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PRESIDENTIAL INABILITY

**HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CONSTITUTIONAL AMENDMENTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-EIGHTH CONGRESS
FIRST SESSION
ON
S.J. RES. 28, S.J. RES. 35
and S.J. RES. 84**

RELATING TO THE PROBLEM OF PRESIDENTIAL INABILITY

JUNE 11 AND 18, 1963

Printed for the use of the Committee on the Judiciary



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WASHINGTON : 1963

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PRESIDENTIAL INABILITY

TUESDAY, JUNE 11, 1963

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 2:20 p.m., in room 2228, New Senate Office Building, Senator Thomas J. Dodd presiding.

Present: Senators Dodd and Keating.

Also present: Fred Graham, chief counsel; Clyde Flynn, minority counsel; William H. Barr, research assistant; and Angelina T. Gomez, clerk.

Senator DODD. We will open the hearings.

Senator Kefauver is not able to be here because he has a sprained ankle and I am filling in for him. I want to read into the record the statement prepared by Senator Kefauver as follows:

On several occasions, this country has been reminded that a dangerous constitutional flaw exists in our presidential system. At least three Presidents have become so seriously ill while they were in office that for a considerable period of time they were incapable of exercising the powers and duties of the Presidency. However, the Constitution does not clearly authorize the Vice President, or any other officer, to discharge the presidential powers and duties while the President is unable to do so himself.

In 1958, this subcommittee conducted an exhaustive series of hearings into the constitutional problem of presidential inability. The three serious illnesses of President Eisenhower were then fresh in the public's memory, and six proposed constitutional amendments concerning presidential inability had been introduced in the Senate. The hearings proved that there was a deep concern among governmental leaders and constitutional scholars about this problem, but that there were equally deep differences of opinion as to what should be done to remedy the problem.

Since the 1958 hearings, the various interested parties have persisted in their efforts to work out a satisfactory constitutional solution to this problem. As a result of these efforts, three proposals have been introduced in the Senate, and are now pending before this subcommittee. We will order that these three resolutions be printed at this place in the record: Senate Joint Resolution 28, Senate Joint Resolution 35, and Senate Joint Resolution 84.

(The full texts of the resolutions follow, together with the Federal constitutional and statutory provisions governing presidential inability:)

88TH CONGRESS
1ST SESSION

S. J. RES. 28

IN THE SENATE OF THE UNITED STATES

JANUARY 23 (legislative day, JANUARY 15), 1963

Mr. KEFAUVER introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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.

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

I

1 "ARTICLE —

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

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

10 "SEC. 3. If the President does not so declare, the Vice
11 President, if satisfied that such inability exists, shall, upon
12 the written approval of a majority of the heads of the execu-
13 tive departments in office, assume the discharge of the powers
14 and duties of the office as Acting President.

15 "SEC. 4. Whenever the President makes public an-
16 nouncement in writing that his inability has terminated, he
17 shall resume the discharge of the powers and duties of his
18 office on the seventh day after making such announcement,
19 or at such earlier time after such announcement as he and
20 the Vice President may determine. But if the Vice Presi-
21 dent, with the written approval of a majority of the heads
22 of executive departments in office at the time of such
23 announcement, transmits to the Congress his written declara-
24 tion that in his opinion the President's inability has not
25 terminated, the Congress shall thereupon consider the

1 issue. If the Congress is not then in session, it shall
2 assemble in special session on the call of the Vice President.
3 If the Congress determines by concurrent resolution, adopted
4 with the approval of two-thirds of the Members present in
5 each House, that the inability of the President has not
6 terminated, thereupon, notwithstanding any further an-
7 nouncement by the President, the Vice President shall dis-
8 charge such powers and duties as Acting President until
9 the occurrence of the earliest of the following events: (1)
10 the Acting President proclaims that the President's in-
11 ability has ended, (2) the Congress determines by concur-
12 rent resolution, adopted with the approval of a majority
13 of the Members present in each House, that the President's
14 inability has ended, or (3) the President's term ends.

15 "SEC. 5. The Congress may by law provide for the case
16 of the removal, death, resignation, or inability, both of the
17 President and Vice President, declaring what officer shall
18 then act as President, and such officer shall act accordingly
19 until the disability be removed, or a President shall be
20 elected. If at any time there is no Vice President, the
21 powers and duties conferred by this article upon the Vice
22 President shall devolve upon the officer eligible to act as
23 President next in line of succession to the office of President,
24 as provided by law."

PRESIDENTIAL INABILITY

88TH CONGRESS
1ST SESSION

S. J. RES. 35

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5 (legislative day, JANUARY 15), 1963

Mr. KEFLAUVER (for himself and Mr. KEATINO) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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.

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

1 “ARTICLE —

2 “In case of the removal of the President from office
3 or of his death or resignation, the said office shall devolve
4 on the Vice President. In case of the inability of the Presi-
5 dent to discharge the powers and duties of the said office,
6 the said powers and duties shall devolve on the Vice Presi-
7 dent, until the inability be removed. The Congress may by
8 law provide for the case of removal, death, resignation or
9 inability, both of the President and Vice President, declar-
10 ing what officer shall then be President, or in case of in-
11 ability, act as President, and such officer shall be or act
12 as President accordingly, until a President shall be elected
13 or, in case of inability, until the inability shall be earlier
14 removed. The commencement and termination of any in-
15 ability shall be determined by such method as Congress shall
16 by law provide.”

88TH CONGRESS
1ST SESSION

S. J. RES. 84

IN THE SENATE OF THE UNITED STATES

MAY 28, 1963

Mr. HRUSKA (for himself and Mr. McCLELLAN) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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.

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

I

1 “ARTICLE —

2 “SECTION 1. If the President dies, resigns, or is re-
3 moved from office, the Vice President shall become President
4 for the remainder of the term to which the President was
5 elected.

6 “SEC. 2. If the President becomes unable for any reason
7 to discharge the powers and duties of his office, they shall
8 devolve upon the Vice President, who shall then act as
9 President until the disability of the President be removed,
10 or the term of office of the President shall expire. Congress
11 shall have the power to establish a procedure to determine
12 the inability of the President to discharge the powers and
13 duties of his office; but such procedure must be compatible
14 with the maintenance of the three distinct departments of
15 government, the legislative, the executive, and the judicial
16 and the preservation of the checks and balances between
17 the coordinate branches. Congress shall provide by law for
18 the case of the removal, death, resignation, or inability of
19 both the President and Vice President, declaring what
20 officer shall then act as President; and such officer shall act
21 accordingly, until the inability be removed, or the expiration
22 of the term for which both officers had been elected.

3 “SEC. 3. Article II, section 1, paragraph 6 is hereby
4 repealed.”

ARTICLE II, SECTION 1, CLAUSE 6 OF THE CONSTITUTION

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.

SECTION 19 OF TITLE 3 OF THE UNITED STATES CODE ENTITLED "VACANCY IN OFFICES OF BOTH PRESIDENT AND VICE PRESIDENT; OFFICERS ELIGIBLE TO ACT"

(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 Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(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 subsection.

(b) If, at the time when under subsection (a) of this section, a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, 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 the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

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

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) 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 (June 25, 1948, ch. 644, sec. 1, 62 Stat. 672).

Senator Dodd (reading from Senator Kefauver's statement) :

The proposal which is embodied in Senate Joint Resolution 28 was drafted as a result of the testimony given at the 1958 hearings. This is essentially the system that was proposed by Attorneys General Herbert Brownell and William P. Rogers, as a result of experience with this problem during the three illnesses of President Eisenhower. It is designed to avoid the pitfalls which were pointed out by witnesses in the 1958 hearings. It differs from the other two proposals in that it specifies a method for determining the commencement and termination of a President's inability, and would not require further action by Congress.

The Bar Association of the City of New York, the New York State Bar Association, and the American Bar Association have devoted a tremendous amount of time and effort to studying this problem since the 1958 hearings. These three groups have endorsed a proposed constitutional amendment, which is embodied in Senate Joint Resolution 35. I believe that this proposal was first drafted by Mr. Martin Taylor, who is here today to appear as a witness. The junior Senator from New York (Mr. Keating) has joined with me in introducing this resolution.

Mr. Richard H. Hansen, attorney at law, of Lincoln, Nebr., has studied this problem for many years. Last year he published a book entitled "The Year We Had No President," which is certainly one of the outstanding works on this subject. In his book, Mr. Hansen approved the principle of Senate Joint Resolution 35, but suggested that such an amendment should clearly require that the Congress preserve the checks and balances between the three distinct departments of Government—the legislative, executive and judicial—when it enacts a presidential inability statute. This principle is embodied in Senate Joint Resolution 84, which has been introduced by the senior Senator from Nebraska (Mr. Hruska).

We are very fortunate that this country now has a young, vigorous and obviously healthy President. This will allow us to explore these problems in detail without any implication that the present holder of that high office is not in good health.

The essence of statesmanship is to act in advance to eliminate situations of potential danger, and I am confident that Congress will take advantage of our present good fortune to prepare now for the possible crises of the future.

Senator Keating, I have just said that Senator Kefauver was absent due to a bad ankle and I have read into the record a statement which he had prepared.

Do you have a statement?

Senator KEATING. I have a short statement, Mr. Chairman. I regret our chairman's incapacity and wish him a speedy recovery. I regret that he is not here today, because I know of his great interest in this problem as well as that of the distinguished Senator who is presiding, whom I am always glad to be associated with.

Senator Dodd. Thank you. You may proceed.

STATEMENT OF HON. KENNETH B. KEATING, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KEATING. Many citizens would be astonished to discover that the Constitution does not provide adequate procedures for the exercise of the President's powers and duties in the event the President becomes temporarily disabled by illness.

No matter what our views may be as to the relative powers of the three branches of Government, no one doubts that the Office of President of the United States is the single most important office in the United States and possibly in the world. It is incredible at

this stage in our history that we have not yet provided clear procedures for determining in what manner the powers of the President shall be exercised during a period of incapacitating illness. While this constitutional defect should be a matter of concern under any circumstances, in this era of crisis, failure to take corrective action could have disastrous consequences.

The Constitution provides in article II that in case of the inability of the President—

to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.

The most serious defect in this provision is its failure to specify that a recovered President may regain his Office when his illness has terminated. If anything, its language implies that the Vice President does succeed to both the Office and duties of the President in case of inability, just as has been the case in the seven instances in our history in which a President has died in office. In view of this, any President would be reluctant to transfer powers to a Vice President despite serious illness, and no Vice President to date has attempted to assume power under such circumstances. Any who did either with or without the President's sanction would be acting under a dark cloud as to his status and authority—and the result could be national paralysis at a time when national leadership is essential.

Unfortunately, this is not a matter which can be dealt with by simple legislation. Nowhere in the Constitution is Congress granted the express power to provide a method of determining presidential inability, and we would have to stretch the meaning of the necessary-and-proper clause beyond reasonable lengths in order to imply such a power.

There may be some justification for the enactment of a statute as an interim measure to serve until a constitutional amendment was ratified. An analogy is suggested by the enactment of a statute embracing the substance of the 14th amendment before its ratification. But the danger in this course is that the people would question any assumption of power under the statute, and all the uncertainties inherent in the present situation would persist. The only appropriate course under these circumstances is adoption of a constitutional amendment.

Even more hazardous than an attempt to deal with this issue by simple legislation is the attempt to deal with it by agreement between the President and Vice President. At best, such an agreement provides only a minimum safeguard against utter chaos in the event of presidential incapacity. In the event a dispute arose between the President and Vice President as to whether the President's inability had ended, the agreement would not even provide such a minimum safeguard.

Both President Eisenhower and Vice President Nixon and President Kennedy and Vice President Johnson have entered into such agreements. In effect, they provide that the Vice President shall serve as Acting President until the President's disability has ended and that the President shall determine when his disability has ended. The President is also to determine when he first becomes disabled except that the Vice President may make this determina-

tion "after such consultation as seems to him appropriate," in any case in which the President is prevented from communicating his disability to the Vice President.

President Eisenhower recognized the stopgap nature of his arrangement with Vice President Nixon and as the chairman knows, was a strong advocate of a constitutional amendment. Unfortunately, however, despite the efforts of some of us to deal with this problem over a period of many years, Congress has been stalemated, and the necessary amendment has yet to be approved.

This is another case in which action has been stalled by widespread disagreement as to how to deal with a situation with which there is widespread dissatisfaction. None of the rival proposals for a congressional, Cabinet or Commission determination of presidential inability has been able to command sufficient support for approval, and admittedly, all have their shortcomings. Unless a spirit of compromise prevails, we must anticipate a further intolerable delay in closing this constitutional gap.

Both the chairman, Senator Kefauver, and I have in the past favored different plans for dealing with this problem. Early in this session, however, we joined in proposing a constitutional amendment (S.J. Res. 35) which we hoped would serve to break the congressional deadlock. This amendment would make it clear that the Vice President would not succeed to the Office of President, but only to the powers and duties of that Office. It would also make it clear that Congress has the power to provide by law a method for determining the commencement and termination of any presidential inability. We would both prefer, I am confident, an amendment which would set out in detail exactly what should be done if a President becomes unable to discharge his duties. But the futility of holding out for an ideal solution has become evident, and there is no question in my mind that adoption of our joint resolution is infinitely more desirable than a further indefinite delay in taking any action whatsoever. I am hopeful, therefore, that all of those interested in making progress on this issue will support our proposal.

Senator Dodd. Thank you, Senator Keating.

Our first witness is Mr. Lewis F. Powell, Jr. Mr. Powell is president-elect nominee of the American Bar Association, and is a senior member of the firm of Hunton, Williams, Gay, Powell & Gibson of Richmond, Va. Mr. Powell holds bachelor of law and bachelor of science degrees from Washington and Lee University and a master of laws degree from Harvard. He holds honorary doctor of laws degrees from Washington and Lee and Hampden-Sidney College. He has been active in educational and civil affairs in Virginia, having served on the Virginia State Board of Education and the State Library Board. He is a trustee and general counsel of Colonial Williamsburg, Inc. He is also a trustee of Washington and Lee University and Hollins College. A leader in the American Bar Association since 1940, he has been instrumental in the association's program to encourage schools and colleges to teach objectively and thoroughly the truth about communism and its contrast with freedom under law.

I could go on for some longer time, but I think that I have provided sufficient background information. Mr. Powell, we are very

pleased that you are here, because we consider you a very distinguished lawyer and, indeed, one of the foremost authorities on this subject.

Senator KEATING. May I join in everything the chairman has said and to congratulate you on your election to the presidency of the American Bar Association. It is a great honor.

Mr. POWELL. Thank you very much, Senator Dodd and Senator Keating.

Senator KEATING. You have had a distinguished career in the law and I want to thank you for the help you have given us today.

Mr. POWELL. Thank you both very much.

Senator DODD. You may proceed.

STATEMENT OF LEWIS F. POWELL, JR., PRESIDENT-ELECT NOMINEE, AMERICAN BAR ASSOCIATION OF RICHMOND, VA.

Mr. POWELL. My name is Lewis F. Powell, Jr. I am president-elect nominee of the American Bar Association, and practice law in Richmond, Va. I appear before this committee today to support Senate Joint Resolution 35, introduced by Senators Kefauver and Keating.

The joint resolution proposes an amendment to the Constitution of the United States, specifying that in the case of the President's death, resignation, or removal, the Vice President shall succeed to the Office of President, and in the case of the President's inability, the duties but not the Office, pass to the Vice President. In addition, Congress would be given the power to prescribe a method for determining the "commencement and termination of any inability."

We in the American Bar Association are especially pleased to speak for Senate Joint Resolution 35 because this resolution embodies the exact language recommended by the association's house of delegates in February 1960. I think it is fair to say that this language originated with the New York State Bar Association in a committee under the chairmanship of Mr. Martin Taylor, who is here to testify today.

The house of delegates is the governing body of the American Bar Association, composed of some 260 lawyers, representing not only sections and committees of the association but State and local bar groups and other legal organizations as well. The resolution, which became association policy in 1960, and the accompanying report are attached to this statement as appendix A, and will be filed.

It is our understanding that the Department of Justice supports this particular solution to a problem which has been the subject of concern and study for many years.

The American Bar Association reaffirmed its support of this constitutional amendment at its midyear meeting in 1962. At that time the house of delegates also approved a proposed congressional statute on this subject, but was careful to specify that such action should not be "construed to modify" the previously expressed support for an appropriate constitutional amendment.

My testimony, therefore, will be confined to the subject of this hearing; namely, Senate Joint Resolution 35 and the reasons why it is deemed to be in the public interest.

The objective, which we all seek to attain, is definitive clarification of responsibility and procedures to be followed in the case of presidential inability. Essentially, the association's position emphasizes three main points:

- (i) A constitutional amendment is highly desirable, if not indeed necessary.
- (ii) The powers and duties of the President, not the office itself, should pass to the Vice President.
- (iii) Congress should be broadly empowered to prescribe the proper method of implementation.

The relevant clause of section 1 of article II of the Constitution, relating to presidential succession reads:

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.

As the history of this provision and the divergent views as to its meaning have been fully discussed by competent scholars in previous congressional hearings, I shall make only the briefest reference to this history.

First, there was the question whether, upon the death of a President, the Vice President succeeded to the "Office" of President or merely to its "powers and duties." The language of the article II did not answer this clearly.

However, in 1841, John Tyler established the precedent of succeeding to the office upon the death of William Henry Harrison. This has since been followed six times without question, so that this particular ambiguity has been satisfactorily resolved.

But such a precedent is of little value in the event of the temporary inability of an incumbent President. The two instances of inability, where the Chief Executive continued in office, were in the cases of Presidents Garfield and Wilson. Garfield was totally disabled for some 80 days preceding his death. Vice President Arthur did not assume the responsibilities of the Presidency because of the concern of the Cabinet that Garfield could not then have resumed the office if he had recovered.

The more serious case of President Wilson's inability, and the problems resulting from lack of established succession procedures are well known to this committee.

In more recent years, agreements with respect to presidential disability have been made between the President and the Vice President in both the Eisenhower and Kennedy administrations. Although these agreements serve to lessen the possibility of confusion, they are hardly an acceptable permanent solution to this problem.

The questions which must be answered are basically two:

First: Does the Vice President succeed to the Office of President or does he assume only the powers and duties of that office?

Second: What constitutes "inability" of the President, and how are the beginning and the end of "inability" to be determined?

It is the view of the American Bar Association that both of these questions are satisfactorily answered by Senate Joint Resolution 35. A constitutional amendment, embodying the language of this resolution, would make it perfectly clear that the Vice President would succeed only to the powers and duties of the President in case of the latter's inability to act.

Such a constitutional amendment would also empower the Congress, by appropriate legislation, to prescribe a method for determining the "commencement and termination" of presidential inability. It is desirable to leave detailed matters of procedure to legislation rather than to attempt to embody them into the Constitution. The important point is that the Congress, if this resolution is adopted, would have a constitutional mandate to prescribe appropriate procedures relating to presidential inability, and this would resolve doubts which have heretofore existed as to the power of Congress in this respect.

The American Bar Association believes that a solution of this unsettled problem is distinctly in the public interest, and urges prompt adoption of Senate Joint Resolution 35 by this Congress. The association will work, through State and local bar organizations, to secure the ratification by the State legislatures.

I thank you for the invitation to appear here today.

Senator Dodd. Thank you very much, Mr. Powell.

Senator Keating, any questions?

Senator KEATING. Would you like to have this resolution by the American Bar Association, which is attached to your statement, as well as the report of the standing committee, made a part of the record?

Mr. POWELL. I would, sir.

Senator Dodd. It is so ordered.

