever will characterize, the members of this House. I will, therefore, dismiss this objection as one which cannot prevail, or find an advocate on this floor."

Representative Barringer of South Carolina, in opposing the Resolution, said:

"Sir, the gentleman from Kentucky presumes much upon the perfection of human nature when he maintains that a gentleman would be unworthy by a vote in that chair, who would cherish anything like unkind feelings towards those who would oppose his elevation to it. We are men; fortunately for us we are
all but men: and while we continue such, we shall remain subject to the passions and infirmities which belong to our being. The gentleman might just as well have asserted that an elevation to that chair does ipso facto annihilate all feeling and passion in the human breast, as to have asserted that it is impossible a successful candidate should feel anything like unkindness towards those whom he knows to have been his opponents. The fact is not so. God forbid that it should be so. God forbid that any station or honor should render its possessor insensible to kindness, and dead to friendship and gratitude. Suppose, for a moment, that everything like political party were utterly annihilated, (and there is much ground to hope that this will, ere long, be literally the case; that we shall lay aside our enmities and animosities, and all coalesce into one great party for the public weal) and suppose further, that, at the opening of the next Congress, there shall be two candidates for the chair, perfectly agreeing in their political principles, equally well qualified for the station, and so evenly balanced in attainments and in intellectual and moral character, that even their friends are scarcely able to draw a distinction in preference of one or the other—under these circumstances, the House proceeds to elect viva voce. I as a member of it, and one whose duty it is to exercise elective privilege, feel perfectly friendly to both candidates, believe that either of them would make a suitable and accomplished presiding officer, but fancy, after much reflection, that I can perceive in one of them some quality which just inclines the balance, and, when called to vote, I name him in preference to the other, and a single vote turns the scale. Will the gentleman from Kentucky tell me, or will he try to persuade this House, that the unsuccessful candidate who, by the change of a single vote, would have gained the election, will feel no secret unkindness towards me, when, through my vote, he lost so great an honor and distinction? No, sir, I know human nature better. He will feel my vote as an act of unkindness; or if, notwithstanding my vote, one of the candidates shall succeed in his election, will he forget who voted against him? No, sir, he will not forget it; and, when distributing the honors of the House, he will show that he has not, by giving every important and prominent station to those who were his friends, and casting those who opposed his election, as far as his appointing power shall enable him to do it, into the shade of oblivion. If this is not so, I have greatly miscalculated the nature of man; but it is so, and it ever will be so; and I, for one, am ready to risk everything rather than advocate an arrangement which will place both the officer and the members in so unhappy a predicament. Yes, sir, I say that the plan will, in practice, be an unhappy one to the officer whom we elect, to us who elect him, and ultimately to the nation at large."

Mr. Barringer continued:

"For what purpose such a plan can be urged upon us God only knows; for I will not willingly presume there is any hidden design in it. But, sir, we are not left on this subject to our own imagination. We are not under the necessity of guessing, and supposing what is the will of our constituents in this matter. They have fully manifested their view of this subject; they have indicated it by action; they have acted toward us on the supposition that we were men, and would continue to be men of like passions with others; that we are not now, and never in this world shall be, perfect beings, and, therefore, they have given us a written rule to govern our proceedings; they have laid down the great charter of their will and our duty—an instrument provided not for one limited period, or one set of public servants, but extending to all time, and controlling an unlimited succession of their public Representatives. Now, I have to ask the gentlemen who advocate this resolution, which of the two they consider the more important, the election of a Speaker of this House, or the election of a Chief Magistrate of these United States—that distinguished public officer, who holds in his hands the destinies of this country, except where the operation of this House shall present a barrier to his power? Sir, I need not ask the question: it can receive but one answer. Yet, what have the people said respecting the election of such an officer as that? They have expressly said that he shall be chosen by ballot. They, it seems, have not that confidence in human nature which the gentlemen from Kentucky possess in such a very liberal measure. "Sir, the gentleman should have taught the people better. They have said that the President, whether chosen by electors or chosen in this House, shall be chosen, not viva voce, but by ballot; they have said to us, we, the people, have so little confidence in the perfections even of you, our Representatives, that, although we give you the election in the last appeal, we will place you in the same situation, and bind you by the same restrictions, as the original electors. We have no sort
of faith in the doctrine that your feelings and passions are all annihilated as soon as we clothe you with legislative authority; and, therefore, we order you to elect our Chief Magistrate by ballot. Whether they have done this with a view to our independence, or to their own security, it matters not, so they have spoken. Nay, sir, they have gone even farther than this; they have said, even to sovereign States, that they, too, when they vote in their collective capacity, shall vote by ballot, and by ballot alone. I refer to the election of a Vice President. Such, sir, is the chart which the people have laid down. That chart I mean to take for my guide. They have spoken their will in a manner not to be misunderstood; they have erected a barrier which it does not become any man whom they have sent here, and who professes to revere their authority, to attempt to break down."

