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PRESIDENTIAL INABILITY

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CONSTITUTIONAL AMENDMENTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-FIFTH CONGRESS
SECOND SESSION
ON
S. J. Res. 100, S. J. Res. 133, S. J. Res. 134,
S. J. Res. 141, S. J. Res. 143, S. J. Res. 144,
S. 238, and S. 3113
RELATING TO THE INABILITY OF THE PRESIDENT
TO DISCHARGE THE POWERS AND DUTIES
OF HIS OFFICE

JANUARY 24, FEBRUARY 11, 14, 18, AND 28, 1958

Printed for the use of the Committee on the Judiciary



UNITED STATES
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PRESIDENTIAL INABILITY

FRIDAY, JANUARY 24, 1958

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,

Washington, D. C.

The subcommittee met, pursuant to call, at 2:10 p. m., in room 424, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver, Langer, and Dirksen.

Also present: Wayne H. Smithey, member, professional staff, Senate Judiciary Committee.

Senator KEFAUVER. The committee will come to order.

This is the subcommittee of the Judiciary Committee on Constitutional Amendments composed of the Senator from North Dakota, Mr. Langer; the Senator from Illinois, Mr. Dirksen; the chairman of the full committee, Senator Eastland, from Mississippi; and the Senator from Missouri, Mr. Hennings.

The purpose of the meeting today is to start hearings on a number of resolutions proposing an amendment to the Constitution to make provision to determine the inability of the President of the United States to discharge his powers and duties, and also the removal of that disability. Also, the committee has before it two bills on the same subject.

We will order that all of the resolutions and bills be printed at this place in the hearing, Senate Joint Resolution 141, by Senator O'Mahoney, a joint resolution proposing a constitutional amendment, Senate Joint Resolutions 143 and 144, by Mr. Bridges, and S. 3118 by Mr. Bridges, the two resolutions proposing constitutional amendments, Senate Joint Resolution 100 by Senator Fulbright, a resolution proposing a constitutional amendment, Senate Joint Resolutions 133 and 134 by the chairman of this subcommittee, resolutions proposing constitutional amendments. S. 238 is a bill by Senator Payne proposing to act in this field by legislation without constitutional amendment. S. 3118, which was filed yesterday by Senator Bridges, is a bill to deal with this subject by legislation rather than by constitutional amendment.

All of these will be printed in the record at this point.

(S. J. Res. 141, 144, 143, 100, 133, and 134, S. 238, and S. 3118 are as follows:)

[S. J. Res. 141, 85th Cong., 2d sess.]

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

(herein), 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"

"Sectio. 1. Whenever the President proclaims that he is unable to discharge the powers and duties of his office, or whenever the Senate and the House of Representatives pass a resolution by a two-thirds vote of each House declaring that the President is unable to discharge the powers and duties of his office, the Vice President, or if there be no Vice President, the officer next in line of succession to the office of President as provided by law, shall be Acting President.

"Secto. 2. An Acting President shall exercise the powers and duties of the office of President under this article until (1) the end of the then current presidential term, (2) such Acting President finds and proclaims that the inability of the President no longer exists, (3) the inability of the President is determined, in accordance with section 3 of this article, no longer to exist, whichever first occurs.

"Secto. 3. Whenever, during any period in which an Acting President is discharging the powers and duties of the office of President under this article, the Senate and the House of Representatives pass a resolution declaring that the inability of the President to discharge the powers and duties of his office no longer exists, the Acting President shall cease to exercise the powers and duties of the office of President and the President shall exercise such powers and duties.

"Secto. 4. The Congress may by law provide for the case where either or both Houses of Congress are not in session, declaring what officer or officers shall convene such House or Houses for the purpose of enabling them to perform the duties conferred upon them by this article.

"Secto. 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."

[S. J. Res. 113, 85th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to provide for determination of the ability of the President 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 herein), 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"

"Sectio. 1. The President pro tempore of the Senate, the Speaker of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate, the majority leader of the House of Representatives and the minority leader of the House of Representatives shall constitute a committee for the consideration of any question which may arise as to the inability of the President to discharge the powers and duties of his office. Such committee shall be convened (1) whenever the Vice President, by letter transmitted to the President pro tempore of the Senate and to the Speaker of the House of Representatives, may suggest that doubt exists as to the ability of the President to discharge the powers and duties of his office, or (2) upon request made by any four of the members of such committee. Four members thereof shall constitute a quorum. Whenever such committee is convened under this section, the committee shall determine whether there is probable cause for belief that the President is unable to discharge the powers and duties of his office. If the committee determines, by affirmative vote of not less than four members, that such probable cause exists, the majority leader of the Senate shall introduce in the Senate, and the majority leader of the House shall introduce in the House, a concurrent resolution stating in substance that it has been determined by the Congress that the President is unable to discharge the powers and duties of his office. Upon the adoption by both Houses of the Congress, by the affirmative vote of

not less than two-thirds of the Members present and voting in each House, of any such concurrent resolution, the powers and duties of the office of President shall devolve upon the Vice President, who shall then discharge such powers and duties until the disability of the President is removed, or until a new President is elected and takes office, whichever occurs earlier.

"Sec. 2. Whenever the Vice President has assumed the powers and duties of the office of President under section 1, and the President thereafter, by letter transmitted to the President pro tempore of the Senate and to the Speaker of the House of Representatives, advises that in his opinion his inability to discharge the powers and duties of his office no longer exists, the committee established by section 1 shall be reconvened. Upon the basis of such letter, the majority leader of the Senate shall introduce in the Senate, and the majority leader of the House shall introduce in the House, a concurrent resolution stating in substance that it has been determined by the Congress that the inability of the President to discharge the powers and duties of his office no longer exists. Upon the adoption by both Houses of the Congress, by majority vote of all Members present and voting in each House, of any concurrent resolution introduced in compliance with this section, the President shall resume the discharge of the powers and duties of his office, and the Vice President shall resume the discharge of the powers and duties of the office of Vice President.

"Sec. 3. Any concurrent resolution introduced under section 1 or section 2 of this article in either House of the Congress shall be placed immediately upon the proper calendar of such House without reference to committee. In debate upon any such concurrent resolution in the Senate, no Senator may speak in all more than one hour, and no dilatory motion shall be in order. It shall be the duty of the Presiding Officer of the Senate to keep the time of each Senator who speaks in such debate, and points of order and appeals from the decisions of the Presiding Officer shall be decided without debate.

"Sec. 4. If the committee established by section 1 of this article determines, at any time at which the Congress is not in session, that there is probable cause for belief that the President is unable to discharge the powers and duties of his office, the Congress may be convened in special session, upon the call of the President pro tempore of the Senate and the Speaker of the House of Representatives acting jointly, for the consideration of any concurrent resolution introduced in compliance with the provisions of this article.

"Sec. 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."

[H. J. Res. 144, 85th Cong., 2d sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to make provision for the continuous discharge of the powers and duties of the office of the President of the United States.

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

"ARTICLE --

"**SECTION 1.** In the case of the removal of the President from office, or his death or resignation, the Vice President shall become President, and shall serve as such for the remainder of the term for which his predecessor was elected. In the case of the inability of the President to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President, and shall be discharged by him during the continuance of the inability of the President.

"**Sec. 2.** The Congress may provide by law for the case of the removal, death, resignation, or inability of both the President and the Vice President, declaring what officer shall then discharge the powers and duties of the office of the President, and such officer shall discharge such powers and duties until the disability is removed, or a new President is elected and has taken office.

"**Sec. 3.** The Congress shall provide by law for the determination of all questions of fact arising under section 1 and section 2 of this article. If the Congress

determines, by concurrent resolution adopted in each House with the concurrence of two-thirds of the Members thereof present and voting, that there is no person chosen in accordance with this Constitution to be President, or qualified in accordance with section 1 or section 2 of this article to discharge the powers and duties of the office of the President, who is able to discharge the powers and duties of such office, the Congress by concurrent resolution so adopted may designate, or provide for the designation of, a person who shall discharge such powers and duties until a person so chosen or qualified is available for the discharge of such powers and duties.

"Sect. 4. If, at any time at which the Congress is not in session, the President pro tempore of the Senate and the Speaker of the House of Representatives should determine that there is probable cause for belief that there is no person chosen in accordance with this Constitution to be President, or qualified in accordance with section 1 or section 2 of this article to discharge the powers and duties of the office of the President, who is able to discharge the powers and duties of such office, the Congress may be convened in special session, upon the call of the President pro tempore of the Senate and the Speaker of the House of Representatives acting jointly, for the consideration of any concurrent resolution which may be introduced pursuant to section 8 of this article.

"Sect. 5. The sixth paragraph of section 1 article II of this Constitution is repealed.

"Sect. 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."

[H. 8118, 88th Cong., 2d sess.]

A BILL To provide for the determination of the ability of the President to discharge the powers and duties of his office, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 1 of title 3 of the United States Code is amended by adding at the end thereof the following new section:

"§ 21. Determination of ability of the President to discharge the powers and duties of his office

"(a) The President pro tempore of the Senate, the Speaker of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate, the majority leader of the House of Representatives, and the minority leader of the House of Representatives shall constitute a committee for the consideration of any question which may arise as to the inability of the President to discharge the powers and duties of his office. Such committee shall be convened (1) whenever the Vice President, by letter transmitted to the President pro tempore of the Senate and to the Speaker of the House of Representatives, may suggest that doubt exists as to the ability of the President to discharge the powers and duties of his office, or (2) upon request made by any four of the members of such committee. Four members thereof shall constitute a quorum.

"(b) Whenever such committee is convened pursuant to subsection (a), the committee shall determine whether there is probable cause for belief that the President is unable to discharge the powers and duties of his office. If the committee determines, by affirmative vote of not less than four members, that such probable cause exists, the majority leader of the Senate shall introduce in the Senate, and the majority leader of the House shall introduce in the House, a concurrent resolution stating in substance that it has been determined by the Congress that the President is unable to discharge the powers and duties of his office.

"(c) Upon the adoption by both Houses of the Congress, by the affirmative vote of not less than two-thirds of the Members present and voting in each House, of any concurrent resolution introduced pursuant to subsection (b), the powers and duties of the office of President shall devolve upon the Vice President, who shall then discharge such powers and duties until the disability of the President is removed, or until a new President is elected and takes office, whichever occurs earlier.

"(d) Whenever the Vice President has assumed the powers and duties of the office of President, and the President thereafter, by letter transmitted to the President pro tempore of the Senate and to the Speaker of the House of Representatives, advises that in his opinion his inability to discharge the powers and

duties of his office no longer exists, the committee established by subsection (a) shall be reconvened. Upon the basis of such letter, the majority leader of the Senate shall introduce in the Senate, and the majority leader of the House shall introduce in the House, a concurrent resolution stating in substance that it has been determined by the Congress that the inability of the President to discharge the powers and duties of his office no longer exists.

"(e) Upon the adoption by both Houses of the Congress, by majority vote of all Members present and voting in each House, of any concurrent resolution introduced pursuant to subsection (d), the President shall resume the discharge of the powers and duties of his office, and the Vice President shall resume the discharge of the powers and duties of the office of Vice President."

(b) The sectional analysis of chapter 1 of title 3 of the United States Code is amended by adding at the end thereof the following new item:

"21. Determination of ability of the President to discharge the powers and duties of his office"

Sec. 2. (a) The following provisions of this section are enacted by the Congress:

(1) As an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of that House to which they specifically apply; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

(b) Rule XIV of the Standing Rules of the Senate is amended by adding at the end thereof the following new paragraph:

"7. Any concurrent resolution introduced pursuant to the provisions of section 21 of title 3 of the United States Code shall upon introduction be placed upon the Calendar without reference to committee. No such concurrent resolution shall be subject to amendment. In debate upon any such concurrent resolution—

"(a) no Senator shall be entitled to speak in all more than one hour, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks; and

"(b) no dilatory motion shall be in order, and points of order and appeals from the decision of the Presiding Officer shall be decided without debate."

(c) Rule XXII of the Rules of the House of Representatives is amended by adding at the end thereof the following new paragraph:

"8. Any concurrent resolution introduced pursuant to the provisions of section 21 of title 3 of the United States Code shall upon introduction be placed upon the House Calendar without reference to committee."

[S. J. Res. 100, 85th Cong., 1st sess.]

JOINT RESOLUTION Relating to the inability of the President 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. Whenever the two Houses of Congress shall adopt a resolution declaring that the Congress believes that the President is unable, by reason of physical or mental disability, to discharge the powers and duties of his office, such resolution shall be transmitted to the Supreme Court of the United States, and the Court shall decide whether or not such inability exists. If the Court decides, by a majority vote of the authorized membership, that such an inability exists, the powers and duties of President shall devolve upon the Vice President, or if there be no Vice President, upon the person next in line of succession to the office of President, as provided by law.

"The Vice President or other person upon whom the powers and duties of the President have developed pursuant to proceedings under this article of

PRESIDENTIAL INABILITY

amendment shall continue to exercise such powers and duties until the end of the presidential term then in effect, unless it has previously been determined that the inability of the President no longer exists, in which event the President shall resume the powers and duties of his office. Such a determination shall be made in the same manner as herein provided for determining the question of the President's inability to perform the powers and duties of his office. "For the purposes of this article of amendment, a quorum in each House of Congress shall consist of two-thirds of the total number of members thereof.

"Sec. 2. In the event the Congress is not in session, and in the opinion of the Vice President, or if there be no Vice President, the President pro tempore of the Senate, and the Speaker of the House of Representatives circumstances exist which create a doubt as to the ability of the President to discharge the powers and duties of his office, they may by joint action call the Congress into special session for the purpose of considering whether the President is unable to discharge the powers and duties of his office.

"In the event the Congress is not in session, and in the opinion of the President pro tempore of the Senate and the Speaker of the House of Representatives circumstances exist which indicate that the inability which occasioned action pursuant to section 1 no longer exists, they may by joint action call the Congress into special session for the purpose of considering whether or not such inability still exists.

"Sec. 3. The provisions of this article of amendment shall apply to any person upon whom the powers and duties of the office of President have devolved in the same manner such provisions apply to the President.

"Sec. 4. This article shall not apply to any person holding the office of President when this article was proposed by the Congress.

"Sec. 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."

(S. J. Res. 188, 85th Cong., 2d sess.)

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to make provision for the Congress to determine the inability of the President of the United States 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 a part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"**SECTION 1.** The Congress may provide by law for the procedure for (1) determining the inability of the President to discharge the powers and duties of his office, and (2) determining when the inability of the President to discharge the powers and duties of his office has ceased to exist. Upon a determination that the President is unable to discharge the powers and duties of his office, such powers and duties shall devolve upon the Vice President, and shall be discharged by him during the continuance of the disability of the President.

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

(S. J. Res. 184, 85th Cong., 2d sess.)

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to establish a committee to determine the inability of the President to discharge the powers and duties of his office

Resolved by the Senate and House of Representative 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 —

"Secto. 1. In the case of the removal of the President from office, or his death or resignation, the Vice President shall become President and shall serve until the end of the then current Presidential term. In the case of the inability of the President to discharge the powers and duties of his office, the powers and duties shall devolve upon the Vice President, and shall be discharged by him during the continuation of the inability of the President. During any such period the compensation of the Vice President shall be at the rate then provided by law in the case of the President.

"Sect. 2. The Congress may provide by law for the case of the removal, death, resignation, or inability of both the President and the Vice President, declaring what officer shall then discharge the powers and duties of the office of President, and such officer shall discharge such powers and duties until the disability is removed, or a President is elected.

"Sect. 3. For the purpose of determining the inability of the President to discharge the powers and duties of the office of President, there is hereby established a committee consisting of the Chief Justice of the United States, who shall serve as chairman of such committee and who shall have no vote in any of its proceedings, the leader in the Senate of the political party having the greatest number of Members of the Senate, the leader in the Senate of the political party having the second greatest number of Members of the Senate, the leader in the House of Representatives of the political party having the greatest number of Members of the House of Representatives, the leader in the House of Representatives of the political party having the second greatest number of Members of the House of Representatives, and the heads of the executive departments of the Government.

"Sect. 4. Whenever the Vice President proclaims that in his opinion circumstances exist which establish a reasonable doubt as to whether or not the President is able to discharge the powers and duties of his office, or whenever the Chief Justice of the United States receives communications in writing from any six members of the committee established by section 3 of this article stating that they have reasonable cause to believe that the President is unable to discharge the powers and duties of the office of President, the Chief Justice of the United States shall forthwith call together the members of the committee established by section 3 of this article in order that they may determine whether or not the President is unable to discharge the powers and duties of his office and to vote on the question 'Is the President unable to discharge the powers and duties of his office?' If a majority of the authorized membership of such committee decides that question in the affirmative, the President and the Vice President shall be notified by written communication and the Vice President shall discharge the powers and duties of the office of President.

"Sect. 5. The Vice President shall discharge the powers and duties of the office of President under this article until (1) the end of the then current presidential term, or (2) the inability of the President is determined in accordance with section 3 no longer to exist, whichever first occurs.

"Sect. 6. Whenever, during any period in which the Vice President is discharging the powers and duties of the office of President under this article, the Vice President proclaims that the inability of the President to discharge the powers and duties of his office no longer exist, or the Chief Justice of the United States receives communications in writing from any six members of the committee established by section 3 of this article stating that they have reasonable cause to believe that the inability of the President to discharge the powers and duties of his office no longer exists, the Chief Justice of the United States shall forthwith call together the members of the committee established by section 3 of this article in order that they may determine whether or not the inability of the President to discharge the powers and duties of his office continues to exist. Such committee shall vote on the question 'Does the inability of the President to discharge the powers and duties of his office continue to exist?'. If a majority of the authorized membership of such committee decides that question in the negative, the committee shall notify the President and Vice President by written communication and the President shall then resume the powers and duties of his office.

"Sect. 7. The sixth paragraph of section 1 of article II of this Constitution is repealed.

"Sect. 8. 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."

{S. 238, 85th Cong., 1st sess.]

A BILL, To amend title 3 of the United States Code to provide for the ascertainment of the physical inability of the President to perform the duties of his office and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (n) the analysis of chapter 1 of title 3 of the United States Code (entitled "The President") is amended by inserting at the end thereof the following new item:

"§ 21. Ascertainment of the physical inability of the President to discharge his duties."

(b) Such chapter is amended by inserting at the end thereof the following new section:

"§ 21. Ascertainment of the physical inability of the President to discharge his duties

"(a) In case of the physical inability of the President to discharge the powers and duties of the office of President, he shall so notify the Congress by written communication made to the Speaker of the House of Representatives and to the President pro tempore of the Senate. Upon the transmission of such communication, the powers and duties of such office shall devolve upon the Vice President, who shall discharge them until the President notifies the Congress, by written communication made to the Speaker of the House and to the President pro tempore of the Senate, of his ability to reassume the powers and duties of his office, or until a new President is inaugurated.

"(b) If, at the time of any notification to the Congress by the President of his physical inability to discharge the powers and duties of his office, there is no Vice President, such powers and duties shall devolve, for the duration of such physical inability, upon the appropriate officer in line of succession, as determined pursuant to section 10 of this chapter.

"(c) In case of the death, resignation, removal from office, or physical inability of the Vice President while discharging the powers and duties of the office of the President, such powers and duties shall devolve upon the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter, until the President, or the Vice President in the case of his temporary inability to discharge the powers and duties of such office, notifies the Congress by written communication to the Speaker of the House and the President pro tempore of the Senate of his ability to reassume the powers and duties of such office, or until a new President is inaugurated.

"(d) If the Vice President has sufficient cause to believe that the President is suffering from a physical inability to discharge the powers and duties of his office and by reason thereof is unable to so notify the Congress pursuant to subsection (a), the Vice President shall so notify the Chief Justice of the United States. Upon receipt of any such notice, the Chief Justice shall establish a panel of not less than three or more than five members appointed by him from qualified medical specialists in civil life. Each member of such panel shall examine the President and shall submit individually his report to the Chief Justice, specifying his findings as to the physical condition of the President and his conclusion on the question whether the President is suffering from any physical inability to discharge the powers and duties of his office. If all members of such panel concur in the conclusion that the President is suffering from such physical inability, the Chief Justice shall so notify Congress by written communication made to the Speaker of the House and to the President pro tempore of the Senate. Any such notification shall have the same effect as a notification transmitted by the President to the Congress under subsection (a).

"(e) If, at any time at which there is no Vice President, the appropriate officer in line of succession, as determined pursuant to section 19 of this chapter, has sufficient cause to believe that the President is suffering from a physical inability to discharge the powers and duties of his office and by reason thereof is unable to so notify the Congress pursuant to subsection (a), such officer shall so notify the Chief Justice of the United States. Any such notification shall have the same effect as a notification transmitted to the Chief Justice by the Vice President under subsection (d)."

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 10 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 on 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 LANGER. We will consider them all at one time, will we, Mr. Chairman?

Senator KEFAUVER. We will consider these all at one time, and anymore that may be introduced during the time we are having our hearings.

The very able counsel of one subcommittee is Mr. Wayne Smith, who is a specialist in constitutional problems.

I had a very short statement which I will direct to be printed in the record at this point.

Before we proceed to hear testimony this afternoon, I think it would be well for me, as chairman of the Subcommittee on Constitutional Amendments, to make a few remarks.

Any amendment to the Constitution is a matter of serious import. It is particularly so when, as here, we are dealing with the Office of the Presidency of the United States, which is probably the most important office in the free world. Serious though it may be, this is not the first instance in which the Congress and the people of the United States have had occasion to focus their attention on possible ambiguities in the clause of the Constitution relating to the succession to the Presidency during periods when the President is disabled.

During the Garfield and Wilson administrations, the Nation was confronted with vivid illustrations of the impasse which may result when a President of the United States is incapacitated. Despite their experience, the legislators of those eras did not succeed in fashioning a solution to the problem. Today, however, the President of the United States, having been himself subjected to illnesses of a serious nature during his term of office, has urged that the Congress submit a proposed constitutional amendment to State legislatures for ratification. We have, in addition, in answer to my inquiry, as chairman of this subcommittee, received suggestions from two former Presidents, Herbert Hoover and Harry S. Truman whose communications I will submit for inclusion in the record at the close of my remarks. With these expressions before us, we may now proceed in a nonpartisan manner to seek to overcome a formidable obstacle, namely, the decision as to what individual or group is best qualified to determine when the President is disabled and when he has recovered sufficiently to undertake the powers and duties of his office.

The subcommittee is scheduled to hold hearings today and later on this issue. It is likely when we have completed today's hearing that it will be necessary to hold additional hearings. We want the best advice which it is possible to obtain. We seek, and indeed we have already sought, to secure the thoughts of some of the most knowledgeable and able men in the United States. If this subcommittee, and ultimately the Congress, may come to an agreement concerning a desirable alternative to the existing constitutional provisions, we will have served to assure the undisturbed operation of our highest office not only for ourselves but for all the peoples of the world who look to this Nation for leadership in the preservation of democratic institutions.

(The statements referred to above are as follows:)

THE KEY LAKO ANGLERS CLUB,
Homestead, Fla., January 20, 1958.

Hon. ESTES KEFAUVER,

*Chairman, Standing Subcommittee on Constitutional Amendments,
United States Senate, Washington, D. C.*

MY DEAR SENATOR: I have received your kind note requesting my views on the proposed bills you send me.

I assume that the question is solely the method of determining the "inability" of the President "to discharge the powers and duties of his office," and contained in it also the method of determining the "removal of disability."

All questions of succession seem covered by article II, section 1, paragraph 6 of the Constitution, and therefore legislation on this subject seems to me unnecessary.

1. There seems to be some question as to whether remedy can be found by statutory law or must be through constitutional amendment. The Congress will need decide whether the above-mentioned section in the Constitution would be sufficient authority for a statutory solution.

2. It seems to me that the method of determining "inability" or "recovery" requires consideration of the spirit of the separation of powers in the Government and certain traditional practices which have become fixed in our national life during the past 100 years.

3. The President and the Vice President are elected as the chosen leaders of a political party with declared mandates, principles, solutions of issues, and promises to the people.

4. The Congress, in one or both Houses, is often controlled by an opposition political party, and thus by those who are, in practice, mostly opposed to the mandates or promises upon which the President and Vice President are elected by the people.

5. All of which leads me to the generalization that a President's inability to serve or his possible restoration to office should be determined by the leading officials in the executive branch, as they are of the party having the responsibilities determined by the election.

6. I believe that a simple amendment to the Constitution (or possibly statutory law) could provide for a commission made up from the executive branch to make the determinations required. I do not suggest that the individual persons be named but that the departments or agencies be enumerated, whose chief official or head should be a member of such a commission. The number could well be limited to not less than 7 and not more than 15 such heads of departments or agencies. There could be a further provision that they should seek the advice of a panel of experienced physicians or surgeons.

I cannot conceive of any circumstance when such a defined body of leaders from the executive branch would act in these circumstances otherwise than in the national interest.

Yours faithfully,

(Signed) HERBERT HOOVER.

INDEPENDENCE, Mo., January 16, 1938.

HON. ERNST KEPPEL,
United States Senate,
Washington, D. C.

DEAR ESTES: In reply to your letter of the 10th, I am sending you a copy of an article of mine, written for the North American Newspaper Alliance, which covers the subject of a President's inability to carry on his duties.

These are my views, and if you want to make use of the article, you are at liberty to do so.

Sincerely yours,

(Signed) HARRY TRUMAN.

(Copyright by Harry S. Truman, 1937)

There has been an understandable reluctance to deal with the delicate and sensitive problem of what we are to do when any President becomes incapacitated and is unable to perform his duties.

Our Founding Fathers did not provide for such an eventuality. During the 188 years of our history under the Constitution, there have been only two occasions when the question arose of a President's ability to serve. I refer to James A. Garfield and Woodrow Wilson. We have been fortunate, indeed, that we have not had to face such a crisis more often.