(App. A follows:)

APPENDIX A

AMERICAN BAR ASSOCIATION

The House of Delegates of the American Bar Association in 1960 adopted the following resolution:

"Resolved, That the American Bar Association approves the adoption of an amendment to the Constitution of the United States on the subject of presidential inability, whereby the sixth clause of section 1 of article II of the Constitution would be amended to read as follows:

"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 the 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 commencement and termination of any Inability shall be determined by such method as Congress shall by law provide."

"Further resolved, That the committee on jurisprudence and law reform be authorized to urge the adoption of such constitutional amendment and to endeavor to secure the cooperation of State and local bar associations to the same end."

REPORT OF THE STANDING COMMITTEE ON JURISPRUDENCE AND LAW REFORM

The sixth clause of section 1 of article II of the Constitution now 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."

This clause, as now written, leaves open the question of what constitutes "Inability" of the President, and fails to provide a method of determining either the beginning or end of the disability. Similarly, the ambiguity in the words "the Same" is unresolved, and the question of whether, in the case of Presidential inability, the Vice President would succeed to the office of President (as in the case of death of the President) or only to the powers and duties of the office, remains unsettled.

Various suggestions as to the methods of determination of Presidential inability have been made, including determination by the President, or by the Vice President or the Cabinet or both, or by an appointed commission, or by reference to the courts. It would seem (1) that the best constitutional practice would be to empower Congress to select the method, as is now authorized by the present clause, in the case of inability of both the President and Vice President, and (2) that the freezing of any one method into the Constitution would be inadvisable, requiring additional constitutional amendment to correct or change.

Also, it is doubtful whether Congress is empowered to deal with the subject without a constitutional amendment, and seems clear that ambiguities in the present clause can only be cured by such amendment and not by act of Congress alone.

Therefore, the committee feels that a constitutional amendment is necessary, and that such amendment should—

(1) Separate the provisions relating to inability from those relating to death, resignation, or removal, thereby removing any ambiguity in the language of the present provision.

(2) Provide for the determination of the question of commencement and termination of the inability of the President or Vice President.

If the recommended amendment were adopted, it would mean—

(1) That, in case of the President's inability (as distinguished from death, resignation, or removal from office), the Vice President will succeed only to the powers and duties of the President and not to the office itself, until the inability is removed or a President elected.

(2) That Congress will be called upon to enact legislation providing a method by which the commencement and termination of any inability shall be determined.

The committee feels that timely consideration of the subject is desirable and important, even though there be no immediate emergency, and that action by the American Bar Association will stimulate early consideration in State and local associations. In making this report and recommendation, the committee has received, and studied with approval, the report of the Committee on Federal Constitution of the New York State Bar Association, which committee has devoted extensive time and study to the subject.

Respectfully submitted.

KARL C. WILLIAMS, *Chairman.*
RICHARD C. BERGEN.
HENRY E. FOLEY.
JONATHAN C. GIBSON.
E. HAROLD HALLOWS.
HENRY M. HOGAN.
EDWIN M. RHEA.

Senator KEATING. I have no further questions. I want to commend you for a fine statement, and to thank you very much.

Mr. POWELL. Thank you, sir.

Senator DODD. Mr. Graham, any questions?

Mr. GRAHAM. Mr. Powell, I believe that the main difference between S.J. Res. 35 and the many resolutions which have been introduced in prior Congresses is that it does not attempt to set out the specific system for determining the termination and commencement of the President's inability; is that right?

Mr. POWELL. Yes, I think that is right.

Mr. GRAHAM. Why does the American Bar Association feel that this would be a better solution to the problem than to set out a specific mechanism in the amendment itself?

Mr. POWELL. We think it is more appropriate to leave the detailed procedure for action by the Congress. We think a constitutional amendment along the lines of S.J. Res. 35 would be compatible with the general framework of the Constitution. The details are more properly a subject for legislation.

Mr. GRAHAM. Mr. Powell, but what if Congress is unable to agree on one particular method to solve the problem, and cannot agree on the statute to be passed pursuant to S.J. Res. 35. You still would have the problem, would you not, if they cannot agree on a statute?

Mr. POWELL. That is a possibility, of course, but I would assume—I think we all are entitled to assume—that, if there were a constitutional mandate on the subject, certainly the Congress would enact appropriate legislation.

Mr. GRAHAM. You made the statement, Mr. Powell, that the American Bar Association would make every effort to help in the ratification of this. Do you think that the State and local bar associations would be able to put across to the people the importance of making this a part of the Constitution, and to explain to them what is really a very simple amendment to the Constitution?

Mr. POWELL. Mr. Graham, obviously I cannot speak for the State bars, but we have had a good deal of experience, through the American Bar Association, in working with State and local bar associations. As I think I said, our house of delegates is a representative body, with representatives from all of the State bars and from all of the major city bars. On a matter of this kind, it is the policy of the American Bar Association to back its action—the action of the House of Delegates—by enlisting the cooperation of the State and local bars. All of these, I think, have committees on legislative or constitutional matters. And so, to answer your question, I would be very hopeful that, through the American Bar Association, and its stimulation, we would be able to enlist the active cooperation and assistance of a large number of State bar associations and the major local bars.

Mr. GRAHAM. Thank you.

Mr. POWELL. We certainly will make that effort.

Mr. GRAHAM. Thank you. Those are all of the questions I have.

Senator DODD. Thank you, Mr. Powell. Are there any other questions?

Senator KEATING. No.

Senator DODD. We are grateful to you for your fine statement. Unfortunately, we have a rollcall on the floor of the Senate which will require us to leave for a few minutes. We will return directly and continue with the hearings. We will now recess for a few minutes.

(A short recess was taken.)

Senator Dodd. The hearing will come to order. I apologize for the delay. I thought there was to be another rollcall, hence I stayed for a while, hoping that it would save us time and myself some steps. We will resume the hearing. I will ask Mr. Martin Taylor to come forward. Mr. Taylor is the chairman of the New York State Bar Association's Committee on Federal Constitution. We welcome you here, Mr. Taylor, and I am sorry for the delay.

I may add that for many years Mr. Taylor was chairman of the Subcommittee on Presidential Inability, also of the New York State Bar, and he has led and encouraged the bar associations to support efforts to resolve the inability problem. Mr. Taylor's subcommittee was the first to draft a proposed amendment along the lines of Senate Joint Resolution 35 and the proposal now is supported by the entire American Bar Association. He is also the senior member of the law firm of Reed, Hoyt, Taylor & Washburn, one of the leading law firms in New York City.

Will you proceed, Mr. Taylor?

STATEMENT OF MARTIN TAYLOR, CHAIRMAN, COMMITTEE ON FEDERAL CONSTITUTION, NEW YORK STATE BAR ASSOCIATION

Mr. TAYLOR. Senator Dodd, when I was here before in 1958, I learned that the Senators have always said too many polite things about witnesses and—

Senator Dodd. Well, do you want me to strike it from the record? [Laughter.] Well, it is the truth.

Mr. TAYLOR. Thank you. I have not a prepared statement, Senator.

Senator Dodd. So we were given to understand beforehand, Mr. Taylor.

Mr. TAYLOR. And I felt that instead of using my own words I would rather read a short paragraph from a book written by Senator Beveridge on the "Life of Marshall," Chief Justice Marshall, which dealt with the precise thing we have before us today:

A constitution to contain an accurate detail of all subdivisions of which the great powers will admit and of all of the means by which they may be carried into execution, would partake of a prolixity of a legal code and could scarcely be embraced by the human mind * * *. The very nature of a constitution, therefore, requires that only its great outlines should be marked and its important objects designated.

The Constitution does not profess to enumerate the means by which the powers it confers may be executed.

I found that, by chance, after Senate Joint Resolution 35 was proposed, and it seems to me it expresses exactly what we have before us, that is, a joint resolution proposing an amendment which gives a broad and general power which can be implemented in such way as may be advisable.

As you know, that general plan has been approved by the American Bar Association. It was originally suggested by the State Bar Association, and there is an excellent report on it which perhaps is too long to put into the record, but some of you may care to read it. It is in the record of the Association of the Bar of the City of New York in volume 17, No. 4, of April 1962, in which they discuss all the previous things that had been talked about and eventually approved in principle, what we are talking about today.

Senator Dodd. Mr. Taylor, we will receive that in the appendix, by reference, in the record.

(The document referred to is exhibit No. 1 in the appendix.)

Mr. TAYLOR. As to the status, now, of Senate Joint Resolution 35, Senator Dodd, the associations that I enumerated have favored it. The Deputy Attorney General expected to be here, and I am told that at a subsequent hearing he will state the position of the Attorney General, again favoring Senate Joint Resolution 35.

It may be that for the record we should go back a little to see some of the problems that have been eliminated, so that we can see the desirability of advocating the present proposal. The character of inability, I think, now, is generally regarded as being unnecessary to a definite theory that whatever tribunal is created by statute could obviously determine inability, and possibly it would be better not to handicap it by an attempt at a definition, because I am told that sometimes lawyers disagree about the text of such things.

The question of whether it is the Office or the duties which devolve on account of an unfortunate phrase in the original draft, which said that "the same shall devolve upon the Vice President." The question arose, what does "the same" mean? The Office or the duties?

Well, it is implicit in Senate Joint Resolution 35 that it is the duties. You will have in mind that from the text on determining termination of inability, that otherwise you would have two Presidents, which is obviously not as good as one—and also historically in various Colonial charters—and some State constitutions there are provisions covering Governors being out of the State, and so on—the point is, they all presuppose a return after disability, and I imagine that was in the mind of the draftsman of the original sentence.

Oddly enough, in Madison's notes made many years afterward, the only thing that was quoted was the one phrase—"What is inability?" Who raises the question—who determines it? And there is no one else that talked about it until a man named Curtis in the 1850's wrote a book about the Constitution and he again repeated that phrase, and that is all there is. In the whole text of discussions by both Marshall and Storey, who were both very busy on constitutional questions for 30 years—inability was never mentioned.

So, then, having disposed of those things, which you will recall from the previous hearings have been very much debated, we reach this point: That it is the duties which devolve. That inability does not have to be defined. And that it is clear it must be susceptible of terminating so that the President does not lose the Office. The other problems that have been raised, I do not think we need to go into, because I think everyone is agreed on this basic theory of leaving to Congress the power to create the way of doing it—not doing it.

Possibly a word might be said about this thing, this arrangement that was prepared by Brownell during President Eisenhower's administration. That has been variously defined. Mr. Powell tells us it was an agreement. I think the Attorney General does not call it an agreement. He says it is a statement of an interpretation of the Constitution.

It has obvious limitations. First, it is only a statement by the present President and Vice President. Second, they might disagree. Third, suppose the Vice President is incapacitated. Fourth, it does not bind any future President. Fifth, somebody might raise the constitutional question of whether they have the power to make such a statement. Everyone, that is, is free to furnish his own interpretation.

However that may be, the Attorney General has stated, I think, both now and before, that to finally determine the question requires a constitutional amendment.

Also, there is this other point which has been discussed in the past and I think now that pretty much the consensus of opinion is the same—I won't use the word "discarded"—the theory which has been advocated by very experienced constitutional lawyers to the effect that it does not require a constitutional amendment, it can be covered by statute. The suggestion is that possibly the broad language at the end of the section of the Constitution that enumerates the powers of the Congress should be broad enough. However that may be, there is this practical objection to it, giving all due deference to that view, and certainly there is considerable disagreement with that view, so that whether a constitutional amendment—or putting it the other way, whether it could be accomplished by statute—if it were, it is certainly unthinkable that someone would not raise the constitutional question, the issue as to whether there was power under the statute.

I think that practically concludes all the strawmen that have been struck down during the last 5 years since I have been here before. I am told that counsel is not going to let me rest on that statement but wants to ask me some questions; and perhaps Senator Keating does.

Senator KEATING. Mr. Chairman, I simply want to express my gratitude to the help and leadership which Mr. Taylor and others in the New York State Bar Association have provided in this field.

Mr. TAYLOR. Thank you.

Senator KEATING. It is nice to have you here.

Senator Dodd. Mr. Taylor, you and the bar have been very helpful to us, and I join in Senator Keating's expression of appreciation. Does counsel have any questions?

Mr. GRAHAM. Yes, Mr. Chairman. Mr. Taylor, I believe that Senate Joint Resolution 35 was first drafted by a subcommittee of your State Bar of New York, is that right?

Mr. TAYLOR. It was first drafted in 1958 by the subcommittee of the State bar association.

Mr. GRAHAM. And you were the chairman of that subcommittee?

Mr. TAYLOR. Well, I drafted it. That is one reason why I should be in favor of it. It was subsequently approved by the association, and I think you have in the record the report of the State bar.

Mr. GRAHAM. Mr. Taylor, apparently what you have done is reduced the problem to the barebone constitutional authorization, and knocked out all of the mechanics; is that right?

Mr. TAYLOR. Yes.

Mr. GRAHAM. Now, is it possible that the States may not support an amendment which gives Congress the power to enact legislation

when they do not know what legislation is going to be enacted pursuant to the amendment?

Mr. TAYLOR. Well, what is in my mind is, I suppose, that it should be determined as to whether it should be submitted just this way, on the theory that people would favor giving the power to the Congress without making a specific proposal, when a change might be controversial; is that what you have in mind, sir? I am not sure I heard you correctly.

Mr. GRAHAM. Well, it seems to me the question is going to be raised by any State legislature, that people do not really know what power they are giving, nor how it is going to be exercised and implemented.

Mr. TAYLOR. Well, is it any different than all of those enumerated powers in the Constitution where Congress is given the power to do—let us suppose you were to go back and take whatever—the 18 or 19 specified powers—in order to embody those powers do you think it would be necessary or even advisable to specify the implementation?

Mr. GRAHAM. But don't you think this might be a little bare compared to other constitutional provisions which—

Mr. TAYLOR. I agree, but the other alternative is to submit a proposal which quite possibly would be objected to for some reason or other, whereas an amendment in broad terms would not be so likely to be.

Mr. GRAHAM. Mr. Taylor, Senate Joint Resolution 28 would give the President the power to determine, that is, to declare his own inability and would empower the Vice President to become Acting President and discharge his powers and duties. I understand that if Senate Joint Resolution 35 were adopted in its present form and until Congress enacted enabling legislation the President would not have that power, would he?

Mr. TAYLOR. No, but I see no problem about that, because any tribunal that is created, if the President declared his own inability, would surely be guided by it, and it does not seem to me necessary to specify that.

Mr. GRAHAM. Now, if Congress—

Mr. TAYLOR. Of course, the difficulty is, he might not be able to.

Mr. GRAHAM. Mr. Taylor, if Congress passed a statute which did not give the President the power to declare his own inability would he have the power then in case, say, the President knew in his own mind that he had the inability, to give the Vice President the power—

Mr. TAYLOR. Doesn't what I said before answer that?—that any tribunal of necessity would act upon it. Suppose the President said to this tribunal, "My doctors say I ought to give up." Surely that would be a factor which would almost compel them to accept that, wouldn't it?

Mr. GRAHAM. Would you think it would be a good idea to have a provision similar to the one allowing the President without going through a tribunal to just announce his own inability?

Mr. TAYLOR. No, I would not.

Mr. GRAHAM. The resolution in effect states that this would clothe the Vice President—he would be the Acting President; do you think that it is a good idea to give him the title of Acting President?

Mr. TAYLOR. Well, you are making it hard to answer. It is hard enough to get this one amendment through without getting one other thing accomplished that a great many people have advocated; that is, that the Vice President be clothed with executive powers. That is really a separate matter; is it not? It is not primarily concerned with inability.

Mr. GRAHAM. How would the Vice President sign his name if he were acting as President pursuant to Senate Joint Resolution 35?

Mr. TAYLOR. I beg your pardon? I did not get that.

Mr. GRAHAM. How would the Vice President sign his name? As "President"? Or as "Vice President"? Or "Acting President"? How would he sign it?

Mr. TAYLOR. How would he, the Vice President, sign his name? Well, I thought I had anticipated everything, but I will have to ask leave to think about that a minute. This did arise, if you remember, in the case of Tyler, and there was a great debate at the time, but in that case there was no question of his going back, because the President had died and that settled it, and—well, he said he would strike out the word "Acting" and sign it as "President."

And, now, as to inability, I do not want to put words into the mouth of the legislature, but I think there should be some wording connected with this thing which would indicate that it was a temporary thing, to phrase the idea that it is temporary.

Mr. GRAHAM. The proposed amendment, Senate Joint Resolution 35, does not create the office of Acting President. Do you think there need be an office of Acting President?

Mr. TAYLOR. Yes.

Mr. GRAHAM. Acting President?

Mr. TAYLOR. Well, there would have to be a way to do that, I agree, but I do not think there need be an amendment, it needs to be covered in the implementing statute.

Mr. GRAHAM. Mr. Taylor, there has been some discussion of the matter of the President being out of town, or out of the country. Should that be included?

Mr. TAYLOR. This was raised at the time President Wilson went to the Peace Conference, and Mr. Wickersham, the Attorney General, whose father was my predecessor on this committee, raised the question as to whether or not that absence was not substantially the same as inability to perform the duties of his office. I do not think it got very much support, but it was commented upon. I would think it unnecessary in modern times. You mean, if the President went to some kind of a conference abroad, or something of that kind?

Mr. GRAHAM. Just one final question, Mr. Taylor. I would like to go back for the moment. Do you think it very necessary that the President have the right without going to a tribunal, if he knows he is unable to discharge the duties of his office, to announce that fact himself, and have it effective immediately? It seems to me that military emergencies might arise or, certainly, the problem of getting, say, NATO moving or getting the Armed Forces to react immediately to a crisis situation. Do you not think it imperative that this system allow the President himself as soon as he realizes he is unable to do this himself, to make it legal in the Constitution for the Vice President or the Acting President to do so?

Mr. TAYLOR. Well, now, I would still think that was not imperative, to use your word. You could conceive of the situation where the President, let us say, in his second term was not awfully well and he was overburdened with his tremendous responsibilities—but it seems to me to be giving him a power which is unnecessary, always assuming, as I have, that the tribunal was small and that it was capable of being called and could come very quickly and could act very quickly.

Mr. GRAHAM. Thank you, Mr. Taylor. Mr. Chairman, I have no further questions.

Senator Dodd. Thank you very much, sir. Mr. Richard Hansen, would you please come forward?

We are pleased to have you here, sir.

Mr. Hansen is an attorney at law in Lincoln, Nebr., and he is a man who is eminent on this subject as an authority on it, and also he is the author of numerous articles, I understand, and of a very fine work on presidential inability, entitled, "The Year We Had No President."

Under Mr. Hansen's leadership, the Nebraska Law Review has conducted an extensive study into the problem of presidential inability. Mr. Hansen, we want to thank you for coming before our committee. Would you proceed as you wish, in your own way?

STATEMENT OF RICHARD H. HANSEN, ATTORNEY AT LAW, LINCOLN, NEBR.

Mr. HANSEN. Thank you very much, Mr. Chairman. It is a pleasure for me to appear before the committee today.

Before I begin discussing the merits and distinguishing features of Senate Joint Resolution 84, I wish first to direct your attention, even though only briefly, to the subject discussed by some of the other witnesses here: the memorandum agreements which Presidents Eisenhower and Kennedy have entered into with their respective Vice Presidents. This was also touched upon by the president-elect of the American Bar Association, and by Mr. Taylor.

There have been many people inclined to herald these arrangements as the ultimate and final solution to the problems of inability. I can heartily endorse the agreements, but only in the spirit in which both President Eisenhower and President Kennedy offered them—that is, just as a stopgap until comprehensive legislation is forthcoming.