Mr. Barringer then concluded:

"I feel unwilling even so much as to hint, that there is, under this resolution, any design which does not appear, or that it is brought forward merely with a view to a special purpose, not openly avowed. To hint that, sir, would be to infringe on the motives of honorable gentlemen; but this much I will say, that, if this resolution is not urged for a particular purpose, there is no reason why we should adopt it; and if it is urged for such a purpose, its adoption is unworthy of us, and of the station which we hold. Sir, the measure, if it goes into effect, will fix a stain upon this country, through the act of her Representatives—a stain which will remain on the page of history, though he who records it may blot it with a tear. Sir, we have read the history of another assembly, which called itself free, and we do know that, when a miscreant, for the promotion of his tyrannical purposes, sought to overawe its freedom, this very measure was the instrument he employed. Let that fact stand as a beacon for our warning, and withhold us from the commission of an act so suicidal."

Mr. Barringer's prediction was born out, at least with respect to the Speaker-ship itself, much later, by the House revolution of 1910.

It remained, however, for Representative Bartlett to make the comment that is most intriguing now, when, many years later, a different political generation looks back on the acts and words of its predecessors.

Mr. Bartlett said that—

"He would vote very manfully for the resolution if any reason could be shown why the present mode of election was not a good one, and why the mode proposed would be better. From the commencement of the Government the practice of electing by ballot had been uniformly observed; and he had listened with attention to the mover of the resolution to hear what evil attended it; but he had listened in vain. He was opposed to hasty changes in legislation, and never would adopt them without a strong probability of some benefit to follow. In the present case, the mover of the resolution had not been able to state a single evil or inconvenience arising from the existing practice. He had, indeed, placed the matter upon the ostensible ground, that the votes of every member would, by the ballot alone. I refer to the election of a Vice President, Such, as..."
Mr. Bartlett then concluded his remarks with this striking observation:

"The possibility of embitterment on the one side * * * while no evil is shown to exist on the other, was, of itself, a good reason against altering the present mode of election. He should therefore vote against the resolution, and against every other which, like this, went to alter what experience had proved to be attended with no evils, for the sake of introducing new-fangled and untried expedients, which carried mischief in their aspect."

The vote in Congress in 1829 supported the principles of secret-ballot election. However, in 1838, the result was reversed. Substitute principles, ones untried and unheralded, came as interlopers to the American political scene.

The "untried expedients which carried mischief in their aspect" that Mr. Bartlett warned against, that is, the use of open voting in leadership determinations, became, for a time, the accepted and the expected in political life.

Contrary to the Constitutional and Jeffersonian concepts which "experience had proved to be attended with no evils," that is, the principles behind the use of the secret ballot, became the untried and the suspect. Moreover, in the ultimate of reversals, they were regarded with suspicion.

The curious facts of this topsy-turvy sequence, make this a true folklore of our times.

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**TESTIMONY OF CONGRESSMAN JACOB H. GILBERT, OF NEW YORK, ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT**

Mr. Chairman, because of the grave national risk and gamble involved, the problem of presidential inability and succession should be dealt with at once. There is little disagreement as to the need to fill this dangerous void in our system of government; the difficulty has been in reaching an agreement on how best to do it. I am firmly of the opinion that a constitutional amendment, as proposed in House Joint Resolution 1, is the proper and most adequate way to meet this need.

I urge immediate action by our committee and the Congress on this resolution so that the long process of ratification by our States might proceed as rapidly as possible.

We are concerned with two problems: (1) the lack of a constitutional provision assuring the orderly discharge of the powers and duties of the President in the event of disability or incapacity, and (2) the lack of a constitutional provision assuring the continuity of the office of Vice President, an office which itself is provided for the primary purpose of assuring continuity.