But the job of the President is getting to be an almost unendurable mental and physical burden, and we ought not to go on trusting to luck to see us through.

We may find that we have waited too long to provide a way of meeting the situation in the event a President becomes incapacitated. There have been suggestions to deal with the matter through legislation. Others have proposed amending the Constitution.

However we deal with it eventually, this is too vital a matter to be acted on hastily without the widest discussion and study. I have felt that there is always great danger in writing too much into the Constitution. We must have certain

flexibility to meet changing conditions. We have already experienced the consequences of hastily amending the Constitution without adequate public discussion, as in the cases of the 18th and the 22d amendments.

In response to the many letters I have received on the subject from all parts of the country, and the world, I am taking the liberty of suggesting a way to meet this problem.

I would like to make it perfectly clear that it is not my intention to cast reflections on anyone, or to raise any doubts about the health or condition of the President. Along with all of our citizens, I wish him good health and a long life.

But there is a growing concern about our needs to provide against the danger of a lapse in the functioning of the Presidency and the crises that might ensue.

The power of the President of the United States and his influence on the world today have grown so great this his well-being is of paramount interest to people everywhere. It is no longer a matter to be decided by political leaders and constitutional authority.

Even a minor indisposition of the President will set into motion unexpected and often unreasoning fears, such as we have recently witnessed.

The framers of our Constitution drafted a brilliant and inspired document in which they anticipated and provided for nearly all of the basic developments of our democracy. But who could fully foresee the role of the American Presidency in the kind of a world in which we now live—a role which also requires the President to be available in person at any hour to make decisions which he alone can make and which cannot be put off?

As Vice President, I found myself acutely conscious of this problem in a personal way when I met President Roosevelt upon his return from Yalta. Up to that time I regarded the circumstances of an incapacitated President as an academic problem in history, such as was posed by Presidents Garfield and Wilson.

After the first shock of seeing President Roosevelt, I tried to dismiss from my mind the ominous thoughts of a possible breakdown, counting on his ability to bounce back from the strains and stress of office. After Yalta, President Roosevelt continued to carry on with sustained energy and alertness—until suddenly called by death.

From the day I succeeded to the Presidency, I have been thinking about the needs of an act of legislation to provide machinery to meet the emergency of a President's disability.

Shortly after taking office, I considered setting up a commission to study the problem and make recommendations. But in the midst of war and during the period of postwar reconstruction we were preoccupied with more immediate and urgent matters.

I therefore chose instead to recommend to the Congress a change by statute of succession to the Presidency from the Cabinet to the Congress in the event the Nation was without a Vice President. Up to that time the Secretary of State was next in order of succession. I did not think that a Cabinet officer—who is not elected by the people—should succeed to the Presidency, which is an elective office. The Speaker of the House, who is, in fact, the top-ranking elected public official after the President and the Vice President, is now under the new law next in succession.

This, however, does not meet the problem when a President is unable to perform the duties of his office.

I suggest, therefore, that the following proposal may provide us with a workable solution:

1. When a President is stricken with an illness, raising the question of his ability to carry out the duties of his office, there should come into being a Committee of Seven composed of representatives of the three branches of the Government. This Committee should consist of the Vice President, the Chief Justice of the United States, the Speaker of the House, and the majority and minority leaders of both the House of Representatives and the Senate. This Committee would select a board of leading medical authorities drawn from top medical schools of the Nation. This medical board, thus chosen, would then make the necessary examinations presenting their findings to the Committee of Seven. Should the findings of the medical board indicate that the President is unable to perform his duties, and that he is, in fact, truly incapacitated and not merely stricken with a transitory illness, then the Committee of Seven would so inform the Congress. Congress then would have the right to act, and by a two-thirds vote of the full membership declare the Vice President as President.

The Vice President, designated as President, would thereupon serve out the full term of his predecessor. Should the stricken President, thus relieved, experience during this term a complete recovery, he would not be entitled to repossess the office.

Should the Congress be in adjournment or recess when a President is incapacitated, the Vice President, the Speaker, and Chief Justice should call a meeting of the Committee of Seven. This Committee, after receiving the medical findings, would have authority to call Congress into special session for the purpose of declaring the Vice President as President.

2. When a Vice President succeeds to the Presidency and leaves the office of the Vice President vacant, the last electoral college should be called into session by the new President for the purpose of selecting and declaring a new Vice President. I would recommend that in every instance where a Vice President succeeds to an unexpired term of a President the electoral college be convened to choose a new Vice President.

By this procedure I think we would be able to ensure the proper continuance of the functioning of the Presidency and, at the same time, protect the Nation's paramount interests through the full exercise of the checks and balances of our free democratic institutions.

I suggest procedure along these broad general lines could be enacted into law by statute. If necessary, these provisions could be framed into a constitutional amendment.

Senator KEFAUVER. Senator Langer, do you wish to make any comment on the subject at the present time?

Senator LANGER. I do not, except to say I think we ought to go into the matter very completely and clearly. It is a matter of great importance and I think we ought to take all the time necessary to do a good job.

Senator KEFAUVER. I know the Senator's feelings about it, and I know his contribution to the thinking on this subject will be most valuable.

Senator Dirksen, do you wish to make any comments or observations?

Senator DIRKSEN. Mr. Chairman, I think my comments would be rather in the nature of questions, and my first question is this: Is it your judgment that if this matter were to be handled by statute rather than constitutional amendment, this particular subcommittee should proceed with the statutory application or statutory remedy for this condition, on the theory that we might very likely decide that we could handle it by statute rather than by amendment? That is a jurisdictional question.

Senator KEFAUVER. Yes.

Senator DIRKSEN. And I do not know whether or not this subcommittee would have authority to go ahead with it.

Senator KEFAUVER. Of course, on the question of whether the problem can be handled by legislation or whether it will require a constitutional amendment, that is one of the subjects that we will have to have hearings on and thrash out. It is a serious subject.

I have spoken to Senator Eastland with reference to this very problem, and I feel that he wants this subcommittee to have hearings and make recommendations or reports either in the field of a joint resolution for a constitutional amendment or legislation, in other words, to handle the whole subject.

Senator DIRKSEN. Now my second question is this: In view of the statement made by the Chief Justices of the Supreme Court that it was their desire, after conferring on the matter, that the Court not be considered in this as an agency or as individuals that should share

in this responsibility, do we proceed from the outset on the theory that we eliminate the Court at once in any consideration of the bills that are before us, because I thought the Court was pretty explicit that they wanted to preserve that separation of powers and therefore felt among themselves that they should not be included?

SENATOR KEFLAUVER. I think it would be well at this point to place in the record the letter from the Chief Justice of the United States of January 20, 1958, to Congressman Kenneth B. Keating. Also following that, a statement by Representative Keating as to his attitude, and I think this is important because he has been one of the leading members of the House Judiciary Committee which has been very interested in this proposal. As Senator Dirksen says, the Chief Justice apparently feels that the Court should not be brought into this matter at all. I would say that if we, as a committee, felt, and if the Congress agreed with us, that the Court should be given some responsibility, then I think we should act accordingly, but I am certain this committee and the Senate also will take into consideration, in making that determination, the feeling of the Chief Justice and of the members of the Court that they should not actively participate. But I am certain, of course, that if in the logic of our legislative body or in a constitutional amendment they were given some responsibility, they would fulfill it. That is my idea.

(The letter and statement referred to above are as follows:)

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., January 20, 1958.

HON. KENNETH B. KEATING,
Member of Congress,
Washington, D. C.

MY DEAR MR. CONGRESSMAN: During the time the subject of inability of a President to discharge the duties of his office has been under discussion, the members of the Court have discussed generally, but without reference to any particular bill, the proposal that a member or members of the Court be included in the membership of a Commission to determine the fact of Presidential inability to act.

It has been the belief of all of us 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 lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.

I realize that Congress is confronted with a very difficult problem, and if it were only a matter of personal willingness to serve that anyone in the Government, if requested to do so, should make himself available for service. However, I do believe that the reasons above mentioned for nonparticipation of the Court are insurmountable.

With best wishes, I am,
Sincerely,

EARL WARREN,
Chief Justice.

STATEMENT OF REPRESENTATIVE KENNETH B. KEATING
(REPUBLICAN, NEW YORK)

CHIEF JUSTICE WARREN OPPOSES MEMBERS OF COURT ON PRESIDENTIAL INABILITY COMMISSION IN LETTER TO REPRESENTATIVE KEATING

Representative Kenneth B. Keating (Republican, New York), senior Republican member of the House Judiciary Committee and of its Special Subcommittee on Presidential Inability, today released the text of a letter from Chief Justice Earl Warren commenting on the inclusion of Supreme Court Justices on a proposed Presidential Inability Commission. In his letter, the Chief Justice said

that all members of the Court believe, for a number of "insurmountable" reasons, that it would be "inadvisable" for any member of the High Court to serve on such a group.

Said Mr. Keating: "In the light of the Chief Justice's letter, it is apparent we should not press for inclusion of members of the Supreme Court on such a Commission, as I have proposed. I regret this, but certainly respect the wisdom and reasoning of the Chief Justice's views."

"All hands now agree that the Commission plan is best. Up to now that has been the main hurdle. All other proposals have been abandoned or are not being pressed. The only problem left to be surmounted is the specific makeup of such a group. I believe we will be able to iron out this detail and have a proposal ready for consideration soon by the House."

Senator KEFAUVER. I might ask the Senator from Illinois what he thinks about it.

Senator DIRKSEN. I always respect the opinions and judgments, certainly the personal opinions of members of the Court, with reference to a matter of this kind, since it does involve bringing a coordinate branch of government into the picture, exercising some responsibility. I believe I can understand rather fully how the members of the Supreme Court come to the conclusion which they reached.

It does not mean, of course, that Congress cannot legislate and bring the Court into the picture if it so desires, but a number of these bills do, of course, embrace the Supreme Court and give it some responsibility. It would minimize the number of bills and also the ground to be covered, if the subcommittee agreed at the outset that they would respect the Court's wishes and decide that they would follow along in another direction.

Senator KEFAUVER. Do you wish to express an opinion about the matter at this time, Senator Langer?

Senator LANGER. I have a very firm opinion. I think the Court should be included, especially the Chief Justice. He is a man who gets a lifetime appointment. He could not possibly have any personal interest in the selection of the President. I think he ought to be in it.

Senator KEFAUVER. Then your feeling is that while we think deeply and give very serious consideration to the attitude of the Chief Justice and of the other members of the Court, that we should go on with our hearings, and taking that into consideration, still legislate according to how we feel about the matter.

Senator LANGER. Let the Chief Justice testify if he feels strongly about it.

Senator KEFAUVER. I think it might be well to read his letter to Mr. Keating.

(The letter referred to above was read at this point.)

Senator DIRKSEN. Actually, Mr. Chairman, if the country were confronted with the real question of disability, the ultimate determination would essentially be a political one. I do not believe that you could disassociate it from its political character as such, and I think the Court must certainly have had that in mind when it undertook to render this informal opinion to Congressman Keating.

Senator KEFAUVER. Yes.

Senator DIRKSEN. Now, I have another question, Mr. Chairman, and that is this: I am sure you are quite familiar with the rumors and the speculations in the press over a considerable period of time that there was no disposition on the part of this session of Con-

gress to actually do anything about this disability problem. Certainly no member of the leadership on either side of the aisle, and insofar as I know, no Member of the Senate has ever made a statement of that kind, but I am sure you are familiar with the fact that these speculations have been very ripe. The reason I bring it up is this. As one who sits in on the Tuesday morning conferences, I know of the active and lively interest that the President has in it. He is completely uninhibited in discussing it, and discussing himself in relation to this question of disability, and he is anxious that something be done about it. Now we could go through all the motions and hear a lot of witnesses and then let our efforts die on the vine. Obviously, we cannot control the action of the entire Senate or the House, but I limit my inquiry only to the subcommittee, whether or not it is our intention to earnestly and diligently go through with this matter, try to find an acceptable proposal and submit it to the full committee with a recommendation that it go on the Senate calendar for action.

Senator KEFAUVER. I can assure the Senator from Illinois that insofar as I am concerned, and having talked with other members of the subcommittee, I feel that the same is true with the other members, that we want to go into this matter thoroughly and conscientiously, try to report a resolution or bill or both to meet the problem and deal with it in this session of Congress. I have heard the rumors that no action was going to be taken in this session of Congress. I think they emanated largely from the House of Representatives, but I do understand from Congressman Celler and also from Congressman Keating that they expect action in the House of Representatives, too. It should be pointed out that the work of this committee will be considerably expedited if the very voluminous hearings, and letters and opinions contained in those hearings, in the House of Representatives were considered by this committee, and we will get copies and see that they are made available. They have had lengthy hearings, as we all know, on the subject.

Senator DIRKSEN. Mr. Chairman, I have nothing more except to say I know of your lively interest in this matter. I think I can bespeak my own. I know that Senator Langer has a sustained interest, and I know from the observations that our distinguished friend from Wyoming has made on the floor and elsewhere from time to time that he has not only an acute, but a very sustained interest in the matter, so that that would add up to the determination of this subcommittee that we try to find the proper proposal and move it on to the full committee in the hope that we can also move it to the Senate floor for action during the present session.

Senator O'MAHONEY. That is the general sentiment that I find in dealing with the matter.

Senator KEFAUVER. Before we start with Senator O'Mahoney and Dr. William Y. Elliott—Dr. Elliott is the head of the Department of History at Harvard University.

Senator LANGER. Mr. Chairman, before we start, my ideas on this matter are that I believe we should leave this entire matter of succession to the Supreme Court. You take, for example, a short time ago in the State of Rhode Island the question of who was to be Governor was left to the Supreme Court of Rhode Island, and to the supreme court alone. Hers are nine men appointed for life. I think they would be entirely disinterested. In my opinion at least it would

be the most advisable way to handle the entire situation, and I just throw it before the committee for what it may be worth.

Senator Kefauver. Yes, sir. We are glad at this time to get your opinion about it, Senator Langer. Since we have many bills here and many opinions, I know we will listen to all of them with open minds and try to arrive at the one that we feel will meet the situation best, taking into consideration also the fact that the Chief Justice and the Justices feel they should not participate. But that should not be conclusive in my opinion.

Now before we start with our first witness, I have already put in the record a letter from former President Truman to me dated January 16, in which he attaches a copy of a brief article that he has written on the subject which has been printed, which sets forth his views. Also a letter of January 20, from the former President of the United States, Herbert Hoover, in which he sets forth his views on how this matter should be handled. Would you like to have them read?

Senator Langer. Could we have Hoover's letter read?

Senator Kefauver. Mr. Smith, will you read his letter?

Senator Langer. I am familiar with former President Truman's letter. I am not familiar with President Hoover's letter.

Mr. Smith. The letter is addressed to the chairman, Senator Kefauver.

MY DEAR SENATOR: I have received your kind note requesting my views on the proposed bills you sent me.

I assume that the question is solely the method of determining the "Inability" of the President "to discharge the powers and duties of his office," and contained in it also the method of determining the "removal of disability."

All questions of succession seem covered by article II, section 1, paragraph 5 of the Constitution, and therefore legislation on this subject seems to me unnecessary.

1. There seems to be some question as to whether remedy can be found by statutory law or must be through constitutional amendment. The Congress will need to decide whether the above-mentioned section in the Constitution would be sufficient authority for a statutory solution.

2. It seems to me that the method of determining "inability" or "recovery" requires consideration of the spirit of the separation of powers in the Government and certain traditional practices which have become fixed in our national life during the past 150 years.

3. The President and Vice President are elected as the chosen leaders of a political party with declared mandates, principles, solutions of issues, and promises to the people.

4. The Congress, in one or both Houses, is often controlled by an opposition political party, and thus by those who are, in practice, mostly opposed to the mandates or promises upon which the President and Vice President are elected by the people.

5. All of which leads me to the generalization that a President's inability to serve or his possible restoration to office should be determined by the leading officials in the executive branch, as they are of the party having the responsibilities determined by the election.

6. I believe that a simple amendment to the Constitution (or possibly statutory law) could provide for a commission made up from the executive branch to make the determinations required. I do not suggest that the individual persons be named but that the departments or agencies be enumerated, whose chief official or head should be a member of such a commission. The number could well be limited to not less than 7 and not more than 15 such heads of departments or agencies. There could be a further provision that they should seek the advice of a panel of experienced physicians or surgeons.

I cannot conceive of any circumstance when such a defined body of leaders from the executive branch would act in these circumstances otherwise than in the national interest.

Your faithfully,

(Signed) HERBERT HOOVER

Senator KEFAUVER. We had asked the Attorney General of the United States to be the first witness, but because of other committee hearings and the fact that he was up here yesterday for confirmation, he has asked to have his appearance put off until next week. We are very fortunate today to have two distinguished witnesses. First, one of the great constitutional lawyers of the Congress and of the country, for whom we all have the highest respect, Senator Joseph O'Mahoney, and, second, Dr. William Y. Elliott, whom I will introduce and give more background on later on.

Senator O'Mahoney, you are the first witness.

Senator O'MAHONEY. Mr. Chairman, when you started that introduction I started to lean back comfortably to listen to Professor Elliott. I did not recognize myself.

Mr. ELLIOTT. Sir, I am not entitled to senatorial courtesy, but I am much gratified that you are the leadoff man.

Senator O'MAHONEY. This was not senatorial courtesy at all, sir.

Senator KEFAUVER. I am certain that all the members of the committee will value very highly your deep thinking about this problem.

STATEMENT OF HON. JOSEPH C. O'MAHONEY, UNITED STATES SENATOR FROM THE STATE OF WYOMING

Senator O'MAHONEY. Mr. Chairman, first let me say I presented my amendment yesterday and discussed it on the floor of the Senate. I ask that the remarks which were made yesterday, and which appear in the Congressional Record as available this morning, be made a part of this record. I do not propose to read them into the record of this subcommittee.

Senator KEFAUVER. Without objection, they will be printed following your testimony here.

Senator O'MAHONEY. I will try to summarize briefly the considerations which have moved me in this matter. First, I am prompted to refer to the statement of former President Hoover. Of course, one must give a great deal of weight and consideration to the expressions of those who have held these positions. Mr. Hoover was President. He was not Vice President. Mr. Truman was both Vice President and President. I have given this consideration for a long time, and I find myself in disagreement with the principal thought expressed by Mr. Hoover, that the choice should be made by a political party. I think it is in error to say that the President and Vice President are actually the choices of a political party. We have of course developed the bipartisan system in the United States, but when the Constitution was drafted, the thought was that both the President and the Vice President should be selected by presidential electors in the several States, voting separately in the several States, so that the choice would fall not upon anybody nominated by a party but upon the man whom the electors felt was best qualified to lead the Nation. As you all know, of course, as the Constitution was first written the man who had the second largest vote in the electoral college became the Vice President, though he was originally a candidate for President. If there were not a majority, then the election was thrown into the House of Representatives.

The first order of succession has been removed by amendments. Now the nominees for President and Vice President run separately,

and both are, of course, chosen by the electoral college, but it still remains the constitutional law that if there is a lack of a majority in the electoral college, the choice falls into the House of Representatives, so that the Constitution as it now reads recognizes the right of the elected representatives of the people in their States and in their districts to make this very responsible choice for the executive leader of the country, the Chief Executive Officer. I see no reason to deviate from that principle. I have read the amendment by Congressman Keating, which I think carries out the thought of former President Hoover. It would have the members of the Cabinet make the selection.

Now, the members of the Cabinet, having been appointed by the President, are under obligation to the President and cannot be expected to exercise a free thought in a matter of succession. If the President should decide that despite his disability he did not want to retire, the members of the Cabinet would not be likely to go against his thinking. I was here in Washington as a secretary of a Senator when Woodrow Wilson became ill.

I remember distinctly how his illness came about. It was in the State of Colorado. He went to Pueblo. There the people had gathered in great numbers to greet him, but he had planned to make only a very brief statement because he was suffering very severe nervous strain as a result of his labors in Paris and of the great pressures that were upon him, and he entered the meeting. The ovation which he received was so great that he decided to abandon the plan to make only a brief statement. He delivered the very best effort that he could. It was a strikingly important and eloquent message, but he suffered a stroke thereafter, and for months he was unable to hold any meeting with his Cabinet members.

The Vice President then was Thomas R. Marshall; and, like Chester Alan Arthur, who was Vice President under Garfield, Marshall made no attempt to take over the duties because of the disability of the President. He was very modest about it, just like Chester Alan Arthur under Garfield. But Wilson was filled with the determination to bring about the League of Nations. That is why he was engaged on that trip. I remember the words of his speech in Pueblo that night when he spoke of the fact that he, as President of the United States, had sent the fighting men of America into the war, and many of them had died. He said:

Yet the mothers of many of these American soldiers who perished in that war, because I asked the Congress to declare war, have rallied to my support now. It is because of the great desire of the people and of my desire to bring peace to the whole world.

Now that determination was so strong that he would not himself give any concept to anybody succeeding him. The precedent had been set that the Vice President would succeed as President, though there is nothing about that in the Constitution. And so Wilson, believing that he could recover, and not wanting to step aside lest he would not be able to carry on this great objective, would not tolerate that thought. And this was evidenced by the fact that when the Secretary of State, Mr. Lansing, called the Cabinet without consulting Wilson, he was requested to resign. That is, I think, evidence of the pressures of which I speak that would be bearing down upon members of the

Cabinet. They are the personal choices of the presiding officer, the Chief Executive, the President. They would not be free, in my opinion, to render a decision that might be essential in the public interest. It might easily be absolutely necessary to the life of the Nation that the Office of President be filled by an Acting President so that we could be protected in some great international crisis. It should not, in my opinion, be left to the decision of the members of the Cabinet.

Now the suggestion has been made by another amendment that has been presented here that the choice be made by the United States Supreme Court. As I recall, in one of the very earliest Congresses of the country, a bill was passed, a pension bill, to pension veterans of the Revolutionary War. It provided that the members of the Supreme Court should decide the facts as to whether or not the pensioner was entitled. The Supreme Court said they would not obey the law because theirs was the judicial function of the Government to pass upon cases, and it must be remembered that the Constitution says that the function of the courts is to deal with cases. That means litigated cases. It does not mean that Congress can push off on the Supreme Court the determination of some legislative duty.

Now, the issue here, I agree with Mr. Hoover, is solely one of the disability of the President. Yet the article of the Constitution, article I or article III—

Senator KEFAUVER. Article II, section 1, clause 6.

Senator O'MAHONEY. Clause 6, that is right. This clause provides in very simple language that when any of these four occasions develop, the resignation, the death, the removal, or the disability of the President, and the President is unable to discharge the powers and duties of the office, "the same shall devolve upon the Vice President."

Senator KEFAUVER. I think it would be a very good idea to print following the printing of the bills, and I will so order in the record, article II, section 1, clause 6 of the Constitution to which Senator O'Mahoney has referred, and also the present succession bill passed in 1948. I think they should be printed there for reference.

(NOTE.—The material referred to is printed on pp. 8, 9 of the hearing.)

Senator KEFAUVER. Will you proceed, Senator O'Mahoney?

Senator O'MAHONEY. The clause reads like this:

ARTICLE II, SECTION 1, CLAUSE 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, and even such officer shall act accordingly until the disability be removed or a President shall be elected.

Now it is clear that the authors of that clause were thinking solely of an Acting President. There is no provision in the Constitution anywhere for the Vice President to take a second oath of office. He takes his oath of office when he is inaugurated as Vice President, and when he does so, then he is qualified as Vice President. Then one of the duties he is to perform is to assume the duties and powers of the office of the Presidency.

Senator KEFAUVER. And yet, Senator O'Mahoney, have not all of our Vice Presidents taken the oath of office of President—

Senator O'MAHONEY. I was going to come to that in a moment. I wanted to show first that this clause which we now read was the work of the Committee on Style of the Constitutional Convention. When the Convention was finished with its work and satisfied that it was about to adopt a Constitution, there was appointed this Committee on Style, the purpose of which was to dress it up in the best language possible, but they had no authority whatsoever to change any of the provisions of the Constitution. Their duty only was to make it a better literary document. So we must refer to the provisions of the Constitution as it went to the Committee on Style. This was proposed by the delegate Pinckney.

It reads as follows, speaking of the President:

In case of removal as aforesaid, death, absence, resignation, or inability to discharge the powers and 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 * * *

The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or inability of the President and Vice President, and such officer shall act accordingly until such disability be removed or a President shall be elected.

So it was clear that as the provision went to the Committee on Style, it was designed to make an Acting President in the case of disability of the President, and an Acting President in the case of the disability of both the President and the Vice President.

Now did the Committee on Style order that? My interpretation is "No." The reason that I say "No" is not only because the Pinckney resolution is couched in the language in which it appears, but because at that time in the Colonies the lieutenant governor or the official next in line did not become governor. He became acting governor. And it is still the case in the States so far as I know. Certainly it is the case in Wyoming and in other States with which I have been familiar.

But the strange precedent came about by reason of one of the odd historical facts that occur from time to time. In the year 1840 Van Buren had been the successor of Andrew Jackson. The Whig Party resisted the election of Van Buren, and they sought to obtain a candidate whom they could nominate to capture the imagination of the people. They selected William Henry Harrison. He won a great victory over the Indians in the Battle of Tippecanoe. He was county clerk in a county in Indiana at the time of the nomination, but he did win; he had won the victory. They did not draw up any political platform. They made no pledges. They pointed out no policy. The Whigs were running on the accumulated dissidence and disapproval, let me say, or disaffection that had arisen with respect to some of Andrew Jackson's policies and personality and some of the activities of Van Buren.