Mr. Katzenbach, when he appears here next week, might recall my endorsement to him of the Eisenhower-Nixon memorandum at a time when the present administration was deciding whether to follow that precedent.

What is wrong with this type of agreement? Previous speakers today referred to the fact that following it is discretionary with a new President. A brief analysis of the three main sections of the memo will reveal other serious defects.

The first section of the agreement allows a disabled President to inform the Vice President of his condition, in which case the Vice President takes over as Acting President until the inability is ended.

The original thought, as conceived by President Eisenhower and Attorney General Brownell, was that this provision would negate the Tyler precedent. But this, I think, is a false assumption. Eisenhower hoped that, if a President was assured by such an agreement that he could resume his office upon recovery, he would not hesitate to temporarily delegate his powers and duties to the Vice President. But we are confronted with the historical fact that Garfield's, Cleveland's, and Wilson's refusal to step aside was based every bit as much on the fact that the Vice President belonged to another faction of the party or was considered (as in the case of Marshall) an intellectual nonentity. And Tyler's precedent offered a comfortable and plausible excuse for the failure to call in Arthur, Stevenson, and Marshall—but in none of these cases did it motivate the refusal.

General Eisenhower is frank about the inadequacy of this section of the memorandum, which he helped to devise. In discussing this matter with me at Gettysburg, he repeatedly stressed that its strength depends entirely upon good will existing between the President and Vice President. There was little good will between Cleveland and Stevenson, and between Wilson and Marshall, and none at all between Garfield and Arthur. Of course, we could also recall the case of Vice President Calhoun who resigned from office because of differences of opinion with President Andrew Jackson.

I might add the further thought that there is no precedent in American history for any President voluntarily relinquishing his office. The fact that we have a 22d amendment would seem to indicate the American people do not feel that Presidents will leave office voluntarily. The same principle applies here, but there are more dramatic examples of disability in American history which make that application desirable to the inability situation.

The second section of the memorandum provides for the Vice President to assume the powers and duties of President when the Chief Executive is unconscious or is unable to communicate with the Vice President.

The basic problem here is Executive secrecy—the problem of keeping the Vice President and the public informed. In this connection I must remind you that there is no law in 1963 which even requires a President to have a physical examination, let alone make the results public. Some people feel that it is in the public interest to maintain secrecy about any President's health; they think bad news would throw the country into a panic and imperil national security. Let me pose this question to those who favor secrecy about presidential illnesses.

What would have happened to the stock market if it had been necessary to announce President Cleveland's death on board the yacht Oneida at sea following a cancer operation when the country thought he was vacationing at home? It is my conviction that a nation which can stand the news of a Pearl Harbor can adjust to news bulletins about the President's health. Eisenhower proved that.

Or consider for a moment the fact that there is not even a provision for filing the text of these memorandum agreements with the Secretary of State, or publishing them in the Federal Register. Ac-

cording to Mrs. Ann Whitman, General Eisenhower's personal secretary, it was necessary for the Eisenhower-Nixon agreement to be "very tightly held and to my certain knowledge less than a handful of people in Washington have ever seen the documents." (Letter from Mrs. Whitman to Richard H. Hansen, dated Sept. 6, 1961.)

The same situation prevails with regard to the Kennedy-Johnson memo. Both are evidenced in the public record by news releases. Now, certainly, no person would accuse either General Eisenhower or President Kennedy of attempting deception, for these private agreements are the only way they can reach the problem.

But, gentlemen of the committee, does it not strike you as a little bit strange that we have a law requiring publication of presidential proclamations on matters involving the administration of Palmyra Island and National Forest Products Week—but that an agreement determining temporary succession to the presidency is "tightly held"?

The last section of the memorandum allows the President to determine his own recovery. Many Senators and Representatives have raised the question of what would happen if a mentally ill President announced his recovery prematurely. And the stock answer always is: impeachment. Is mental illness a "high crime and misdemeanor"? The memo agreement is silent on this point. How many men of good will in the Congress would vote for impeachment under such conditions?

My remaining remarks will be directed primarily to Senate Joint Resolution 84, introduced by Senators Hruska and McClellan. These two Senators, in common with many of us, have been concerned for several years with the alarming problems of presidential inability. In speaking about Senate Joint Resolution 84, some of the objections I have to the other two proposals under consideration will become apparent. Nevertheless, I shall also be glad to answer any specific questions regarding Senate Joint Resolution 35 and Senate Joint Resolution 28.

By this time, the reasons for using the means of a constitutional amendment as a first step to a solution should be clear. A majority of scholars favor this route, among them being three Attorneys General—Brownell, Rogers, and Kennedy.

While I subscribe to this school of legal thought, I readily admit that there are also some profound legal intellects—Edward S. Corwin, for instance—who favor a direct approach by a simple congressional act. But, gentlemen, the mere fact that there is a dispute among men who have thoroughly studied the question means to a pragmatist that if we settle for anything less than an amendment, we will be asking for litigation at a time when delays are least desirable—when a President is ill.

What should the amendment include?

Cornelius Wickersham, one of the finest lawyers in the United States and a serious student of this problem, has ably stated the case for simplicity and flexibility in his article in 7 Villanova Law Review 262. That excellent presentation stresses the need for maintaining the traditional flexibility of the Constitution and confining the amendment to a statement of general principle, rather than trying to spell out in detail the method for determining presidential

disability. In that respect I endorse his conclusions wholeheartedly—and the similar remarks made along that line by Mr. Taylor and Mr. Powell.

The greatest area of disagreement among students of this subject revolves around the precise method for the determination of inability. I am sure you will recall that President Eisenhower's proposals ran into needless opposition because they tried to incorporate the method into the Constitution. And, being realistic about this problem, we must realize that it is so complex that the more sound and simple the initial approach, the more likelihood there is of receiving favorable attention from busy Senators and Representatives.

If we can clarify for all time the powers of the Congress to legislate on the topic, in working toward that end we will create a better atmosphere, I think, of cooperation in devising a specific method for determining presidential inability.

There is another very practical reason for keeping the method itself in a form susceptible to easy amendment. Should Congress see fit to stress the medical aspects in the mechanics of the determination process, they could adapt it from time to time to keep pace with developments in medicine. This is a medico-legal problem, not merely a legal problem. I will not dwell on the amendment approach, for it has been discussed thoroughly by the other witnesses today.

The conclusions just referred to comprise the backbone of Senate Joint Resolution 35, which was the creation of the American, New York, and New York City Bar Associations, and the brain child of my good friend, the eminent lawyer, Mr. Martin Taylor. Congress should give careful attention to the proposals offered on behalf of these distinguished gentlemen and organizations, representing as they do, the thinking of some of the Nation's most astute legal scholars.

Why, then, you might ask, gentlemen, has Senate Joint Resolution 84 been introduced and how does it differ from the bar association proposal?

Senator Kefauver has stated:

We wrestle with delicate problems touching upon the fundamental principles of separation of powers and the coordinate independence of the separate branches of Government.

It is necessary, in granting and in clarifying the powers of Congress to include a safeguard of some type for the separation of powers doctrine. This, in my opinion, is not done by the bar association proposal.

I would invite to your attention the fact that our ex-Presidents, in their writings on this subject, have shown a preoccupation and concern with the maintenance of a separation of powers. For instance, Attorney General William P. Rogers offered a resolution before the Congress which, if you will remember, kept the determination of disability within the executive branch. This was no accident. It was based on solid ground—the separation of powers. Brownell was concerned over a shift in checks and balances.

What are former President Herbert Hoover's conclusions? He has stated that "the method of determining 'inability' or 'recovery' requires consideration of the spirit of the separation of powers in

the Government." And he then proposed a method which would keep the determination in the executive branch, specifically, the Cabinet.

Now, I am not trying to suggest to you that the three ex-Presidents are all in accord on a method for determining disability. I have visited with two of them about it, and they are not. But we are not concerned in Senate Joint Resolution 84 with the method; we are not trying to duplicate past mistakes and get the cart before the horse.

What I am seriously stressing to you is that the ex-Presidents are concerned with avoiding any shift in the checks and balances which keep the gigantic organization of Government on an even keel. The writings of the ex-Presidents are there for all to see, and this aspect is one worthy of the deepest and most serious consideration.

The judicial branch shares the concern over separation of powers. This is illustrated by the letter which Chief Justice Warren wrote to Senator Keating at a time when the distinguished Senator was investigating the possibility of having the Supreme Court make the determination of presidential inability. The Chief Justice said:

It has been the belief of all of us [the Supreme Court] that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in the lack of a quorum, it would be inadvisable for any member of the Court to serve on such a commission * * * I do believe that the reasons above mentioned for non-participation of the Court are insurmountable.

Twenty years of criticism and bitterness toward the members of the Court who served on the Electoral Commission of 1876 offer sufficient proof of the wisdom of Chief Justice Warren's statement.

One of our leading objectives, I think, should be to eliminate, so far as humanly possible, politics from the method for determining presidential inability. The majority of the present Members of the Congress would subscribe with feeling to this principle for they are no less interested, I am sure, than the Supreme Court in maintaining the coequal nature of the three branches of Government.

But it has not always been so, and may not always be so. Let us recall the shameful period following the Civil War when a group of willful, scheming men cast a lasting shadow on the impartiality of the legislative branch by their sadistic attempt to impeach President Andrew Johnson.

When I mentioned this point to former President Harry Truman, he brushed it aside by stating that if Abraham Lincoln had lived that same Congress would have impeached the 16th President. Of course, I am aware that many historians agree with the man from Independence, but the point hardly proves that we are insured of impartial determination of such questions by Congress. "Profiles in Courage" has a chapter about the man who cast the deciding vote against the impeachment. (Kennedy, John F., "Profiles in Courage," New York: Harpers, 1955; ch. VI, p. 126, concerns Edmund G. Ross.) This ugly episode cannot be dismissed from our consideration by oversimplifications.

These are several of the most serious reasons why I believe that while we should give Congress the power to legislate in this area, we

must act wisely in giving this body a guideline which will require an examination of such vital points in adopting a method for determining the disability of the President.

Let us realize, also, in deciding on an appropriate amendment, that the final solution will not be the work of any one man, any one organization, any one mind, but of a concert of thinking by men of good will. There can be no pride of authorship by any of us in regard to the amendment, for this will be the reaction of small minds to a large problem. And in our quest for an answer to this 180-year-old dilemma, it might be well for us to remember as Benjamin Franklin said, that "God governs in the affairs of man." It is true of amendments as it was of the original Constitution.

In that spirit we can proceed with confidence though the problem is complex. In that spirit we will work together to see that an amendment is adopted and the constitutional void closed. For it would be a sad commentary on us all if we spent millions for defense and lost a war because we failed to amend a vital section of the Constitution and provide continuity in the Executive.

Senator Dodd. Mr. Hansen, that is a very fine statement, and a very interesting one, and I am sure that every member of the committee will be interested in reading it—some of us could not be here—but I am sure they will read it carefully and agree with me it is an excellent presentation on this very important matter.

Are there any questions?

Mr. GRAHAM. Yes, Mr. Chairman. Mr. Hansen, can you make available for us copies of the memorandum agreements of Presidents Eisenhower and Kennedy? Do you have them? You used the term that they were "tightly held."

Mr. HANSEN. I can get a copy of the press release issued by the Kennedy administration and make it available, Mr. Graham; but the originals, as I said and you just noted, are tightly held and no one has access to them.

Mr. GRAHAM. The press releases would not actually cover the wording; is that right?

Mr. HANSEN. I don't know. They say it covers the main points, and I am sure President Kennedy and General Eisenhower would not try to deceive the public. But the point is that we need a law requiring publication of these matters, because we may not always have men who are so forthright as our last two Presidents.

Mr. GRAHAM. Could you get the press release, and make it an exhibit to your statement?

Mr. HANSEN. Yes; I would be glad to provide copies of the press release from President Kennedy's office.

(The press release is printed in the appendix to the record as exhibit No. 2.)

Mr. GRAHAM. I wish we had time, so we could go into these matters in detail. But, there are two other things I do want to ask. First of all, the essence of your version, as you state it, is preserving the separation of the three branches of the Government—the executive, the legislative, and the judiciary, and the preservation of the system of checks and balances between the branches of Government. Now, Mr. Hansen, if Senate Joint Resolution 84 were made an

amendment to the Constitution and, if pursuant to it the Congress passed a statute, would not that statute be subject to challenge and litigation on the ground it does not comply with this provision in the amendment?

Mr. HANSEN. Well, I think a great deal would depend on how we go about devising the machinery for determining the disability of the President. I would hope, if this amendment should pass the Congress and be approved by the States, that President Kennedy, or the incumbent President, would appoint a commission of great national prestige—perhaps two Justices of the Supreme Court, the Speaker of the House, the President pro tempore of the Senate—in order to avoid embarrassing the Vice President—and two members of the executive branch, with the three ex-Presidents as ex officio members, so their ideas could be considered and we could have the benefit of their experience and their advice, but not be bound by it.

Now, I think we are going to have to approach this thing with seriousness, and with consciousness of the fact that this cannot be simply something devised by one or two people. It is going to have to have a great deal of prestige and a lot of thought behind it. Does that answer your question?

Mr. GRAHAM. I understand many heads are needed. My question now is if such a bill were in fact adopted, and if it did not preserve the system of checks and balances, it would be unconstitutional, would it not? Would it not be subject to challenge?

Mr. HANSEN. Perhaps, but there is always a chance of litigation when you pass any law. I think this is a superficial objection and the clause would obviate more litigation than it would create.

Mr. GRAHAM. Thank you very much.

Senator Dodd. Any further questions?

(No response.)

Senator Dodd. I might add in closing this session that there is a possibility that some questions may arise in our minds after this hearing is over, and also, Mr. Hansen, you might think of something additional which would be of benefit to the committee. I believe, therefore, that it would be best to keep the record of the committee open with a view to that possibility, and also in view of the fact that the chairman was temporarily unable to attend. We shall leave the record open.

Mr. HANSEN. I would, Senator, be very happy to answer any questions the committee might have; and I am also glad to see no impairment of succession here in behalf of the continuity of the executive.

Senator Dodd. Well, I hope we get along all right. Thank you very much, Mr. Hansen.

Mr. HANSEN. Thank you very much, Mr. Chairman.

(Supplemental statement received from Mr. Hansen follows:)

SUPPLEMENTAL STATEMENT OF RICHARD H. HANSEN, SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS, HEARINGS ON PRESIDENTIAL INABILITY

Since the separation-of-powers doctrine is implied, its practical application has necessarily been by the courts. The doctrine has been held pertinent to some sections of the Constitution and not to others, and the interpretations have often been questioned. If the basic reason for a constitutional amendment is to avoid litigation when the President is ill, the same reason logically

compels us to make the separation of powers clearly applicable to the disability clause.

There is no certainty that the doctrine will be applied to the wording of the S.J. Res. 35. Furthermore, court decisions regarding other sections of the Constitution, where the doctrine has been applied, would not be negated by its inclusion here. Its recognition in the disability clause is essential when we consider that the doctrine has been made almost disreputable by riddles of administrative law.

During the 19 months' study by the staff of the Nebraska Law Review, careful attention was given the multitude of bills introduced following President Eisenhower's illness. Many would have disrupted the balance of power. Others indicated little concern with this aspect of the problem. Can we be insured of such attention a scant 5 years later?

The concern of the ex-Presidents with keeping the determination of disability within the executive branch clearly explains what the phrase means. These men have given the matter deep thought. We ought not ignore their message, and leave the door open to certain confusion and possible vetoes which could prove disastrous.

President Madison objected when the Constitutional Convention wished to give Congress power to remove a President pending impeachment trial. The Convention followed his advice and did not disrupt the tripower concept. The inability amendment should thereby embody this clause. The subcommittee should heed a wise principle recognized by the Father of the Constitution.

(Whereupon, at 4:15 p.m., the committee adjourned subject to call of the Chair.)

PRESIDENTIAL INABILITY

TUESDAY, JUNE 18, 1963

U. S. SENATE,

SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to recess, at 10:40 a.m., in room 2228, New Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver, Dirksen, Fong, and Keating.

Also present: Fred Graham, chief counsel, Clyde Flynn, minority counsel, William H. Barr, research assistant, and Angelina T. Gomez, clerk.

Senator KEFAUVER. The committee will come to order. We are happy to say the ranking minority member and minority leader, Senator Dirksen, is present; and other Senators will be here shortly. This is the second hearing we have had on resolutions dealing with the problem of presidential inability.

My opening statement was made and placed in the record at the previous meeting, as were other statements by other Senators.

It has been recognized by Members of the Congress, by members of the bar, the Executive, and by citizens generally for some time that this is a problem that should be dealt with. And, as I pointed out in my opening statement, it should be dealt with in a time when there is no immediate necessity for the legislation, but in preparation for the future. By that I mean we have a very healthy President and it is not anticipated that the resolution or any laws passed in the event the amendment is adopted, will be used any time in the near future. However, there have been previous times when we have had Presidents who have been disabled, and of course there may be in the future.

Our looking into this matter at this time and acting on it, I hope, at a time when there is no expected necessity of having to use the resolution and laws passed pursuant to it, is similar to the statesmanlike and thoughtful resolution that was passed out of the Judiciary Committee 2 weeks ago. The resolution was sponsored by Senator Dirksen and others, and it provided that in the future the Director of the Federal Bureau of Investigation be appointed by the President, with the advice and consent of the Senate. It was not passed in anticipation of any present situation, but only in looking toward the future.

Before we have our first witness, Senator Dirksen, do you wish to make any comment?

Senator DIRKSEN. Not at this time, thank you.

Senator KEFAUVER. We are delighted to have as our first witness Mr. Nicholas deB. Katzenbach, Deputy Attorney General of the United States, a very able and hard working lawyer who is doing a fine job in his position. Mr. Katzenbach began his Government service in 1961 as Assistant Attorney General in the Office of Legal Counsel, Department of Justice, and assumed his present duties in April 1962. Previously he was professor of the University of Chicago Law School and also had been a member of the Law Faculty of Yale, and has had wide legal experience.

Mr. Katzenbach, we are glad to have you here. If you will, proceed with your statement.

STATEMENT OF NICHOLAS deB. KATZENBACH, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES; ACCCOMPANIED BY NATHAN SIEGEL, ATTORNEY, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. KATZENBACH. I am delighted to be here, Senator. I have a prepared statement. Would you like for me to read that?

Senator KEFAUVER. Yes, if you will, sir.

Mr. KATZENBACH. Once again this subcommittee is confronted with the very difficult and all-important task of attempting to clarify the law relating to succession of the Presidency in the event that the President is unable to discharge the powers and duties of his Office.

There are three proposals before you designed to have this effect by amending the Constitution as it relates to the contingency of presidential inability. One, a relatively clear and uncomplicated proposal, is Senate Joint Resolution 35, introduced by Senator Kefauver and Senator Keating, which seems to us the best of the three. Another, Senate Joint Resolution 84, introduced on May 28, 1963, by Senator Hruska and Senator McClellan, is similar to Senate Joint Resolution 35, except for one provision which I shall discuss hereafter. The other, more elaborate and detailed, is Senate Joint Resolution 28. Each of these proposals would replace and repeal by implication the sixth clause of section 1, article II of the Constitution, which provides as follows:

In Case of the removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The subcommittee may recall that in 1961 the Attorney General rendered an opinion to the President dealing with the question of presidential inability. With your permission I should like to make this opinion a part of the record in these hearings.

Senator KEFAUVER. Without objection, it will be made a part of the record in the appropriate place.

(The document referred to is printed in the appendix to the record as exhibit No. 3.)