Problems have existed in this country for almost two centuries so far as continuity in the executive branch of our Government is concerned. President Johnson said in his message a few days ago: "It is truly astonishing that over this span we have neither perfected the provisions for orderly continuity in the executive branch, nor have we had to pay the price our continuing inaction so clearly invites and risks."

We have been without a Chief Executive during several periods in our history during which the President was unable to perform his duties. It could happen again unless our Constitution is clarified and amended to define procedures for a successor to assume the powers and duties of the Presidency.

Since the Bill of Rights, the first 10 amendments to the Constitution, was written, 9 of the 14 subsequent amendments have related directly either to the office of the Presidency and Vice Presidency or to assuring the responsiveness of our voting processes to the will of the people. The American people have not hesitated to amend their Constitution when common-sense has dictated it—our most recent amendment was in 1901—and certainly common-sense and deep concern for the welfare of our country dictate it now. In such perilous times as these, there should be no doubt about whose hand is responsible for the running of our country. We are prepared for the possibility of a President's death, but we are not prepared for the probability of a President's incapacity by injury, illness, or other affliction.

On at least two occasions in our history American Presidents have been disabled for long periods of time and were incapable of discharging their presidential duties. On 16 occasions the office of Vice President has been vacant. During two perilous decades since World War II, that office has been vacant.
The problem of presidential disability is more serious than that of presidential succession because a President could be disabled and not admit it. President Garfield was disabled for over 2 months prior to his death from an assassin's bullet in 1881; President Wilson was disabled for 17 months from September 1919 to March 1921; President Eisenhower was disabled on two occasions. We have in the past been in the position of having to get along without decisive leadership from the Presidency due to illness.

When President Garfield lay unconscious those 80 days, the Cabinet, without constitutional authority, ran the Government as best it could. Our country was actually without a President, even though the Constitution provides that when the President is unable to carry out his duties, the Vice President is to take over. But the Constitution does not say whether he is to become President or merely act as President; it does not say whether he is to take over until the end of the term or until the President becomes able. And the Constitution does not say who shall decide when such a disability begins and ends. The Constitution does not define what is a state of presidential disability. It does not specify how or by whom a declaration of presidential disability is to be initiated or declared, and it does not specify how and by whom it shall be decided when the period of presidential disability has ended. These omissions make it entirely possible for a President who has become incompetent—physically, or mentally, or both—to retain his powers until a successor is elected. And conceivably this period could last from the time he takes the oath of office until his 4-year term has ended. The only remedy the Constitution provides is the impeachment of the President on charges submitted by the House and Senate and sustained by two-thirds of the Senate.

House Joint Resolution 1 proposes a constitutional amendment to provide that if the President declares his inability in writing, the Vice President shall become Acting President until the President recovers; he assumes the duties and powers—not the office. If the President does not declare his own inability—if he is unconscious or too ill to do so—the Vice President, acting with the concurrence of the majority of the Cabinet, can determine the President to be disabled. If a dispute should arise between the President and the Vice President and the Cabinet, Congress would decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

Mr. Chairman, I strongly recommend that the situation of presidential inability be clarified by constitutional amendment to avoid any confusion about when and to what extent the second in command should assume the duties of President.

Mr. Chairman, the Constitution should be amended to provide that in the event of a vacancy in the office of the Vice President, the President shall nominate a successor. Our proposal here would give the President the power to nominate the Vice President, subject to congressional approval by a majority vote of both Houses. It is desirable that the President and the Vice President enjoy harmonious relations and mutual confidences, and that the President be granted the generally accepted prerogative of choosing his Vice President. On the other hand, this amendment would recognize the right of the people to have a choice in the Vice President's election through their elected representatives in Congress. Our traditional system dictates that the people, through their elected representatives, have a voice in the selection of the Vice President.

Under our Constitution, Congress could call for a special election. So far in our history, this has not been done. The time of great national tragedy when we have lost a President is hardly a time conducive to the well-reasoned selection by popular vote. Congress, on the other hand, is the body entrusted with making major decisions. Congress declares war; Congress may elect or remove Presidents under certain circumstances. I feel that Congress can best represent the wishes of the people and is, therefore, the proper body to elect a Vice President upon the nomination by the President.