So in order to gather in all of these dissident factors, the Whig Convention went to John Tyler, a Democrat of the State of Virginia, who did not agree with everything that Andrew Jackson stood for or everything that Van Buren stood for. He ran on the ticket and they were both elected.

You all know that Harrison died within a month, precisely a month I think after he was inaugurated. History records that a message was sent to John Tyler by the Cabinet. Now I am talking about the Cabinet again, and this was a Cabinet headed by Daniel Webster.

The message, loosely translated, was that "owing to the unfortunate death of our beloved President, William Henry Harrison, you Mr. John Tyler are now the Acting President of the United States."

That was Daniel Webster's interpretation of the meaning of this Constitution. But Tyler was a Democrat and did not agree with all of the things for which the Whig Cabinet stood. He did not propose to enter the office and discharge the duties and functions thereof under any conditions that would lead the Cabinet to think that its members could tell him what to do, so he rode post haste to Washington.

He went to Justice Cranch and he was sworn in as President. He thereby took a second oath, although the oath he had taken as Vice President was actually all that was needed. Now that is the reason why Vice Presidents ever since that time have taken the oath of office. But it is also true that Vice Presidents ever since that time, whenever the President was actually disabled, as in the case of Garfield and in the case of Wilson, have not sought to take over and discharge the duties of the office, because they were unwilling to invite the hostility of the President's friends in executive office and perhaps thereby precipitate an emotional dispute.

I think it is clear to all of us who have been living through these last 30 years that the burdens of the Presidency have been tremendously increased, tremendously increased. It is impossible for the President to discharge himself all of the tasks that have to be discharged, but nevertheless it is important that if the President is disabled, the people shall be protected--I mean actually disabled--the people shall be protected in their right to have an Acting President who has been elected by the people and who is above, in his authority, any of the officials in the Government, because he takes over those powers and duties. If that were not so, there would be no protection against the very condition that Tyler feared, a sort of regency by the Cabinet. Now that, Mr. Chairman, is one of the reasons why I am very firmly of the opinion that the right to determine when the disability exists does not belong in the Cabinet and does not belong in any commission that may be created. Let us not forget that the President of the United States and the Vice President are the only officials of the Government who are chosen by votes of all of the people of the States.

The Congress is only just a lesser degree below that in contact with the people. We are not chosen by all the people of the United States, but Senators in their own States are the choice of the people of their respective States, and those Congressmen, those representatives who are selected for the whole State, are likewise the choice of all the people of the State. The others are the choice of the people of the districts which they represent.

We all believe that this was intended to be a Government of the people, by the people, and for the people, and the less intervention we have between the people and the officers and their performance of duty, the better the Government is likely to be. It will not be saved from all error but it will be more likely to be a government of the people. Because the people wanted to choose the President and Vice President they made the electoral college a dead letter in the Constitution, and many States now require that the names of the candidates for President and the Vice President shall appear on the ballot, and that the electors shall have no discretion but must vote for the candidates who receive the greatest vote. In the same way when the Constitution was written,

the Senators were designed to be the representatives of the States, and they were to be chosen not by the people of the States, but by the legislatures of the States. But the people, wanting to have closer touch with the Senate, adopted the constitutional amendment for popular election of Senators.

So here we have now the choice as I see it between these various proposals. (1) That the Cabinet shall choose; (2) that a special commission shall be appointed to choose; (3) that a constitutional amendment will be adopted to allow the Congress by law to define the succession.

Now what would be more simple, what would be more direct than to have the Congress itself determine the disability when the President himself does acknowledge it and by this failure leaves the Government in the hands of appointed office holders.

This is taken care of in the amendment that I proposed yesterday, because it is provided that when the President himself proclaims his disability, the Vice President steps in as acting President, and then when the Vice President finds that the President has recovered, the President takes his office back again. But if the condition arises where there is a disability and the President does not recognize it, and the Vice President hesitates to raise the issue but the fact of disability is recognized, then the Congress by resolution can declare that there is a disability and then the Vice President takes over by operation of law.

When I first drafted this, I provided that the Speaker of the House should have the authority to call the Congress to vote upon the question after having summoned before it certain officers of Government to testify under oath as to the manner in which the functions of the Presidency were being discharged. But after that had been written, it became apparent that the Speaker was himself in line of succession and that that would probably be an improper way of acting. So I eliminated the Speaker altogether, and the amendment as it is before this body now makes the matter operative through resolution by the Congress, and I mean the concurrent resolution, not the joint resolution that has to be signed by the President, operative there both in the case of the President and of the Vice President.

If the Vice President should not recognize the ability of the President to reassume the duties, Congress could step in again.

The statement has been made that Congress is usually a bipartisan body. Mr. Hoover says something about that:

The Congress in one or both Houses is often controlled by an opposition political party and by those who are in practice mostly opposed to the mandates or promises upon which the President and Vice President are elected by the people, all of which leads me to the generalization that the President's inability to serve or his possible reversion to office should be determined by the leading officials of the executive branch.

Well, Mr. Chairman, that seems to me not to recognize the fact that political platforms sometimes are written only for the campaign, and the policies of a party proclaimed when it is running for election are often very different from the policies of the party when it is in office and is carrying on the functions of government. I have seen "outs" who were elected and became "ins" and having become an "in," I have seen them discover that the things they thought they could do with the Government could not be done, and I have seen them abandon the declared policies of far-reaching change. And in our time I think it

can be said without fear of successful contradiction that there is a great deal of bipartisanship in the Congress of the United States now. I think President Eisenhower has enjoyed a great deal of bipartisanship support, with support from his opposition party and opposition from his supporting party. The record is clear in that respect.

I think President Eisenhower was perfectly frank and very candid in his desire to have a solution made of this problem, and I think he expects this Congress to pass an amendment and submit it to the people.

Congress might easily offer two amendments and let the people choose. We have only one authority, and that is the authority to pass the resolution of amendment by the requisite number of votes through both Houses of Congress, and it must be the people of the States who will decide.

And so, Mr. Chairman, I think that I have presented in brief--it is more lengthy than I expected to be--a summary of the amendment I propose.

Let me read, however, at this point, the full text of the amendment that I have introduced.

Senator KEFAUVER. You mean of Senate joint resolution 141?

Senator O'MAHONEY. Yes.

Senator KEFAUVER. We have ordered it printed in the record.

Senator O'MAHONEY. Very well, that will be sufficient, except for this point. I would like to submit to questioning if there is any with respect to the direct provisions.

Section 1. Whenever the President proclaims that he is unable to discharge the powers and duties of his office, or whenever the Senate and the House of Representatives pass a resolution declaring that the President is unable to discharge the powers and duties of his office, the Vice President, or if there be no Vice President, the officer next in line of succession to the office of President as provided by law, shall be Acting President.

Sec. 2. An Acting President shall exercise the powers and duties of the office of President under this article until (1) the end of the then current presidential term, (2) such Acting President finds and proclaims that the inability of the President no longer exists, (3) the inability of the President is determined, in accordance with Section 3 of this article, no longer to exist, whichever first occurs.

Sec. 3. Whenever, during any period in which an Acting President is discharging the powers and duties of the office of President under this article, the Senate and the House of Representatives pass a resolution declaring that the inability of the President to discharge the powers and duties of his office no longer exists, the Acting President shall cease to exercise the powers and duties of the office of President and the President shall exercise such powers and duties.

There is a provision which makes it clear that Congress, when the President has recovered, can prevent an ambitious Vice President from holding on when he should yield to the President, having recovered.

Section 4 is the ordinary section about the submission of ratification.

Senator KEFAUVER. Senator O'Mahoney, you have made a very good background statement and a forceful statement in support of your resolution.

May we ask you some questions?

Senator O'MAHONEY. Certainly.

Senator KEFAUVER. I will ask two brief questions and then yield quickly to my colleagues.

One of the principal objections to the idea contained in your resolution and to others that leave the decision to either Congress as a

whole, or to the House of Representatives under the provision where it selects a President when no candidate for President has a majority of the electoral college, is that it might lead to long debate, to discussions, to filibuster, to committee hearings and findings at a time when there is great urgency, and I just wanted to get your comments on that.

Senator O'MAHONEY. Yes.

Senator KEFAUVER. That is a criticism that is frequently made.

Senator O'MAHONEY. I know. I have heard of it. My answer to it is the answer that Alexander Hamilton gave when Aaron Burr sought to, or let me say hoped, instead of sought, hoped to have the House of Representatives elect him President instead of Jefferson. He had run for President with the understanding that he was to be the Vice President, but as it happened, the Presidential electors, voting in the several States, did not take notice of that fact, and they both had exactly the same vote. So Burr expected to be elected.

Now if there was one man in the whole country who had no confidence or faith or any liking for Aaron Burr, it was Alexander Hamilton, the leader of the Federalist Party. He persuaded his Federalist members of the House to vote for Jefferson rather than for Burr.

Now I think that a matter of such great importance will weigh as heavily upon the Members of Congress now and in the future as it did then. This is a matter of tremendous significance and responsibility, and I would say frankly, Mr. Chairman, that I have noticed—I have been here for a long time now as a secretary and as a Senator—I have noticed that men grow under responsibility, and I have seen instance after instance of the preference of Members of Congress for the good of the country rather than for their own election.

I think I might well give you another illustration that I know very well.

You will recall that there was a Senator from Texas by the name of Joe Bailey, a very great orator. His son was later elected to the House of Representatives and was serving in the House of Representatives just after F. D. R. became President. The younger Mr. Bailey sponsored legislation to pay a bonus to the veterans. It was during the period when Roosevelt was trying to economize in Government, believe it or not.

Senator KEFAUVER. That was in 1933 and 1934 as I remember it.

Senator O'MAHONEY. That is right, when the effort was being made to balance the budget. You have heard that frequently. But in any event, the House passed the bill, it came over to the Senate and the Senate passed the bill, but the President vetoed it. I remember as well as though it were yesterday when our former colleague, Tom Connally of Texas, the Senator, against whom Bailey had been announced as a candidate in the Texas primary for the vacancy in the Senate that was about to take place, the place was to be filled again, Tom Connally voted to sustain the veto of the President. As he walked off the Senate floor that day I was the first person, I think, to see him as he came off the floor and he said to me: "Joe, I think I have just voted myself out of the Senate."

Well, he did not. He was renominated and reelected. I have no fear of Congress rising to its responsibility when the responsibility is as great as it is in a matter of this kind.

Senator KEFAUVER. I have forgotten the number of days involved, but in 1824 in the contest in the House over who should be selected when the election was thrown into the House between Andrew Jackson, Crawford, John Quincy Adams, and Henry Clay, when Clay finally resigned and Adams, the third man, was selected, it took quite a lot of time and created a great deal of acrimony.

Of course, in 1877 during the Hayes-Tilden controversy they finally had to refer it to a special commission.

Senator O'MAHONEY. One of these extra-constitutional commissions.

Senator KEFAUVER. But what is your answer to the proposition that this might result in one of those kind of controversies that would make it very difficult for the Congress to settle.

Senator O'MAHONEY. Well, I really do not think so. I think Congress can settle the controversy more judicially than the Commission which settled the Tilden imbroglio, may I say to the chairman. We are not dealing with perfection. The Constitution itself is one of the most perfect documents ever written, but it has been frequently amended. My plea, Mr. Chairman, for this amendment is based upon the fact that it is in harmony with the basic principle of popular government, not with delegated powers.

Senator KEFAUVER. Senator Langer, do you have some questions to ask?

Senator LANGER. I have no questions.

Senator KEFAUVER. I know Senator Dirksen has some questions, but one further question.

Your proposal is of course in the form of a joint resolution to propose a constitutional amendment. Many students of the Constitution seem to feel that article II, section 1, clause 6 gives Congress the right to legislate by statute on the subject of the determination of disability and determination when the disability no longer exists. I would like to get your view about that, Senator O'Mahoney.

Senator O'MAHONEY. Which section of the Constitution does that?

Senator KEFAUVER. It is contended by some that article II, section 1—

Senator O'MAHONEY. Article II, section 1, clause 6?

Senator KEFAUVER. Clause 6, would give the Congress the right to do, for instance, what your proposed constitutional amendment would do.

Senator O'MAHONEY. Well, the vesting of power on Congress there is contained in this language:

And the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice President.

It does not say "inability of the President or Vice President." It says "both of the President and Vice President," and it seems to me, therefore, that this clause specifically refers to the fact when both of these officials at the same time are unable to discharge, it might be that the President was unable to discharge the duties because he had been removed or because he had died or because he had resigned or because of his disability. I think that the joining of those two provisions there is an argument rather in support of my contention, which is that the constitutional fathers believed that they were providing for an Acting President in both cases.

Senator KEFAUVER. In other words, you think that the word "both" there means that—

Senator O'MAHONEY. It has got to be done by constitutional amendment.

Senator KEFAUVER. Means that when there is neither a President nor a Vice President, Congress then may provide for the succession as it has done.

Senator O'MAHONEY. As it has done.

Senator KEFAUVER. Senator Dirksen.

Senator DIRKSEN. I have only one question. This looks a little far-fetched. You could, however, conceive of a situation where you might prefer a Vice President to an Acting Vice President, and if there was some indication of a disability, not too marked, perhaps—

Senator O'MAHONEY. You said; "might prefer a Vice President to an Acting President"?

Senator DIRKSEN. To the incumbent President.

Senator O'MAHONEY. Yes.

Senator DIRKSEN. That while the disability might not be too marked, yet you might want to put him on the shelf, and you would get a resolution through both branches of Congress. Now if you had topheavy majorities, it would not be too difficult to do it. I recall serving in the House back in the 74th Congress when we had, I think, a total of 87 Members on our side, and it persisted as a rather unbalanced Congress for quite a number of years, as you well know.

On one occasion when Senator McNary was the minority leader in the Senate there were only 17 Republicans in the Senate.

Senator O'MAHONEY. That is right.

Senator DIRKSEN. The only reason I raise the question is this: You simply say, "enactment of a resolution by both branches." I would infer from that that it is by a simple majority.

Senator O'MAHONEY. Yes.

Senator DIRKSEN. Would you nail it down by requiring a two-thirds vote in both branches?

Senator O'MAHONEY. I would have no objection to that.

Senator DIRKSEN. Because if the disability is very evident, you will have no great difficulty.

Senator O'MAHONEY. It ought to be very evident. It ought to be real disability, not a political disability or a pretended disability or a disability over which any ambitious person might be trying to ride to power, certainly. If the committee felt that it should be a two-thirds vote, I would have no objection. Indeed, I must give my wife credit for having suggested that to me this morning.

Senator DIRKSEN. Your wife suggested that?

Senator O'MAHONEY. That is right.

Senator DIRKSEN. I think she deserves to be elevated to the realm of statesmanship.

Senator O'MAHONEY. Oh, she has been, in my mind, for a long time.

Senator DIRKSEN. Overriding vetoes does require a two-thirds vote.

Senator O'MAHONEY. Yes, there is a lot of force to that suggestion, Senator.

Senator DIRKSEN. That is all, Mr. Chairman.

Senator KEFAUVER. It should be somewhat difficult to declare disability or define disability.

Senator O'MAHONEY. Oh, yes. It certainly should not be decided perhaps by a majority of one; so, as I say, I would have no objection to the will of the committee in a matter of that kind.

Senator KRAUWER. Either two-thirds or a constitutional majority.
Senator O'MAHONEY. Something like that; anything of that nature.
Senator KRAUWER. One further question.

We were talking a little bit ago that in your opinion article II, section 1, clause 6, would not enable Congress by law to provide for the determination of disability, and when disability ceased to exist, but that it refers only to where both the President and the Vice President are either dead or disabled.

Senator O'MAHONEY. I think Congress has already exercised all the power that was given to it in that second clause of clause 6.

Senator KRAUWER. But even if there be some validity to the argument that this might give the Congress the authority by law to deal with the determination of the question of disability, there is no provision in article II, section 1, clause 6 that would authorize in any event the giving to the Congress the right to determine the removal of the disability.

Senator O'MAHONEY. That is right.

Senator KRAUWER. Because removal of disability is not specified. Any further questions?

We certainly are grateful to you for your contribution.

Senator O'MAHONEY. Thank you very much, Mr. Chairman, for your patience. I very much appreciate it.

Senator KRAUWER. And we hope as a member of the full committee and interested in this problem you will sit with us and participate as much as you can, Senator O'Mahoney.

Senator O'MAHONEY. Thank you. I will be happy to.

(The statement presented by Senator O'Mahoney in the Congressional Record is as follows:—)

PROPOSED CONSTITUTIONAL AMENDMENT TO GIVE CONGRESS POWER TO DETERMINE DISABILITY OF THE PRESIDENT TO DISCHARGE THE POWERS AND DUTIES OF HIS OFFICE

Mr. O'MAHONEY. Mr. President, I introduce a joint resolution proposing an amendment to the Constitution of the United States to provide for a method of determining disability of the President of the United States.

The Vice President. The joint resolution will be received and appropriately referred.

The joint resolution (S. J. Res. 141) proposing an amendment to the Constitution of the United States relating to the determination of the inability of the President to discharge the powers and duties of his office, introduced by Mr. O'Mahoney, was received, read twice by its title, and referred to the Committee on the Judiciary.

Mr. O'MAHONEY. For the third time in the history of this Nation, we are confronted with a situation which graphically demonstrates the ambiguity created by precedent in the Presidential succession provisions of our Constitution.

When, after having been shot down by a disappointed office-seeker, President Garfield lay ill for 80 days and his sole act as President was his signature on an extradition paper, the country wondered if it would be constitutionally proper for the Vice President to assume the powers and duties of the President. Even the members of the Cabinet debated whether, if he did so, the President, upon recovery, could resume the duties of his office.

When President Wilson lay seriously ill, the victim of a severe stroke, the Nation again pondered these issues.

Now President Eisenhower, himself the unfortunate victim of heart attack, ileitis, and cerebral spasm, has called upon the Congress to settle once and for all the perplexing issues arising out of the Presidential succession in times when the President is incapacitated.

JOHN TYLER SET PRECEDENT MORE THAN 100 YEARS AGO

We would not be here reviewing this problem had it not been for the precedent established by Vice President John Tyler in 1841, when, upon the death of President William Henry Harrison, he insisted upon taking the oath as President of the United States and resisted all attempts to address him as Acting President rather than the President.

He had already taken the oath of office as Vice President of the United States. There is no language in the Constitution requiring the Vice President, upon succeeding to the powers and duties of the office of President, to take a new oath of office. It was John Tyler who created that precedent, as the result, I am confident, of a misconstruction of the language of the Constitution.

There were many in Tyler's day who would not agree that he was President, but rather felt that he was Acting President. Among the newspapers of the day, the Harrisburg Intelligencer, the Richmond Inquirer, and the New York Evening Post expressed that view. Some Members of Congress raised the question of how they should address him when they notified him that the Congress was ready for work. It was Mr. Wise of Virginia who informed the Congress that Tyler would insist upon being regarded as the President and, although this did not meet with the approval of persons such as Senator William Allen of Ohio, Vice President Tyler had his way, and was thereafter known as the President.

THERE WAS A POLITICAL BACKGROUND TO TYLER'S ACTION

It may be of interest to point out that this action was the result of the fact that William Henry Harrison was a Whig and Tyler a Democrat. Harrison was nominated by the Whigs as their candidate for President in 1840. The campaign was conducted without a political platform upon the part of the Whigs.

John Tyler, who had been at least a disident Democrat, so far as some of the policies of Andrew Jackson and Martin Van Buren were concerned, was persuaded by the Whigs to accept the nomination for Vice President. However, when Harrison died, the Cabinet, headed by Daniel Webster, sent a message to Mr. Tyler, at his home in Virginia, to the effect that, owing to the regrettable death of the President of the United States, William Henry Harrison, he persuaded Chief Judge William Cranch of the Circuit Court of the District of Columbia to administer to him the oath of President of the United States.

Instead of responding to this message, Tyler came hurrying to Washington, and he persuaded Chief Judge William Cranch of the Circuit Court of the District of Columbia to administer to him the oath of President of the United States.

The reason behind his insistence upon being known as the President was that he was fearful that the Cabinet, appointed by General Harrison, would attempt to direct his activities in the office of President and in discharging his duties and powers of that office.

So, refusing to be subject to the orders of the Cabinet, he took the oath as president.

CONSTITUTION CITED IN ARGUMENTS ON BOTH SIDES OF QUESTION

The language of article II, section 1, clause 6 of the Constitution formed the basis of the arguments both pro and con with respect to the right of Vice President Tyler to become more than Acting President. That part of the Constitution reads as follows:

"Article II, Section 1, Clause 6, the Constitution of the United States of America

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

The matter of Presidential succession first appeared in the Constitutional Convention in the draft submitted by Charles Pinckney. When the original draft of the Constitution went to the Committee on Style it contained two separate clauses

dealing with Presidential succession. Although the manner of the selection of the President and the status of his successor had not been decided upon by the convention at that point, it is interesting to note the language of these two clauses.

This is the language which went to the Committee on Style, and which was revised solely for the purpose of attaining what the members of that committee deemed to be better literary quality in the great document which was being prepared. I now read the Pinckney provision:

"In case of [the President's] 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."

"The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President, and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected."

Please note that in this draft the Vice President was to exercise the powers and duties of the Office of the Presidency as distinct from the Office itself. Also note that he was to serve until the inability of the President be removed. Further, the delegation of power to Congress was to establish what person should act in the event both the President and Vice president were disabled. The Committee on Style changed this language so that it became 1 clause instead of 2, and in so doing brought much of the confusion which now exists.

However, I believe that the primary cause of the confusion was the action of Vice President Tyler, as I have already described it, because the clause of the Constitution as it reads refers to the "powers and duties of the said Office," and then adds: "The same shall devolve on the Vice President."

DRAFTERS OF CONSTITUTION INTENDED THAT VICE PRESIDENT SHOULD ASSUME DUTIES OF THE OFFICE, NOT THE OFFICE ITSELF

It is clear from the language of the Constitution itself and from what was said in the Pinckney draft that the intention of the drafters of the Constitution was not that the Office should devolve upon the Vice President, but that the powers and duties thereof should so devolve upon him.

The wisdom of the Founding Fathers is certainly legendary, but it is obvious that in this area at least, it was not infallible so far as the Committee on Style was concerned. When John Tyler established his precedent and the others of his day acceded to it, they rested their argument upon that part of the clause 6 which states that in case of removal of the President from his Office, or of his death or inability to discharge the duties of his Office, the same shall devolve upon the Vice President. It was their position as I have said, that the words "the same" referred to "the said Office" rather than to the powers and duties of the said Office. Their argument may be disputed today in theory but it is established in precedent for, since the assumption of the Office of the Presidency by Vice President Tyler, six other Vice Presidents have assumed that Office upon the death of the President. Vice Presidents Fillmore, Arthur, Theodore Roosevelt, Coolidge, and Truman gained Office in this manner.

It is important to note that there are four instances in which the words "the same" apply with equal logic. First there is removal from office; secondly, there is death; thirdly, there is resignation; and fourthly, there is inability. What devolves upon the Vice President by virtue of this clause devolves in each of these cases and the pattern having been established that it is the office which devolves upon the Vice President upon the death of the President, it is difficult to maintain today, if the Vice President were to act in the President's stead during the President's incapacity, that the Vice President had not become President. This, of course, would exclude the possibility that the President could, upon recovery, resume the powers and duties of the office of President.

This very difficulty has twice before caused conscientious Vice Presidents to refrain from assuming the powers and duties of the Presidency, although the situation then existing certainly demanded it.

AMENDMENT WOULD ENABLE PRESIDENT TO RESUME DUTIES UPON RECOVERY FROM DISABILITY

The purpose of my amendment, Mr. President, is to remove this ambiguity completely, and to provide that when the disability exists, particularly in days

of great crisis, the Vice President shall, by virtue of his office and by reason of the Constitution, become the acting President, not the President. This would enable the President, who was ill and disabled, to resume his office upon recovery, and there would be no question or doubt about it.

NATION HAS SUFFERED FROM LACK OF LEADERSHIP DURING INCAPACITY OF PRESIDENTS

That this Nation suffered by reason of the failure of Vice President Arthur and Vice President Marshall to assume the office of President may be inferred from the inactivity of the Presidents during their periods of incapacity. Allusion has already been made to the fact that during his 80 days of illness, President Garfield signed by one official document, that being an extradition paper. In President Wilson's day he was not able to meet with the Cabinet for 8 months. More than a score of bills became law without his signature. The Democratic Members of Congress sought unsuccessfully to get his advice on certain matters then pending before the Congress. Leadership and direction were obviously lacking.

NATIONAL LEADERSHIP BY THE EXECUTIVE IS ESSENTIAL

While it was important to have leadership and direction in 1881 and in 1929, it is doubly important to have such characteristics today. It is foolhardy to suppose that this country may indulge in the supposition that since the Nation has not suffered greater tribulation during these periods of Presidential incapacity, it may expect to escape unscathed in a similar crisis in the future.

It is not sufficient to consider this matter in the light of what the office means to the United States alone. We must consider what the Office of the Presidency of the United States means to the world as well, for this Nation occupies a position of leadership which we must maintain in order that the free institutions we revere may continue to exist.

PRESIDENT EISENHOWER HAS ASKED CLARIFICATION OF DETERMINATION OF PRESIDENTIAL DISABILITY

We are confronted, then, both by an opportunity and by a challenge. The opportunity has been made possible by the candor and frankness of President Eisenhower, who has stated that when you are confined to your bed you think about a lot of things and that one of the things he thought about was the determination of the inability of the President. His reflection caused him to request the Department of Justice to submit a proposed solution of the issue we are discussing today. Such a proposal has been submitted in the House of Representatives by Congressman Keating. It must be obvious to all that inherent in the assumption of such a proposal by the President is the idea that the present provisions of the Constitution are inadequate in this regard. If they are inadequate, the paramount question is what new remedy shall be invoked by which to determine the inability of a President.