Mr. KATZENBACH. Since it comprehensively discusses the problem and its history, and inasmuch as the subcommittee is already fully

aware of this background, I see no point in reviewing the matter again except as it may be necessary to an understanding of what is contemplated by the proposed amendments.

It is generally agreed that the sixth clause of article II, section 1 no longer provides any problem in the event of the death of a President. In such a contingency, as a matter of historical practice, established by John Tyler, and followed by six other Vice Presidents, the Vice President becomes President. The first sentence of Senate Joint Resolution 35 reflects this tradition in the case of death, but extends the same principle to a case of removal of, or resignation by, the President. In these three contingencies—removal, death, or resignation of the President—the Vice President would become President and be sworn in as President.

Senator KEFAUVER. Just a minute, Mr. Katzenbach. We are glad to have Senator Fong, a member of the subcommittee, with us.

Senator, our witness is Deputy Attorney General Katzenbach.

Senator FONG. Thank you.

Mr. KATZENBACH. When we turn to the problem of presidential inability, however, a similar settled practice on which to rely does not exist although the Eisenhower-Nixon agreement and the identical Kennedy-Johnson agreement represent a basis upon which such a practice may be established. It is with respect to inability that article II, section 1, clause 6 is unclear on two important points. The first is whether it is the office of the President, or the powers and duties of the said office, which devolve upon the Vice President, in the event of Presidential inability. The second is who shall raise the question of "inability", and who shall make the determination as to when it commences and when it terminates.

S.J. Res. 35 is designed to clarify both of these points. Its second sentence makes it clear that it is not the "office" but merely the "powers and duties" of the office which devolve on the Vice President until the inability has been removed. While the language used may be adequate, in order to make it clear beyond dispute in what capacity the Vice President would be serving, signing proclamations, orders and other documents in this situation, I would suggest that the words "as Acting President" should be included after the words "Vice President" in lines 6-7, page 2 of the proposal, as was done, for example, in sections 2 and 3 of S.J. Res. 28. It seems to me that if a Vice President undertook to exercise presidential power under the second sentence of S.J. Res. 35 he would feel assured that no one would look upon him as a usurper. It was precisely this fear which deterred Vice President Arthur from acting after President James Garfield was shot in 1881 and lay in a coma for 80 days completely unable to perform any of the duties of the presidency. So, too, when Woodrow Wilson suffered a stroke in 1919, Vice President Marshall refused to assume any of the powers of the presidency because of the constitutional uncertainty of some as to whether Wilson could resume his office upon his recovery. The second sentence of S.J. Res. 35 is intended to provide a disabled President with a clear constitutional guarantee that he can return to his office as soon as he determines that his inability has ended.

The third sentence of S.J. Res. 35 relates to cases of removal, death, resignation, or inability of both the President and Vice President

is involved, the proposal makes it plain that the officer who shall act as President (presently under and pursuant to the Succession Act of 1948) shall do so on a temporary basis until a President is elected or the inability is removed.

The last sentence of S.J. Res. 35 leaves it to Congress to decide what the procedures shall be for determining "the commencement and termination of any inability." This is, of course, bound to be the most controversial feature of S.J. Res. 35.

One objection may be that this provision is a blank check which, if abused, could upset the balance of power between the legislative and executive branches, and place the President at the mercy of a hostile Congress. I think this danger is quite remote, and at all events not great enough to outweigh the advantages of conferring this authority upon the Congress which represents the national electorate over more complex constitutional provisions. If the methods adopted by Congress for dealing with the problem do not meet the standards of the separation of powers or otherwise satisfy the President, he may veto the bill, and his veto could be overridden only by two-thirds of each House. Moreover, if Congress enacts a measure which is approved by the President, and thereafter attempts to amend or repeal it, its action will also be subject to approval or veto by the President. It seems unlikely, therefore, that any bill would ever be enacted into law which was not acceptable to the President, and which did not afford adequate protection to the people and to the office of the President.

It may be noted that a proposal such as Senate Joint Resolution 35 has the support of the American Bar Association, the New York State Bar Association and the Association of the Bar of the City of New York. It is hardly likely that there would be such unanimous support for this proposal among these eminent lawyers if they believed the risk of impairing the balance of power under the Constitution was substantial or real. Congress, it will be recalled, presently has the authority under the Constitution to enact laws of succession when both the President and Vice President have suffered inability. Vesting similar authority in the Congress to determine procedures on the inability of the President alone would not therefore be a drastic departure from the authority it has always had under the Constitution; rather it would be consistent with it. Indeed, there are many eminent scholars—among them Everett S. Brown, Edward S. Corwin, Charles Fairman, Davis Fellman, James Hart, Arthur N. Holecombe, and Mark DeW. Howe, to name only a few—who are of the opinion that Congress may deal with the problem merely by statute, and that it requires no amendment to the Constitution. Without regard to whether these scholars are right, there are persuasive arguments against freezing any specific plan in the Constitution by which a President's inability may be determined in the event of an impasse between the President and Vice President.

I think Senator O'Mahoney summed up very well the reasons why the approach to the problem taken by a proposal such as Senate Joint Resolution 35 should be preferred over others. Testifying before this committee in 1958, he said:

The President is the only Federal officer elected by all the people of all the States. The Members of Congress are elected by the people of several States and congressional districts.

We are, of course, dealing with the highest elective office which is in the power of the people of the United States to bestow on any man. * * * The determination of the inability of the President of the United States must be publicly accepted and the vehicle calculated to gain public acceptance most readily, it seems to me, is the vehicle to be adopted. There is no group, nor could there be any individual, who represents a better cross-section of public opinion than the Congress of the United States. Their decision would be less apt to be motivated by temporary gain than any other agency for any such temptation would be tempered by the knowledge that they would soon have to stand accountable before the people of the United States in free and open elections.

While the Department in general favors the procedures provided for in the fourth sentence of Senate Joint Resolution 35, it is of the opinion that it should be clarified. Presumably it is not intended by this sentence that, after ratification of the amendment but pending enactment of implementing legislation by Congress, a President and Vice President shall be precluded from entering into an understanding such as was approved by the past two administrations. For, after ratification but prior to enactment of implementing legislation, such an understanding would still continue to serve the useful purpose of encouraging a Vice President to discharge the powers and duties of the Office of President, until the latter's disability was ended, and make possible the uninterrupted operation of the affairs of the Government. Indeed, such an agreement helps to solve most of the problem, although admittedly it does not solve them all. However, it is at least arguable that, in its present form, once the amendment is ratified, the language of the last sentence of Senate Joint Resolution 35 may render the understanding of no effect, since, read literally, it may be interpreted as meaning that even before implementing legislation is enacted, only Congress shall establish the method for determining the commencement and termination of the inability. This would be a most unfortunate result which I am quite sure the authors of the proposal do not intend.

The primary purpose of the last sentence is to confer broad discretion on the Congress to deal chiefly with the unusual situations such as where the President and Vice President have reached an impasse, or an atomic attack or like holocaust prevents communication and agreement between the President and Vice President. I think that this intention would be reflected more clearly if the word "shall" after "ability" in line 15, page 2 of Senate Joint Resolution 35 were changed to "may." There would then be no question but that the existing understanding between President Kennedy and Vice President Johnson, which is identical to the understanding between President Eisenhower and Vice President Nixon has been left unimpaired and that it will remain operative until Congress passes implementing legislation.

I recognize, as was observed before, that there are eminent statesmen and constitutional scholars who are of the opinion that Congress has power to act in this matter under the "necessary and proper" clause (article I, section 8, clause 18), that a statute would therefore suffice as a solution to the presidential inability problem, and moreover, that enactment of a statute is to be preferred because it would likely take less time than the ratification of an amendment. On the other hand, there is equally distinguished authority, includ-

ing the opinions of former Attorneys General Brownell and Rogers as well as Attorney General Kennedy, that the only definitive method of settling what problems remain despite present arrangements is a constitutional amendment. While the current understanding between the President and the Vice President does resolve the major problems in my judgment, it cannot resolve all problems which would conceivably arise, unlikely as they appear to be. For example, some observers have theorized as to the possibility of disagreement between a President and a Vice President as to the existence of inability—both as to when it has begun and when it has ended.

There remain for discussion Senate Joint Resolution 84 and Senate Joint Resolution 28. Senate Joint Resolution 84 is similar to Senate Joint Resolution 35 except that it expressly imposes the limitation on Congress that in establishing a procedure to determine the inability of a President to discharge the powers and duties of his office, such procedure—

must be compatible with the maintenance of the three distinct departments of Government * * * and the preservation of the checks and balances between the coordinate branches.

While I am wholly sympathetic with the sentiment which has prompted the recommendation, I do not believe it is necessary or desirable. For one thing, it expresses a principle which already pervades, and is inherent in, the Constitution. To include this principle in merely one section of one article of the Constitution may open the door to the argument that the principle no longer applies to other portions of the Constitution. Moreover, in its specific context, the limitation on the Congress is quite elusive and may be susceptible of varying interpretations and accompanying confusion. Then again, if the method adopted by Congress for determining Presidential inability does not meet the standards of the separation doctrine or preserve the system of checks and balances between the coordinate branches, the President may veto the bill, and his veto, as already noted, could only be overridden by two-thirds of each House. It seems most unlikely, therefore, that any bill dealing with the matter of Presidential inability could ever be enacted which did not afford adequate protection under the separation doctrine.

I now turn to the consideration of Senate Joint Resolution 28. Sections 1 and 2 of this proposal are similar in their effect to the first two sentences of Senate Joint Resolution 35. At this point, marked differences between the two proposals appear. Section 3 of Senate Joint Resolution 28 deals with cases in which the President is unable or unwilling to declare his own inability. In that event, the Vice President with the written approval of a majority of the heads of the executive departments in office, would assume the discharge of the powers and duties of the Office of Acting President. Section 4 covers the situation of a disagreement between the President and Vice President as to whether the inability has ended. The President would be permitted to resume the powers and duties of his Office by making a public announcement that his inability has ended. This he could do on the seventh day after making the public announcement. But Congress would be called on immediately, whether

in session or not, to resolve the question of presidential inability if objection is raised in writing by the Vice President, supported by a majority of the heads of executive departments in office at the time of the President's announcement. In that event, Congress would decide the issue. If two-thirds of the Members present in each House acting by concurrent resolution determined that the President's inability had not terminated, the Vice President would continue to serve as Acting President. The President could, however, thereafter resume the powers and duties of his Office either if the Vice President proclaimed that the President's inability had ended, or Congress, by a majority of the Members present in each House, determined, by concurrent resolution, that the President's inability had come to an end.

It is true that the procedure embodied in section 4 of Senate Joint Resolution 28 has definite advantages over the impeachment process. For one thing, of course, presidential inability could scarcely fall into the category of a high crime or misdemeanor for which impeachment lies under the Constitution. In addition, under section 4 the stigma of impeachment would probably be absent. Of greater consequence, impeachment would bar the President from returning to office after his disability ceased. Moreover, impeachment proceedings could be carried on only if Congress were in session.

While the procedure under Senate Joint Resolution 28 is intended to avoid the stigma of impeachment, it may, however, be interpreted by the people in that light. Apart from the wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The chances are that supplemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future—not covered by Senate Joint Resolution 28—where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35 makes this possible; Senate Joint Resolution 28 does not.

Since it is difficult to foresee all of the possible circumstances in which the presidential inability problem could arise, we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures. We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35, which treats the contingency of inability differently from situations such as death, removal, or resignation, which states that the Vice President in case of presidential inability succeeds only to the powers and duties of the office as Acting President and not to the office itself, and which declares that the commencement and termination of any inability may be determined by such methods as Congress by law shall provide. Such an amendment would supply the flexibility which we think is

indispensable, and at the same time put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding.

Thank you.

Senator KEFAUVER. Thank you, Mr. Katzenbach, for a scholarly, thoughtful, clear, and explicit statement of the position of the administration.

Do you wish to introduce the distinguished lawyer who is sitting next to you?

Mr. KATZENBACH. I am accompanied by Mr. Nathan Siegel, who is an attorney in the Department of Justice, and who has worked on this problem through two administrations.

Senator KEFAUVER. We are glad to have you, Mr. Siegel. We know of your long and thoughtful work in this field. I have only two observations, Mr. Katzenbach. I call Senator Keating's attention to this statement on page 9, in which Mr. Katzenbach pointed out that the present language of Senate Joint Resolution 35 might be interpreted as meaning that agreement between the President and Vice President could not continue after the passage or adoption of an amendment, constitutional amendment, as envisaged by Senate Joint Resolution 35.

He says, on page 9, "this would be a most unfortunate result which I am quite sure the authors of the proposal do not intend." For my part, as one of the sponsors of the bill, it was not intended that way.

Senator KEATING. I certainly join the chairman in that statement. It has not occurred to me that that was a possibility.

Senator KEFAUVER. I do think the suggestion of substituting, "may" for "shall" as suggested by Mr. Katzenbach, probably should be done, and we should certainly consider having it done.

Senator KEATING. Page 2, line 15.

Senator KEFAUVER. Yes, page 2, line 15.

Senator KEATING. Right.

Mr. KATZENBACH. It now reads, "ability shall be determined by such method as Congress * * *"

Senator KEATING. I doubt whether that would be the effect of the amendment; but, certainly, we ought to amend it to be sure that the temporary agreement is not vitiated prior to the enactment of the necessary legislation. If the Department's lawyers think that change is needed, we certainly ought to make it.

Senator KEFAUVER. Yes. I thought it well for us to point out our intention for the legislative history.

The other matter, Mr. Katzenbach, is on page 4, in which you suggest that page 2, lines 6 and 7, the words "as Acting President" should be included after the words "Vice President."

My question is, Would that run contrary to the requirement that bills and other state documents must be signed by the President? Would there be any complication or difficulty there?

Mr. KATZENBACH. I should think it would help clarify that rather than conflict with it. Permit him to sign as Acting President, where the present language and practice is for the President to sign all such things. I would think that it would be helpful to have the words "as Acting President."

Senator KEFAUVER. The committee is very glad to have Congressman Wyman of New Hampshire with us. He has long been interested in this problem and will discuss it at a later time this morning.

Senator Dirksen, do you have any questions?

Senator DIRKSEN. No.

Senator KEFAUVER. Senator Keating, do you have any questions?

Senator KEATING. I have no questions, Mr. Chairman.

I want to commend the Deputy Attorney General for a very well reasoned statement, and appreciate his appearing here and giving us the benefit of his views.

Senator KEFAUVER. Senator Fong, do you have any questions, sir?

Senator FONG. I have nothing, Mr. Chairman, except that I feel that the Attorney General has given us a very fine statement here. I am inclined to go along with him to make it very simple and not clutter up the Constitution.

Senator KEFAUVER. Mr. Graham?

Mr. GRAHAM. No questions, Mr. Chairman.

Senator KEFAUVER. Mr. Flynn?

Mr. FLYNN. No; thank you.

Senator KEFAUVER. Mr. Katzenbach, your statement seems to be generally appreciated by the members of the committee, as you are known to be an historian and able constitutional lawyer.

I am sure you and the President and other members of the executive realize the importance of acting upon problems like this, when action on them may not be required, but when we know that preparing for the future, for future contingencies, should be done at a time when there is calm and no apparent necessity for it.

Mr. KATZENBACH. That is true, Senator. I also think that the scholars have written almost about as much on this as is possible, and very little more scholarly writing could be done. So, it is all right to clarify it, without hurting scholarship.

Senator KEFAUVER. We are glad to have you with us, Mr. Siegel. Thank you very much for coming.

The committee is very happy to have Congressman Wyman, Representative of the State of New Hampshire, who has been interested in this problem a long time and previously served as Attorney General of New Hampshire; from 1953 to 1961, has served as President of the American Association of Attorneys General and is now a member of the Appropriations Committee of the House. Representative Wyman is chairman of the Standing Committee on Jurisprudence of the American Bar Association and, as such, has devoted much study to the problem of presidential inability.

Congressman Wyman, I have a copy of your bill, and we have talked the matter over. This, of course, is not a subcommittee to act on the bill, but we would like to have your bill, H.R. 1164, printed in the record for reference.

We would like to have your thoughts, first in the event that Senate Joint Resolution 35, or others authorizing the Congress to act, is passed. In that event, it would be quite pertinent and helpful to

have considered specific proposals. We are aware of the fact that some lawyers feel that constitutional amendment may not be necessary.

We appreciate having you with us. Will you proceed?

STATEMENT OF HON. LOUIS C. WYMAN, A REPRESENTATIVE IN CONGRESS FROM THE FIRST CONGRESSIONAL DISTRICT OF THE STATE OF NEW HAMPSHIRE

Mr. WYMAN. Thank you, Mr. Chairman, and members of the committee.

I will be very brief, because I know you are very busy and you have heard a lot of testimony on this subject.

I felt that this was one hearing that I ought to attend.

In fact, I am obliged to attend because, in 1962, in February, the House of Delegates of the American Bar Association unanimously adopted a resolution, recommended in a report of the standing committee on jurisprudence and law reform, of which I am chairman, that affirmed the position of the American Bar Association in favor of a constitutional amendment. It also affirmed the need, and used language with such words as "urgent," for an interim statutory enactment, to cover the situation of what might happen in foreseeable emergencies; and the House also unanimously adopted a statutory recommendation—

Senator KEFAUVER. You are talking about the house of delegates?

Mr. WYMAN. Yes; which is the governing body and establishes policy for the American Bar—which is the bill which you just referred to, H.R. 1164.

I have the report and recommendations of our committee that were acted upon in 1962, in February, with me; and, if I might, I would like to hand it to the clerk that it might be incorporated perhaps into the record. It is very brief. It is not an extensive report.

Senator KEFAUVER. If there is no objection, it will be made part of the record at the appropriate place, Congressman Wyman.

(The material above mentioned is as follows:)

88TH CONGRESS
1ST SESSION

H. R. 1164

IN THE HOUSE OF REPRESENTATIVES

JANUARY 9, 1963

Mr. WYMAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the case of inability of the President or Vice President or interim successor.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That the determination of whether the President, or any
4 individual acting as President, has an inability to discharge
5 the powers and duties of President shall be made as provided
6 by this Act.

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

1 (b) If the President does not so announce but the
2 Vice President or person next in line of succession to the
3 President is satisfied that the President or person then Act-
4 ing President has such an inability, he shall give written
5 notification thereof to the Chairman and members of the
6 Commission provided for by section 3 of this Act. Upon
7 receipt of such written notification of Presidential inability
8 or upon its own motion whenever a majority of its member-
9 ship shall be of the opinion that there exists such Presidential
10 inability, the Commission shall forthwith convene and deter-
11 mine whether in its opinion the President or Acting Presi-
12 dent has an inability to discharge the powers and duties of
13 the said office. Notice and opportunity to be heard shall be
14 given to the President. If the Commission so determines,
15 the Chairman shall forthwith give written notice of its deter-
16 mination to the Speaker of the House of Representatives and
17 to the President pro tempore of the Senate with a copy of
18 such written notification to the Vice President or person next
19 in line of succession to the Presidency. Upon receipt of this
20 written notice the Vice President or person next in line of
21 succession to the Presidency shall forthwith proceed to dis-
22 charge the powers and duties of the office of the President
23 pending final determination of the question of inability as
24 provided herein.