The office of Vice President has become one of great importance. It is no longer simply an honorary position. It carries specific and far-reaching responsibilities in the executive branch of the Government. It is essential that there always be a presidential successor fully conversant with domestic and world affairs and prepared to step into this high office on short notice and work harmoniously with the President.
Vacancies in the office of Vice President have occurred on 16 different occasions for periods totaling more than 37 years. Seven Vice Presidents have died in office and one resigned; eight Vice Presidents have taken over the office of President upon the death of the incumbent President since 1841.

Under our present law, where the Speaker of the House would take over the duties of the Presidency, it is conceivable that the successor would belong to a different political party from the deceased President. Such a change in the highest levels of the Government could hardly be conducive to the smooth and uninterrupted conduct of our country's affairs. Someone chosen for another office should not be elevated to the Vice-Presidency automatically. The office of Vice President is of such importance that we should have a man who is chosen for that specific purpose. He should not inherit this office because he happened to be chosen as the best man to fill another post. A man should be chosen who can work with the President, and he should be a member of the President's own political party. In a time of crisis, or at any time, we should not have a quick change of philosophy or change of direction. During the Garfield, Wilson, and Eisenhower illnesses, we were fortunate that we did not have an extreme international crisis, although we did have many important problems during these disability periods.

I am of the opinion that the best way to fill the office of the Vice President in the case of a vacancy would be as proposed in our resolution to amend the Constitution to permit the President to nominate a new Vice President and the Congress to elect him. This is close to the present system in which we find the President of the United States having a definite voice in deciding who the vice-presidential candidate will be—and I feel that the Congress should ratify the President's nominee because it best represents the wishes of the people. It is the body that comes closest to being able to determine what the people want.

Without proper constitutional provision, we face the risk of a nation in danger of confusion and chaos in the event the President is removed by death or is incapacitated by illness of accident, and we are faced with a vacancy in the second highest office of our land.

There is an urgent need for a constitutional amendment to permit the President and the Congress to fill the Vice-Presidency whenever it becomes vacant. I urge prompt approval of House Joint Resolution 1.

STATEMENT BY CONGRESSMAN J. EDWARD ROUSH, OF INDIANA

Mr. Chairman, members of the committee, within the past month our attention has been called again to the need for a clearly established policy relating to presidential disability.

All of us are most gratified by the prompt recovery of President Johnson from his minor illness. But this should not minimize the importance or the urgency of the issue.

The danger inherent in our failure to make this necessary revision to the Constitution are known to all of us. Even when the oceans provided buffers of time and space the need existed. The passage of the years has only served to emphasize this need.

At the same time we make this revision we can also make certain the office of Vice President will be promptly filled if any vacancy should occur in the future. During the past two decades this office has been vacant for 5 years. During the history of our Nation the office has been vacant on 16 different occasions totaling more than 37 years.

If we act promptly on this matter it is possible this most necessary amendment to our Constitution could be effected within this year. Forty-seven of our State legislatures are either in session or will be in session during 1965. I am certain the members of those legislative bodies also are aware of the urgency of the issue.

If there are those who do not believe there is a need for such an amendment they have been silent. And I am certain those who share the belief there is such a need and are in a great majority.

The problem is recognized. The solution is clear. Action is demanded. The time to act is upon us.
STATEMENT OF HON. EDWARD R. ROYBAL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and members of the committee, as the sponsor of House Joint Resolution 312, an identical resolution to House Joint Resolution 1, I am most grateful for the opportunity you have afforded me to express by strong support for this proposal.

The committee is to be congratulated on its fine work in taking up this important matter and for your commendable effort to clear up some 175 years of constitutional uncertainty. Nothing less than the safe and sure continuity of the legal government of the United States is at stake. This essential continuity has been endangered many times in the past, and in some instances only good fortune has prevented possible disaster. I am sure that the members of this committee fully realize that we can no longer afford, in this nuclear-space age, to leave the fate of or Government to the whims of chance.

For more than a year after Lyndon Johnson became President, our national luck held out, and we were all witnesses to an impressive demonstration of the true inner strength of America's democratic traditions.

After the tragic assassination of our beloved President John F. Kennedy, the new President firmly and quickly took up the reins of leadership, to assure continuity of the Government in the midst of a great constitutional crisis, to begin to heal the Nation's wounds, and to reinstill in our people a sense of unity and brotherhood and faith in the future.

This experience has again focused public attention on the critical issue of Presidential and Vice-Presidential succession, as well as the related, and in some ways more difficult, problem of presidential disability. And I believe there has developed a strong national consensus in favor of resolving these issues in a positive way, so that there will be no doubt concerning the constitutional provisions for handling such problems in the future.