This, then, is our challenge. We must determine the critical question of who, or better yet, what body, shall determine when a President is incapacitated, and when he has recovered sufficiently to perform the duties of his office.

SEVERAL METHODS HAVE BEEN PROPOSED

The President has suggested that the Cabinet be the agency to determine the ability of the President to discharge the functions of his office.

Senator Fulbright has submitted another proposal under which the Supreme Court would make such a determination after submission of the issue to the Congress.

The chairman of the Judiciary Subcommittee on Constitutional Amendments, the distinguished senior Senator from Tennessee, Mr. Kefauver, has authored two proposals, one of which would require the appointment of a commission to determine the issue. The other proposal of the chairman would leave determination of that question to await the enactment of a statute following authorization for such procedure.

While I do not desire in any manner to deprecate the efforts of any other person who has seriously considered this matter, I am convinced that each of them represent certain difficulties which I shall specify in a moment. I believe that the proper approach to this problem would be to vest the determination of this issue in the Congress of the United States. 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 the several States and congressional districts.

CONGRESS CAN BEST REPRESENT THE WILL OF THE PEOPLE IN THIS MATTER

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. To interpose the Supreme Court, or the members of the Cabinet between the people of the United States and the Office of President would seem to me to violate the spirit of the Constitution as we know it. 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. There is no such check existent so far as the members of the Supreme Court or the Cabinet are concerned, and while I would not impute bad faith to anyone who might occupy those offices, I am deeply conscious of the fact that we are dealing with the Constitution and that we must, therefore, examine all contingencies. It has been argued that the members of the Supreme Court, or the members of the President's Cabinet, could be removed by impeachment in the event that they were unfaithful in the task which they would be called upon to perform, should the President be incapacitated. Impeachment is a difficult proposition, not lightly to be considered, and often fettered with political implications of the greatest magnitude. The check which impeachment affords, therefore, is hardly as formidable as the check represented by the ballot box.

With this in mind, I would like to review some of the provisions which I have written into the amendment which I now offer.

I ask unanimous consent that the text of the joint resolution may be printed at length at this point in the Record.

There being no objection, the joint resolution was ordered to be printed in the Record, as follows:

"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. Whenever the President proclaims that he is unable to discharge the powers and duties of his office, or whenever the Senate and the House of Representatives pass a resolution declaring that the President is unable to discharge the powers and duties of his office, the Vice President, or if there be no Vice President, the officer next in line of succession to the office of President as provided by law, shall be Acting President.

"Sec. 2. An Acting President shall exercise the powers and duties of the office of President under this article until (1) the end of the then current presidential term, (2) such Acting President finds and proclaims that the inability of the President no longer exists, (3) the inability of the President is determined, in accordance with section 3 of this article, no longer to exist, whichever first occurs.

"Sec. 3. Whenever, during any period in which an Acting President is discharging the powers and duties of the office of President under this article, the Senate and the House of Representatives pass a resolution declaring that the inability of the President to discharge the powers and duties of his office no longer exists, the Acting President shall cease to exercise the powers and duties of the office of President and the President shall exercise such powers and duties.

"Sec. 4. The Congress may by law provide for the case where either or both Houses of Congress are not in session, declaring what officer or officers shall convene such House or Houses for the purpose of enabling them to perform the duties conferred upon them by this article.

"Sec. 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 7 years from the date of its submission."

Mr. DIRKSEN. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. DIRKSEN. I certainly would not be offensive to my friend from Wyoming. I share his concern about former President Tyler's confusion. But I am wondering what has happened to the 3-minute rule. Has it become a casualty this afternoon? We are in the morning hour, I admonish my colleague.

Mr. O'MAHONEY. Mr. President, I regret that I was not close enough to hear what my friend from Illinois said.

Mr. DIRKSEN. We are in the morning hour, and I wondered whether the 3-minute rule had become a casualty.

Mr. O'MAHONEY. The 3-minute rule has frequently been a casualty in the progress of these matters. Senators have been very indulgent, the Senator from Illinois particularly. He is always kind and indulgent toward me. I express my public appreciation to him now, as I have done on many occasions before. I now come to the analysis of the proposed amendment, and then I shall be finished.

ONLY PRESIDENTIAL DISABILITY IS DEALT WITH IN AMENDMENT

My joint resolution, I should explain, deals only with the question of the inability of the President. It does not attempt to repeal article II, section 1, clause 6, insofar as that article relates to the death, resignation or removal of the President. My resolution provides that the President may himself proclaim that he is unable to discharge the powers and duties of his office and that when he does so, the Vice President shall succeed him as Acting President. It also provides that in the event the President does not, or cannot, make such a proclamation, the Senate and the House of Representatives may pass a resolution declaring that he is unable to discharge the duties and powers of his office, and the Vice President may thereupon assume those duties. I have required in my resolution that the President proclaim, rather than announce, his disability, for a proclamation is a more formal act which is widely publicized and disseminated and which would serve to fix the date, the time, and the place of such action so as to avoid, as near as possible, litigation which may result.

CONGRESS COULD DETERMINE PRESIDENT'S ABILITY TO RESUME DUTIES

Under the terms of my joint resolution the Acting President is permitted to exercise the powers and duties of the Office of the President until the end of the current presidential term, if the President does not recover sufficiently to assume those duties himself. If the President does recover, the Acting President may so declare and the Vice President will then cease to exercise the functions of the Presidency. In the event that neither of these two contingencies occur, my resolution would permit the Senate and the House of Representatives to determine whether the President had sufficiently recovered to again resume his duties. Since I realize that the Congress is not always in session, and its function under my resolution is of extreme importance, I have taken the precaution to provide authority for the Congress to pass a statute declaring what officer or officers may convene either or both Houses of Congress to determine the issue of inability. These basically are the provisions of the amendment.

CONGRESSIONAL RESOLUTION REGARDING PRESIDENTIAL DISABILITY WOULD BE CONCURRENT RESOLUTION

I should touch on one other matter in discussing my proposal. When the proposal states that the Senate and the House of Representatives may pass a resolution declaring inability, or declaring that the inability has been removed, I am referring to the type of resolution which is popularly known as a concurrent resolution. This is a resolution which, as all Members know, does not require the signature of the President. A concurrent resolution, as such, is not mentioned in the Constitution. It has been used for so long, however, without serious question that I believe it forms a proper vehicle to be utilized in this instance.

Senator KEFAUVER. Following Senator O'Mahoney's presentation we have statements, in support of their legislative proposals, which I will order printed in the record, by Senator Bridges, by Senator

Fulbright, together with some attachments, and by Senator Payne, and also a statement which I made on the floor of the Senate on January 13 in support of my proposal.

(The documents referred to are as follows:)

STATEMENT BY FREDERICK G. PAYNE ON PRESIDENTIAL INCAPACITATION SUBMITTED TO THE CONSTITUTIONAL AMENDMENTS SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

It is a real pleasure for me to submit this statement on the question of Presidential Incapacitation. The chairman and every member of this subcommittee deserve a great deal of praise for going forward with consideration of this controversial, but tremendously important problem and I want to take this opportunity to particularly commend the chairman for the very great interest he personally has shown in this matter.

As you gentlemen know the reason that presidential incapacitation is a problem today is the vague wording of article II, section 1, clause 6 of the Constitution. In other words the problem has existed since the Constitution was adopted, which immediately suggests the question, "Why hasn't it been resolved before this?" There have been several attempts throughout our history to clarify the constitutional language but as you know, no action has ever been taken.

After considerable study, the record of the treatment of this question has led me to the conclusion that proposals for resolving the doubt which now exists which originate within the Congress will not in all probability ever receive final approval. The reasoning behind my conclusion is as follows: Presidential disability is a question that can best be described as politically loaded. The Congress of the United States is quite properly the forum of partisan politics, but unfortunately this very desirable characteristic makes any proposal dealing with the problem of disability immediately suspect. Proponents of proposals dealing with the problem are likely to be suspected of being motivated by partisan or regional considerations while opponents are likely to be suspected of being motivated by similar factors. Obviously any solution of this problem, if it is to be adopted, will have to be very carefully conceived and thoughtfully balanced to avoid conveying a seeming advantage or disadvantage to any one group. In the final analysis any such proposal must be weighed and tested by the men who properly represent partisan and sectional interest—the Members of Congress. But on the basis of past experience, I firmly believe that no proposal relating to this problem can get to first base without having broad national support.

Because of this I introduced a bill in the Senate last year to create a high level, nonpartisan Hoover-type commission to study the problem of Presidential Incapacitation and make recommendations to the Congress. Under that bill (S. 924), which is now pending before the Committee on Rules and Administration, the Commission would also be empowered to study the future of the electoral college and the role of the Vice President in the Federal Government. While I realize that S. 924 is not before this subcommittee, it offers an approach to this problem which I believe the subcommittee might well consider. The Commission proposed by S. 924 was patterned very closely after the 2 Hoover Commissions. The very real success enjoyed by the 2 Hoover Commissions is in large part due, I believe, to the very great prestige of the members of the 2 Commissions. In view of the fact that the disability problem is of such gravity and of such a controversial nature, it seems to me that the best hope for its ultimate resolution lies in a high level, nonpartisan commission whose recommendations will receive wide national support. It is my hope that the living former Presidents of the United States would be invited to serve on the Commission and the remaining members would be selected in the same manner as were the members of the Hoover Commission. Recommendations from a group including such eminent Americans as President Hoover and President Truman would not be under political suspicion. They would come before Congress for approval or disapproval with a prestige that would enable congressional consideration on a plane above mutual suspicion or party politics.

This question of the approach to be taken in resolving the problem of Presidential Incapacitation is, in essence, a preliminary matter for your subcommittee to decide. I am confident that the decision reached will be a sound one and in the best interests of the American people. The important thing here is not the method but the result, and whatever method will achieve a wise result is the right method.

Now let me turn to my own thoughts on Presidential Incapacitation and the bill which I introduced last year (S. 238) which is identical with one (S. 2703) which I introduced in the 84th Congress.

There is no more interesting constitutional question today than the problems associated with the present provisions of the Constitution with regard to just what happens when a President is not removed, has not resigned, and has not died, but is unable to perform the duties of his office. As you know from the study you have already given this subject, the problem is far from new. In fact it has existed since the Constitution was adopted. While the question of just what was meant by "Inability" was raised at the Constitutional Convention, it was given very little attention and no conclusions were reached. Until the assassination of President James Garfield the problem received practically no attention by anyone, and none by Congress.

During the period while President Garfield lay mortally wounded, considerable discussion took place as to whether the Vice President should exercise the duties of the Presidency but it was finally decided, apparently contrary to fact, that President Garfield was not constitutionally unable to discharge his duties of the Office. His death put an end to the urgency of a solution to the problem and the matter lay dormant until President Woodrow Wilson's illness. Although Congress then gave the question some consideration it took no final action and in retrospect it appears that the White House itself had determined that President Wilson was not constitutionally disabled.

After Wilson's illness the matter again receded from public attention and congressional awareness and was not revived until the fall of 1955 when President Eisenhower suffered a heart attack. Fortunately the President's illness did not prevent him from carrying on the duties of his office, but it did serve to focus attention once again on the need for establishing some definite procedure to be followed in the event of Presidential inability. The President's subsequent illnesses have served to underline the need for a solution to this problem.

Today it is patently obvious that executive leadership of the United States must be a continuing thing and that we cannot afford to have any possibility of a lapse. Any such lapse could well be disastrous, not only the United States alone, but to the entire free world. Therefore, Congress has a very grave responsibility to the Nation to resolve, once and for all, the doubt that surrounds this aspect of the succession clause of the Constitution.

President Eisenhower at a press conference in January 1956 firmly expressed his belief that steps should be taken now to clarify the procedures to be followed in the event of Presidential inability, and properly placed the responsibility to take such action on the Congress. The President made the following statement:

"Well, when you are as closely confined to your bed as I was for some time, you think about lots of things, and this was one of the foremost in my mind.

"I do believe that there should be some agreement on the exact meaning of the Constitution, who has the authority to act.

"The Constitution seems to be clear the Congress cannot only make the laws of succession, but it can determine what is to be done, and it says, 'In the case of So-and-So and So-and-So,' but it does not say who is to determine the disability of the President. And we could well imagine a case where the President would be unable to determine his own disability.

"I think it is a subject that, in its broadest aspects, every phase of it should be carefully studied by the Congress, advised with the Attorney General, and any kind of advice they want from the executive department, and some kind of resolution of doubt reached. I think it would be good for the country."

On the basis of my own study of the matter it seems to me that the arguments holding that the framers of the Constitution did not, in the event of Presidential inability, intend the Vice President to succeed to the title of President, but only to exercise the powers and duties is the most compelling, for many reasons. First, the whole history of the Constitutional Convention points in this direction. Secondly, I believe that the rule followed by the courts to the effect that where words admit different meaning, the one consonant with the object in view is to be selected, is entirely reasonable and logical, and particularly applicable to the problem at hand. If we assume that the succession clause means that a Vice President succeed to the title of President in the event of inability of the President it raises almost insurmountable problems. On the other hand, if we assume that the Vice President does not acquire the title, but only the powers and duties, the problem becomes relatively simple, and involves only spelling out adequate procedures by legislation.

What then does it really boil down to? In general terms it is a question of determining Presidential inability. This necessarily involves who should initiate

proceedings, who should make the determination, how the determination should be made, and finally how such an inability is to be terminated. The first question, who should initiate proceedings, is probably the simplest one to answer. Here we must recognize that inability can be of varying kinds. For instance there could be just plain physical inability. In this event the President, himself, should make the determination and notify the Congress. Such a notification should serve to automatically give the Vice President the responsibility to exercise the powers and duties of the President, but should not give him the title. On the other hand inability could be of such a nature that the President could not make the decision, such as paralysis, coma, or mental incapacitation. In this event someone else would have to initiate proceedings and to my mind there is only one logical person to do this. He is the Vice President. The courts have a well-established rule that in contingent grants of power, the one to whom the power is granted should determine when the emergency has arisen. The Vice President is charged by the Constitution to exercise the powers and duties of the President when the latter is unable to do so, and therefore it is the Vice President's responsibility to raise the question when he has good cause to believe the President is incapacitated.

It might be said that the Vice President should determine when inability exists, but experience has shown that this procedure cannot be relied on. In effect, it would require the Vice President to act at his peril and in the two instances when the occasion has arisen, the Vice President has refused to act. History, as well as considerations of human nature, require that the Vice President be given some degree of clear legal sanction and protection in the event of Presidential inability. In order to avoid the dangers of partisan accusations and the undesirable consequences of a possible struggle for power, it would appear that the Vice President should only raise the question and that the determination should be made by some other agency.

Now we come to the heart and the most troublesome part of the problem. Who should make the determination and how should it be made? Many proposals have been advanced on this subject, all of which have merit, and all of which appear to raise some rather serious problems. It would seem to come down to deciding which system would be the most feasible and at the same time involve the smallest degree of hazard. At this point it should be noted that the whole reason for needing any system at all is because of the recognized necessity for having continuing executive leadership. Therefore, any system must be one that will permit reasonably expeditious determination, without sacrificing the ability to make a correct decision to considerations of speed. A system that is time consuming would be too cumbersome and unwieldy and would not meet the requirements of the problem. It has been suggested that it is the responsibility of Congress to make the decision, but I believe that experience has shown that on such an important question Congress could never act with the required degree of promptitude. In all probability it would take Congress weeks or even months to reach such a decision, if indeed it could reach one at all. For largely the same reasons I believe that a select committee of Congress would prove unworkable.

With regard to Congress there is another important consideration which should be taken into account. Congress is the forum for partisan politics, and properly so. However, the determination of Presidential inability should be free of political considerations, and should be insofar as possible a question of fact. Whether or not the President has the support of any groups or party should not play any part in the question of the inability of a President to perform his duties. To allow such a situation to arise would be to permit the party or parties which lost the presidential election to override the decision of the people. Therefore, I believe that Congress should at most play a very limited part in determining Presidential inability.

It has been suggested that the decision of a President's possible incapacitation should be made by the Cabinet since it is the closest group to the President and in the best position to know. It is probably true that the Cabinet, due to its close personal contact with the President, would have access to information bearing directly on the question, but I believe that there are other considerations which would make it undesirable to have the Cabinet perform this important function. Obviously there is a great possibility that political considerations might influence the Cabinet, either individually, or collectively. Personal loyalty, while it is a commendable trait, should not play part in a decision of this nature, and of all the agencies of Government the Cabinet would most strongly be influenced by personal loyalty. During the illness of President Gar-

field it was personal loyalty that restrained the Cabinet from declaring the President incapacitated. Wilson summarily dismissed a member of his Cabinet for disloyalty because he advocated such a decision. From this it would seem reasonable that any Cabinet decision, in all probability, would be influenced by factors which should not enter into a question of such importance.

We come then to a question of what agency of the Government is reasonably free of the influences that should be avoided. The obvious answer is the Supreme Court. A proposal has been made that the Court should make the decision on a petition for a writ of mandamus to order the Vice President to exercise the functions of the President. This proposal in itself involves serious constitutional questions which I will not go into since I feel there is another reason why it should be rejected. I have already pointed out that any system which would be time consuming would be too cumbersome to meet the demands of the situation. It should go without saying that the judicial process is necessarily slow and it seems to me that it could not be expected to move with rapidity on such a weighty question as Presidential inability.

On the other hand, as I have indicated, the Court is the only branch of the Government that is removed from political influence and would not be affected by questions of loyalty. This was the factor that caused me to prepare and introduce S. 238. I am not irrevocably committed to the provisions of this bill, but it seems to me that it meets many of the problems involved better than most of the other proposals that have been advanced so far. Briefly, the bill would provide that the President notify the Congress in writing of his inability, if able to do so, and such notification would automatically give the Vice President the responsibility of exercising the powers and duties of the President, but would not give him the title. When the President felt he was recovered he would resume his duties by notifying Congress. With regard to disability of a nature that prevented the President from notifying Congress, the bill provides that if the Vice President had good cause to believe that such an inability existed he would notify the Chief Justice. The Chief Justice would then appoint a panel of qualified, civilian, medical specialists who would examine the President. Each member would individually submit a report of his findings, stating the physical condition of the President, and his conclusion of whether the President was able to exercise the powers and duties of his office. If all the members of the panel agreed in the conclusion that the President was suffering an inability, the Chief Justice would notify the Congress in writing. Such notification would have the effect of placing the powers and duties, but not the title, of President on the Vice President.

The bill has been objected to principally on the basis that it enlarges the judicial functions of the Court. To my mind this objection is not well founded since the duty placed on the Chief Justice is strictly ministerial in character and is not essentially different from other duties imposed on the Chief Justice by statute. The question has also been raised as to how would the inability determined by the medical panel be terminated. It is my feeling that this should be accomplished simply by the President notifying the Congress in writing that he was resuming the responsibilities of his office. At first glance it might seem that this could well result in a struggle for power, but I believe that when carefully considered such would not be the case. A President would necessarily be hesitant to resume his office after being found incapacitated until he was sure of his condition, because he would not want to run the risk of the process being repeated. Second, the President is the President unless he vacates the office by death or resignation, or is removed by the Congress. The decision as to ability or inability is his and his alone, except in those situations which prevent him from making the decision.

Since introducing S. 238 I have continued to study this problem and would like to suggest a modification which I think would improve the procedures proposed in my bill as presently written. This modification would in several ways be very similar to the proposal of the distinguished chairman of this subcommittee in Senate Joint Resolution 134. Although I have not worked it out in complete detail the idea basically would be to set up a permanent commission which would decide the question of Presidential disability whenever requested by the Vice President. In short the Commission would be the deciding agency in lieu of the Chief Justice and panel of doctors as presently provided in S. 238. Though I would not recommend that doctors actually be members of the Commission it would seem to me that the Commission should seek such medical advice.

The membership of the Commission is something that in itself is highly controversial. However, in view of the nature of the problem it would seem to me that the Chief Justice should be the Chairman, but should not have a vote. The

other members should probably be the majority and minority leaders of each House of Congress, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Attorney General. In this manner the problem of having either the Congress or the Cabinet decide the question would be avoided, while at the same time the advantages of each of these bodies in relation to this problem could be realized.

In this statement I have not attempted to cover all of the many ramifications of the question of Presidential inability, but only to point up what appears to me to be the principal controlling considerations, and to test some of the proposals that have been made against those considerations. I am sure that as the subcommittee continues its study of this matter it will continue to develop valuable information on all aspects of the problem. The arguments, pro and con, for any specific proposal or on any given interpretation will be multitudinous and weighty and the ultimate decision with which this subcommittee will be faced will be a very difficult one. I want to take this opportunity to assure the subcommittee of my lasting interest in this matter and to express my willingness to be of assistance in any way that I can.

STATEMENT OF HON. J. W. FULBRIGHT

Mr. Chairman, I appreciate being given this opportunity to present my views on Senate Joint Resolution 100, a proposed amendment to the Constitution relating to the inability of the President to discharge the powers and duties of his office. I introduced this resolution in the Senate of the United States on June 19, 1957, and I introduce for the record a copy of Senate Joint Resolution 100, and ask that it be printed at this point in my remarks.

The applicable part of the Constitution which Senate Joint Resolution 100 is designed to clarify is contained in article II, section 1, clause 6, which 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 then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

This provision of the Constitution thus takes into account four possibilities regarding succession during the Presidential term: Removal (impeachment), death, resignation, and inability.

A study of the history of successions which have occurred under authority of article II, section 1, clause 6, reveals that succession by reason of death of the President has occurred upon seven occasions; that removal (impeachment) was attempted once, but the attempted impeachment of President Johnson failed by a single vote; that no President has ever resigned; that no President has ever been determined to be unable, by reason of a disability, to discharge the powers and duties of the office, although prior to the present administration there have been at least two Presidents whose abilities to discharge the powers and duties of the office have been seriously questioned by students of constitutional government (Garfield and Wilson).

I propose to confine this statement to the problems presented by the inability clause. The prime problems raised but unanswered by this provision of the clause are as follows:

What kind of disability is included?

In what manner and by whom is the disability to be determined?

What period of time is involved?

How may the status quo be restored if disability is eliminated?

Many take the position that any problems arising by reason of the inability clause can be resolved by appropriate legislation, and that a constitutional amendment is unnecessary. Authority, if any exists for such legislation, must be found in article II, section 1, the pertinent part of which is " * * * and the Congress may by law provide for the case of * * * inability both of the President and Vice President, declaring what officer shall then act as President and such officer shall act accordingly until the disability be removed or a President shall be elected."

Analysis of this clause indicates that it is not applicable to the problem of establishing procedures for determining inability but rather it is applicable only and is directed to the problem of determining the line of succession when those

elected to the office of President and Vice President are no longer capable of discharging the powers and duties of the Presidency. The clause does not give authority to the Congress to make laws establishing or determining that inability does in fact exist. Many constitutional experts are of the opinion that only by means of a constitutional amendment can procedures be established whereby a President can be declared incapable of performing the duties of his office because of physical or mental disability. The important point to be made, however, is that to allow any doubt as to the constitutionality of legislation in this area is much too hazardous to leave to chance. The only absolutely safe procedure is to enact a constitutional amendment, thereby eliminating the possibility of unconstitutional legislation.

For over 75 years, the problems relating to the disability of a President have received some attention by the Congress, but nothing has ever been done with regard to them. It has been said that we have existed as a Nation for nearly 175 years without providing a solution to the problems inherent in the "Inability" clause and in all that time no serious detriment to the Nation has occurred. But the mere fact that we as a Nation have been fortunate thus far is no reason to tempt providence in so important a matter as the Presidency. Prudence and commonsense dictate that serious detriment may occur if we neglect to remedy the situation.

The amendment proposed by Senate Joint Resolution 100 is nonpolitical in nature. It is not a Democratic or a Republican amendment. It is not a liberal or a conservative amendment. It is a necessary amendment in view of the serious problems raised by the failure of the Constitution to provide for a continuity in the adequate performance of the powers and duties of the President in the event of disability. This proposed amendment properly meets the demands of the situation. It removes any uncertainty about the legality of any action taken during the incapacity of the President.

The proposed amendment provides that whenever the Congress believes the President is unable, by reason of physical or mental disability, to discharge the powers and duties of the office, it shall request the Supreme Court to decide whether such disability exists and if the Court so decides, then the powers and duties of the President shall devolve upon the Vice President or upon the person next in line of succession.

The proposal provides for succession only after due consideration by the two Houses of Congress and by the Supreme Court. The action thus taken has an impact on all three branches of the Government; yet no unilateral action by any single branch of the Government can be conclusive. I am convinced that it is absolutely vital that the system of checks and balances, America's unique contribution to government, be maintained, and Senate Joint Resolution 100 does not violate this time-honored system.

The requirement that the Congress should be directly involved in proceedings involving succession to the Presidency is absolutely necessary. The President is elected by all the people—so is the Congress. What other body under our Constitution is the alter ego of all our citizenry? It is, therefore, fitting and proper that no possibility of succession because of inability take place until the Congress has expressed its belief that the President is disabled.

The proposed amendment requires a majority of a quorum of two-thirds of the total number of the Members of each House for adoption of a resolution. Hence, it precludes the possibility of a small clique in either House achieving a political coup. At the same time it does not require so great a preponderance as to allow a small clique to prevent, for political advantage, a necessary change in the Executive.