25 SEC. 3. (a) There is hereby established a commission

8

1 to be known as the Presidential Inability Commission, here-
2 inafter referred to as the "Commission". The Commission
3 shall be composed of the following members: (1) The Chief
4 Justice of the United States, who shall act as Chairman.
5 The Chairman shall have no vote in the proceedings of the
6 Commission except in the case of a tie. (2) The leader of
7 the House of Representatives of the political party having
8 the greatest number of Members of the House of Representa-
9 tives. (3) The leader of the House of Representatives of the
10 political party having the second greatest number of Mem-
11 bers of the House of Representatives. (4) The leader in
12 the Senate of the political party having the greatest number
13 of Members of the Senate. (5) The leader of the Senate
14 of the political party having the second greatest number of
15 Members of the Senate. (6) The Surgeon General of the
16 United States.

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

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

25 (d) The Chairman shall convene the Commission with-

1 out delay upon receipt by him of a written notification from
2 the Vice President or person next in line of succession to the
3 Presidency provided by section 2 (b) or upon receipt by him
4 of a communication in writing from two members thereof
5 stating that they have sufficient cause to believe that the
6 President has an inability to discharge the powers and duties
7 of the office of the President.

8 SEO. 4. (1) Upon receipt of written notification from
9 the Commission of Presidential inability pursuant to section
10 2 (b) of this Act, the House of Representatives, if then in
11 session and if not at such time as it shall convene, shall
12 proceed forthwith by resolution adopted by a vote of the
13 majority of the Members of the House of Representatives
14 present and voting (providing a quorum is present), to re-
15 quest the Senate to take appropriate action to determine
16 whether the President has an inability to discharge the
17 powers and duties of his office. A copy of such resolution
18 shall, upon its adoption, be forwarded immediately to the
19 Chief Justice of the United States and to the Senate. If
20 the House shall fail to request the Senate as aforesaid, the
21 Clerk of the House shall immediately thereafter give writ-
22 ten notification to the person acting as President of such
23 fact and such person shall forthwith cease to discharge the
24 powers and duties of the President.

25 (2) Upon receipt of the copy of such resolution the

1 Senate shall forthwith proceed to finally determine whether
2 the President has such inability to discharge the powers and
3 duties of his office. The Chief Justice of the United States
4 shall preside over the Senate throughout its deliberations
5 and the Vice President shall not participate therein. Notice
6 and opportunity to be heard shall be given to the President.

7 (3) If the Senate determines, by a vote of two-thirds
8 of the Senate present and voting (providing a quorum is
9 present), that the President or the person acting as Presi-
10 dent has such inability to discharge the powers and duties
11 of his office, the Senate shall, by a resolution adopted by
12 the same two-thirds vote required to make such determina-
13 tion, direct the Vice President or person next in line of
14 succession to the Presidency to act as President during
15 the period of inability of the President or Acting President,
16 or until the end of the then current Presidential term. If
17 the Senate shall fail to so determine the existence of Presi-
18 dential inability, the Secretary of the Senate shall immedi-
19 ately give written notification to the person acting as
20 President of such fact and such person shall forthwith cease
21 to discharge the powers and duties of the President.

22 (4) Any determination made by the Senate under the
23 preceding paragraph may be revoked and the inability of
24 the President or the person acting as President which was
25 the basis of such determination may be declared to have

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1 terminated by the Senate as in the case and manner of
2 the original determination. And in such event the Senate
3 shall by a resolution adopted by a vote of two-thirds of
4 the Senate present and voting (providing a quorum is
5 present) declare that the President is restored to the powers
6 and duties of the office of the President effective at such time
7 as may be provided by such resolution.

[February 1962, No. 48]

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JURISPRUDENCE AND LAW REFORM

RECOMMENDATIONS

(1) *Presidential inability*

That the house of delegates, adopt the following resolution with respect to Presidential inability:

"Whereas statutory provision for succession to the powers and duties of the Office of President of the United States, in the event of Presidential inability to discharge said powers and duties, is of vital public importance at this time; and

"Whereas provisions for succession in such event should apply not only to the Vice President but to any person next in line of succession to an Acting President; and

"Whereas executive accords relating to such contingency between an incumbent President and Vice President can make no such provision: Now, therefore, be it

"Resolved, That the American Bar Association urgently recommends to the Congress of the United States the enactment of statutory provision for the contingency of Presidential inability by a statute which shall make provision substantially as follows:

"A BILL To provide for the case of inability of the President or Vice President or interim successor

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. 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 3 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 forthwith 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. 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 notification 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 in 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 or 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 next 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), 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.

"(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 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."

Further resolved, That the committee on jurisprudence and law reform hereby is directed to advocate the introduction and adoption of such statute by all appropriate means.

Further resolved, That this resolution shall not be construed to modify the heretofore expressed support of this body for appropriate constitutional amendment relating to the same subject."

REPORT

1. *Presidential inability*

In 1900 this committee recommended and the house of delegates authorized this committee to support a constitutional amendment to section 1 of article II of the Constitution in respect to presidential inability. The proposed amendment would clarify by change in constitutional language an uncertainty believed by many to exist in present wording in respect to whether, in the event of presidential inability, a Vice President succeeds to the Office of President or merely assumes the powers and duties of the office, and would expressly empower Con-

gress to provide a mechanism for determining when presidential inability begins and when it ends.

The proposed amendment which is still a pending recommendation, does not undertake to define inability. It has not been implemented by the Congress.

As early as March 26 of 1957 the House Committee on the Judiciary printed an analysis of reports to a questionnaire dealing with the subject.¹ In April of 1957 the same committee took the testimony of the then Attorney General of the United States and printed a number of proposals dealing with the subject.²

In January and February of 1958 further hearings were held by the Senate Committee on the Judiciary, at which the views of a number of witnesses were expressed with considerable detail.³

On August 2, 1961, the present Attorney General rendered an opinion to the present President to the effect that in his opinion the Vice President determines the President's inability, saying in part " * * * it is the Vice President, if the President is unable to do so, who determines the Presidential inability and (that) it is the President who asserts when the inability has ceased." This opinion related to a review of "the understanding between the President and the Vice President" which was approved by the present Attorney General (as well as by his predecessor in relation to a previous administration) as constituting a partial practical solution to the problem of Presidential inability.

Section I of article II of the Constitution provides:

"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." [Emphasis supplied.]

Review of substantial testimony, opinions, and memorandums relating to this subject discloses fundamental differences of opinion between scholars, teachers, public officials, and others, as to whether a constitutional amendment is necessary before Congress can make provision for the contingency of an inability to discharge the powers and duties of the Presidency on the part of an incumbent.

This committee is unanimously of the opinion that in this day and time statutory provision for such succession is of urgent importance and should be enacted without delay; more particularly, without the delay attendant upon the process of constitutional amendment. Even those who favor constitutional amendment concede the desirability of statutory enactment and the uncertainty as to whether constitutional amendment is required. That an inability is not necessarily confined to physical affliction or mental incapacity only broadens the depth of need for statutory provision of the type here proposed.

Many suggestions have been offered. Executive agreements existed between the predecessor President and Vice President as they do between the present incumbents. However, this committee feels strongly that a subject of such fundamental importance should not be left to executive agreement between two individuals, regardless of their high office. No such agreement can apply to persons in line of succession to the Presidency, nor can such agreements have the force of law.

Accordingly, having reviewed at length various congressional proposals and individual recommendations in this field, your committee unanimously recommends that the American Bar Association propose to Congress and authorize this or other committees of the association to vigorously support a specific statutory enactment substantially in the form of the bill which is appended to this report. This bill would achieve several objectives without

¹ House committee print, 85th Cong., 1st sess., "Presidential Inability," Committee on Judiciary, Mar. 26, 1957.

² Hearing before Special Subcommittee on Study of Presidential Inability, serial No. 8, Apr. 1, 1957, 85th Cong., 1st sess.

³ Presidential Inability hearings before Subcommittee on Constitutional Amendments, Senate Judiciary Committee, 85th Cong., 2d sess., Jan. 24, Feb. 11, 14, 18, and 28, 1958.

unreasonable interferences with the Executive or with the proper prerogatives and functions of Congress.

Concisely, it provides that in the event of Presidential inability, when the President does not himself proclaim the existence of same by message to Congress, the Vice President may bring the possibility to the attention of an unpaid Commission (which can also act on its own initiative) which shall then forthwith proceed to make a tentative determination of the existence or non-existence of such inability. If the Commission is of the opinion that such inability exists, its Chairman is then required to notify the Speaker of the House and President pro tempore of the Senate to this effect, with a copy to the Vice President. This copy is the Vice President's authority and directive to discharge the powers and duties of the Office of President (but not to assume the Office itself) until the Presidential term ends or the inability is ended or there should be a failure of either House of Congress to take the steps required by the bill, which are simply that the House by majority vote shall refer the matter to the Senate for final determination. In the Senate a two-thirds vote is required with the Chief Justice of the United States presiding without a vote. If either House of Congress should fail in the required vote, its administrative officer shall so notify the Vice President, who shall then resume the Vice Presidency. If an inability is finally found by the Senate by two-thirds vote, its resolution shall provide that the Vice President shall continue to discharge the powers and duties of the Office for duration of the inability or to the end of the President's term, whichever is shorter. Should the inability be considered to have terminated, it may be initiated and declared in the same manner. If a Vice President should be reluctant to initiate a preliminary determination of inability by the Commission, it may act on its own motion. The Commission is comprised of six members, consisting of the Chief Justice of the United States as Chairman, who shall have no vote unless there is a tie, the majority and minority leaders in the House and Senate and the Surgeon General of the United States. In this way no person in line of succession to the Presidency participates in the proceedings, except for the Speaker of the House, who deals with 400 direct Representatives of the people.

A solution is provided in this bill for the difficult problem of an understandably reluctant Vice President, of acting rapidly and yet safely and of empowering a Vice President to act as President pending final determination of inability by the Congress, all of which makes a workable provision for the direction and safety of the United States, indispensable in the present era.

The bill also expressly applies to the Vice President and to any person next in line of succession to a person acting as President.

It is recommended that the House adopt the proposed resolution as a matter of fundamental and urgent importance in the public interest.

Mr. WYMAN. We are for—and without receding from the position taken in 1960—we are for a constitutional amendment, Mr. Chairman.

We think a constitutional amendment which says in simple language that Congress may provide a method for determining Presidential inability, its existence and its termination would be a desirable clarification to the present language.

However, there is within our committee, as there are within scholars in the field of constitutional law, great differences of opinion as to whether this is necessary.

I have read with interest the analysis of Presidential inability in the 85th Congress, 1st session, a document of the Committee on the Judiciary in the House, and the hearings before your committee in times past on Presidential enactment, including particularly those of January 24 and February 11, 14, and 28, 1958.

Even there, it is possible to see that some think a constitutional amendment is unnecessary, and some think it is; but all agree that it is desirable and all agree that no harm can be done by a constitutional amendment.

The Bar Association of the City of New York, through a learned committee again reaffirmed this necessity last year. With all due

respect to our committee's views the New York group deems a constitutional amendment to be required.

We urge a constitutional amendment plus an interim statute.

But, the urgencies and the reason why I came over here to take a little of your time today, and I have been to see you, Mr. Chairman, as you know, in my capacity for the bar association in years before—

Senator KEFAUVER. Yes, Congressman Wyman. I remember our visits with Mr. Taylor of the American Bar Association, and with you on several previous occasions.

Mr. WYMAN. That's right, sir.

The urgency of the situation lies in the confusion that is implicit in pacts and accords between a President and a Vice President as to how there is to be a transition in the powers and duties of the office, a devolution of the powers and duties to the Vice President, as the Constitution provides, in the event of an inability of the President. Most of these pacts or accords contemplate that the President, himself, shall make declaration, such as "I am sick, I am unable, you take over."

It is conceivable in this rather mixed-up and dangerous world that we live in, that circumstances might very well arise in which a President might not be able to say this, or there might be an extreme difference of opinion between a President and a Vice President, or even others, as to whether an inability so affects his power and capacity as to result in the constitutional formula becoming applicable.

Therefore, we have taken the position in the bar association and the association recommends that a statute ought to be on the books, so that if such a thing happens there will be a course of action laid out in answer to the need, and we won't have a situation where the Vice President is obviously and understandably, whether it is of a Democratic Party or Republican Party, unwilling to grasp for the power lest he give the impression of seeking to take over.

In the same sense, we don't believe that the President's Cabinet, or that anyone in line of succession to the Presidency, ought to be on the Commission that determines the existence of inability; or, if included, there ought to be just a very small minority on the Commission, because this is so obviously controversial; and it is very unlikely that members of a President's own team are going to put him on the sidelines for an indefinite duration.

We have recommended the statute because we believe that the process of constitutional amendment takes time and the statute should cover the situation in the interim.

In whatever form a constitutional amendment is proposed, it will be a long time before the legislatures of the necessary number of States ratify it; although I think it will be ratified eventually.

I would like to demolish one criticism that has motivated the thinking of those who take a dim view of the statutory interim solution that, if we have a statute then the constitutional amendment will be considered no longer necessary.

This is obviously not true and this is not going to be of any force and effect in the legislatures of the States.

We need the constitutional amendment, but the country needs a solution to this problem, so that there will never be a gap, a hiatus in the transition of the executive powers and prerogatives that go with the Presidency in critical times, in this atomic era, when an hour or two might make all the difference.

The statute which the bar association has unanimously recommended, may not be the statute in its final form as passed by the Congress. The Commission membership, the method of determining the existence of an inability, the lack of necessity for Congress to be in session to initiate the determination and to end it, the certificate of the Vice President to assume the powers and duties of the Office, the necessary number of votes in both Houses to initiate the determination and to end it, may be changed, but some statutory solution, as an interim procedure ought to be considered by this committee, I believe, as it passes upon the overall desirability of the constitutional amendment.

I happen to be one of those who believe that the constitutional language would authorize a statutory solution, without an amendment but many feel otherwise.

Nevertheless, a vacuum is undeniably there. Whether or not, when the President and Vice President are both unable, Congress may legislate as former Attorney General Brownell testified, only to provide the line of succession, and not as to whether there is an inability; when it commences and when it ends. Many disagree with this limitation as I do.

There may well come a moment in national affairs when prompt and decisive action to meet an emergency of presidential inability will be in the public interest, and I think that there can be no question about executive accord as not being the proper solution. Such accords cannot extend to others in line of succession to the presidency.

Finally, Mr. Chairman, I would like to give a few reasons why we, of the bar association, believe that action is essential.

First, in the event of a presidential inability, the proposals which have been made will clarify the procedural steps necessary to assure a reasonable means of continuity in the powers and duties of the President, and without unnecessary delay.

Second, there would be provided a means to overcome the initial inertia of a Vice President reluctant to act for fear, as I said, of an inference that he is reaching for power.

Third, there is no requirement of a special session of the Congress, should Congress be in recess at the incipiency of an inability.

Fourth, no problem is presented of self-interest in the composition of the Commission authorized to make the initial and temporary determination of the existence of presidential inability.

This is by virtue of the fact that no member thereof is in line of succession to the Presidency and I might parenthetically say that I think your proposals, Senate Joint Resolution 19, I think it was—I don't remember the number, Mr. Chairman—I think you had the whole Cabinet in a part of the picture of providing—

Senator KEFAUVER. Senate Joint Resolution 28, I think.

Mr. WYMAN. Twenty-eight, sir—the whole Cabinet in the position of passing upon a presidential determination of an inability, and that troubled some of us because of the fact that all of the Cabinet are

appointees of the President and might not be en rapporte to the same extent and to the same degree with the Vice President.

This has happened before.

Fifth, it removed from the presidential family of appointees initial responsibility for the declaration of inability, as well as the opportunity to unreasonably delay accession of a successor to the powers and duties of the Office.

Here, I would like to call your attention to another possibility.

The Supreme Court of the United States, in its original jurisdiction, does not have the power to render advisory opinions, and there is no way to know, in advance, whether or not a statutory interim solution would be well or favorably received by the judiciary, yet the Federal District Court of the District of Columbia probably has jurisdiction of petitions in mandamus brought by the Attorney General of the United States, with consequent appellate jurisdiction therefrom on this issue, in and to the Supreme Court of the United States. Were such a petition to be brought, the district court decision might quickly be sent to the High Court. Should there be any doubts as to district court jurisdiction, Congress could readily so vest it provided it was believed to be desirable to have such a question decided by the courts. This is within the power of Congress, to this kind of issue, without constitutional amendment. Compare *Attorney General vs. Taigart* in 69 N.H.

But, that is merely one of the alternatives.

Sixth. The interim statute would remove the opportunity for private arrangements between a President and a Vice President that can have no operable effect upon successors, acting Presidents suddenly possessed of an inability of whatever type. It would present to the Congress a practical solution to a great problem.

The American Bar Association is a great national nonpartisan organization of lawyers. Its specific recommendations for enactment in the current session of a statute plus proposing an amendment consistent with the urgency of the problem. I have been directed by the association, as chairman of the standing committee on jurisprudence and law reform, to appear before you and to urge both favorable action upon your proposal for constitutional amendment, that will clearly state that Congress may provide the method of determining; and also for an interim statute.

Mr. Chairman, we conceive this as being of a most serious nature, a most urgent problem.

The adoption of this constitutional amendment would follow, it seems to me, in the legislatures of the various States, almost without objection.

This recommendation is directly concerned with the safety and security and very survival of the United States.

This is a problem which is of the most serious nature, because if a Vice President were to claim to deal with the powers and duties of the Office of President, without authority, application to the courts for injunctive processes or other types of legal maneuvering would take a long period of time, would cast a cloud over the entire pattern of conduct; and might, in respect to debt obligations in respect to executive appointments, and in respect to the business and operations of the Government, create a situation that

we ought to avoid now by taking a course of action and recommending it for the consideration of the Congress.

Presidents in previous years and to date have had inabilities. The risk is always present. We should be forehanded here for certainly we have been forewarned.

There have been all kinds of situations, where it seems to me that it is of the essence of the legislative processes, in the Congress, to at least put on paper our direction to the executive branch as to how to meet this very important problem, and also to recommend to the legislatures a constitutional amendment that would remove any doubt or any controversy whatsoever in respect to the right of Congress and the power of the Congress to put the statute on the books.

Thank you, Mr. Chairman.

Senator KEFAUVER. Congressman Wyman, the constitutional amendment that you recommend and speak of, I take it, is Senate Joint Resolution 35, which is the resolution recommended by the American Bar Association and by your committees of the bar association. Is that correct?

Mr. WYMAN. That is correct.

Senator KEFAUVER. We have another one along the same lines, which was discussed by Mr. Katzenbach, Senate Joint Resolution 84, by Senators Hruska and McClellan, the only difference being, as I read it, on page 2, line 13, there is this clause:

Such procedure must be compatible with the maintenance of the three distinct departments of Government, legislative, executive, and the judicial, and the preservation of checks and balances between the Government and its branches.

Do you have an opinion about that, or what you think about Mr. Katzenbach's testimony as to his feeling with respect to it.

Mr. WYMAN. I have not seen that, Mr. Chairman.

However, from just what I have heard, as you read it, I would say it is merely a recitation of requirements that already exist in the law. Perhaps it does no harm to recite them.

Senator KEFAUVER. Senator Dirksen, do you have any questions?

Senator DIRKSEN. That was a very interesting statement, but I have no questions.

Senator KEFAUVER. Mr. Graham?

Mr. GRAHAM. No questions, Mr. Chairman.

Senator KEFAUVER. Mr. Flynn?

Mr. FLYNN. No questions.

Senator KEFAUVER. Congressman Wyman, I want to thank you for a very intelligent and helpful statement on this problem.

Thank you for your continuing interest and for your willingness to come over and give us again your viewpoint about the whole matter.

Mr. WYMAN. Mr. Chairman, I trust you can understand that I am acting under the resolution that I have offered for your consideration.

Senator KEFAUVER. Yes. We have that resolution and it shall be made part of the record. Thank you very much.