As an affirmative response to the need for a solution to these problems, House Joint Resolution 312 proposes to amend the Constitution in three respects: First, it confirms the established custom that a Vice President, succeeding to a vacancy in the office of the President, becomes President instead of Acting President; second, it establishes a procedure for filling a vacancy in the office of Vice President; and third, it deals with the problem of presidential disability.

Section 1 of the proposed amendment provides that in the case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2 provides that in the event of a vice-presidential vacancy, the President can nominate a new Vice President, who will take office when he has been confirmed by a majority vote of both Houses of Congress.

Section 3 enables a President to declare his own disability to exercise the powers and duties, of his office, thus voluntarily turning over those powers and duties, but not the office, to the Vice President who then becomes Acting President.

In the absence of a Presidential declaration of disability, section 4 permits the Vice President to make such a declaration, and with the approval of a majority of the Cabinet, or such other group as Congress may indicate, assume the presidential responsibilities as Acting President.

Section 5 permits the President to reassume the powers and duties of his office when he declares that no disability exists. It also provides for immediate congressional resolution of any dispute over the President's ability, by authorizing him to resume discharging the powers and duties of his office unless two-thirds of both House and Senate agree with the Vice President and a majority of the Cabinet (or such group as Congress designates) that the President is unable to perform those duties.

This proposal, though not perfect, represents a sincere effort on the part of many persons who have studied the admittedly complicated issues involved to offer a workable means of solving difficult and delicate problems affecting the continuity and perhaps the life of our Government. Several suggestions have been made to improve this proposed amendment. I trust the committee will give full and thorough consideration to all these suggestions.

But I also urge the committee to act without unnecessary delay, for the subject is important to the future stability and peace of this Nation, and we cannot afford the risk of further delay in this vital matter.

As President Johnson stated in his recent message, "Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly
continuity in the Presidency that is imperative to the success and stability of our system.

"Action on these measures now will allay future anxiety among our people—and among the peoples of the world—in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal offices of our constitutional system.

"If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries."

Thank you.

STATEMENT OF HON. HERBERT TENZER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

I submit for the record relevant correspondence on the problem which we have discussed in these hearings.

Mr. NICHOLAS KATZENBAUER, Attorney General, Department of Justice, Washington, D.C.

DEAR MR. KATZENBAUER: Due to limitation of time, I was unable to pose a question on the record at the House Judiciary Committee hearings on presidential succession and disability on Tuesday, February 9, 1965, when you appeared and testified.

During the luncheon recess, I inquired of several members of the committee as to whether there was an executive policy or Secret Service requirement which prohibits the President and the Vice President from riding in the same plane or any other means of transportation. None of my colleagues with whom I consulted were aware of any such policy and suggested that I pose the question to you for the record.

I would appreciate a reply to this question in order that your response may be made a part of the official record of the committee hearings.

Thank you for your attention and cooperation.

Sincerely,

HERBERT TENZER, Member of Congress.


Hon. HERBERT TENZER, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN TENZER: The Attorney General has referred to me your letter dated February 10, 1965, inquiring whether there is "an executive policy or Secret Service requirement which prohibits the President and Vice President from riding in the same plane or any other means of transportation."

We are not aware of any such policy in the form of a statute, regulation, or formal order.

Insofar as you wish to know whether there is any Secret Service "requirement" in this area, I have taken the liberty of referring your inquiry to the Secret Service.

Sincerely,

NORBERT A. SOHLER, Assistant Attorney General, Office of Legal Counsel.


Hon. HERBERT TENZER, House of Representatives, Washington, D.C.

DEAR Mr. TENZER: As indicated in his letter of February 18, 1965, Norbert A. Schlel, Assistant Attorney General, has referred to this office your inquiry as to whether there is a Secret Service requirement which prohibits the President and
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the Vice President from riding in the same plane or any other means of transportation.

The Secret Service, despite the lack of an executive policy or Secret Service requirement, has succeeded in preventing the President and Vice President from riding in the same airplane or helicopter on the infrequent occasions when such procedure was contemplated. The Secret Service made its objections known to the President and he has always agreed with our decision.