There has been some comment that the Supreme Court should be kept out of this problem, since it is contrary to the traditional constitutional purposes for which the Court was established. There is little substance to such an argument. The Constitution already provides that the Chief Justice of the United States shall preside over proceedings for the removal of a President for cause, through impeachment. The problem herein is not a political problem. It is a national governmental problem. The matter can only be resolved by facing up to the responsibilities required under constitutional government. Accordingly, the participation by the Supreme Court in matters involving succession to the Presidency is not only already required by our own Constitution, but nothing required of the Supreme Court under the proposed amendment can in any way be deemed to impair the dignity of the Court, demean it, or cause it to become involved in partisan politics. The proposed amendment provides that upon a referral by the Congress, the final responsibility for determining whether disability exists

rests upon those of judicial temperament, appointed for life and, insofar as constitutional government can provide, beyond the temptations of political advantage. Yet, the Court cannot act unless first requested to do so by the separate and independent legislative branch of the Government.

Senate Joint Resolution 100 allows for due consideration by both elected and appointed officials. It requires action by officials already provided for in the Constitution, and it does not necessitate the creation of a new body of officials, commission, or agency.

It provides that the succession shall continue to the end of the current term, unless the disability is sooner relieved, in which event the President will again assume his office. This is consistent with the intention of the Founding Fathers who intended that succession by reason of disability should continue " * * * until the disability be removed, or a President shall be elected." Further, logic decrees that this should be so, for the people having elected a President intended that he should serve in that office for all of the ensuing term except for such periods as he may be disabled, or unless the office becomes vacant for the other reasons set forth in article II, section 1, clause 6.

The proposal provides for resumption by the President of his office in the same manner as is provided for relieving him of his burden when he is disabled; that is, by concerted action of the Congress and by the Supreme Court.

It provides for the possibility of succession by reason of inability even during periods when there is no Vice President by assumption of the office by those next in line of succession as provided by law.

And finally, it provides for succession even during possible periods when the Congress is not in session by establishing a procedure for reconvening the Congress upon the joint call of the presiding officers of both Chambers for the specific purpose only of considering whether it is the belief of the Congress that the President is unable, by reason of physical or mental disability, to discharge the powers and duties of his office.

I take this opportunity to point out to the committee that certain weaknesses are inherent in various proposals which have been suggested from time to time. For example, some say the President himself has the authority to declare himself disabled. While the Constitution is silent on whether the President is the appropriate one to make a determination of inability, such solution, even if constitutionally proper, is inadequate in the circumstances. What, for example, if the President is in a coma and unable to make any declaration, or is suffering from a mental disability, or supposing the President is in fact disabled and refuses to so declare? There are those who say that in such a situation resort can be had to impeachment proceedings. This is either ridiculous or unconstitutional since disability is not a high crime or misdemeanor.

Some say that the Constitution already provides that the Vice President has the authority to determine that a vacancy by reason of inability exists. No such grant of authority to the Vice President can be found anywhere in the Constitution. Further, no such grant of power ought to be placed in the hands of any one man, let alone the hands of the man who has the most to gain by the exercise of such a grant of power. Indeed, the impeachment proceedings are already so designed as to prevent the Vice President from being in a position to determine his own succession by providing that the Chief Justice of the United States and not the Vice President shall preside over such proceedings.

Proposals embodying the view that the Cabinet is the appropriate body to determine disability suffer from the obvious disadvantage that cabinet officers have a direct interest in the continuance in office of the President who appointed them. Cabinet officers are the personal choice of a President, and serve at his pleasure. Their vested interest may color their judgment. Further, being non-elected officials they are not reflective of the will of the electorate.

Proposals for a joint determination by the Cabinet and certain legislative officials suffer from the obvious disadvantage that they give the Cabinet a veto power in any determination of inability.

Some would propose a special committee appointed for determining Presidential disability. Such a committee necessitates the creation of an additional body outside the contemplation of the Constitution and would create a duplication of officials presently available to make a determination. Further, such committee would either not have final authority and hence would serve only to complicate the procedure and create additional delays in reaching a final determination, or such committee would have final authority, and the placing of such power in the hands of a few might well lead to undesirable consequences.

Senate Joint Resolution 100 has the advantage of simplicity, yet it allows for deliberate reflection upon a grave constitutional change. It can be effected in as relatively short a time as circumstances may require; at the same time it provides a broad base of participation by responsible officials so that none can manipulate it for personal or partisan political advantage.

I believe it appropriate to bring to the attention of the committee an article appearing in the New York Times on January 23, 1958 relating to a letter from Chief Justice of the United States Warren addressed to Representative Kenneth B. Keating of the House Judiciary Committee. The Chief Justice stated that it was the unanimous belief of the Supreme Court that no member of the Court should be a member of any commission created to determine whether a President was disabled. The basis for this belief being that there is a "possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a commission."

In light of the foregoing, the advisability of adopting the amendment proposed by Senate Joint Resolution 100 becomes readily apparent. Under it, the Supreme Court would be acting as a judicial body without having been involved in any prior proceeding. The constitutionality of the procedure and their determination thereunder could not be challenged. Further, the Court itself recognizes the probability, under any procedure, of the matter coming before the Court for a final determination. Since this is so, the most appropriate and direct procedure is outlined in Senate Joint Resolution 100. Further, the Court voices no objection to making a final determination, it merely objects to having one or more members involved in any prior proceeding, the propriety of which would ultimately be placed before the Court.

(The text of the New York Times article follows:)

[The New York Times, Thursday, January 23, 1958]

"HIGH COURT JUSTICES AGAINST DISABILITY ROLE"

"WASHINGTON, January 22 (AP).—Chief Justice Earl Warren said today that he and the other Supreme Court Justices felt they should not be members of any commission to determine whether a President was disabled.

"Various proposals before Congress to provide by law for the Vice President to take over the Presidency temporarily in case of need call for a commission to determine whether a President is in fact disabled. Several of these bills would provide for one or more members of the Supreme Court to be on the commission.

"Chief Justice Warren expressed his views in a letter to Representative Kenneth B. Keating of upstate New York, senior Republican member of the House Judiciary Committee. He wrote:

"It has been the belief of all of us (the Justices) 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 lack of a quorum, it would be inadvisable for any member of the Court to serve on such a commission."

I again, Mr. Chairman, in closing, recommend for the thoughtful consideration of this committee the merits of Senate Joint Resolution 100.

I introduce at this point, for the benefit of the committee, a bibliography of selected material on Presidential inability.

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UNITED STATES SENATE,
COMMITTEE ON APPROPRIATIONS,
January 24, 1958.

Hon. ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendments,
Senate Judiciary Committee, Washington, D. C.

DEAR MR. CHAIRMAN: I do not anticipate that I will be able to personally attend the hearing being conducted by your subcommittee this afternoon on legislation covering the subject of Presidential inability or disability.

Yesterday, I introduced one bill, S. 3113, and two proposed constitutional amendments, Senate Joint Resolutions 143 and 144 on this subject and have furnished Mr. Wayne H. Smithey of your subcommittee professional staff with a detailed explanation of them. I will be very appreciative if you can arrange to have this material made a part of the hearings.

Sincerely yours,

STYLES BRIDGES.

**EXPLANATION OF MEASURES PROPOSING SOLUTIONS TO THE PROBLEM OF
PRESIDENTIAL INABILITY****INTRODUCTION**

In the bill I have introduced the question of Presidential inability would be determined by the Congress. Its initial consideration would be by a congressional committee, composed of the President pro tempore of the Senate, the Speaker of the House, and the majority and minority leaders of both Houses. Following affirmative action by this committee, a concurrent resolution would be reported to each House, the adoption of which would require the concurrence of two-thirds of those present and voting.

Both of my proposals of constitutional amendment are based on the assumption that the Constitution might not now contain authority for Congress to provide by legislation for the determination of the ability of the President to discharge the powers and duties of his office.

In one joint resolution I am proposing by constitutional amendment to achieve what the bill is designed to do by statute.

The other joint resolution proposes, as an alternative, a constitutional amendment which, among other things, grants Congress constitutional authority to provide for the making of such determinations, but would not incorporate into the Constitution itself details of the methods to be used.

BILL

The bill is based upon the assumption that constitutional authority now exists under which the Congress by legislation may provide for the determination of the ability of the President to discharge the powers and duties of his office.

Subsection (a) of the first section of the bill creates a committee for the consideration of any question which may arise as to the inability of the President to discharge those powers and duties. It is composed of the President pro tempore of the Senate, the Speaker of the House, and the majority and minority leaders of both Houses. The committee would be convened whenever the Vice President, by letter transmitted to the President pro tempore of the Senate and to the Speaker of the House, might suggest doubt as to the ability of the President to discharge his powers and duties. It could also be convened, in the absence of any such letter, upon request made by any four members of the committee, that number being prescribed as a quorum of the committee.

Subsection (b) of the first section makes it the duty of the committee, when convened for that purpose, to determine whether there is probable cause for belief that the President is unable for any cause to discharge the powers and duties of his office. If a determination is made, by the affirmative vote of at least four members, that such inability exists it is then the duty of the majority leader of each House to introduce in his House a concurrent resolution stating in substance that it has been determined by the Congress that the President is unable to discharge his powers and duties.

Subsection (c) of the first section provides that if such a resolution is adopted by both Houses, by the affirmative vote of not less than two-thirds of the Members present and voting in each House, the powers and duties of the President shall then devolve upon the Vice President, who shall discharge them until the disability of the President is removed or until a new President is elected and takes office.

Subsections (d) and (e) of the first section of the bill deal with the restoration to the President of his powers and duties upon the termination of his inability to discharge them.

Subsection (d) requires the committee described above to be convened upon receipt, by the President pro tempore of the Senate and the Speaker of the House, of a letter from the President advising that in his opinion his inability has ceased to exist. Upon the basis of such a letter, the majority leader of each House would be required to introduce in his House a concurrent resolution stating in substance that the Congress has determined that the inability of the President no longer exists.

Subsection (e) provides that upon the adoption of such a concurrent resolution by both Houses, by majority vote of all Members present and voting in each House, the President shall resume the discharge of the powers and duties of his office, and that the Vice President shall then resume the discharge of the powers and duties of the office of Vice President.

Section 2 of the bill is intended to insure the prompt disposition by the Congress of any concurrent resolution introduced in conformity with the provisions of the first section. Section 2 would amend the rules of the Senate and of the House to provide for the placement of any such resolution upon the appropriate calendar without reference to committee. The Senate rules also would be amended to provide that no such concurrent resolution would be subject to amendment; that no Senator would be entitled to speak for more than 1 hour in debate thereon; that no dilatory motion would be in order; and that points of order and appeals from the decision of the Presiding Officer made in the consideration of such a concurrent resolution would be decided without debate.

Following the precedent of section 101 of the Legislative Reorganization Act of 1946, the rule changes so made are explicitly stated to be made by the Congress in the exercise of its constitutional right to adopt rules for its proceedings, and the right of each House to alter such rules is expressly reserved.

JOINT RESOLUTION

The companion Senate joint resolution is based upon the assumption that the Constitution does not now provide authority under which the Congress by legislation may provide for the determination of the ability of the President to discharge the powers and duties of his office. It would propose an amendment to the Constitution which would add thereto a new article providing the mechanism for such determinations.

Sections 1 and 2 of the proposed constitutional amendment would provide that such determinations be made in precisely the same manner for which provision is made by the first section of the bill described above.

Section 3 of the proposed constitutional amendment would provide, in a manner comparable to that prescribed by section 2 of the bill described above, for the expeditious consideration by the Congress of any concurrent resolution reciting a determination by the Congress that the President is unable to discharge the powers and duties of his office, or that any previously determined disability of the President has ceased to exist.

Section 4 of the proposed constitutional amendment would authorize the President pro tempore of the Senate and the Speaker of the House of Representatives, acting jointly, to call the Congress into special session for the consideration of any concurrent resolution for a determination that the President is unable to discharge his powers and duties if the committee established by section 1 of the amendment should determine, at any time at which the Congress is not in session, that there is probable cause for belief that the President is unable to discharge those powers and duties.

Section 5 of the proposed constitutional amendment provides that it shall be inoperative unless ratified by legislatures of three-fourths of the several States within 7 years from the date of its submission.

ALTERNATIVE JOINT RESOLUTION

The alternative joint resolution also rests upon the assumption that the Constitution does not provide authority under which the Congress may provide for the determination of the ability of the President to discharge his powers and duties. It differs from the joint resolution described above in that it proposes a constitutional amendment which would grant to the Congress constitutional authority to provide for the making of such determinations, but would not incorporate into the Constitution itself a detailed prescription of the method to be used in making such determinations. The amendment proposed by the alternative joint resolution is based upon the theory that (1) the Constitution should provide a means for the solution of any problem of Presidential inability which may arise in the future, but (2) the fallibility of human foresight may render impracticable any undertaking to place in the Constitution itself detailed provisions regulating the disposition of every contingency which might conceivably occur at any time during the future life of the Nation.

Sections 1 and 2 of the alternative amendment proposed by this joint resolution would replace the present provisions of the sixth paragraph of section 1 of article II of the Constitution, which would then be repealed by section 5 of the amendment.

Section 1 of the alternative amendment deals with the situation in which the President is rendered incapable of performing his duties because of his removal, death, resignation, or inability occurring at a time at which there is a

Vice President who can discharge those duties. It would restate the first clause of the sixth paragraph of section 1 of article II of the Constitution in a manner which would expressly confirm the historical interpretation given thereto by providing that in the case of the removal, death, or resignation of the President, the Vice President shall become President, and shall serve as such for the remainder of the term for which his predecessor was elected. It would add a new provision to the effect that in the event of the inability of the President to discharge his powers and duties, such powers and duties would be discharged by the Vice President only during the continuance of the inability of the President. Thus, it would be made clear that in the event of incapacity of the President arising from causes other than removal, death, or resignation, the Vice President would not succeed to the office of President or become President.

Section 2 of the alternative amendment deals with the situation in which the President is rendered incapable of performing his duties because of his removal, death, resignation, or inability occurring at a time at which there is no Vice President who can discharge those duties. It restates, without change in effect, the present provisions of the second clause of the sixth paragraph of section 1 of article II of the Constitution. Like the present constitutional provision which it would replace, it would confer authority under which the Congress may provide by law for such a situation.

The first sentence of section 3 of the alternative amendment provides new express authority under which the Congress shall provide by law for the determination of all questions of fact arising under sections 1 and 2. The second sentence provides new authority under which the Congress is authorized by concurrent resolution, adopted with the concurrence of two-thirds of all Members present and voting in each House, to provide for the discharge of the powers and duties of the President at any time of emergency at which there may be no person who is qualified, under the Constitution or under any statute previously enacted, to discharge those powers and duties. That sentence is intended to enable the Congress to supply an officer to discharge the powers and duties of the office of President if (1) no person can qualify therefor under any existing constitutional or statutory authority, and (2) the Congress is precluded from making provision by statute for the designation of any such person because of the absence of any person who is qualified to sign any bill which it might enact for that purpose.

Section 4 of the alternate amendment contains a provision (comparable to that of section 4 of the principal proposed amendment described above) authorizing the President pro tempore of the Senate and the Speaker of the House of Representatives acting jointly, to convene the Congress in special session if they should determine, at any time at which the Congress is not in session, that there is probable cause for the invocation of the provisions of the second sentence of section 8. Thus, provision is made for the solution of any unusual situation which has not been foreseen, and for which no provision has been made by statute.

Section 6 of the alternative amendment provides that the proposed amendment shall be inoperative unless ratified by legislatures of three-fourths of the several States within 7 years from the date of its submission.

PRESIDENTIAL DISABILITY

Mr. REPAUVER. Mr. President, it is generally conceded that the Office of President of the United States is one of the most—if not the most—important offices in the free world. In addition to the awesome responsibilities originally conferred by the Constitution upon the President, practice and precedent have increased both the powers and the responsibilities of this office so that the occupant of that office now possesses tremendous influence not only in domestic but also in international affairs. Anything which affects an institution as important as this is, therefore, a matter of grave concern to the people of the United States and certainly to their elected representatives.

The recent illness of the President, telescoped as it was upon two prior illnesses, has served to focus attention again upon the exercise of the powers and duties of this extremely important office during periods when the President may be incapacitated. While there might have been some question of propriety in mentioning this subject at one time, the President's commendable initiative in

submitting a constitutional amendment on the matter has served to dispel that concern. The President, in conference with congressional leaders and publicly, has strongly urged that Congress act to clear up this area of doubt in our Constitution. The concern today is not, and should not be, obscured by the personalities of those who temporarily occupy the offices of President and Vice President. The question which must constantly be uppermost in all minds in the consideration of this subject is the question of the successful operation of democratic institutions and their survival at all times, but particularly in time of peril.

The Constitution, of course, provides that in the event of the inability of the President to discharge the powers and duties of his 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 difficult to know what the authors of the Constitution intended by the term "inability" since inability or disability was never defined and was mentioned only once in the debates of the Constitutional Convention. According to Madison's notes, Mr. Dickenson expressed the thought that the section under discussion was too vague and wanted to know the extent of the term "disability" and who was to be the judge of it. So far as is known, no one answered the questions and there was no further discussion bearing upon this point.

The questions asked by Mr. Dickenson at the Constitutional Convention might not now be so important had it not been for the precedent established by Vice President John Tyler who when he assumed the office of President in 1841 after the death of President Harrison, took the oath of President and contended that he was in fact the President and contended that he was in fact the President and not Acting President of the United States. This contention rests upon an interpretation that the words "the same" have reference to the office of the Presidency, as distinguished from the powers and duties of the office. The precedent established by Vice President Tyler has since been confirmed six times, by Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, and Truman, and is, therefore, well established by custom. The practice, however, of a Vice President assuming the office of President, rather than assuming the powers and duties of the office, has served to inject doubt concerning the power of a temporarily disabled President to resume the powers and duties of his office upon recovery from his disability after having relinquished such powers and duties to the Vice President. As a matter of fact, the doubt so created has been afforded such weight that in two instances in the history of the United States, Vice Presidents have refused to assume the powers and duties of the office of President of the United States, although the situation, in retrospect, would certainly seem to have warranted such action.

In 1881, for example, during the 80 days of President Garfield's fatal illness, he performed but one single act—the signing of an extradition paper. The Cabinet at one time met and discussed the inability question. All agreed upon the desirability of Vice President Arthur's acting as President during President Garfield's illness; but 4 of the 7 Cabinet members, including the Attorney General, thought that the powers and duties of the Office could not temporarily devolve upon the Vice President. As a result, the Cabinet decided that they would not advise the President to encourage the Vice President to act as President, since it might be construed that they were asking the President to vacate his Office for the remainder of his term.

The second instance in which the Nation stood in peril for lack of resolution of this question occurred during the administration of President Woodrow Wilson. President Wilson's illness was of a more prolonged duration than that of President Garfield, lasting from September 25, 1919, until almost the end of his term in March of 1921. During this period, because of his inability, 28 acts of Congress became law without the President's signature. The President did not meet with his Cabinet for 8 months. The British Ambassador spent 4 months in Washington without being received by the President. Leaders in the Senate sought to discuss the terms of the Versailles Treaty with the President, but were refused permission to see him by the President's physician. The affairs of Government were largely disposed of by decisions of the President's wife, his aides in the White House, and certain members of his Cabinet. The Cabinet considered asking the Vice President to act as President, but the White House contingent fought the move. A prominent Cabinet member, Secretary of State Lansing, who approached the President's secretary with a suggestion of this

nature, was rebuked and later forced to submit his resignation upon the recovery of the President.

Even from the vantage point of historical perspective, no one can accurately assess today just what damage was done to the United States and the world by this impasse. The League of Nations was then up in the air. Many today believe that greater United States participation could have so changed the international climate that World War II might have been averted. The League was President Wilson's brainchild. Had he been succeeded by Vice President Marshall, who then would have borne the responsibility for decision and leadership, would the outcome have been different?

No one really knows--no one can really say. All we do know is that such a period of inaction in today's world might be even more costly, and thus it is well that we pay heed to the maxim that the wise prepare, while others postpone. The lessons of the past, combined with the concern of the present, have impelled me to explore the adequacy of the Constitution and the laws of the United States respecting this question and, in my judgment, they are in need of repair.

When these matters were previously considered by the Congress, solution was rendered impossible by the failure of those who desired a solution to agree upon the mechanism of that solution. Some have contended that the problem ought to be dealt with by act of Congress. Others have felt that a constitutional amendment was necessary. All seem to have recognized that a critical question to be resolved is, By whom shall the inability be determined? At present the Constitution seems to place the determination of inability in the hands of the Vice President, who must, of necessity, act at his peril. He must depend, of course, upon popular acceptance of his decision and he must face the possibility that the legality of his assumption of the powers and duties of the office may be challenged in the courts of the United States. As former Senator Lyman Trumbull, of Illinois, pointed out in a symposium printed in the North American Review in November 1881, just a few months after President Garfield was fatally wounded—

"Any Vice President who should assume those duties in a doubtful case, when the exigency did not unmistakably require it, would be treated as a usurper by all patriotic citizens."

The Vice President must also reckon with the fact that in any court test the Constitution may be interpreted in such a way as to prevent the resumption of the powers and duties of the Presidency by the President himself upon recovery. This has, in the two instances cited, proved to be such an obstacle that the Vice Presidents of the United States have refused to accept the powers and duties of the office, although had they done so, history could not have been critical of them.

The role of the Vice President as the sole constitutional agent for the determination of the question of Presidential inability has been criticized, since the Vice President is, in a very real sense, a party in interest. This has led to suggestions that his discretion should be conditioned upon, or replaced by, a determination by, first, the Supreme Court; second, the Congress; third, the Cabinet; or fourth, a Presidential commission.

In 1920, Representative Fess, of Ohio, proposed a constitutional amendment which would have utilized the services of the Supreme Court, the Congress, the Cabinet, and the Vice President. He proposed that disability be determined by the Supreme Court when authorized by concurrent resolution of Congress. If Congress was not in session, the Vice President was authorized to call Congress into special session for the purpose of considering such a resolution upon recommendation of the Cabinet.

Currently, there are proposals before the House of Representatives which would make the Supreme Court, the Cabinet, or a Presidential Commission the agency for determining or recommending Presidential inability. The proposal which the administration has indicated it favors, casts the Cabinet in the decisive role. At the outset of this session, there were only two proposals on this subject pending in the Senate. One is proposed as a constitutional amendment and the other as a straight bill.

Senator Fulbright has submitted a proposed constitutional amendment which would provide that the Supreme Court, by majority vote, could determine the question of Presidential capacity to serve, after the passage of a concurrent resolution by the Congress stating that the Congress believed the President unable to perform the powers and duties of his office. Under the proposal of the junior Senator from Arkansas, the same procedure would have to be followed in order for the President to resume his constitutional functions.

Senator Payne has introduced proposed legislation which would permit the Chief Justice, after receiving notification from the Vice President that the Vice President believed the President incapacitated, to impanel a board of from 3 to 5 medical specialists from civilian life. Each specialist would examine the President and, if all concurred that the President was physically unable to perform his duties, the Chief Justice would so notify the Congress in writing and the Vice President would assume the powers and duties of the Presidency. His amendment reflects the view of those who believe that Congress now has the constitutional power to legislate in this field.

Last Thursday I introduced two additional proposals, which were in due course referred to the Committee on the Judiciary where the Fulbright and Payne proposals were already pending. I submitted these two proposals, not in anywise to prejudge consideration of the two pending proposals, but rather to lay before the Senate and the Committee on the Judiciary alternative procedures for consideration. As chairman of the Judiciary Committee's Standing Subcommittee on Constitutional Amendments, I am aware of the need for a thorough and dispassionate study of this whole area of the law. It seemed to me that a submission of these proposals would contribute to such consideration. Of the two proposals which I have submitted, one would merely confer upon the Congress authority to prescribe by law the procedure for determining the inability of the President of the United States and the question of his fitness to resume the powers and duties of that office. This proposal has the benefit of brevity, which most persons are willing to concede is a commendable consideration in the drafting of constitutional amendments.

The other amendment, however, is more detailed. This amendment would create a commission or committee composed of the heads of the executive departments of the Government of the United States and the majority and minority leaders of both Houses. The commission would be chaired by the Chief Justice of the United States, who would have no vote in the proceedings. It could be called into session by either the Vice President or upon written application of six of the members of the commission, addressed to the Chief Justice. The commission would call for such medical and other testimony as it desired and would be required to determine the question: Is the President able to discharge the powers and duties of his office? If a majority of the commission found that he was not able to perform the duties of his office, such powers and duties would then devolve upon the Vice President, who would continue to assume those powers and duties until the commission determined that the President was able to resume the powers and duties of his office.

The subcommittee, therefore, will have before it what I believe are four basic approaches to a solution of this problem, namely:

First. A simple amendment, granting Congress the authority to provide the detailed solution by statute, which is more easily changed or adjusted to meet future contingencies, but which by that very fact also lacks the stability of constitutional amendment.

Second. A constitutional amendment, conferring the power of decision in the matter upon the Supreme Court, following reference of the question to the Court by Congress.

Third. A constitutional amendment setting up a commission which includes representatives of all three branches of Government, but which admittedly is weighted in favor of the executive branch.

Fourth. A statutory approach.

I have not undertaken to discuss the issue of whether remedial legislation in this field must take the form of a constitutional amendment or may be accomplished by a simple statute. The former Attorney General, Herbert Brownell, has endorsed the view that the change should be made by constitutional amendment. Certainly such a method would present no opportunity for challenge at some future critical period on constitutional grounds. On the other hand, a statute on the subject might invite such a challenge which could serve as a severe hindrance to essential action. I expect, however, that this question will be fully explored at hearings which, as chairman of the Standing Subcommittee on Constitutional Amendments of the Committee on the Judiciary, I have scheduled to begin on January 23, 1958. I have discussed this problem and make this announcement at this time not by way of suggesting that the subcommittee intends to consider this important subject in haste, but rather to alert those who are interested and knowledgeable on this subject that the subcommittee desires and intends to take information and testimony looking to a solution of what is surely a difficult and vexatious problem. Whether, after the subcommittee has

completed this initial task it will prove more able to reach agreement on a solution than its predecessors have been, I cannot predict. I would suggest, that if we are not willing, in the light of our present knowledge, to undertake such a task, we will deserve the condemnation of those who must live with the uncertainties which our inaction will have served to perpetuate.