Our next witness is Mr. Robert A. Koch, who is a member of the committee on Federal legislation of the Association of the Bar of the City of New York.

We are happy to tell Mr. Koch that the Association of the Bar of the City of New York has been a great help to the various sub-committees of the Judiciary Committee, and we hope that you express our continuing appreciation to them.

Mr. Koch is a graduate of Harvard College, class of 1944, and Yale Law School, class of 1949. He is a member of the firm of Gasperini & Koch, 375 Park Avenue, New York City.

He is a member of the New York City Bar Association committee on Federal legislation and participated in drafting the report on Presidential inability that was adopted by the New York City Bar Association in 1962.

We appreciate the taking of your time and effort to come down and give us your testimony, and the position of the Association of the Bar of the City of New York. We have the report of the Association of the Bar of the City of New York on the general matter of Presidential inability. Notation of this, in the appendix of the report, will be made at a proper place.

(The report referred to is printed in the appendix to the record.) You may proceed, Mr. Koch.

STATEMENT OF ROBERT A. KOCH, MEMBER OF THE COMMITTEE ON FEDERAL LEGISLATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. Koch. Thank you very much, Senators Kefauver and Keating.

We, of the Association of the Bar of the City of New York appreciate the invitation from this subcommittee to present our views with respect to the problem of presidential inability.

As Senator Kefauver mentioned, I am engaged in law practice in New York City. I have been a member of the committee on Federal legislation of the association of the bar for the past 3 years, and participated in the preparation of this report which has been made a part of the record.

This report was adopted by our committee in the winter of 1962 and was submitted to and approved by the members of the entire bar association, in an annual meeting on May 8, 1962.

The report of our committee discusses in detail the historical background of this problem, and finds that two principal questions are unanswered by the present constitutional provisions.

The first is, Does the Office of the President, or do the powers and duties of said office devolve upon the Vice President?

The second is, Who raises the question of inability and who makes the determination as to the commencement and termination of inability?

The position of the Association of the Bar of the City of New York is that the ambiguity in clause 5 of section 1 of article II of the Constitution, when considered in the light of the seriousness of the problem of transfer of Presidential authority in a time of national or personal crisis, makes it highly desirable that the Constitution be amended so as to clarify to the extent possible the respective roles of the President and the Vice President in the case of inability of the President.

Our association feels that the essentials of a constitutional amendment are that it: One, confirm the established view that, upon the removal of the President during office, or his death or resignation, the Vice President actually becomes President.

Two: Reaffirm and clarify beyond any doubt, that in case of the inability of the President to discharge the powers and duties of the Office of President, the Vice President assumes only the powers and duties of the office and not the office itself.

Three: Empower Congress to enact legislation for determining when inability commences and when it terminates.

The association believes that the establishment of the procedure for determining when inability commences and the system of restoration would best be left to enactment by Congress, subject to the veto power of the President contained in clause 2 of section 7 of article I of the Constitution.

We believe that constitutional amendments should not be overly detailed, and future contingencies in the operation of the implementation of the constitutional mandate, not now presently foreseeable, should be left to the good judgment of Congress and the President; that is, a majority of both Houses and Presidential approval or a two-thirds vote of both Houses overriding a Presidential veto.

I have read the testimony of Mr. Lewis F. Powell, Jr., president-elect nominee of the American Bar Association, and of Mr. Martin Taylor, chairman of the committee on Federal constitution of the New York State Bar Association, on behalf of that organization, and concur with their views in support of the Senate Joint Resolution 35.

I also heard, and to the extent that I had an opportunity, studied the testimony of the Deputy Attorney General of the United States this morning and am in agreement with his testimony to the effect that a constitutional amendment in the area of presidential inability, in the formula now contained in Senate Joint Resolution 35, would be highly desirable.

The problem of presidential inability has been given a great deal of attention by Members of Congress, by bar associations, by lawyers and legal scholars within the past few years, and the almost universal conclusion seems to be that this is an area where constitutional clarification would be highly desirable.

I would say, from my experience and the experience of the membership of our committee, that they felt more impressed with the need for a constitutional amendment in this area, the more they studied the problem, and also felt strongly that it would be better to deal with the problem of presidential inability in a context apart from the tremendous pressures created by the illness or disability of a particular President.

Thank you very much.

Senator KEFAUVER. Mr. Koch, by your last sentence, you mean that, if we have to deal with it when an inability really exists, it makes it more complicated and difficult, and impractical.

Mr. KOCH. That is what I mean to say.

Senator KEFAUVER. You recommend Senate Joint Resolution 35, which is the recommendation of the American Bar Association, which Senator Keating and Senator Dirksen and I joined in sponsoring in the last Congress.

I read parts of the testimony of two previous witnesses, a clause in Senate Joint Resolution 84, which was made on May 28 by Senators Hruska and McClellan. Do you have a copy of that?

Mr. KOCH. I don't have one, but I believe from the discussion—

Senator KEFAUVER. I understand from Mr. Graham that Senator Hruska asked that the record be left open for 24 hours. We will leave it open for 1 week for Senator Hruska's or any other statement.

Do you have Senate Joint Resolution 84, and the part referred is the clause beginning on line 13 and ending on line 17:

Such procedure must be compatible with the maintenance of the three distinct departments of government, the legislative, the executive, and the judicial and the preservation of the checks and balances between the coordinate branches.

Would you give us your opinion about that, Mr. Koch?

Mr. KOCH. Senator, I would hesitate to pose as a constitutional expert, but I think I would agree with the testimony of the Deputy Attorney General that it creates an unnecessary confusion in the Constitution to put language like this into one amendment.

I think it leaves open the question of whether this language is also not applicable to other amendments, and then I think you also might run into a problem that someone would say that the statutory procedure was not constitutional, and you would, in effect, create a really whole new set of problems.

I think the spirit of the sentence is something that we would all agree with, but I think, as a practical matter, there would be problems in introducing this into the Constitution.

Senator KEFAUVER. Thank you, Mr. Koch, for your observation. You heard the colloquy between the Deputy Attorney General and Senator Keating and myself, with reference to the legislative intent as to the passage and adoption of the amendment contemplated by Senate Joint Resolution 85 to upset any agreement that had been entered into between the President and the Vice President, and the Deputy Attorney General's suggestion is that, on page 2, line 15, the word "shall" be changed to "may."

Do you agree with that?

Mr. KOCH. I would think that would be a desirable change. I wouldn't think that you would want an amendment to cast doubt on the President's existing arrangements.

Senator KEFAUVER. It was not our intention, and I am sure it was not the intention of the American Bar Association.

Mr. KOCH. I am sure it was not.

Senator KEFAUVER. Senator Keating, do you have any questions?

Senator KEATING. No, I have no questions. I want to express my appreciation to Mr. Koch and the Association of the Bar of the City of New York for the great help that they have been and for the work that they have done in this area. The very splendid report which we were furnished in May 1962, and this testimony you have given, have been of tremendous assistance.

You have been very helpful, and the association has made a contribution in this field in the finest traditions of the bar.

Mr. KOCH. Thank you, sir. I would like to say also that the association of the bar gets tremendous help, not only from the Senators from New York but the other Senators and their staffs, and

I think the communication that has grown up, in terms of documents and information, is certainly most helpful to all of us.

Senator KEFAUVER. Mr. Graham, do you have any questions?

Mr. GRAHAM. No, sir.

Senator KEFAUVER. Mr. Flynn?

Mr. FLYNN. No. Thank you, Mr. Chairman.

Senator KEFAUVER. Mr. Koch, we appreciate your coming down. Will you express our appreciation to the Bar Association of the City of New York. Thank you very much.

I have received a letter from former Vice President Richard M. Nixon, in which he regrets that he could not be here to testify. Mr. Nixon requests that the discussion of presidential inability in his book, "Six Crises," be printed in the record, to express his views.

(The passages from "Six Crises" are printed as exhibit No. 4 in the appendix.)

Senator KEFAUVER. As far as I know, other than the desire of Senator Hruska to submit a statement, I know of no one else who wishes to ask to testify.

Mr. Graham, do you have any other questions?

Mr. GRAHAM. No, sir.

Senator KEFAUVER. I think that the whole problem has been very well canvassed and discussed, both in previous conferences and this one.

We will leave the record open for a week, if necessary, in order to receive Senator Hruska's statement.

I direct that the record be printed as quickly as possible, so that we can take some action on this important problem.

(The statement of Senator Hruska follows:)

**STATEMENT OF SENATOR ROMAN L. HRUSKA TO CONSTITUTIONAL AMENDMENTS
SUBCOMMITTEE ON SENATE JOINT RESOLUTION 84**

As I indicated at the time Senate Joint Resolution 84 was introduced, this measure adheres to the basic provision of the bar association proposal, deviating from it in only one respect. However, this one difference could avoid a good deal of confusion. By delineating that any method adopted by the Congress to determine presidential disability must be compatible with the maintenance of the traditional balance between our three governmental departments, Senate Joint Resolution 84 gives an essential guideline to the Congress in enacting implementing legislation.

One might ask why such a guideline is necessary? Isn't it implied in the bar association proposal?

A guideline is necessary because of the extreme divergence of views and the multiplicity of ideas concerning the method for determining presidential inability. If there were not so many proposals on method, and if they were not so varied in their approach, the danger of upsetting the balance of power between the departments would be much less.

But, Mr. Chairman, the variety of proposals has been quite astounding and it is this great variance in approach that has made the whole problem so difficult to analyze. It was the great difference of opinion on the method which contributed substantially to the defeat of the Eisenhower proposals which, it will be recalled, sought to incorporate a method into the amendment. With the suggestions running from the ridiculous to the conceivable, but none of them to the sublime, a guideline would be helpful to the Congress.

The suggested guideline here would insure against placement of the determination machinery exclusively in either the legislative or judicial branches. And, I must remind you, there have been proposals offered in previous Congresses which would have accomplished just that. Adoption of such a method would give either the legislative or judicial branches a convenient alternative to impeachment on the one hand, and on the other,

would impose on the court a nonjudicial function and thrust it into politics. As Mr. Hansen pointed out last week when he testified before the subcommittee, the experience with members of the Court on the Electoral Commission of 1876 has shown such proposals to be unwise.

In response to the question as to whether or not the guideline offered in Senate Joint Resolution 84 is implied in the bar proposal, the answer is that we should not rely on an implication when we have it in our power to clarify the issue by addition of a few simple words. One might also conclude from the fact the separation of powers doctrine is implied in the bar association proposal that its supporters feel its inclusion is desirable.

Moreover, it was a reliance on the wording of the original disability clause and the implication that the Vice President would act as President in cases of inability which gave rise to the Tyler precedent and an interpretation completely alien to the original intent of the drafters of the clause. That experience must not be overlooked in wording this amendment. We must not rely on implication but concise wording.

The reasons behind Senate Joint Resolution 84 and the guideline proposed therein evolved from a painstaking examination of the history and experience with our present inability provision. This proposal is not the innovation of any one person. In devising this clause, as Mr. Hansen pointed out in his testimony, the drafters were guided, in great part, by the writings of Presidents Hoover, Truman, and Eisenhower. Those writing are cited in Mr. Hansen's statement.

This problem is so complicated and the task facing the Congress in adopting an appropriate method is so intricate that I feel any guidelines which can be given will be welcome and will tend to lessen the burden placed upon us.

I sincerely hope the subcommittee will act favorably on Senate Joint Resolution 84 and report it out to the full Judiciary Committee for consideration.

Senator KEFAUVER. We will stand in recess, subject to further call of the committee.

(Whereupon, at 11:50 a.m. the committee was adjourned.)

APPENDICES

EXHIBIT No. 1

Excerpt From the Reports of Committees of the Association of the Bar of the City of New York Concerned With Federal Legislation, Vol. 1, No. 2, pp. 51-74, May 1962.]

A Report on The Problem of Presidential Inability*

By THE COMMITTEE ON FEDERAL LEGISLATION

INTRODUCTION

There presently exists a defect in the Constitution of the United States relating to the inability of the President to discharge the powers and duties of his office. This inability may come about because of serious illness, as it has in the past, or some other emergency. In the present day and age, the serious consequences of such an occurrence cannot be stressed too strongly. In the opinion of the Committee, action should be taken to clarify the Constitution and thereafter to enact legislation dealing with the problem, prior to the advent of some future Presidential inability. This report discusses the problem and recommends a Constitutional amendment relating thereto.

BACKGROUND

Clause 5 of Section 1 of Article II of the Constitution 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."

It is well settled by precedent that in case of removal, death or resignation of the President, the Vice President succeeds to the presidential office and not just to the "powers and duties of that office."¹

What happens, however, in the event that the President is unable to discharge the powers and duties of his office is not

* This report and the resolutions proposed by the Committee were approved by the Association at the Annual Meeting held on May 8, 1962.

¹ Edward S. Corwin, *The President: Office and Powers*, 51-58 (1957); Opinion of Attorney-General Robert F. Kennedy, Aug. 2, 1961 (42 Op. No. 5, 17-18).

clear. Two principal questions are unanswered by the present Constitutional provision, namely:

First, does the "Office" of the President, or do the "Powers and Duties of said Office," "devolve" upon the Vice President?

Second, who raises the question of "Inability" and who makes the determination as to the commencement and termination of "Inability"?

As to the first question, several times in United States history, when the President has been seriously incapacitated, the question of whether the "Office" of President, or the "Powers and Duties of the said Office," "devolve on the Vice President" has been forcibly raised. Does a determination of inability affect the Office, or the Powers and Duties of the Office, and does the Vice President, if he assumes the Powers and Duties of the Office, do so on a temporary basis, or on a permanent basis, thus displacing or ousting the President? The problem indeed is aggravated by the precedent above referred to, which has been established by seven Vice Presidents who *upon the death* of the President then in office assumed not only the powers and duties of the office of President but also the office itself. In view of the language of the clause, the question has been raised whether the same result will not occur *upon the inability* of the President to discharge the powers and duties of the office, namely, that the Vice President will then assume the office of the President, and the President will be ousted. Although the records of the debates of the Founding Fathers demonstrate that this was not their intention, nevertheless the precedents established by the seven Vice Presidents upon the death of the President then in office, the language of the clause, and the reluctance of Vice Presidents Arthur and Marshall to act when Presidents Garfield and Wilson were incapacitated because of the fear that by such assumption of the powers and duties of the presidency they would be ousting the President,² has led to a constitutional ambiguity which should be clarified. Historians believe that our Government has suffered

² Ruth C. Silva, *Presidential Inability*, 35 U. Det. L.J. 139, 169 (1957).

in the past as a result of this ambiguity. Certainly the original understanding of the framers of the Constitution that only the powers and duties of the President passed to the Vice President upon the inability of the President could be set forth in the Constitution, and it would seem that the present Congressional Session affords an excellent opportunity to clarify this constitutional defect.

The second question—who decides whether "Inability" exists and when "Inability" begins and ends—has received conflicting answers from scholars and others,³ none of them wholly satisfactory. Indeed the very fact that there is so much disagreement among the best informed underscores the need for constitutional clarification. The majority of scholars seem to believe that the Vice President has the power to determine when Presidential inability exists; some, however, argue that Congress has the power; and others argue that the Constitution is entirely ambiguous. It is contended that the President himself determines when his inability has ended and thereupon reclaims his powers. If such interpretation is correct, however, what happens in the unhappy circumstance that the President is mentally incapacitated and in that state might attempt to reclaim his powers is a question to which no satisfactory answer has been given.⁴

This Committee has studied the question and concluded that the only permanent and final solution to the problem is a Constitutional amendment enacted by Congress and submitted to the States, amending Clause 5 of Section 1 of Article II. Such Constitutional amendment should eliminate the ambiguity and confer upon Congress the power, in general terms, to establish a system of determining when inability commences and when it terminates. The Committee further believes that promptly after the adoption of such amendment Congress should enact legislation (i) providing a method to determine when inability commences; and (ii) establishing a procedure whereby the President,

³ The divergent views are summarized in the Opinion of the Attorney General, Note 1, *supra*, at pp. 20-23.

⁴ Fortunately for the country, this has never happened on the national level, but not long ago Louisiana faced the problem with respect to its Governor. See Gasperini, *The Presidential Inability Riddle*, 31 N.Y. State Bar Bulletin, 258 (1959).

if and when he recovers from his inability, may resume the powers and duties of the office of President. Throughout the period of inability, however, the President should retain the office of President and the Vice President should serve only as Acting President.

***AGREEMENTS BETWEEN THE INCUMBENT PRESIDENT
AND INCUMBENT VICE PRESIDENT***

On March 3, 1958, President Eisenhower and Vice President Nixon established a precedent by publishing a memorandum of agreement between them as follows:

"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 has 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."

On August 10, 1961, the White House announced that an agreement identical to the Eisenhower-Nixon agreement had been made between President Kennedy and Vice President Johnson.⁵ The White House statement also said:

"After consultation with the Attorney-General, it is the understanding of the President and the Vice President that these procedures reflect the correct interpretation to be given to Article II, Section 1, Clause 5 of the Constitution. This was also the view of the prior Administration and is supported by the great majority of constitutional scholars."

⁵ New York Times, August 11, 1961.

Released at the same time was an opinion of Attorney General Robert F. Kennedy⁶ which approved the Kennedy-Johnson agreement as "clearly constitutional and as close to spelling out a practical solution to the problem as is possible."

It seems clear that in the event of inability of the present President this Memorandum would be construed as establishing a procedure by which the powers and duties of the office of President would be assumed by the Vice President until the inability had ended. The determination as to the ending of the inability would be at the sole discretion of the President. The Memorandum notes that the procedures "are intended to apply to themselves only" and thus would not appear to be binding upon future incumbents of the office of President and Vice President.

A serious defect in the "agreement approach" is that

"It does not provide for a system of final determination of inability by anyone other than the President, in the event that the President is actually unable to discharge the powers and duties of the office, but believes otherwise."⁷

Numerous arguments have been put forward in opposition to the view that an agreement of this sort should be looked upon as the "last word" in answer to the problem, but probably the most forceful argument is that if the agreement were challenged at a time when it was to be implemented, a serious conflict would arise "at the very time when clear-cut procedure was vitally necessary."⁸

Accordingly, while the Kennedy-Johnson agreement may be looked upon favorably as a temporary measure, in the opinion of the Committee a Constitutional amendment and implementing legislation to govern cases for the future are necessary.

⁶ Note 1, *supra*.

⁷ Note 4, *supra*, at 264.

⁸ Martin Taylor, Chairman of the Committee on Federal Constitution of the New York State Bar Association, *New York Law Journal*, September 11, 1961. The Committee of which Mr. Taylor is chairman has been very active in pressing for a Constitutional amendment to deal with the problem.

**CONGRESSIONAL ACTION WITHOUT
PRIOR CONSTITUTIONAL AMENDMENT**

This Committee has carefully considered whether a statutory approach to the problem without a prior Constitutional amendment expressly empowering Congress to legislate is desirable. The Committee's conclusion is that such an approach is undesirable, in the light of the lack of agreement as to whether Congress under the present Constitutional provision has the power to enact such legislation.⁹ Any action taken should be permanent and legally unassailable.

This Committee agrees with the view of former Attorney General Brownell who stated:¹⁰

"Ordinary legislation would only throw one more doubt into the picture, for the statute's validity could not be tested until the occurrence of the presidential inability, the very time at which uncertainty must be precluded."