The Secret Service has always discouraged the President and the Vice President from riding in the same automobile. On the occasion of any public function, our wishes have prevailed. However, there have been occasional off-the-record movements on which Presidents have spontaneously invited the Vice President to ride in the same car with no opportunity for objection on our part or where the objection would be impracticable or considered discourteous. There have also been instances where Presidents and Vice Presidents have been passengers aboard the same boat.

Sincerely yours,

JAMES J. ROWLEY.

STATEMENT OF HON. HERMAN TOLL, REPRESENTATIVE FROM PENNSYLVANIA

Mr. Chairman, my House Joint Resolution 240, proposing an amendment to the Constitution as above described, is designed to correct the longstanding and very serious constitutional gap on the problem of presidential inability. Provision is also made for the nomination by the President of a Vice President when a vacancy exists in that office.

I believe that with the illness of President Eisenhower during a part of his presidential tenure, and the sudden, tragic death of President Kennedy, the American public has been increasingly alerted to some of the critical possibilities that could conceivably arise if the vagueness and the deficiencies of clause 6, section 1, of Article II of our Constitution are not soon remedied: It is high time that the delays and procrastination of many years on this vital subject be brought to an end.

In these years and even days or hours of frequent domestic and foreign crises, it is increasingly unthinkable that the office of the Presidency should ever be left vacant even momentarily. For the same reason, our Nation should never be without a Vice President— whose office and duties have grown in importance with each passing year— hence section 2 of House Joint Resolution 240 provides for that contingency.

We have now had the advantage of prolonged and valuable study, and intensive analysis, of this entire subject by numerous able and distinguished men and committees, both in Congress and in private industry, and by the American Bar Association. Every effort has been made to establish criteria and reach conclusions that will best protect our Nation and facilitate the smooth expeditious and capable functioning of the presidential and vice-presidential offices at all times and under any contingencies that might arise.

I hope and believe that the provisions of House Joint Resolution 240, by seeking to establish, through constitutional amendment, practical methods of orderly transition in the case of presidential inability or a vice-presidential vacancy, will go a long way toward assuring the very essential “executive continuity” for our country.

I very much hope that early action will be taken by the committee and by the Congress on this vitally important subject.

CHAMBER OF COMMERCE OF THE UNITED STATES,

HON. EMANUEL CELLER,
Chairman, House Judiciary Committee,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CELLER: The Chamber of Commerce of the United States supports adoption of a constitutional amendment setting up procedures for handling cases of presidential inability and for keeping the office of Vice President filled.

The national chamber approves the method embodied in Senate Joint Resolution 1 and House Joint Resolution 1 and believes that any proposed constitutional amendment dealing with the above matters should clearly specify, as the
PRESIDENTIAL INABILITY

The aforementioned bills do, the precise method by which cases of presidential inability should be handled.

One improvement should be made in section 5 of the measure passed by the Senate. Instead of allowing 7 days for the transmission of a communication from the Vice President and the Cabinet to the Congress disputing a presidential declaration that no disability exists, a shorter length of time would appear preferable in order to minimize the period of uncertainty.

The interval of time should be kept to an absolute minimum to permit the speedy clarification, if challenged, of a President's assertion that his disability has terminated.

We urge prompt action by the House Judiciary Committee so that adoption of a constitutional amendment on presidential inability and vice-presidential vacancy may be ratified by the States in this calendar year.

Sincerely yours,

THERON J. RICE.


In re constitutional amendment concerning presidential inability.

Hon. EMANUEL CELLER,
Chairman, House Judiciary Committee,
U.S. House of Representatives, Washington, D.C.

DEAR SIR: Enclosed please find a copy of a resolution which was unanimously approved by the Centre County, Pa., Bar Association supporting the Bayh-Cellar amendment, House Joint Resolution 1. We hope that this may be of some use to you in your efforts to secure passage of this important piece of legislation.

Sincerely yours,

DELBERT J. MCQUAIDE,
Member Pennsylvania Bar Association Committee on Presidential Inability and Vice-President Vacancy.

RESOLUTION

Be it resolved, That Centre County Bar Association, Pennsylvania, recommends that the Constitution of the United States be amended in accordance with the following principles:

1. In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

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

3. The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress;

4. In the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term;

5. When a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term: Be it further

Resolved, That Centre County Bar Association, Pennsylvania urges the Congress of the United States to initiate an amendment to the Constitution of the United States in accordance with the foregoing provisions of this resolution.