I hope that any Senators or citizens who have any suggestions, ideas, or proposals in this connection will see that they are sent to the Judiciary subcommittee.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KEFAUVER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Senator KEFAUVER. The committee is highly honored to have as our next witness Prof. William Yandell Elliott, a native and distinguished son of Tennessee, who is professor of history at Harvard University, has taught and lectured in many of our principal universities, has served the Government in many important positions such as consultant to the President's Committee on Administrative Management, National Advisory Defense Committee, Office of Production Management, House Special Council Post-War Economic Policy and Planning, the War Production Board, and the Business Advisory Council. Dr. Elliott, both by experience and education and study is well qualified to give us the benefit of his views on this subject. Without objection, I will order the short biographical sketch of William Yandell Elliott, taken from Who's Who, printed at this place in the record.

(The biographical sketch referred to above is as follows:)

Elliott, William Yandell, univ. prof.; b. Murfreesboro, Tenn., May 12, 1896; s. William Yandell and Annie Mary (Bullock) E.; A. B., Vanderbilt U., 1917, A. M., 1920; certificate Sorbonne, Paris, France, 1919; D. Phil., Coll., Oxford U., 1923; LL.D. m. Barbara Foster, June 28, 1923; children—William Yandell, Paul Pinkerton Foster, Charles James Fox Wharton; m. 2d, Mary Louise Ward, Aug. 28, 1930; children—Ward Edward, David William Penn. Instr. Vanderbilt U., 1919-20; instr. U. of Calif., 1923-24, asst. prof., 1924-25; lecturer and tutor dept. of govt. Harvard, 1925-20, asst. prof., 1925-20, asso. professor, 1929-31, professor since 1931, Williams professor of government 1942, dir. of the Harvard summer school since 1930. Consultant to President's Committee on Administrn. Management 1936, Nat. Advisory Defense Comm., 1940, Office of Prodn. Management 1941, House Special Com. Postwar Econ. Policy and Planning, 1945-46; mem. Senator Tydings mission to Philippines 1945; dir. Stockpile and Transportation Div., W. P. B., vice chmn. Civilian Requirements; staff dir. House Select Com. on Fgn. Aid, 1947-48; staff dir. House Committee on Fgn. Affairs, 1947-49; asst. dir. O. D. M. 1951-53; mem. planning bd. Nat. Security Council since 1953; Served with 114th Field Artillery 30th Division, A. E. F.; 1st lieut. at close of World War I. Grad. mem. Business Advisory Council. Dept. of Commerce, dir. Foreign Service Edn. Found. Mem. Disciples of Christ. Editor: the British Commonwealth at War, 1943. Author: several books in political sci. 1928-40; Western Political Heritage (with N. A. McDonald), 1949; American Foreign Policy; Organization and Control, 1952. Home 660 Concord Avenue, Belmont. Office: Littauer M-28, Harvard Univ., Cambridge, Mass.

Member Sigma Chi, Phi Beta Kappa. Democrat.

Senator KEFAUVER. We certainly appreciate your coming here and being with us, Mr. Elliott.

STATEMENT OF WILLIAM YANDELL ELLIOTT, PROFESSOR OF HISTORY, HARVARD UNIVERSITY

Mr. ELLIOTT. Mr. Chairman, I am of course very much honored to be here as a witness before this committee and I appreciate your kind introduction.

If I could add a word to your own, I have also been a servant of the servants of the people in both Houses of Congress, as you well know, sir, in preparing staff reports for both the Senate and the House, and as a staff director of the committee with which Senator Dirksen was then connected. I say this to recall to you these proofs of the respect that I have for the Congress.

Senator KEELAUVER. Yes, in many capacities in both the House and the Senate.

(Discussion off the record.)

Mr. ELLIOTT. The subject that you are attacking, as Senator Dirksen remarked, is fraught with such great national importance that it might today affect our very survival as a free nation. But it is not simply a matter of the immediate moment that we are concerned with. It is as John Marshall said, "a Constitution that we are construing," and a Constitution that we are contemplating amending. We are approaching our second century under that Constitution, the foundation of our firm union.

The Constitution is a document hammered out of compromises by perhaps the greatest feat of statesmanship that has been achieved by any system in bringing into being something that has survived as well as it has, basically the same in its grand design. But it attempted to provide, sir, for things that I think we had better bear in mind: not simply for the current situation with which the men of that time were confronted, but for the future.

Aristotle remarks in *The Politics* somewhere that what seem small amendments of constitutional systems (what he calls "basic laws") sometimes have unsuspected possibilities for destroying the whole structure. In other words what are apparently harmless innovations can have large and dangerous consequences. Therefore one must approach a constitutional amendment I hope in the spirit of seriousness, even reverence, which is shown by this committee; and at the same time not be frightened of having to deal by amendment with a situation that is not adequately covered, as I think it is a matter of common agreement this situation of who declares Presidential inability, and how, is not adequately covered. You can, if you choose, act under the doctrine of, not the "silence of Congress", in this instance, but under the silence of the Constitution, and try to torture out of it through the implied powers clause or the implied powers doctrine as it has become a part of our constitutional interpretation, some power of Congress to act through statute alone in this matter. I think that Senator O'Mahoney has given us a very brilliant and soundly reasoned statement, grounded on his evident historical knowledge, as to the limits intended by this provision in the Constitution on congressional ability to determine inability by its own act, alone. He gave some very good reasons for thinking that on the ground alone of the history of article II, section 1, clause 6, it would be unwise to proceed by statute and probably unconstitutional. It would certainly involve us in doubts and ambiguities which had better be clarified once and for all in a way that only constitutional amendment can do with finality.

But were it perfectly legal to act by statute only, and constitutional beyond a doubt—as it is not, in spite of some authority to the contrary, I should suggest, sir, that the seriousness of this problem requires that

the people of the United States not only understand it thoroughly but act upon it with a speed worthy of the need for settling this issue once and for all and in our time today. I think you do go back to the people ultimately for your source of authority on a matter of this importance. It is to prevent their confusion and division of counsels and leaders that we have a Constitution.

Now I would like if I may, having paid homage to Senator O'Mahoney's remarkable constitutional exegesis, to differ somewhat with him in his conclusions. I would like further to lay groundwork for that difference as to method by reminding you of what I think is the basic nature of the separation of powers in our system.

The danger, I think to the separation of powers in our system does not come, certainly not at the present time, from any desire on the part of the Congress to usurp the prerogatives or the influence and lessen the prestige and the powers of the Executive of the United States. I think no one could have any doubts as to the patriotic attitude, completely transcending partisanship that Congress has so far displayed in this matter. But we are concerned with something that may not be merely meeting the current situation of a current crisis, but with something that deals with the future of our whole constitutional system. In that respect, I would like to remind you, sir, of the logic of the separation of powers and some dangers that it seems to me we run if we tamper with it by encroachment on the Executive powers, unintentional though it may be, by putting it in the hands of Congress to remove a President without impeachment.

In the first place, our system is unlike either the French or the British. Be reassured that I do not intend to lecture you on that difference but just to remind you of a couple of matters that I think need bearing in mind.

The French system creates inevitably and infallibly and alas, very painfully, a weak executive, by having a legislature that can at any time upset a government. This makes the temptation of blocks and groups within the legislature so strong to reshuffle ministries even at the cost of bringing financial and defense policies into confusion, that we have had a history since the Third Republic, written in the most painful type; the red of inflation and the black of national pessimism and loss of confidence.

We certainly do not want to follow that path in any way whatever, and I think we are, under our present system of balance, in no danger of doing it. The British system, on the contrary, has a system in which the right to call a general election is the protection of an executive which is responsible to Parliament, i. e., to the House of Commons under existing practices. Therefore the Cabinet, headed by a real Prime Minister, is in a very strong disciplinary position to protect itself against encroachments and undermining by parliamentary maneuvers, not by ground swells of changes in real public support. It can and does exercise a discipline over unnecessary elections through snap votes of no confidence, a discipline so great that it has been almost unheard of to have a vote of no confidence in the British Parliament, since World War I. The one instance since that time where this withdrawal of support in effect took place was not inside the halls of Parliament or the House of Commons, but outside, in a political club, by what was in effect a caucus vote to end a coalition.

Now we are in neither position, the weak French executive or the tightly disciplined British. The President of the United States is unable to call a general election to test the sentiment of the country. He is, as Senator O'Mahoney has reminded us, elected by all the people. Along with the Vice President, he is the only nationally elected figure. Congressmen, even Senators, do not represent the Nation at large. He can and sometimes does run well ahead of his party in terms of national confidence and the voters' expression of party support in the legislative halls.

The legislature is not infrequently, as President Hoover's letter reminds us, I believe, of a different party complexion. This happens frequently with both parties. I remember serving as staff director for the House Foreign Affairs Committee in a Republican Congress when President Truman was President of the United States, the 80th Congress, and surely we have seen more recent evidences of it. President Hoover lost his Congress. President Wilson did from 1918, so did Cleveland, and so on. This is far from being abnormal, if we consider the frequency with which our 2-year elections bring it about.

Now, given the fact that we have had very few instances (through "inability" or, better, "disability") what was, in effect, having "no President," in our history—and these have already been adequately alluded to and developed by Senator O'Mahoney and others—it, nevertheless, is a very necessary thing to cure any such possibility at this period where quick decisions must be had, but cure it without at the same time running the risk that at some future time we may find a Congress removing a President from partisan motives because they were expressing a wave of national hysteria like that after the reconstruction period when the impeachment of Johnson narrowly failed, even protected by the two-thirds provision for the Senate's judgment by votes. Such a risk should make the power of the Congress to act alone on this matter of determining succession by statute, or by joint resolution sanctioned by statute, a real danger by permitting a fundamental but unintended change in our separation of powers. Leaving the decision to action by Congress alone, I think, is unwise on two counts, sir. It is unwise, first, because, as your questions to Senator O'Mahoney indicated, there is a great deal of well-grounded opinion that in the circumstances that one might be confronted with, the cumbersome action of a legislative body with all the possibilities of wrangling, tactics of delay by blocks, filibusters, and so on; it would be exceedingly difficult to get quick and certain decision from Congress. This alone would make congressional action not the appropriate remedy for that kind of decision.

Furthermore, any such debates, and the inevitable changes of partisan motives in any doubtful cases, would cause a great deal of hard feelings. It would exacerbate many situations if there were real divisions on this point. To delay and debate would probably be an unnecessary thing in terms of the other available alternatives that I think are presented in some of the resolutions before this committee that may well be preferable.

But were it possible for Congress in all cases to act with the utmost expedition and speed, and to act either through the somewhat archaic device of having the House vote by States with one vote to each State (the method that would be used if the electoral college has failed to

come to a solution), or by joint resolution of both Houses, Senate and House, both acting in either case, were this perfectly possible, were Congress capable of being called rapidly into session and acting on 24 hours' notice or some such thing as that, without real inquiry and debate—and I think this unlikely and, perhaps, unwise—it would, nevertheless, be very questionable in my mind as to whether this would be the right method of determining either the disability or the return to ability of the President of the United States.

I want to treat my reasons for that conclusion very briefly under two points. The first is the danger that an unintentional upset in the balance that has been set up in our Constitution by the separation of powers would be achieved. I say "unintentional" because I think no one would expect Congress to operate in this kind of an atmosphere in that kind of a way, but as I reminded you in the beginning, this is the Constitution we are talking of, that governs the future behavior of all sorts of Congresses. One of the strong points of the men at the Constitutional Convention was that they showed a very accurate view of the failings of human nature, the fact that in times of high passions and, perhaps, a very grave crisis where a decision might be fatal in one way or the other or where division in the country could be even more painful, an action like that in the impeachment of Johnson would be possible through this device, and would be much easier, because it might, under some of the proposed amendments or statutes, be done by a bare majority vote.

Now the Senator from Wyoming, graciously, with the statesman-like help of his wife (this morning) said a two-thirds majority in each House would be all right on this point of congressional action, to meet his ideas. I would say this would be a far less objectionable method of dealing with the thing, except for its cumbersomeness. If swift action is also a requisite, the two-thirds protection can increase the delay. You would remove at least the hair-trigger character of the act; you would make it possible to protect against partisan passions in some degree. But, even so, I think it is not the way in which to be expeditious.

There is yet another point to remember. Congress is not the best equipped body, at large and as a whole, to have knowledge of the President's real condition.

Let me start out, sir, by saying that I am convinced that the present President, like any President who confronts this problem of possible illness in such times of perpetual crisis, sees the necessity of action, prefers that it be, as far as I can make out from his words, done in an unambiguous and clear way. He has made some recommendations of his own for the consideration of the Congress, as I understand it. I have not followed those closely, but I gather that they are somewhat parallel to President Hoover's suggestion here, although he would prefer an amendment to a statute. The President probably has worked out understandings with the Vice President to deal with emergencies not covered by his own free decision *compos mentis*.

In a time of national peril, where quick action and the ability to respond immediately must be known by the enemy as the most valuable part of our deterrent to aggression; it is obvious that we do have to have a situation that prevents us from having a President in a coma, a President who cannot operate, a President who could not make decisions of that sort, yet a President whom the Vice President would

feel reluctant to relieve of all his duties decisively and at once. If we took no other example than that of Wilson, the painful period described by Senator O'Mahoney, with the insight into the workings of what passed for Presidential decisions in the White House, ought to remind us of that danger forever.

We were, in effect governed for a considerable period of time by the President's personal physician and the second Mrs. Woodrow Wilson, as a transmission belt for all executive policies from a man really too ill to make decisions. What harm was done by that to the possibility that we might have had a League of Nations with compromises which Abbott Lawrence Lowell told me he had almost gotten the President to agree to before he became too ill, and became so entrenched in his advocacy that he would make no concessions to the Senators' amendments, and so on. One can only speculate on that, but it is obvious that such a history could be repeated at some time, if not today. Therefore, we do need, let us agree, a method that is sound, foolproof, constitutionally clear and unambiguous, and capable of being put through, I hope, with some speed, because it seems reasonable to all sides.

Now, I know reasonable men can disagree as to methods. I hope they will, because you often bring out some of the weaknesses of solutions by pointing to the difficulties that they raise. But in the resolutions that you have kindly furnished me in the day or two that I had to prepare for this, I have looked them through with a good deal of care, and I think they each have a good deal of merit.

For instance, Senator Payne's resolution here, which would leave it up to the President, effectively contains at least one item that, it seems to me, is missing in some of the other resolutions, not Senate Joint Resolution 141, by Senator O'Mahoney, or the recommendations from Mr. Hoover, and, I think, Mr. Truman; namely, that there should be some recognition that the President himself may well initiate, close, and finally determine his inability, not by resignation, necessarily, from his office, but by saying that he is unable to discharge his constitutional duties and that the Vice President must take over as Acting President.

In that case, the language that Senator Payne's resolution uses, though it is addressed to a statute and not to a constitutional amendment, would seem to me to be appropriate to incorporate in any of the constitutional amendments.

I think that is one of the few things, Mr. Chairman, that I noticed, perhaps, is not entirely covered in your own resolutions, particularly Senate Joint Resolution 134.

This may be taken for granted in your resolution, and the others. One may say that there is no necessity of covering voluntary action by the President: But it surely ought to be recognized as clear law that the determination of the President himself as to his inability ought to be conclusive, ought to be a definitive matter and should merely be communicated to Congress as a fact.

Senator KEFAUVER. For the record, you were talking about S. 238 in discussing Senator Payne's language?

Mr. ELLIOTT. I was talking about Senate Joint Resolution 238, yes.

Senator KEFAUVER. Subsection (b) ?

Mr. ELLIOTT. Subsection (a), sir, at the top of page 2: "In case of the physical inability of the President to discharge the powers and duties of office as President, he shall so notify the Congress by written communication" and so on.

Now, then, the only thing that I am not quite clear about in Mr. Paynes language here, and I think this is raised in a very interesting way by former President Truman's views as expressed in his letter, is whether the President is his own best judge of whether he should resume his powers. There I think it is very much more questionable as to whether once having turned over his powers to the Vice President, there should not be at least some check on his resuming his powers. There would be no question of a man who is really in possession of his faculties and his conscience not taking over powers when he felt ready to resume them. But on the other hand, a President sometime in the future, looking at this in long-run terms, who was subject to some aberrations or something of that sort, might well plunge the country into an extremely difficult situation if he asserted powers which he was manifestly not capable of holding, at some time in which he had been allowed to do this by unchecked decision of his own. So I would not be equally clear on that point and I merely flag it for your attention as something that deserves careful consideration when you are dealing with the resumption of his office.

Now on the question of the other resolutions, I find myself in some minor disagreement or perhaps it could be a major disagreement with that great friend of mine, Senator Fulbright. Senator Fulbright has done two things in his resolution:

Senator KEFAUVER. You are now referring to Senate Joint Resolution 100?

Mr. ELLIOTT. I am now referring to Senate Joint Resolution 100. In effect, Senator Fulbright's resolution suggests that whenever the two Houses of Congress shall adopt a resolution declaring that the Congress believes the President is unable by reason of physical or mental disability to discharge the powers and duties of his office, such resolution shall be transmitted to the Supreme Court of the United States and the Court shall decide whether or not such inability exists. If the Court decides by a majority vote of the authorized membership that such inability exists, the powers and duties shall devolve upon the Vice President or if there be no Vice President, and so on.

Now this has at least the advantage that there is a check on Congress and there is, in that sense, in the tradition of checks and balances, a protection against some future usurpation of power by pressure of Congress. It may not be that the actual decision itself would ever need to take place. But the capacity of Congress to declare disability by its own action alone could be a strong coercive factor in the dealings of Congress with the Executive. That is why I so much agree with Senator O'Mahoney that the committee on style, in drafting this, being true to the resolution that it had before it, really did not intend to convey that power on Congress. That is my own feeling about it, and I believe that is also your expressed view, Mr. Chairman.

I would think that at least a very reasonable view which would make more solemn and difficult processes than are contemplated by

Senate Joint Resolution 100 unless backed by amendment. Reasonable men can differ on the interpretation of something like this, and people would argue possibly that having gone to the country without a full explanation in the Federalist papers and since the debates in the constitutional convention in the States did not establish anything definite as to meaning in ratifying, a broad latitude might be justified under the "implied powers" of Congress. Prof. Edwin Corwin, one of our most vigorous and authoritative writers on the Constitution, does make the argument for implied powers—but to my mind for one, with more authority than persuasion.

But for reasons that I have urged, I would prefer the constitutional amendment route for decisive clarity, even were there a much clearer case for the possible validity of statutory action.

Now Senator Fulbright's resolution, coming back to his main point here, associates the Court as the check, but it does put the initiation in the Congress, subject to all the disabilities from my point of view of debates, length of time, stirring up the country by an unnecessary wrangling on a point of this sort, and perhaps not being close enough to the realities of the situation to be the best judges of it.

The Court is no closer to this side of the problem—the political—if I understood the language that was read from the Court as I came in. The Court has itself expressed its opinion on the impropriety of being drawn in, and I would fully concur with the wisdom of the learned Justices in refusing to do something that savors more of a political act under the doctrine that the Court has always used as you will recall avoiding decisions that called for political choice rather than judicial decision, by a judicial finding of law.

Nor would I be very much encouraged to bring in another element of judgment of fact by associating medical advice as a conclusive factor, as is so often proposed, on which to base the finding either of a court or any other type of quasi-judicial committee. I think any committee in its right mind would want to have medical advice, but I am, I think, sufficiently acquainted with the medical profession to know that they differ very radically in their diagnoses and their political opinions often seem to have a very considerable bearing on their medical findings.

I am reminded, if I may say so, of the opinion of one of my own very learned medical colleagues, a man of the highest reputation at Harvard, who found that President Truman, by one of these dangerous in absentia diagnoses, was suffering from some obscure form of ailment that made him, what shall I say, not quite non compos mentis, but temporarily aberrational over periods of time and subject to rages, which my medical friend thought could be treated by drugs. He cited successful preventive treatment of several of his patients. I am glad to say he was not allowed to prescribe for President Truman on that basis or he might not have had the reaction that the President did have in a fit of justified wrath in taking up the Communist challenge in Korea that I think was very useful.

And drugs used perhaps in another instance in Mr. Eden's case may well have been responsible for a certain lack of responsibility in at least taking the preparations to carry out what he was committing his country to. I do not know, but that is quite a usual view today in informed British circles.

Diagnosis, medical prescription, has to be taken as all other things do, and as the Court takes them, in terms of reasonable interpretation. The ultimate evaluation has to be by people who are really close to the situation.

Now I may say, sir, you know we have differed on the wisdom of question periods for the Cabinet members by the Houses of Congress. So it is without any flattery to you, Mr. Chairman, that having read these resolutions, I am more attracted, after analysis, to the resolutions that bear your name than to any of the others. But I have 1 or 2 suggestions to make which might alter some language, if you are going to keep the whole of the executive heads of the executive departments in there. That is like Sanhedrin. Lloyd George said you cannot win a war with a Sanhedrin. I do not know who the heads of the executive departments are, but the language—

Senator KEFAUVER. Mr. Elliott does me the favor of referring to Senate Joint Resolution 134.

Mr. ELLIOTT. Yes, that is the long form rather than the short form.

Senator KEFAUVER. The resolution that I introduced.

Mr. ELLIOTT. I may say I prefer it to your short form, Senate Joint Resolution 133, for the reason that I am going to develop.

This resolution, the Kefauver Senate Joint Resolution 134, says, in effect, that—

For the purpose of determining inability of the President to discharge the powers and duties of the office of President, there is hereby established a committee consisting of the Chief Justice of the United States, who shall serve as chairman of such committee, and who shall have no vote in any of its proceedings.

I think that meets the Chief Justice's objection to judicial participation by the Court. Hers he is only a symbolic figure, symbolic of the majesty of the law, but taking no voting part in the proceeding. He serves as something like the British Crown, which is there to remind all officials in Britain of the fact that they do have a common symbol of the law. This role for the Chief Justice would, I think, have a very salutary effect in whatever group has to make a decision of this kind.

Therefore, I would myself warmly support this language. This is not the full Court. This is not addressing itself to the problem as a Court. This is simply having the Chief Justice preside, if I understand it, at such a meeting.

Senator KEFAUVER. That is the intention, to just have him preside, to see that there was a fair committee hearing. I thought the precedent for this was the Chief Justice presiding in impeachment proceedings in the United States Senate.

Mr. ELLIOTT. It seems to me to be a very sound precedent and one that reminds all concerned of the fact that this is a constitutional issue of the gravest importance fraught with the safety of the Nation. The presence of the Chief Justice I think could not but be beneficial under those conditions.

The leader in the Senate of the political party having the greatest number of Members, the leader of the party having the second greatest number of Members in the Senate, the leader in the House and minority leader and heads of the executive departments of Government.

Now the only language that I know of that deals with "heads of the executive departments" that I can remember (and it has been 16 years since I taught constitutional law and history, but I think my memory is accurate on the point) that deals with the executive departments, is that the President under section 11, article 2, section 2, "He may require the opinion in writing of the principal officer in each of the executive departments," and so on.

That is the sole constitutional reference. Some people have said there was no reference to executive departments. That is not so. It is in there.

But the principal officer of the executive departments in the meaning of the Constitution may not mean the same thing as Congress means by setting up a "department" by law as different from an "agency." There may well be agencies of far more importance in some ways than departments. The fact that the President has some of them in his Cabinet, the fact that Congress in its wisdom has seen fit to give them statutory membership on the National Security Council, the Office of Defense Mobilization, before that the National Security Resources Board set up by the National Security Act of 1947, and reiterated in 1949.

This is, I think, not accidental, and I would find it therefore useful—and I believe that possibly President Hoover's letter has some real point to it in that way—to name the intended agencies. I believe that is particularly necessary because not all the executive departments are of equal closeness to the President or of equal importance in their knowledge of national security policies and perhaps in the stature of the men themselves. Whoever makes this decision in the executive departments or in the legislative departments must represent something that transcends partisanship. I think we are all in agreement on that.

As far as this constitutional provision is capable of assuring it, the men who make this decision should be people who are thinking in terms of the country and whose daily jobs force them to think of that under an oath to support the Constitution, rather than to show loyalty to any man. "No man is above the law," said *U. S. v. Lee*. It is a thing that we should always remind ourselves of.

Now my own view, sir, is that you might choose for this task the regular members of the National Security Council; the Secretaries of State, Defense, ODM, Treasury. The Secretary of the Treasury was a member of the Security Council by invitation under Mr. Truman quite as much as under Mr. Eisenhower. I think that this Department is of a stature so important as to deserve this recognition. I do not want to try to spell all this out; but I would think possibly the Budget Bureau, because there is a man very close to the President and yet in some sense a servant of the Congress too, someone who was set up by Congress and who is supposed to act as a watchdog. You might by that method get 7 or 8 heads of agencies, close to the President, but chosen for their great ability and patriotism. I think they would have to be 7 or 8, if you were going to follow through with your idea of having four Members of the Legislature, even though these four are split between the parties. Something of that order—there should possibly be a more definitive treatment of it in the light of President Hoover's very interesting suggestion, in your final drafting.

Now there is one other thing that is covered by President Truman's suggestion in his letter that I would recommend for the attention of the committee, and then I think I had better yield myself to questions. I apologize for taking so much time.

Senator KERAUER. Your discussion is very helpful and you take all the time that you wish.