The argument that the process of Constitutional amendment involves a long delay is not persuasive: when there is agreement on the need for a Constitutional amendment, speedy action can be taken. As pointed out by former Attorney General Brownell:¹¹

" • • • History shows, • • • , that a constitutional amendment can be speedily effected when the objective to be obtained is a popular one, if, of course, Congress is disposed to act in the first place. The seventeenth amendment, providing for the election of senators by popular vote, took thirteen and a half months. The twenty-first amendment, repealing the eighteenth (prohibition) amendment, took less than ten months. Woman's suffrage, the nineteenth amendment, required only fifteen months, and the twenty-second amendment, limiting Presidents to two terms, was ratified in eleven months. These periods may be compared with the five years it took Congress to enact a new statute establishing the sequence of presidential succession after the Vice President."

There is also the likelihood that if Congress did enact a statute prior to a Constitutional amendment it would make more difficult the eventual achievement of an amendment to the Federal

⁹ Note 3, *supra*.

¹⁰ Brownell, *Presidential Inability: The Need for a Constitutional Amendment*, 68 Yale L.J. 189, 205 (1958).

¹¹ *Id.* at 206-207.

Constitution, because Congress and the public would be lulled into the erroneous belief that the problem had been solved.

ESSENTIALS OF A CONSTITUTIONAL AMENDMENT

The essentials of a Constitutional amendment are that it:

1. Confirm the established view that upon the removal of the President from office, or his death or resignation, the Vice President actually becomes President;
2. Reaffirm and clarify beyond any doubt that in case of the inability of the President to discharge the powers and duties of the office of President, the Vice President assumes only the powers and duties of the office, and not the office itself; and
3. Empower Congress to enact legislation for determining when inability commences and when it terminates.

This Committee believes that the establishment of the procedure for determining when inability commences and the system of restoration would best be left to enactment by Congress, subject to the veto power of the President contained in Clause 2 of Section 7 of Article I of the Constitution. Constitutional amendments should not be overly detailed, and future contingencies in the operation of the implementation of the Constitutional mandate, not presently foreseeable, should be left to the good judgment of Congress and the President, i.e., a majority of both houses and Presidential approval or a two-thirds vote of both houses overriding a Presidential veto.

In the light of the above criteria, pending proposals for a Constitutional amendment will be reviewed.

PROPOSAL OF THE COMMITTEE ON FEDERAL CONSTITUTION OF THE NEW YORK STATE BAR ASSOCIATION

The Committee on Federal Constitution of the New York State Bar Association, in its report of December 31, 1958, recommended a Constitutional amendment to read as follows:

"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, 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 shall be determined by such method as Congress shall by law provide."¹²

The Committee on Federal Constitution stated:

" * * * it is felt by this Committee that a Constitutional Amendment is necessary, and that the Amendment should provide in substance:

(a) That the commencement and termination of any inability should be determined by such method as Congress shall by law provide; and

(b) 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 office itself."

It endorsed as "second best" to its proposed Constitutional amendment, S.J. Resolution 161 (1958) (introduced in substantially the same form in 1961 as S.J. Resolution 19 and H.J. Resolution 529, Appendix 3). The reason S.J. Resolution 161 was "second best" was stated by that Committee as follows:

"S.J. Res. 161 specifies the method and machinery for determining the commencement and termination of disability. This precludes leaving to Congress the details which might have to be changed in the future because the method selected proved to be unsatisfactory. S.J. Res. 161 appears to us to be preferable, however, to other methods that have been suggested."

The Executive Committee of the New York State Bar Association on January 29, 1959, adopted the following resolutions:

"Now, THEREFORE, BE IT RESOLVED, that the Executive Committee of the New York State Bar Association hereby recommends that the present provisions of the Constitution of the United States dealing with the death, resignation, removal or inability of the President (Article II Section 1, Clause 5) be amended so that (1) the commencement and termination of any inability shall be determined by such method as Congress shall by law provide and (2) the Vice President, in case of the inability of the President,

¹² Proceedings of the 82nd Annual Meeting and Committee Reports for 1958, N.Y. State Bar Assn. (1959), 104-108. See Appendix 1. A proposal for an amendment in that form is contained in H.J. Res. 7, Appendix 2.

shall succeed only to the powers and duties of the office and not to the office itself;

"FURTHER RESOLVED, that said Report of this Association's Committee on Federal Constitution is hereby approved and adopted, including the text of the proposed Constitutional Amendment therein set forth, and including the determination of said Committee that S.J. Res. 161 introduced in the Senate March 4, 1958 by Senator Kefauver and bi-partisan sponsors (proposing a Constitutional Amendment which lays down a detailed method and machinery for determining the commencement and determination of disability) is favored as second best to said Committee's proposal and as preferable to other methods that have been suggested.

In both the proposed Constitutional amendment of the Committee on Federal Constitution of the New York State Bar Association (H.J. Res. 7) and S.J. Resolution 19, it is made clear that the powers and duties of the office of President devolve upon the Vice President in the event of the inability of the President and not the office itself, *i.e.*, the Vice President does not assume the office of President but solely the powers and duties thereof. This Committee endorses a Constitutional amendment making this clear.

The proposal of the Committee on Federal Constitution thereafter delegates to Congress the responsibility for enacting legislation dealing with the determination of the commencement and termination of inability. This Committee concurs with that recommendation allowing Congress to deal by law with the determination of the commencement and termination of inability. Such initial legislation would have to have the approval of the President or be enacted by a two-thirds vote of each House. Repeal or modification would also be subject to the same safeguards. Thus, the possibility of considerations other than the President's inability entering into the determination would be greatly reduced, if not entirely eliminated.

PROPOSALS OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JURISPRUDENCE AND LAW REFORM

In 1960, the above Committee recommended and the House of Delegates of the American Bar Association approved a Con-

stitutional amendment providing that in the event of Presidential inability, a Vice President assumes the powers and duties of the Presidential office, not the office itself, and expressly empowering Congress to provide a mechanism for determining when Presidential inability begins and when it ends. That position was the same as this Committee took in 1959 and which is reaffirmed in this Report.¹⁸

The ABA Standing Committee on Jurisprudence and Law Reform recommended to the House of Delegates, and the latter approved, at its mid-winter meeting in February, 1962, the enactment of a statute by Congress dealing with Presidential inability, but a further resolution of the Standing Committee and the House of Delegates was to the effect that the call for legislation was not to be "construed to modify the heretofore expressed support of this body for appropriate constitutional amendment relating to the same subject."

Thus, should this Association approve this Committee's recommendations contained in this Report, the American Bar Association, the New York State Bar Association and this Association will be in accord with respect to the desirability of a Constitutional amendment dealing with the problem of Presidential inability.

***PROPOSALS DEALING WITH PRESIDENTIAL INABILITY
INTRODUCED IN THE 87TH CONGRESS¹⁴***

A number of proposals dealing with Presidential inability have been introduced in the 87th Congress which have been considered by the Committee.

H.J. Resolution 33 (Celler) proposes a Constitutional amendment providing that (1) the Vice President assumes the powers and duties of the Presidential office (i) if the President announces

¹⁸ Report of the Committee on Federal Legislation, July 27, 1959.

¹⁴ S.J. Res. 19 and 125; H.J. Res. 7, 33, 35, 97, 223 and 529; and H.R. 513. H.R. 513 (Multer) would deal with the problem by statute without a prior Constitutional amendment upon the assumption that under the present Constitutional provisions Congress has the power to legislate. For the reasons above stated, the Committee does not recommend H.R. 513.

his inability or (ii) if the Vice President is "satisfied" that the President is disabled and convenes both Houses of Congress and announces that the powers and duties have devolved upon him; and (2) the President may resume his duties upon an announcement of his ability and intention to so resume them. The Celler proposal follows generally the provisions of the Eisenhower-Nixon and Kennedy-Johnson agreements. It is open to the objections, discussed above, that it leaves the determination of when Presidential inability commences solely to the President and Vice President and the determination of when inability ends solely to the President. The Committee does not recommend H.J. Resolution 33.

H.J. Resolution 35 (Celler) is identical to H.J. Resolution 33, except that H.J. Resolution 35 is in the form of a joint resolution relating to Presidential inability affirming the substance of the Kennedy-Johnson agreement, rather than a joint resolution proposing a Constitutional amendment, as is H.J. Resolution 33. While Congressional approval by a joint resolution of the provisions of the Kennedy-Johnson agreement, which presently is simply an understanding reached between the incumbent President and Vice President would seem to do no harm, the Committee nevertheless believes a clarifying Constitutional amendment is necessary.

S.J. Resolution 125 (Keating) proposes a Constitutional amendment providing for the establishment of a "Presidential Inability Commission" to determine the question of when inability begins and ends. A similar proposal (H.J. Res. 97), except for the personnel of the commission, has been introduced by Congressman Curtin. In view of the above stated "essentials of a Constitutional amendment," the Committee does not recommend S.J. Resolution 125 or H.J. Resolution 97.

There remain to be discussed H.J. Resolution 7 (Bennett), identical to H.J. Resolution 223 (Robison), and S.J. Resolution 19 (Kefauver), identical in substance to H.J. Resolution 529 (Lindsay).

H.J. Resolutions 7 and 223

Annexed hereto as Appendix 2 is H.J. Resolution 7 (identical to H.J. Resolution 233). These Joint Resolutions propose a Constitutional amendment in the form recommended by the Committee on Federal Constitution of the New York State Bar Association (Appendix 1), which the Committee approves.¹⁵

The Committee notes that H.J. Resolution 7 (Appendix 2) is silent as to present Clause 5 of Section 1 of Article II of the Constitution, but assumes that present Clause 5 would be repealed.

S.J. Resolution 19

Annexed hereto as Appendix 3 is S.J. Resolution 19 (which is identical in substance to H.J. Resolution 529).

With immaterial exceptions, S.J. Resolution 19 is the same as S.J. Resolution 40, considered by this Committee in its 1959 Report.¹⁶

Because this Committee believes that the procedure for determining when inability commences and the system of restoration should be left to Congress to determine,¹⁷ it does not recommend S.J. Resolution 19 in its entirety as a desirable Constitutional amendment, although it does recommend that certain of the provisions contained in S.J. Resolution 19 should be embodied in an amendment, as set forth in the Committee's recommendation (Appendix 4), and that certain other provisions contained in S.J. Resolution 19 might be included in implementing legislation after a Constitutional amendment has been adopted.

A detailed analysis of the six sections of S.J. Resolution 19 follows:

Section 1 deals with the case of the removal of the President from office, or of his death or resignation. It provides that the Vice President shall become President for the expiration of the then current term. This confirms the practice which has, in fact,

¹⁵ Page 191 *supra*.

¹⁶ See note 13 *supra*.

¹⁷ Page 191 *supra*.

been the situation since Vice President Tyler in 1841 eliminated the word "Acting" from the title "Acting President" on the first paper submitted to him for signature after the death of William Henry Harrison. Since then, six other men elected as Vice Presidents of the United States: Messrs. Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, and Truman, likewise assumed, upon the death of the President in office, the actual office of the Presidency and not just the powers and duties of the office.

Section 2 provides that the Vice President shall discharge the powers and duties of the office of President as Acting President, if the President himself declares in writing that he is unable to discharge the powers and duties of his office, but makes it clear that only the powers and duties of the office shall be discharged by the Vice President as Acting President. In so far as this provision makes clear that only the powers and duties of the office shall be discharged by the Vice President as Acting President, this Committee believes it should be included as part of a Constitutional amendment. In so far as it deals with a determination of inability by the President, a matter of procedure, this Committee believes it should be included in the implementing legislation of Congress, and not frozen into the Constitution.

Section 3 provides for the failure of the President to declare his inability. The Vice President, if satisfied that the President is unable to discharge the powers and duties of his office, shall, upon the written approval of the majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the office of President as Acting President. Once again, it makes certain that the office of the Presidency does not devolve upon the Vice President, but only the powers and duties of the office. Furthermore, it vests in the Executive branch of the Government, in the Vice President and the members of the cabinet, presumably the men closest to the President and upon whom he would rely to the greatest degree, the power to determine and to confirm the President's inability to discharge the powers and duties of the office of President. Upon such determination and approval, the Vice President assumes the discharge

of the powers and duties of the office of President as Acting President. This Committee believes that this section, which deals with procedure, might also be included in implementing legislation of Congress and should not be frozen into the Constitution.

Section 4 provides for the resumption of the powers and duties of the office of the Presidency by the President when the President's inability is terminated. This the President may do by a simple public announcement in writing that his inability has terminated, and seven days thereafter he shall resume the discharge of the powers and duties of his office. If there should be a dispute as to the termination of the President's inability, the Vice President, again with the written approval of a majority of the heads of the executive departments in office at the time of the President's announcement, may transmit to Congress the Vice President's written declaration that in his opinion the President's inability has not terminated. If this should occur, Congress shall thereupon consider the issue and, if it is not in session, it shall assemble in special session on the call of the Vice President. Upon a concurrent resolution, adopted by Congress with the approval of two-thirds of the members present in each House, to the effect that the ~~inability of the President has not terminated, the Vice~~ President shall assume the discharge of the powers and duties of the office of the President as Acting President until:

1. He proclaims the President's inability has ended;
2. Congress itself by concurrent resolution adopted by a majority of the members present in each House determines that the President's inability has ended; or
3. The President's term ends.

In other words, a two-thirds vote of the members of each House present is necessary to confirm the Vice President's declaration, with the majority approval of the cabinet, that the President's inability has not terminated. A simple majority of the vote of the members present in each House to the effect that the President's inability has ended would thereafter restore the powers and duties of the office of President to the President. Again, the

President would retain the office of President and only the powers and duties of the office would devolve upon the Vice President as Acting President.

It should be noted that Clause 3 of Section 7 of Article I of the Constitution reads as follows:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a Question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

However, the view of the Senate Parliamentarian is that concurrent resolutions, at least in so far as the Senate is concerned, are not used for legislative purposes and accordingly are not required to be presented to the President. In *Senate Procedure: Precedents and Practices*, by Charles L. Watkins and Floyd M. Riddick, Government Printing Office, 1958, at pages 167-168, there appears the following:

"Concurrent resolutions are not required to be presented to the President of the United States unless they contain matter which is properly to be regarded as legislative in character and effect [Footnote: Feb. 20, 1896, 54-1, *Journal*, p. 145; Jan. 26, 1897, 54-1, *Journal*, p. 76; see Nov. 24, 1903, 58-1, *Record*, p. 438.], and under the practice of the Senate they are not used for legislative purposes, and are not sent to the President for approval. [Footnote: Nov. 7, 1919, 66-1, *Record*, pp. 8074-75.]"

This Committee assumes that under the procedure to be followed the concurrent resolutions provided for in S.J. Resolution 19 would not require the approval or disapproval of the President, Vice President or Acting President, since the Congressional action contemplated would seem to be more in the nature of fact determination than "legislative in character and effect." If this were not so, confusion could arise as to whether the Vice President as Acting President could disapprove the necessary concurrent resolutions adopted by Congress in his capacity as Acting President. This could result in a situation where a two-thirds vote of the Senate and House of Representatives would be neces-

sary under all circumstances to restore the powers and duties of the office of President to the President from the Vice President serving as Acting President,—a result that is not contemplated and is directly contrary to the intent of S.J. Resolution 19.

As with respect to Section 3, Section 4 which deals with procedure might be included in implementing legislation of Congress and should not be frozen into the Constitution.

The first sentence of Section 5 provides, in the language of the present clause of the Constitution, that Congress may provide for the case of the removal by death, resignation or inability both of the President and the 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." Upon consideration, the Committee favors a change in the language of the present clause of the Constitution, as proposed by the Committee on Federal Constitution of the New York State Bar Association (Appendix 1), the effect of which would be that upon the removal, death or resignation of both the President and the Vice President the officer next in line of succession would succeed to the office, and not merely the powers and duties of the office, but that in the case of inability such official would only be Acting President. Such change is reflected also in the Committee's proposed Constitutional amendment (Appendix 4, Sec. 4). If both the President and Vice President have died, resigned the office, or been removed from office, there seems to the Committee no reason why the person next in line of succession should not become President, and not Acting President. Under circumstances where there is no likelihood that the President or Vice President will again be available to fill the office of President, the country's interests would be better served, especially in the field of foreign relations, by a "full-fledged" President rather than by an Acting President. The Committee is aware that such change in the Constitution would require conforming changes in the Presidential Succession Act,¹⁸ which spells out who shall

¹⁸ 3 U.S. Code Annotated, §19 (June 25, 1958, C. 644, §1,625 Stat. 672).

exercise the powers and duties of the office of President, and provides that such person shall "act as President," whether his predecessor in the office of President (either the President or Vice President) has died, was removed, resigned or was merely disabled.

The second sentence of Section 5 provides for the situation where there is no Vice President. Under such circumstances, the powers and duties conferred by the amendment on 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." The Committee believes that this situation should be dealt with by implementing legislation and not by amendment.

Section 6 provides that the proposed amendment shall be inoperative unless ratified by the legislatures of three-fourths of the States within seven years from the date of its submission. Section 6 should obviously be a part of the Constitutional amendment.

The Committee notes that S.J. Resolution 19 (Appendix 3) is silent as to present Clause 5 of Section 1 of Article II of the Constitution, but assumes that present Clause 5 would be repealed.

THE NEED FOR ACTION

In examining the literature concerning the question of Presidential inability, the Committee was impressed by the fact that the literature ebbs and flows with the status of the health of the incumbent in the White House. Thus in 1881, at the time when President Garfield lay critically stricken, a number of articles dealing with the Presidential inability question and prospective solutions appeared. In 1919 and 1920, during the illness of President Wilson, once again the question came to the forefront of the minds of the American people. Most recently, during the illnesses of President Eisenhower, the subject was revived and numerous proposals advanced, extensive hearings conducted by both Houses of Congress, and articles written.

The Republic cannot afford, in the present age of global and national problems of great complexity and vital importance, to allow the Constitutional problem of possible Presidential inability to remain in its present unsatisfactory state. It would seem that the present is the time for objective analysis and appraisal of the situation and for setting in motion the necessary machinery for the enactment of a Constitutional amendment, to be followed by implementing legislation resolving the question permanently and unambiguously.

RECOMMENDATIONS

1. The Committee recommends the adoption of an amendment to the Federal Constitution dealing with the problem of Presidential inability, that would:

- (i) confirm the established view that upon the removal of the President from office, or of his death or resignation, the Vice President actually becomes President;
- (ii) reaffirm and clarify beyond any doubt that in case of the inability of the President to discharge the powers and duties of the office of President, the Vice President assumes only the powers and duties of the office, and not the office itself; and
- (iii) empower Congress to enact legislation for determining when inability commences and when it terminates.

2. With respect to specific proposals, the Committee recommends the adoption of an amendment to the Federal Constitution either (i) in the form of Appendix 4 to this Report; or (ii) in the form recommended by the Committee on Federal Con-

¹⁹ Four members of the Committee disagree with the recommendation in favor of the last sentence of Section 3 of the proposed Constitutional amendment (Appendix 4), which reads: "The commencement and termination of any inability shall be determined by such method as the Congress shall by law provide." These members are inclined to the view that such power, if specifically granted by the Constitution at all, should rest primarily in the Executive branch of the Govern-

stitution of the New York State Bar Association (Appendix 1) which is embodied in H.J. Resolution 7 and 223 (Appendix 2).¹⁹

Respectfully submitted,

THE COMMITTEE ON FEDERAL LEGISLATION OF
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDWIN L. GASPERINI, *Chairman*

HOWARD J. AIBEL	SEDGWICK W. GREEN
WILLIAM G. F. BOTZOW	H. MELVILLE HICKS, JR.
VICTOR BRUDNEY	LAWRENCE W. KEEPNEWS
JOSEPH CALDERON	ROBERT A. KIRTLAND
EDWARD Q. CARR, JR.	ROBERT A. KOCH
DONALD J. COHN	HERBERT PRASHKER
LOUIS A. CRACO	LEONARD B. SAND
WILLIAM G. FENNELL	WILLIAM J. SCHRENK, JR.
BARRY H. GARFINKEL	TELFORD TAYLOR
RICHARD A. GIVENS	HAROLD R. TYLER, JR.
EVERETT I. WILLIS	

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March 20, 1962

ment, and therefore would favor something along the lines of the Kefauver and Lindsay Joint Resolutions (Appendix 3), which assigns to the Executive branch in the first instance the responsibility of dealing with the question of Presidential inability in preference to assigning such responsibility to Congress. Three members would (1) approve an amendment which contained only Section 2 and the first sentence of Section 3 of Appendix 4 (i.e. confirming the established view that upon the removal of the President from office, or his death or resignation, the Vice President actually becomes President, and reaffirming and clarifying beyond any doubt that in the case of the inability of the President to discharge the powers and duties of the office of President, the Vice President assumes only the powers and duties of the office, and not the office itself) and (2) leave to the President and Vice President at the time in office the more detailed resolution of the problem within the framework of the clarified Constitutional language. Mr. Calderon does not believe that there is sufficient warrant to amend the existing Constitutional provision.

RESOLUTIONS PROPOSED FOR STATED MEETING OF THE ASSOCIATION

RESOLVED, that this Association favors the adoption of an amendment to the Federal Constitution dealing with the problem of Presidential inability, that would:

(i) confirm the established view that upon the removal of the President from office, or of his death or resignation, the Vice President actually becomes President;

(ii) reaffirm and clarify beyond any doubt that in case of the inability of the President to discharge the powers and duties of the office of President, the Vice President assumes only the powers and duties of the office, and not the office itself; and

(iii) empower Congress to enact legislation for determining when inability commences and when it terminates.

RESOLVED, that this Association recommends the adoption of an amendment to the Federal Constitution either in the form of Appendix 4 to the Report of the Committee on Federal Legislation dated March 20, 1962, or in the form of Appendix 1 to said Report, which is embodied in H.J. Resolutions 7 and 223 (Appendix 2).

RESOLVED, that the Report of this Association's Committee on Federal Legislation dated March 20, 1962, on S.J. Resolutions 19 and 125, H.J. Resolutions 7, 33, 97, 223 and 529, 87th Congress, relating to proposed amendments to the Federal Constitution dealing with the problem of Presidential inability, and other proposals, is approved.

APPENDIX 1

PROPOSED CONSTITUTIONAL AMENDMENT OF THE COMMITTEE ON FEDERAL CONSTITUTION OF THE NEW YORK STATE BAR ASSOCIATION

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, 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 shall be determined by such method as Congress shall by law provide.

APPENDIX 2

H.J. RESOLUTION 7 (Bennett) 87th Congress

(Identical to H.J. Resolution 228 (Robison) 87th Congress)

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 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."

APPENDIX 3

S.J. RESOLUTION 19 (Kefauver) 87th Congress

(Identical in substance to H.J. Resolution 529 (Lindsay) 87th Congress)

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 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. 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. 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.

"SECTION 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.

"SECTION 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.

"SECTION 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.

"SECTION 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."

APPENDIX 4

CONSTITUTIONAL AMENDMENT TO CARRY OUT
RECOMMENDATIONS OF THE COMMITTEE ON
FEDERAL LEGISLATION OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK

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. Clause 5 of Section 1 of Article II of the Constitution of the United States is hereby repealed.

"SECTION 2. 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 3. In case of the inability of the President to discharge the powers and duties of his said office the said powers and duties shall devolve on the Vice President until the inability be removed. The commencement and termination of any inability shall be determined by such method as the Congress shall by law provide.

"SECTION 4. 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 be President, or, in case of inability, act as President, and such officer shall be or act accordingly until the disability be removed or a President shall be elected.

"SECTION 5. 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."

EXHIBIT No. 2

THE WHITE HOUSE,
OFFICE OF THE WHITE HOUSE PRESS SECRETARY,
August 10, 1961.

The President and the Vice President have agreed to adhere to procedures identical to those which former President Eisenhower and Vice President Nixon adopted with regard to any questions of presidential inability. Those procedures are as follows:

(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 so 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.

After consultation with the Attorney General, it is the understanding of the President and the Vice President that these procedures reflect the correct interpretation to be given to article II, section 1, clause 5 of the Constitution. This was also the view of the prior administration and is supported by the great majority of constitutional scholars.

The relevant constitutional provision is:

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.

Under this provision, upon a proper determination of presidential inability, the Vice President succeeds temporarily to the powers and duties of the Presidency until such time as the President is enabled to act again. Unlike the case of removal, death, or resignation, the Vice President does not permanently become President.

Under the arrangement quoted above, the Vice President agrees to serve as Acting President "after such consultation as seems to him appropriate under the circumstances." There is no provision of the Constitution or of law prescribing any procedure of consultation, but the President and Vice President felt, as a matter of wisdom and sound judgment, that the Vice President would wish to have the support of the Cabinet as to the necessity and desirability of discharging the powers and duties of the Presidency as Acting President as well as legal advice from the Attorney General that the circumstances would, under the Constitution, justify his doing so. The understanding between the President and the Vice President

authorizes the Vice President to consult with these officials with a free mind that this is what the President intended in the event of a crisis.

Prior to the Eisenhower-Nixon arrangement, there were no similar understandings of a public nature. For this reason, prior Vice Presidents have hesitated to take any initiative during the period when the President was disabled. Obviously, this is a risk which cannot be taken in these times, and it is for that reason that President Kennedy and Vice President Johnson have agreed to follow the precedent established by the past administration.

EXHIBIT No. 3

**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 8, 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.

THE PRESIDENT.

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 Senate⁴ 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

¹ See Max Farrand, *The Records of the Federal Convention of 1787* (1911 Ed.), 600.

² 2 *Id.* 186.

³ 2 *Id.* 427.

⁴ 2 *Id.* 495.

President be chosen, or until the inability of the President be removed."² 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."³

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.⁴ 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:⁵

"(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

² 2 *id.* 495, 499.

³ 2 *id.* 582.

⁴ Davis, *Inability of the President*, Sen. Doc. No. 808, 65th Cong., 2d sess. 10 (1918).

⁵ 2 Ferrand, *op. cit. supra* note 1, 598-599.

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."⁹ 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;

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;

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;

⁹ 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.

and such officer shall act accordingly, until the 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.¹¹ 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."

¹¹ Silva, *Presidential Succession* 82 (1951).

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:¹² " * * * 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

¹² *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.¹³ 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."¹⁴ 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.¹⁵ 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-

¹³ Charles Warren, *The Making of the Constitution*, 634-635 (1928).

¹⁴ *Id.* 635.

¹⁵ Silva, *op. cit. supra* note 11, 11.

comes President.”¹⁶ 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

¹⁶ *Id.* 12.

¹⁷ *Id.*

¹⁸ *The Federalist* (J. B. Cooke, ed., 1961), No. 68, pp. 461-462.

¹⁹ Silva, *op. cit. supra* note 11, 167.

in case of the latter's death * * *."²⁰ 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 3 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

²⁰ Charles Warren, *op. cit. supra* note 13, 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.²¹ 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.²²

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:²³

"* * * 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

²¹ Richard H. Hansen, *Executive Disability*, 40 Nebr. L. Rev. 697, 701-703 (1961).

²² 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.

²³ *Ibid.* 43.

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 resumption of his constitutional powers and duties by the temporarily 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 statutory 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 language 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 disability of both the President and Vice President to determine "what officer shall then act as President." It is claimed by those who assert that the Vice President becomes President 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 President 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.²⁴

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:²⁵ "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.²⁶ 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."²⁷

²⁴ Senator Charles W. Jones, 13 Cong. Rec. 142-143, 191-193 (1881).

²⁵ Senator Richard Coke, 13 Cong. Rec. 141 (1881). See also, William W. Croskey, *Hearings before Special Subcommittee of House Committee on the Judiciary to Study Presidential Inability*, 84th Cong., 2d sess. 107 (1950).

²⁶ Croskey, *id.* 107.

²⁷ *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;⁵⁰ 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.⁵¹ Both of my immediate predecessors, former Attorneys General Herbert Brownell⁵⁰ and William P. Rogers⁵¹ 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,

⁵⁰ 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 Fellman, University of Wisconsin; Thomas K. Finletter, 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. Romani, the Brookings Institution, and Arthur E. Sutherland, Law School of Harvard University. *Presidential Inability*, House Committee Print, 85th Cong., 1st sess. 49-52 (1957).

⁵¹ *Id.* 52-54.

⁵⁰ Herbert Brownell, Jr., *Presidential Inability: The Need for a Constitutional Amendment*, 68 Yale L.J. 180, 192-193, 203-205 (1958); *Hearing before the Special Subcommittee of the House Committee on the Judiciary on Problem of Presidential Inability*, 85th Cong., 1st sess., 4, 10 (1957).

⁵¹ *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, 58. 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.²²

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.²³

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:²⁴

"* * * 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,

²² Theodore W. Dwight, *Presidential Inability*, Vol. 133 No. Am. Rev. 436, 443 (November 1881); Representative Henry A. Wise and Senator Robert J. Walker, Cong. Globe, 27th Cong., 1st sess. 4-5 (1841); Senator Charles W. Jones, 13 Cong. Rec. 142 (1881), 14 id. 918 (1883).

²³ Brown and Silva, *Presidential Inability*, House Committee Print, *supra* note 22, 12.

²⁴ *Id.* 12-13. See also, Silva, *op. cit. supra* note 11, 78-77.

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,⁵² 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.⁵³ 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.⁵⁴ Although President Tyler's action might readily have been questioned had historical materials on the framers' intent been at hand,⁵⁵ 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:⁵⁶

⁵² David Fellman, *Presidential Inability*, House Committee Print, *supra* note 22, 24-28.

⁵³ John Tyler, Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, [John] Calvin Coolidge, and Harry S. Truman.

⁵⁴ Silta, *Presidential Inability*, 33 U. Det. L.J. 130, 151-153 (1957).

⁵⁵ Hansen, *op. cit. supra* note 21, 704.

⁵⁶ Edward S. Corwin, *The President: Office and Powers*, 84 (1937).

"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.⁴⁰ 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-

⁴⁰ 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.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."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."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-

⁴¹ *Id.*

⁴² *Id.* 202.

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 inability exists.⁴⁴ Both of my immediate predecessors favored this

⁴⁴ Silva, *op. cit. supra* note 11, 100-102; Davis, *op. cit. supra* note 7, 13; Senator Augustus H. Garland, 13 Cong. Rec. 139-141 (1881); Senator Elbridge G. Lapham, 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.* 58-59; 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:⁴⁵

" * * * 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.⁴⁶ 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.⁴⁷

⁴⁵ Brownell, *op. cit. supra* note 30, 204.

⁴⁶ Early authorities are cited by Silva, *op. cit. supra* note 11, 105-107. More recent authority will be found in note 53.

⁴⁷ Thomas M. Cooley, Vol. 183 No. Am. Rev. 422, 426-427 (November 1881).

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*.⁵⁸ It is an argument favored by Attorneys General Brownell⁵⁹ 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.⁶⁰ 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."⁶¹

Both of my immediate predecessors were, therefore, strongly opposed to the legislative or judicial route for resolving the problem. Mr. Brownell said: "Ordinary legislation would only throw one more doubtful element into the picture, for the statute's validity could not be tested until the occurrence of the presidential inability, the very time at which uncertainty must be precluded."⁶² Authority is divided on this point.⁶³ I concur in Mr. Brownell's judgment.

⁵⁸ Butler, *op. cit. supra* note 44, 428, 482; Davis, *op. cit. supra* note 7, 18-14.

⁵⁹ Brownell, *op. cit. supra* note 80, 208.

⁶⁰ Hearings, *op. cit. supra* note 31, 170, 176.

⁶¹ Butler, *op. cit. supra* note 44, 481. 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.

⁶² Brownell, *op. cit. supra* note 80, 205.

⁶³ Among those who recently expressed themselves in favor of an amendment to the Constitution upon the ground that it is either necessary or desirable are: Stephen K. Bailey, Hon. Peter Frelinghuysen, Jr., Richard G. Huber, Joseph E. Kallenbach, Arthur Krock, Jack W. Peltason, C. Herman Pritchett, Arthur E. Sutherland, Hon. John J. Sparkman (*Presidential Inability*, House Committee Print, *op. cit. supra* note 28, 59-63). Edgar W. Waugh, Charles S. Rhyne (*Hearings, op. cit. supra* note 31, 127, 191).

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.⁶⁴ 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:⁶⁵ "The Constitution recognizes but one method of removing the President, and that is by conviction on articles of impeachment."

David Fellman, James Hart, Arthur N. Holcombe, Hon. Herbert Hoover, Mark DeW. Howe (*Presidential Inability*, House Committee Print, *op. cit. supra* note 28, 63-68).

⁶⁴ Brownell, *op. cit. supra* note 30, 204; Rogers, *Hearings*, *op. cit. supra* note 31, 175.

⁶⁵ Senator Coke, 13 Cong. Rec. 141 (1881).

III

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:⁶⁸

"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-

⁶⁸ N.Y. Times, March 4, 1958, p. 1, col. 2, p. 17, col. 1.

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:⁵⁷ "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

⁵⁷ 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.

EXHIBIT No. 4

(The following is an excerpt from the book, "Six Crises," by former Vice President Richard M. Nixon, pp. 178 to 180, 1962:)

The problem of presidential disability is complex, dating back to the Constitutional Convention in 1787 when Delaware's Delegate John Dickinson brought it up and got no answer.

Authorities and experts have written books on the subject, all dealing with the ambiguity of article II, section I, clause 5 of the Constitution, which says:

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.

Simply stated, this clause does not make clear: Who decides when the President is unable to discharge the powers and duties of his office? just what devolves upon the Vice President, the "powers and duties" or the "office" itself? can the President resume office once he has given it up? who decides if the President is well enough to resume his office, if he can at all?

Anyone, I think, can imagine 2 dozen troublesome contingencies which might become involved in passing the powers of a President to a Vice President, and constitutional lawyers, who have studied the question for more than a hundred years, can think of 200 more. President Eisenhower, after studying the problem closely, was intent on solving the practical problem of giving his Vice President the authority to act immediately in a crisis, if necessary. He mentioned several alternatives, but kept coming back to the idea of writing a letter which would give the Vice President alone the authority to decide when the President was unable to carry on—that is, when the President himself was unable to make the decision.

In early February, the President called Rogers and me into his office, commented that he thought he had licked the problem, and handed each of us a copy of a letter. Then he leaned back in his chair and, while we followed on our copies, he read a four-page letter to us, beginning, "Dear Dick." We made some minor suggestions and he incorporated them into the letter and then sent it on to his secretary, Ann Whitman, for final typing. Marked "Personal and Secret," one copy went to me, one to Bill Rogers as Attorney General, and one to John Foster Dulles, as Secretary of State and ranking member of the Cabinet.

With the exception of our very minor suggestions, the letter was wholly Eisenhower's in concept and drafting, and it was a masterpiece. Leaving the White House, Bill Rogers remarked that Eisenhower would have made an outstanding lawyer, for the letter handled the contingencies of a very complex problem from every angle and was as good a drafting job as any constitutional expert could have done.

The President made public the following key paragraphs:

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 so 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.

This letter established historical precedent. Eisenhower was the first President in American history to take cognizance of and act upon a serious gap in our Constitution. President Kennedy, even before his inauguration, drew up an identical list of procedures for his Vice President, Lyndon Johnson, to follow in exercising the rights and duties of the President in the event of Kennedy's incapacity. The new administration adopted in its entirety the section of the Eisenhower letter which was made public, and it would be fair to assume that President Kennedy's successor will follow the precedent.

But what must be clearly understood is that the agreement President Eisenhower set forth in his letter to me, and the one President Kennedy has entered into with Vice President Johnson, are only as good as the will of the parties to keep them. Presidents and Vice Presidents have not always had the mutual trust and the cordial relations President Eisenhower had with me or that President Kennedy has had with Vice President Johnson up to this time. Jealousies and rivalries can develop within an administration which could completely destroy such an agreement.

Only a constitutional amendment can solve the problem on a permanent basis. President Eisenhower's agreement with me was personal and had the force of his authority only during his term of office. President Kennedy's agreement is similarly limited. These agreements, which are mere expressions of a President's desires, do not have the force of law. Even a law passed by Congress might be subject to constitutional challenge. However, such a law would express the will of Congress and should be passed while the incumbent President is in good health and before a presidential election year drags politics into an already complex problem. The experiences of Garfield, Wilson, and Eisenhower should have taught us a lesson. Surely the time has come for a truly bipartisan program to draw up a constitutional amendment which would define the rights and duties of a Vice President during any period when the President of the United States is incapacitated.

The urgent need for such an amendment becomes crystal clear when a President is disabled, but that is precisely the time when politics bar any reasonable agreement on the wording of such an

amendment. The time to begin solving this problem is now, when the incumbent President is in good health and at a safe distance from the politics of a presidential election year. It is hardly necessary to point out that these perilous times in which we live will continue, and more than ever before our Nation will need an able and healthy Chief Executive or Acting Chief Executive at all times.

Action on this problem will have important side effects as well. It will assure the continued useful employment of the Vice President as a deputy of the President rather than as a fifth wheel in the Government, another precedent established by Eisenhower. The Vice President will thus become an integrated member of the incumbent administration, able and ready to take over the rights and duties of the President if it becomes necessary. This being true, it also will bolster the new political trend of selecting capable men as Vice Presidential nominees, men to whom the Presidential nominee would be willing to turn over his duties during a period of disability, rather than the selection of men solely on geographical, factional, or party appeasement considerations.

EXHIBIT NO. 5

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
SYLVESTER C. SMITH, JR.
AMERICAN BAR CENTER
CHICAGO 37, ILLINOIS
HICK PARK 3-0533

June 21, 1963

JUN 22 '63
SAC

NEW JERSEY OFFICE
PRUDENTIAL PLAZA
NEWARK 1, NEW JERSEY
TELEPHONE MITCHELL 3-6000

Honorable Estes Kefauver
United States Senate
Washington 25, D. C.

Dear Senator Kefauver:

On behalf of the American Bar Association, I wish to express our pleasure that you and Senator Keating have co-sponsored S.J.Res. 35, a joint resolution proposing a Constitutional amendment relating to the clarification of procedures to be followed in the case of inability of the President of the United States.

I wish to personally voice my agreement with everything stated to your committee on June 11 by Lewis F. Powell, the President-Elect Nominee of the American Bar Association. We are most optimistic over the favorable outlook for adoption of S.J. Res. 35 in this session of Congress, and are delighted that such strong support is evident from the Administration, the New York State Bar Association, and the Association of the Bar of the City of New York.

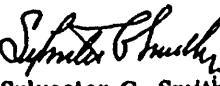
As Mr. Powell has stated to your Committee, the House of Delegates of the American Bar Association first urged the adoption of the language of S.J. Res. 35 in 1960.

In 1962, the House of Delegates of the Association looked again to the problem of Presidential Inability. While the House of Delegates approved the language of a statute to deal with this problem, it also emphasized that the 1960 position favoring a Constitutional amendment should not be disturbed.

The Association strongly recommends the adoption of a Constitutional amendment at the earliest possible time. As Mr. Powell stated to your committee when he testified, the American Bar Association will work through the state and local bar groups in securing ratification by the States. I am writing to the president of each state bar urging support for S.J. Res. 35.

I commend you for your leadership in attempting to solve this serious problem.

Sincerely,


Sylvester C. Smith, Jr.