Mr. ELLIOTT. I know you are all very busy men and I do not want to impose on you. But if you look at the suggestions that Former President Truman makes, I rather question one recommendation. Possibly it came from his own natural feeling, which may have come out of being a Vice President who took over. He would not have liked to have someone come back from the dead or the near dead or elsewhere and tell him not to take over permanently, but to get out after getting started. I refer to his suggested language about the Vice President designated as President who would "thereupon serve out the full term of his predecessor." Should the stricken President achieve complete recovery, he would not be entitled to repossess the office, apparently--if I have correctly understood the language.

I do not think that is quite in accordance with the mandate of the people. They elected this man, and if he does fully recover himself--and there is no reason to believe that this does not happen and has not happened--you would have a situation in which he was eliminated once and for all. I do not want to attribute any motives to Mr. Truman, or to try to guess what his reasons for that were, whether because of his own experience or anything else, but I would simply beg leave to disagree with the result that seems to be plainly intended.

On the other hand, I would think very favorably of nailing down a point which I think is raised by Senator O'Mahoney. He has pointed out, if I may read it once more, the exact language of article II, section 1, clause 6: "Declaring what officers shall then act as President (in the case of the disability), both of the President and the Vice President," as you noted, Senator, "declaring what officer shall then act as President, and such officer shall then act until the disability is removed."

Now accepting your views on this as I do, is it not rather strange that there is no mention of "officers shall also act as Vice President?" There is no mention of Vice President in here, and so far as I know, there is no really direct handling of this lack in any of the resolutions. When Mr. Truman became President, we did not have a Vice President, and this has happened over and over again.

Now is this not a loophole that should be plugged?

Senator O'MAHONEY. I think it is not strange, if I may interject at this point, Dr. Elliott, that the drafters of the Constitution did not take that matter into consideration, because obviously they were assuming that in most cases the Vice President would act as President for only a short time, and one of the elements that convinces me that it was their intention always that the Vice President should only be an Acting President is the provision with respect to the election of the President.

Mr. ELLIOTT. Yes, but the election of the President can equally well be interpreted as a regular election, and there is nothing that I know of in the debates to suggest that that was not in their minds. In other words, there was no provision for a special election in their minds that I know of.

Senator O'MAHONEY. Yes, I agree with you in that respect.

Mr. ELLIOTT. And unless they expected the electoral college to function in some way retrospectively as is suggested again I think, is it not, in the Hoover or the Truman letter?

Senator DIRKSEN. President Truman's letter, "reconvene the electoral college."

Mr. ELLIOTT. Yes, here it is.

I would recommend that in every instance where a Vice President succeeds to an unexpired term of President the electoral college be convened to choose a new Vice President.

Well, I do not really know whether that is the right way to do it, but I have considered this with some care and I am hanged if I do know how to get a Vice President under this kind of situation. If you let Congress choose him, as would seem a simple method of doing it, by either both Houses or something, you have got a terrific wrangle on.

In the second place, you do not have as a result of congressional action a Vice President who necessarily shares in any way the views of the President. It is imperative in our system today, more than ever, that the Vice President should assume very wide duties, and should be in line of succession, should be in the National Security Council, and so forth. Again, I refer to President Truman. You will remember how handicapped he felt he was in assuming his duties in the National Security Council without having really been schooled in them. He obviously did not want to let that happen again.

So I think he has a very important point in his letter which I would hope that this subcommittee would take seriously. I really do not know a better way of handling it than the one he has proposed.

Yet I admit that it seems to me to be not a very good way.

One possible suggestion which people have sometimes canvassed is that the President should propose to the Congress, someone for Vice President. But suppose Congress does not accept the President's nominee? Well, then you possibly would have to have a national election. But it is not always very easy to call a national election to elect one man and to get a real response from the country. So perhaps President Truman's advice is as sound as any on this point, that the electoral college was elected by the same party that elected presumably the President, and reflects the majorities of that time. You are not trying to reflect a new situation in the mandate from the people because the 4-year term is a part of our system. And you cannot really reflect a total picture of the country's feelings without a national general election on the issues.

We do not remove the President simply because he has lost his parliamentary majority, so to speak, and for the very good reason that I tried to point out at the beginning. He has no protection. He cannot call a general election to find out whether the country supports him or the Congress.

Our system is not geared to that. You know, sir, I have made some proposals in other times and other places which I regard as out of bounds here, which I think might deal with that more fundamental problem. But this type of radical reform of our whole system of 2-year elections is so far afield that I do not regard that as a practical suggestion to intrude my ideas about constitutional reform; or even the possibility of having the President's family represented in both

Houses in order to take care of the chairman's, Senator Kefauver, concern about answering questions. I think again if the Cabinet members are going to answer questions, they had better have votes, and be entitled to the full privileges of debate and membership. This is a very far-reaching business, and it might have real dangers. I am aware of those, too, in getting the back up of the representatives of the people by having a block of official intruders. You know parliamentary bodies do have this reaction about official majorities and I am not unaware of it.

Therefore, I am just raising this narrower issue with you of taking care that there shall also always be a Vice President. I do not have, for once, any kind of pet solution, and I really am stumped on it, but I think the suggestion is well worth consideration.

Now, sir, there are many other things that I could go on and try to talk about, but I would like to conclude with one matter of such importance that I would like to call it to your attention and again say that I have no particular remedy for it.

We live in times when it is possible and I hope never probable and if we take the necessary action in time and with sufficient vigor it would not be probable, to have a surprise attack delivered on this city which would wipe out the entire Government. I would not like to go into this except in executive session, but I think you are all well aware from your several duties in other parts of the Senate and from your general acquaintance as Senators with all that has been discussed now, that this is not an impossibility, though it is a bad dream.

Now under those conditions, is the act of succession that we are now operating under adequate? Might it not be the case that in order to have no ambiguity about the Government, we should have not only the Congress covered by it, because the Congress might be in session, not only the Cabinet, covered by this act of succession, but some provision for State governors in some form to get together and try to choose one of their number, if there were nobody else available for this? I think that this could be covered by statute, because it is within—I do not know what your view would be, sir, but I should think it would be covered by the Succession Act under article II, section 1, clause 6. It is a provision which we would pray and hope would never of course occur, but in any such time of extreme disaster and peril as that, if this Nation is to survive as a people, it would be important to have met any possible contingency in advance. To do this helps to prevent temptation.

What is more important perhaps is to leave no loophole to a prospective enemy who thinks by a surprise blow at the heart of the Nation he could cripple us. This is something I think the Senate—

SENATOR LANGER. The Senate has had a bill before it to take care of that situation.

MR. ELLIOTT. Good, sir. I am very relieved to hear it. I do not know the bill and would not of course therefore express an opinion, but it is very gratifying to me to know that in your deliberations you have considered that also.

MR. KEFAUVER. Suppose for the record we print the bill in the appendix so that we can have reference to it.

(The bill S. J. Res. 8, 84th Cong., 1st sess., as passed the Senate is printed on p. 241.)

Senator O'MAHONEY. Such a bill might normally go to the committee having jurisdiction over civil defense.

The Civil Defense Act was written to prepare for defense against just such a contingency, but it never included the destruction of the Government.

Senator LANGER. Oh, yes; it included the destruction not only of the President and Vice President, but a majority of the Congress.

Senator O'MAHONEY. That is right, it does.

Mr. SMITH. Senator, do you have in mind the resolution which the chairman of this subcommittee proposed in the last Congress, by which State governors could have appointed Representatives in time of emergency or disaster?

Senator LANGER. That is right. That is the bill.

Mr. SMITH. That, sir, was the resolution of the chairman of this subcommittee which was reported by the committee and passed by the Senate in the last Congress.

Mr. ELLIOTT. If that is the case, I am simply in ignorance of it, and I hope that something of that sort will deserve the attention of the Congress because it seems to me to be of great importance.

Senator DIRKSEN. Dr. Elliott, conceivably a majority could be wiped out of both bodies and you could not do business without the necessary quorum.

Mr. ELLIOTT. Legally we would be in a very curious situation.

Senator DIRKSEN. So if you had to wait on a special election—

Mr. ELLIOTT. That is precisely the point. I did not think it necessary to develop that very much further because I was sure you would recognize the importance of it.

Now one final and concluding remark, if I may, Mr. Chairman. I have said in general that I support your resolution, which seems to me to be quite carefully drawn, as against the other resolutions. However, I just say that it seems to me there is nothing inherently illogical in the following proposition.

I would favor eliminating the Vice President completely from this business of determining the inability of the President or having a voting part in it. That is not because the Vice President would be "ambitious" or anything of that sort. On the contrary, I think he might lean over backward against declaring the President unable, in order not to be accused of being ambitious. I do not refer to this Vice President. I make no reference to that. His conscience and his sense of national duty is, I think, as good as any man's that I know, and sometimes a little better. But the point is that any Vice President might take this attitude, and if he did vote, he would undoubtedly be traduced by people who would say something about his motives. Therefore, I would think it would be useful not to expose him to this kind of thing. This is a matter of course that you will exercise your own judgment on completely as you do on all other matters. But I think in terms of just the impact on the opinion of the country and the position of freeing the Vice President of any leaning over backward on the one hand or of the accusation of ambition on the other, it would be useful to eliminate him.

If that were done, sir, as you cut down the number of the executive departments, I really raise a question about whether you need to put in the leaders of both Houses and so on, more than to say that this committee should consult with them, you see, to get their views, to be sure that they have taken the temper of Congress in this thing,

because to mix up voting in this way, this selected group of them, is I think unnecessary and leads to a certain amount of mixing of functions, and would be much simpler if you would put it in some form of that kind.

Senator KEFAUVER. Senator Langer, do you wish to ask Dr. Elliott some questions?

Senator LANGER. I have no questions.

Senator KEFAUVER. Senator Dirksen?

Senator DIRKSEN. No; but I think Dr. Elliott has been a very good witness this afternoon. I have just one observation to make. I quite agree with your observations with respect to the Vice President, because inherently he would be confronted with this old conflict-of-interests idea.

Mr. ELLIOTT. And he might lean over backward and he probably would. That is the thing that frightens me about this. He really would not be willing to say the man was unable to perform the duties of his office. He would therefore endanger himself of accusations of self-interest and he might just do the wrong thing through trying to avoid it.

Senator KEFAUVER. I might at that point explain my thinking of how the Vice President is brought in in the resolution, Senate Joint Resolution 184, which I filed. It was the intention to leave the power of the Vice President to take over as it is now in the Constitution, but also to have a method of establishing a committee to decide upon the inability of the President.

It provides that when the Vice President asks for the convening of the committee, or a majority of the members of the committee ask for the convening of the committee, the Chief Justice should convene them.

I thought that the Vice President might feel that he should take over, but because of the reluctance that they always have, we would rather have a committee pass upon it.

Mr. ELLIOTT. You have covered this, sir, because you do give alternative approaches to it. That is to say you have it so that six members or whatever it is of that group could act independently of the Vice President.

Senator KEFAUVER. You would not eliminate the present constitutional right of the Vice President to take over, however.

Mr. ELLIOTT. Oh, no; I do not eliminate that at all, but I do not think he should be his own judge of when the President is disabled. That is the point. He takes over in any case.

Senator LANGER. Mr. Chairman, I want to express my thanks to Dr. Elliott for his very fine presentation here.

Senator KEFAUVER. Yes; we are all certainly very grateful to Dr. Elliott who has given of his time to come to Washington by his own means to inform this committee. It has certainly been a very excellent dissertation and discussion that he has presented.

Senator DIRKSEN. Well, it is an urgent matter now.

Senator KEFAUVER. No question about it.

Senator DIRKSEN. And it is a rather wonderful thing that the President is so completely uninhibited in discussing the matter. He is the very essence of candor and lays it all out in all the discussions we have had.

Mr. ELLIOTT. May I make one observation on that, sir? A President might feel very reluctant to resign on his own initiative for

disability, unless he had the backing of this kind of finding. Do you see what I am talking about?

Senator O'MAHONEY. Yes; surely.

Mr. ELIAORR. You know, it looks like quitting. This might be a real protection to the man's deeper inner sense of duty. There is a conflict in a certain sense that any conscientious man might well have, confronted with this kind of decision, "Should I take this decision upon myself and quit," the first time in history that a President ever quit. Not this President alone, but any President. Well, if he had the protection of this kind of a method of determination, it would make it very much easier for him to be guided by his real conscience.

Senator O'MAHONEY. Mr. Chairman, may I say I am sure we are all very much impressed, as I always have been, whenever I have had the fine opportunity of listening to Dr. Elliott. It has been a stimulating statement which he has made and I am sure it will provoke thought on all of our parts.

I did, however, want to make this comment. I was not persuaded by the doctor's argument about the separation of powers. We are dealing here with the determination of the disability of the President. It has nothing to do with the legislative power nor with the executive power to enforce the laws. We are concerned only with finding the best forum to determine whether or not the Chief Executive is unable to perform the duties of the office. That is the only question that is here.

The alternatives that are presented to you are of going to bodies which are somehow, some way separated from the people. The Cabinet is appointed by the President, not by the people, not elected. The Supreme Court and all the Justices of the Supreme Court are appointed by the President and confirmed by the Senate. The President and the Vice President, as I have already said, are the only officers who are elected by all of the people, and the suggestion of having Congress make this determination is based upon the actual fact that the Congress is the only existing body which comes with authority from the people.

The amendment that we propose here does not in any sense invade the executive power nor does it touch the legislative power. The Constitution left a gap. There was no method provided for determining whether or not a disability actually existed, and I still feel that the method suggested in S. J. Res. 141 is the better method.

As a matter of fact, I would say that leaving the power, or vesting the power, of determining the disability of the President or the Acting President in the hands of the Cabinet or in the hands of a political party would itself be a violation of the powers of the people. It might even be a violation of the doctrine of the separation of powers.

Now let me say just another word with respect to the comment that Dr. Elliott made on President Truman's suggestion. I agree with him.

One must remember in considering this matter that when the Constitutional Convention created the office of Vice President, they were singularly at a loss to know what to give him to do.

Mr. ELLIOTT. That is right.

Senator O'MAHONEY. And finally they decided that he would preside over the Senate.

Mr. ELLIOTT. That is right.

Senator O'MAHONEY. That seems to me to be conclusive evidence that they were creating an office which should assume temporarily the duties of the Chief Executive when any of these contingencies arose, in an acting capacity. I do not feel that it is necessary for us to provide for the election of another Vice President by the electoral college which has already been robbed of practically all of its selecting powers.

Senator KERNAUER. Do you wish to make some further comments?

Mr. ELLIOTT. I would like to make a very short comment on that, because it is so important an observation.

In the first place, taking up the last one first, it seems to me that the health of the Vice President is normally assumed to be better than that of the President, but there is no guaranty of this whatever.

Senator O'MAHONEY. None whatever.

Mr. ELLIOTT. There might be a disability of the Vice President without anybody to step into his shoes, you see, and I would like never to leave that gap, that is all. I think President Truman, conscious of this thing, has, it seems to me, made a most useful suggestion about it, which I would like to leave there.

Senator KERNAUER. While you are on that subject, about having a second Vice President when the Vice President takes over the powers and duties of the President, President Truman suggests the reconvening of the electoral college which you think is as good a plan as has been suggested although you are not satisfied with it. How about the President or the Acting President proposing, nominating a Vice President to be ratified either by the Senate or by the electoral college.

Mr. ELLIOTT. I did suggest that, sir, as a hasty thought on my part, but I have not thought it out enough to be at all confident about it. If they turned him down, as I suggested, then he would be in a rather curious position. You would have another stalemate. Maybe the President would have to come to an accommodation with them and work out somebody they could agree on. I would myself rather lean to that, but I do not want to rule out President Truman's ideas.

The reason I do not want to rule out the use of the last electoral college rests precisely on the point that Senator O'Mahoney raised about my first suggestion: The electorate that elected first the House of Representatives and then the Senate of the United States, both Houses, may not be at all the same electorate that elected the President of the United States. The difference of votes between the two parties in Congress and for the Presidency in terms of partisanship might be quite different even in a presidential election year. You are dealing with the parties in Congress just as much as in the executive department and perhaps more so. I personally would like a 4-year term for the House and 8 for the Senate. Actually, the people whom the President appoints to his official family for these high offices are, in some sense, the inheritors of his policies more than anybody else could be, and they represent that Presidential mandate from the Nation at large, though indirectly, in a way that I dare say is at least the equal of anything that you would find in the reflection of a Congress elected quite often on local issues, Senator.

Senator O'MAHONEY. Oh, I think that is a very sound theory.

Mr. ELLIOTT. No, Senator. It is a fact that this Nation was deprived of your services on what I regard as one of the most unfortunate local issues that I can think of—wool—and I'm a woolgrower myself—but I don't vote just on wool.

Senator O'MAHONEY. Do not disarm me.

Mr. ELLIOTT. There was a case manifestly where something local supervened over national interest.

Senator O'MAHONEY. There are occasions, may I say, when the President runs ahead of his party, and I have known other occasions when the Congress has run ahead of the candidate for President.

Mr. ELLIOTT. That is true.

Senator O'MAHONEY. There have been some such cases.

Mr. ELLIOTT. That is all I am saying, that in a sense there is a slightly different mandate on a nationwide basis, and it seems to me that that should be borne in mind when you consider this, but I am sure, sir, this question will be debated with all your vigor and usual persuasiveness on the floor of the Senate.

Senator KEFAUVER. I do want to again express our very deep appreciation to you, Dr. Elliott. You have made an outstanding contribution to this subject. We thank you, Senator O'Mahoney, for leading off with your excellent statement.

Senator O'MAHONEY. Thank you very much, Mr. Chairman.
(Whereupon, at 4:30 p. m., the subcommittee adjourned.)

PRESIDENTIAL INABILITY

TUESDAY, FEBRUARY 11, 1958

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:15 p. m., in room 424, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senator Kefauver.

Also present: Senator Joseph S. Clark of Pennsylvania; Wayne H. Smithey, member, professional staff.

Senator KEFAUVER. The committee will come to order. Our first witness this morning is Judge Musmanno, distinguished member of the Pennsylvania Supreme Court.

We are delighted to have Senator Clark from Pennsylvania, who is here to introduce and present Judge Musmanno. We will be glad to have any words from you Senator Clark.

Senator CLARK. Mr. Chairman, thank you very much for your courtesy in permitting me to appear before your subcommittee this morning to introduce formally to you a gentleman whom I am sure you have heard many things about. That is the distinguished Justice of the Supreme Court of Pennsylvania, Michael A. Musmanno.

Judge Musmanno has had a long, active, full, and varied career. He first, I imagine, came into national prominence many years ago when he was counsel for the defense at the Zacco-Vanzetti trial in Boston, endeavoring to protect the civil rights and civil liberties of those two unfortunates.

Since then he has had a distinguished career at the bar and in the Navy during World War II.

He has been serving with distinction on the Supreme Court of Pennsylvania for the last several years where his industrious research and his keen interest in the liberalization of the law of our Commonwealth has made its mark.

With respect to the subject matter before your committee, the question of legislation or a constitutional amendment to provide for the case of Presidential disability, a matter which is of the keenest interest to the entire country, Justice Musmanno has given very grave and careful thought, brought to bear upon the fine powers of his active mind, and I have no doubt that the suggestions which he is prepared to make to your subcommittee will be a very real benefit in the solution of this most difficult problem, which I think all Americans must hope can be solved in a satisfactory manner at the earliest possible moment.

Thank you very much, Mr. Chairman, for your courtesy.

SENATOR KEFAUVER. Thank you very much, Senator Clark. The fact that you would come here and speak so highly of Judge Musmanno is a great recommendation to him.

Of course, we know of your active participation in the judiciary of Pennsylvania for many years, Senator Clark.

We would be glad if you would sit with the committee this morning and join in any questioning that you care to.

SENATOR CLARK. Thank you, Mr. Chairman. I regret that I have another committee meeting to which I must go, and I want to thank you again for permitting me to come here.

JUDGE MUSMANNO. Thank you very much, Senator Clark.

SENATOR KEFAUVER. Judge Musmanno, Senator Clark and also Senator Edward Martin, Senator Clark's colleague from Pennsylvania, have both suggested that you would be able to enlighten the committee on this important problem. Senator Martin would also be here except that he is being given an examination by a physician today, his regular checkup. He asked me to explain to you that he was glad to join with Senator Clark in presenting you to the committee and in feeling that you would have a contribution to make.

I read in the New York Times, Sunday, of a new book that you have written, Judge Musmanno, of your experiences as a lawyer over a period of many many years. It sounds like an interesting book. I think you are entitled to a plug for your book this morning.

JUDGE MUSMANNO. I want to assure you it was entirely coincidental that that review appeared on the eve of my appearance here before the committee.

SENATOR KEFAUVER. Very well, Mr. Justice Musmanno, will you proceed?

You have a prepared statement. The full statement will be printed in the record so that any of it you do not read, or if you want to summarize, the entire statement will appear as presented.

STATEMENT OF PENNSYLVANIA SUPREME COURT JUSTICE MICHAEL A. MUSMANNO

JUDGE MUSMANNO. I shall be pleased if you care to put any questions, as I proceed with my exposition of what I regard to be a workable plan to solve the problem which has plagued our country for 168 years, as to what should be done in the event of a Presidential disability.

Mr. Chairman, every 4 years the people of the United States elect a President and a Vice President. The Vice President must answer to precisely the same qualifications required of the President. But once the Vice President takes office, he becomes a stranger to the President's office, for which he is fully qualified, while the back of the man who is President sags under the weight of the burdens increasingly piled upon it.

No one with the meagerest cognizance of public affairs can fail to perceive that it is physically impossible for any one man to discharge all the duties which now devolve upon the President of the United States in response to the dictates of the Constitution and because of the imperious demands of daily recurring national crises.

Since the Government must, of course, continue to function, regardless of limitations of flesh and bone, the President is compelled to turn to some one or more other persons to discharge executive pow-

ers and duties, lest Government collapse. Thus, the President depends on an assistant to the President, sometimes referred to as the "Assistant President," an office which does not exist in the Constitution.

It may fairly be assumed, without intending any disrespect, that, in loyally and conscientiously assisting the President, the "Assistant President" does some things which constitutionally must be done by the President himself.

I make no observation on how he does these things. He probably does them well, but he has no authority to do them at all. Not only does he have no authority to exercise Presidential power but the people have never passed on his qualifications to do what the President alone is supposed to do.

In the meantime, a man who possesses the constitutional and occupational fitness to be President, which fitness has been considered and approved by the people, stands by idly and impotently. Is it not the acme of absurdity that the Vice President, with all his proved capacity to assist the President, must employ all his time as a time-keeper of debates in a legislative body of which he is not a member and where he can neither speak nor vote—except in a tie, a rarity so exceptional as practically to be nonexistent? And is it not even more absurd that when that legislative body adjourns, the Vice President has no duties at all, except to keep healthy so as to take over in the event the President dies or resigns, the latter of which no President has ever done yet?

In no other spheres of activity—military, civil, commercial, industrial, or fraternal is a substitute chief officer held in idleness until the moment he is to become chief himself,

The vice commander of an army, division, or regiment has duties which are indispensable to the success of the military enterprise.

He renders continuous and unceasing assistance to his superior and is so intimately associated with what his chief is doing that in the event of an emergency he assumes command without a break in the continuity of operation.

The executive officer of a ship has duties of an extremely important character, aside from taking over the command of the vessel in the event the command devolves upon him.

The vice president of an industrial corporation is not kept hidden away from the office and the plants of the company until he is summoned to head the business of which he has been kept in complete ignorance. He works by the side of the president of the railroad or steel company or the automobile firm at all times, and he is qualified at every and any moment to undertake with up-to-date competence, the responsibilities of the president, should it become necessary to do so.

President Eisenhower is the only President who, while not utilizing the capacities of the Vice President to discharge Presidential functions (since he may not do so constitutionally), has at least allowed the Vice President to be kept minutely and intimately informed on the problems confronting the White House, and therefore, the people of the United States. It is nothing short of shocking to learn from former President Truman's memoirs that before he became President he was denied even the slightest knowledge on the atom bomb. It was not until the day after he had been sworn in as President and had had his first Cabinet meeting that he learned of the

most destructive weapon in the world and learned further that he was the person who was to decide if and when to use it.

Under the constitutional amendment which I offer, Congress will supply the machinery to determine whether the President at any given moment is physically capable of standing on the bridge and giving the orders which will carry the vessel of the well-being of the American people through the storm which may threaten our security and even survival.

If, because of illness, the President lacks the strength and keenness of perception needed to guide the ship through heavy seas and foul weather, a suitable commission will so declare, and direct the Vice President to take the helm.

We could be confronted with such a situation tomorrow, a year, or a decade from now. And no one realizes that possibility more than President Eisenhower. He has expressed himself emphatically on the subject.

Several plans have already been discussed in this connection, but I am constrained to say, with all respect and courtesy to the authors of the various plans, that in my opinion they are not feasible either because they lack working practicability or because they encounter constitutional barriers.

Thus, one plan recommends that the President's Cabinet decide if and when the President should resign if disabled. Since the Cabinet is made up entirely of Presidential appointees, one cannot dismiss the thought that their judgment and decision could well be influenced by personal considerations.

Another plan proposes that Congress enact legislation which would permit the Vice President himself to decide when he should assume the President's office.

This plan, I respectfully submit, is unworthy of consideration. No person should have it in his own exclusive power to elevate himself to a higher office in a representative republic.

A Vice President who would crown himself in such a fashion would quickly find the crown tarnishing under the people's appraisement of an act which could be interpreted as selfish, egotistic, and unworthily ambitious.

Moreover, there have not been lacking examples in our history where the President and Vice President were of divergent political views even though belonging to the same political party, and there have been painful occasions where the Chief Executive and the Vice President were personally hostile to each other.

One suggested bill provides that a commission representing the executive, legislative, and judicial branches of the Government determine Presidential inability.

Senator KEFAUVER. What bill is that we are talking about here?

Mr. MUSMANNO. Mr. Chairman, I did not endeavor to particularize the individual bills because I did not want to be seemingly criticizing the wisdom of any particular Congressman or Senator, but I have read all the bills on the subject which I have been able to obtain, and from all of them I have gathered what the various plans are, and I am indicating that none of those plans in my respectful opinion meets the needs of the situation.

Senator KEFAUVER. Yes. Very well, Judge, I understand. There are several bills which would bring in the legislative, executive, and

judicial branches and I did not know if you had reference to any particular one or not, but you have satisfactorily explained your attitude.

Mr. MUSMANNO. Very well.

(Discussion off the record.)

Senator KEFAUVER. All right, sir, will you proceed?

Mr. MUSMANNO. With regard to the suggestion that the chairman just made, might I respectfully interpolate here that the ratification of a constitutional amendment does not take as long as is generally supposed. David Lawrence, in an article which he wrote recently on this subject, reminded us that the 21st amendment repealing the 18th amendment was ratified in 10 months after submission.

The 17th amendment, providing for the popular election of Senators was ratified in 13 months.

The 19th amendment, which of course as we know granted women suffrage, was ratified in 14 months, and the 20th amendment was ratified 11 months following submission by Congress.

I really believe, Mr. Chairman, and I am sanguine in this hope, that if Congress would adopt a constitutional amendment on this subject quickly, that we could still have a ratification of the amendment by the end of this year.

Before our brief discussion on constitutional amendments, I was referring to the bill which provides for a commission representing the executive, legislative, and judicial branches of the Government.

While the plan involved in that proposed legislation might meet constitutional requirements it still would not satisfy, because two-thirds of the Commission would be made up of persons not elected by the people and, to that extent, the plan would deny the people an authoritative voice in the selection of their President.

Another serious objection to this indicated plan is that since the Supreme Court might be called upon to evaluate its constitutionality, the Chief Justice and the senior Associate Justice who are declared to be members of that proposed Commission would be disqualified from considering the case, thereby depriving the country of a full judicial review at the time it would be most needed.

The Chief Justice of the United States has already informed Congress that the entire membership of the Supreme Court is opposed to such a plan. Of course, the Court's wishes should be respected.

Still another plan declares that the President should voluntarily resign if disabled, and if he refuses to resign, impeachment proceedings could be initiated to compel him to do so.

This would be a most sorry solution of the problem. It would make of a President's unfortunate illness the matter of a "state trial" with all the agonies which go with it, not only to the principals involved, but to the Nation itself.

The only logical governmental body to decide Presidential inability is Congress which is responsible directly to the people.

Under the constitutional amendment I propose, Congress would, as I have stated, provide the machinery for determining Presidential inability. I am sure that Congress can and will work out a suitable plan to meet every contingency.

I personally would recommend that Congress enact a law resolving the Judiciary Committees of the Senate and House into a permanent

Presidential Inability Commission. The membership of such a Commission would be large enough and representative enough to speak for all parties, all geographical sections of the country, and all current points of view.

At the same time, it would be small enough to meet and act quickly. The chairmen of the committees would be empowered to call a joint meeting of the committees at any time, whether Congress be or not be in session.

The chairman of the Senate Judiciary Committee would preside over the Commission. This Commission, made up, as it would be, of persons elected by the people and commanding the respect of the entire country, would be entrusted with the delicate and grave task of determining whether a President, because of inability to discharge his powers and duties, should be displaced by the Vice President.

In the event the Commission found the President unable to attend to the responsibilities of the Presidential office, the Vice President would become President for the period of the President's disability.

When the President would have recovered his health or in any way have overcome his inability to act, the Commission would restore him to office and the elevated Vice President would revert back to his original office.

A two-thirds vote of the Commission would be required to declare the President unable to discharge the powers and duties of his office, and a similar vote would be needed to restore him to office, once the disability ceased.

Circumstances could combine to prevent the President from fulfilling the duties of his office for reasons other than ill health. Now that our Presidents fly long distances over oceans, deserts, and mountains a President's plane could be lost, so that days, even weeks, could pass with no news as to whether he had survived.

A President could conceivably become captive of circumstances or hostile forces. These things could happen when momentous questions could be demanding immediate answers. In such situations where the President would be unable to perform his duties, even though presumably healthy, the Commission would be empowered to direct the Vice President to become President until the President's inability would have been removed.

But even more important than the matter of succession to the Presidency is the need to ease the burdens of the President to the end that there will be less chance of his becoming physically incapacitated while in office. No President can possibly do all the things which the Constitution of 1787 requires of him in the setting of 1958.

He cannot sign all the documents he is supposed to sign, he cannot read all the reports submitted to him to read, he cannot meet and talk to all the people which in the full discharge of his functions it would be expected he should meet. He cannot handle all the details of recommendations for legislation, he cannot go into the minutiae of the entire Military Establishment; he cannot supervise the whole diplomatic corps. He cannot review all the criminal convictions under Federal statutes to determine whether he should exercise the Presidential pardoning power.

The President of 1958 must attend to matters which could not even have been imagined in George Washington's and John Adams' days.

The President of today is studying problems provoked by sputnik, he must be schooled in missiles, satellites, and rockets, he must confer with scientists, he must consider a revamping of our educational system with emphasis on the science of survival.

He must study the globe and concern himself with what is happening in all the European countries, in the Middle East, Far East, Africa, and wherever else the Soviet threat of world domination rears its python head to strike at our lifelines.

He must study the budget and the tax rate. He must worry over charts depicting trends in our national economy, he must keep his finger on the pulse of NATO and our ever-growing number of alliances. He must preside over Cabinet meetings.

He must appoint judges and promote Army and Navy personnel. He must consider foreign aid and reciprocal trade agreements. He must ponder questions involving enforcement of court decrees and the possibility of calling out the National Guard in domestic turbulences.

As head of a political party he must meet with party leaders and map out political policy and program in various parts of the Nation.

Ever since Suez, scarcely a day has passed that some crisis has not snarled the President's desk. He must watch the United Nations on its ever-revolving carousel and international alignments and realignments.

There are national security meetings to attend and advise. There is royalty to receive and entertain. He must give news conferences where he is placed under cross-examination which requires him to answer questions and elucidate on every phase of our complex Government, complicated foreign affairs, and technological advances in aircraft, satellites, and intercontinental missiles.

He must appear on television where he must be reassuring to a nation of eager people seeking light and guidance, and in preparing for the performance he must keep in mind the triple role of a wise statesman, a spiritual counselor, and a charming actor.

Senator KEFAUVER. Judge, that is one of the best descriptions of the duties of a President I have ever seen. It is very vividly given.

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

While the President is doing all these things, necessarily breaking many of the rules of good health in exerting himself beyond the suburbs of endurance, the Vice President stands by like a man at the edge of a frozen lake with a rope in his hand which he is forbidden to throw to the skater who has broken through the ice.

Under the plan I recommend, the Vice President not only throws the rope but he hastens to the rescue in a durable launch which will take aboard all other national safeguards struggling in the cold waters of indecision and delay.

If this constitutional amendment is adopted Congress would of course provide for a separate establishment for the Vice President. He would have his own staff and he would have his own mansion. Naturally he would no longer preside over the Senate where he is at present a robot who makes no decisions and a metronome which controls no tempo or rhythm. I provide that the Senate shall elect its own president as well as president pro tempore. The Vice President would thus dedicate all his time to the executive branch of the Government, to which he belongs and of which he is an inalienable integral part.

Foreseeing possible criticisms that this plan might somehow reduce the supreme power of the President and his responsibility to the Nation, let me say at once that while the Vice President would work closely with the President, exercising such Presidential powers as are delegated to him, he would always be subordinate to the President. There is no possibility whatsoever that by adding dignity and authority to the Vice President's office, this would effect a lessening of accountability in the Office of the Chief Executive.

National responsibility must always remain in one person, the President, and by allowing him to decide which powers he will delegate for long or short periods, our Government will have, as it must have, executive leadership in a single man. He will be the leader of our Nation.

His task will always be the dedicated one of guiding the destinies of the American people ever toward the fulfillment of the ideals of the founders of our republic and the dreams, hopes, and aspirations of the American people.

In view of the fact that President Eisenhower has now suffered three serious illnesses while in the White House, it has been suggested that if he should again be incapacitated, he should resign and make Richard Nixon Acting President until such time as the President should feel he had fully recovered from his illness.

This plan was suggested at the time President Garfield lay prostrate from an assassin's bullet.

Garfield's friends and supporters, however, refused to make the recommendation because they feared that once Chester Arthur assumed the President's office he would be installed permanently, and Garfield, if he should recover, could never again regain office, except, of course, in a succeeding national election. The same situation prevailed during the period of President Wilson's illness.

As of the present moment the President could not even constitutionally delegate his power to sign important documents in the event some accident disabled his writing hand. When President Eisenhower underwent surgery at the Walter Reed Hospital for ileitis, he was under anesthesia, according to a signed article in the Washington Post February 2, for 4 hours. It is frightening to contemplate that if during this period the United States had suffered an atomic or missile attack, there would have been no Commander in Chief to coordinate defense, counterattack, and civilian evacuation. He did ready United States defense forces for emergency before taking the anesthesia.

In these days that large areas of the country could be wiped off the face of the earth in a matter of hours, even minutes, it is not necessary to point out how vital it is that we have at all times a Commander in Chief ready to respond to any emergency.

Under the plan I recommend, the President, before entering the hospital would only need to delegate his full powers to the Vice President for the period of the operation, and the whole country could be assured that in the event of an attack, we would not find our great engine of defense immobilized because of the lack of an engineer to pull the levers.

Where the Vice President becomes President because of the death, resignation, or removal of the President, or where the President's

illness is ascertained to be one which will endure for some 6 months or more, the Vice President, who will have become President, will himself need assistance, even as the President needed it.

It must be kept in mind that in three instances the Vice President succeeded to the Presidency only 1 month after the President had begun his term of office.

President Tyler served 3 years and 11 months of Harrison's term; Andrew Johnson served 3 years and 11 months of Lincoln's term; Harry Truman served 3 years and 11 months of Franklin D. Roosevelt's fourth term.

In the other four cases where Vice Presidents became President, their incumbencies were not of short duration. Chester A. Arthur served out 3 years and 6 months of Garfield's term; Theodore Roosevelt served out 3 years and 6 months of McKinley's second term. Fillmore and Coolidge served, respectively, 2 years and 8 months and 2 years and 7 months of their predecessors' terms.

So much, Mr. Chairman, did these Vice Presidents in some instances believe that they were serving out their own terms of the Presidential office that in the cases of Theodore Roosevelt and Calvin Coolidge, they both declared that the first terms which they served, because of accession to the Presidency, constituted the first term of an enumeration of first and second terms in order to determine whether they should be a candidate for a third term.

Because of the possibility, as exemplified by the above historical facts, that a Vice President may become President for practically the entire term of the deceased or removed President, I have introduced in my plan something entirely new in our governmental scheme.

If, for the purpose of conserving the President's health and allowing him to concentrate on the immediate momentous problems of his Office, he needs a Vice President who will take over some of the burdens of the President's Office, it naturally follows that when the Vice President assumes the office of the President in his own name, he will need, as the President needed, a Vice President to assist him. I have thus provided that when the Vice President becomes President, Congress shall elect a Second Vice President who shall perform all the powers and duties of the Vice President during the time the Vice President holds the office of President.

The Second Vice President will be chosen from not less than three persons qualified under the Constitution for the Presidency and recommended by the national committee of the political party of which the President is a member.

If the Vice President assumes the office of President only temporarily and the President resumes his office, the original Vice President reverts back to his Vice President's status and the office of the specially chosen Second Vice President, if it has been created, shall cease to exist.

Congress will undoubtedly provide for other features in the implementation of this constitutional amendment.

We can entertain the hope that even after setting up machinery for Presidential succession based on a President's inability to perform his duties, the Nation will never have to witness a transfer of the President's office in the midocean of crises, domestic or foreign.

But, so long as human flesh remains something less formidable than stone and steel, this possibility always hovers within the realm of po-

tential reality and the time to take aboard an additional pilot is not when the ship is headed for annihilating rocks, but before the perilous passage is begun.

In any event there can be no question that the President's burdens have pyramided until no human Atlas can carry them without hazardizing his health and the welfare of the Nation. In these crucial days, and more crucial days to come, we can take no chance on a Presidential stumble which could conceivably send our well-being, security, and even survival over the abyss of complete ruin.

We do not need, nor do we want, in the White House, a Hercules of muscles and brawn, but we do want and can have a President who will exercise at all times the genius of leadership, the courage of initiative, and the dynamic drive of concentrated effort, but we must supply him with an armored knight who will hold off and strike down the ever-pressing foes of distraction, detail, and delay, while the President leads us on to ever greater heights of peace, security, prosperity, and human happiness.

Senator KEFAUVER. Judge Musmanno, you have presented a very thoughtful and challenging statement, and one containing not only a suggested solution to the immediate problem that we are considering, defining the inability and the removal of the inability of the President, but several other problems with which many of us have been interested and concerned for a long, long time, and which have been discussed by students of the Constitution and political scientists throughout the years.

It is quite apparent that you have given this matter a great deal of careful thought. We appreciate your preparation of this paper and your appearance here.

Now if you will, sir, let us read your proposed amendment section by section and perhaps we can discuss it as we go along.

Mr. MUSMANNO. Yes, Mr. Chairman.

SECTION 1. The executive power shall be vested in a President of the United States of America who may delegate, in writing, such powers and duties as in his discretion he shall deem appropriate, to the Vice President whose exercise of such delegated powers and duties shall have the same legal effect as if performed by the President.

Senator KEFAUVER. Now sir, I suppose that that would apply especially to a President who is going out of the country or who may be undergoing an operation or who, in the normal course of things, would want to delegate certain responsibilities and powers to the Vice President.

It would not apply to delegations during a period of inability, is that correct?

Mr. MUSMANNO. That is true, Mr. Chairman. This is a voluntary act on the part of the President to relieve himself of an onerous duty or chore when more pressing problems are demanding his undivided attention.

Senator KEFAUVER. And the power to delegate would automatically carry with it the power to take back?

Mr. MUSMANNO. That is true.

He could delegate a particular responsibility, he could delegate the powers of a particular department indefinitely or he could delegate certain powers or all his powers for a certain limited period of time

indicated in the document of delegation, and he may also, after having delegated powers unconditionally and indefinitely later recall those powers by another writing.

Senator KERNAUVER. Very well, I think that is clear.

Now let's go on to section 2.

Mr. MUSMANNO (reading) :

Sec. 2. 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 office of President, the Vice President shall become President.

Mr. Chairman, you may note there that I have altered slightly the language of the Constitution which states in that respect (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.

Constitutional authorities have argued at great length and for a long time on whether this provision of the Constitution means that the Vice President shall discharge the powers and duties of the office and therefore only become, in a manner of speaking, an Acting President, or whether he takes over the office completely.

The first time that this question came before the country was when Harrison died. A large body of opinion at that time was to the effect that Tyler would succeed only to the powers and duties, he would be only an Acting President, and would not become President. Tyler apparently was of that belief himself, because when he first took the oath, he referred to himself as Acting President, but 2 days later he seems to have reconsidered his position and he then declared himself President of the United States. And all other Vice Presidents who have since become President because of the death of their predecessors have followed that precedent. But there still remains some doubt as to whether because of the construction of that long paragraph there may not be the interpretation that the Vice President only succeeds to the authority to discharge the powers and duties of the Presidential office rather than to the office itself.

I have endeavored to remove all ambiguity by saying that the Vice President, in the event of the death, resignation, or inability to discharge the powers and duties of the office, shall become President and actually be the President.

Senator KERNAUVER. Judge Musmanno, I follow your logic and agree with it as to the first two contingencies, that is the death or resignation, but I wonder if where you make the Vice President the President in case of inability, whether you are not getting into trouble in the event that inability is removed.

Mr. MUSMANNO. I do not believe I am, Mr. Chairman, and I anticipated that possible observation.

I use throughout my exposition and in this proposed amendment the phraseology that the Vice President shall become President during that period he is actually holding the Presidential office. I do not have him an acting President, or a temporary President.

I do not think that when the Vice President actually is exerting the powers of the President that there should be any limitation on his powers, especially if he is representing us overseas or is dealing with other nations should there be the thought that somehow or other

his actions are not final and they still need the approval of the President. I believe that during the time the Vice President occupies the Presidential chair, whether it be for the remainder of the term of a dead President or whether it be only for the matter of 6 weeks while the President is undergoing an operation and convalescence, the Vice President should be actually the President.

Of course, Mr. Chairman, this entire constitutional amendment is unitary. It must be considered in all its various integral parts. We are not to be restricted to one particular paragraph in determining just what is the specific purpose of that delegation of power, and I think that by the time we get to the end of the reading of this whole proposed amendment, it will become quite clear that there shall be no question about the right of a disabled President to recover his office once his inability has been removed.

Senator KEFAUVER. All right, sir, then read the next paragraph of section 2.

Mr. MUSMANNO. Yes.

When the Vice President thereupon becomes President for an interval in excess of 6 months, Congress shall determine whether or not a Second Vice President shall be elected to perform all the powers and duties of the Vice President for the period the Vice President shall be President.

Obviously, if the Vice President becomes President only for a matter of days or weeks, we would not want to create the office of Second Vice President.

The Second Vice President shall be elected by Congress from not less than three persons duly qualified under the Constitution and recommended for election by the national committee of the political party of which the President is a member.

Senator KEFAUVER. Judge, in the election of the new Vice President or the Second Vice President by the Congress, I know it is not well in a proposed constitutional amendment to develop or to set forth details, but how did you have in mind Congress electing a Second Vice President, that is by joint session or in what manner?

Mr. MUSMANNO. I had in mind, Mr. Chairman, the action of Congress as Congress acts generally, by a majority vote of both Houses, just as any bill would be enacted. And in view of the fact that the possible candidate for such an office could only come from the party of which the President is himself a member, it could not happen that because the majority of Congress would be of a party opposite to that of which the President is a member, that the Vice President would then be of a party opposite to the party of which the President is a member.

Senator KEFAUVER. Would you have in mind the Senate acting on it separately from the House or would you have in mind a joint session with everybody having one vote.

Mr. MUSMANNO. I had not worked out that detail. I would at first blush assume that each House would vote separately just as legislation is voted on. I do not know that the House and Senate ever join in one joint session for the purpose of enacting legislation.

However, in working out the machinery, whatever might seem wise would of course still come within the framework of this amendment as I have now drafted it.

Senator KEFAUVER. Your language there would, in your opinion, be interpreted then to mean in such manner as the Congress may decide?

Mr. MUSMANNO. Yes, that is correct, and I do have a provision at the end of the amendment to that effect.

Senator KEFAUVER. All right, sir, let's go to section 3.

Mr. MUSMANNO (reading):

Sec. 3. In the event the President is unable to discharge the powers and duties of the office of President for any reason, the Vice President shall become President and continue in said office until the President whom he has replaced is able to perform the powers and duties of President.

Thereupon, the Vice President shall resume the powers and duties of the office of Vice President and the office of Second Vice President shall cease to exist.

I think that this language would carry with it the modification of what might seem to be didactic language in the first paragraph of section 2, that the Vice President actually becomes the President during inability of the President. And then you will notice that I add here specifically:

Congress shall by legislation provide the manner of determining the inability of the President, for any reason, to discharge the powers and duties of the office of President and when such inability has ended.

In my exposition, I have recommended a Presidential Inability Commission made up of the House and Senate Judiciary Committees. The Congress might desire to adopt some other method in which to resolve this problem, and of course it would have that complete authority under this amendment as now drafted.

Senator KEFAUVER. I would like to ask you a question or two about section 3, but let's go back to section 2 for just a minute.

I know that in determining to have the Second Vice President elected by the Congress as a whole, either by each House acting separately or by a joint session, which is unknown in the working of Congress today, as you have pointed out, that you gave consideration to the election under the constitutional provision of having an election thrown into the House where each State has one vote, as in the case where no candidate for President has a majority of the electoral college.

Why did you not think that plan more feasible?

Mr. MUSMANNO. I thought this plan would be more feasible because it would be less cumbersome. It would be a vote of the membership of Congress rather than a vote by States, and it would provide for a greater and more responsible representative vote because I include the Senate in the deliberation of the determination of a Second Vice President, whereas in the election of a President, the choice is left to the House of Representatives alone.

Senator KEFAUVER. It would be more representative and more democratic.

Mr. MUSMANNO. And more democratic, yes.

Senator KEFAUVER. Sir, in the—

Mr. MUSMANNO. Allow me to interrupt just there, Mr. Chairman.

Senator KEFAUVER. Yes.

Mr. MUSMANNO. When the Constitution was drafted and adopted, Senators were elected by the legislatures. Now of course they are elected by the people. We have a more democratic choice, and, therefore, I thought as you have indicated, it would be a more democratic way of proceeding to elect a Second Vice President.

Senator KEFAUVER. One of my good friends of the press has pointed out here that when the Constitution was originally written and for a number of years thereafter political parties in the sense we have them now were not envisioned, and your section 2, the second part of it, is based upon the theory that political parties will continue to be a part of our political system.

Mr. MUSMANNO. Yes, I do. When the Constitution was written and adopted, there seemed to be a feeling that George Washington would live forever, and that there would be a unanimity of political thought on how a Republic should run, but we found immediately after President Washington's retirement that there was not that unanimity.

In fact, John Adams' Vice President was not of the same party as John Adams himself, and now our system, our American system, our American party system, I think represents the very core of democratic idealism, because we have constant opposition to the party in power. We thus have a system of checks and balances which at all times calls to account what is being done by the party in power.

So while it is not written into the Constitution, I believe that our party system is as much a part of our governmental scheme as the division of our Government into three departments.

Senator KEFAUVER. This would of course be the first time that political parties were mentioned in the Constitution.

Mr. MUSMANNO. Yes; that is true, Mr. Chairman.

There are many features of our Government today which we accept without question but which are not mentioned in the Constitution.

For instance, the Constitution makes no reference to the Cabinet at all, and yet we now accept the President's Cabinet as practically part of the White House.

Senator KEFAUVER. Except that nobody knows exactly who the Cabinet is.

I mean we think of the Cabinet technically as the heads of executive departments, and yet we find the Ambassador to the United Nations, the head of the Bureau of the Budget and several other people being brought in and classified as Cabinet members very often when actually they are not heads of executive departments.

Mr. MUSMANNO. Yes; that is true. There is no crystallization into definite and precise language statutorily or otherwise as to what the Cabinet is.

Senator KEFAUVER. Then, sir, it is well to assume that political parties get together on matters without delay and with unanimity, but we all know of some cases where that has happened only after a great deal of agitation.

What if the political party representing the President's party, the national committee, just couldn't decide?

Mr. MUSMANNO. I do not think there would be a dearth of candidates, nor would there be any trouble in selecting three of them.

The big problem might be how to select 3 out of 33.

Senator KEFAUVER. Yes.

Mr. MUSMANNO. And since it would always be by a vote of the committee, it would be quite fantastical to assume that there could not be a majority vote on at least three out of the many candidates that could be presented.

Senator KEFAUVER. I was not talking about in the Congress after it got there.

Mr. MUSMANNO. Yes.

Senator KEFAUVER. I was thinking about in the committee itself.

Mr. MUSMANNO. Yes, I refer to the national committee as such.

Senator KEFAUVER. All right, sir. Now in connection with section 3, you would leave the machinery for establishing the Committee, which would decide upon the inability and the removal of the inability of the President, to Congress to decide?

Mr. MUSMANNO. Yes.

That machinery would naturally include a procedure. There would be an ascertainment of the President's condition in the event he was ill.

Certainly there would be perhaps even a smaller Committee appointed by the Chair of the Commission to select doctors and experts to pass upon or to examine and report to the Commission on the President's condition.

There would be many details which I am positive Congress would work out satisfactorily.

Senator KEFAUVER. This would enable Congress, to through legislation, decide that it, itself, the Congress, should decide, or it could decide upon a Commission, part from the Congress, part from the executive branch, or could decide upon a Commission wholly of either, or it could decide upon a Commission as you have suggested, made up of the Judiciary Committees.

Mr. MUSMANNO. Yes.

Senator KEFAUVER. Of the House and the Senate.

Mr. MUSMANNO. Yes. When I first approached this problem, I actually had Congress deciding the question of inability. I had drafted that in very specific language. But then I thought that there might be difficulties in the event Congress was not in session.

Some time would be required to bring Congress to Washington and time might be of the essence. So therefore—

Senator KEFAUVER. Filibusters, delays.

Mr. MUSMANNO. That is true. It is all possible. So I thought there should be a permanent body, and I feel that the two Judiciary Committees would fulfill all the requirements of any emergency.

Senator KEFAUVER. I know the Judiciary Committees will be satisfied with the confidence that you have expressed in them, Judge Musmanno.

Mr. MUSMANNO. Yes; I do have that confidence implicitly and completely.

Senator KEFAUVER. All right, sir; suppose we go on now to sections 4 and 5.

Mr. MUSMANNO. Section 4. The Vice President shall not be President of the Senate or preside over that body as heretofore.

I do not think that any great constitutional authority has ever ascribed to that feature of our Constitution any considerable merit; namely, that one of the Vice President presiding over the Senate. I think that feature was included only to provide the Vice President with some employment while he stood by ready to take over the Presidency in the event of a President's death.

In many ways the Vice President was regarded as a rather superfluous in the early days of our Republic, and even in the drafting of

the Constitution: In one of the debates on the subject as to how the President should be addressed, someone said that he should be referred to as "Your High Mightiness." That of course was regarded by most of the members of the convention as being perfectly absurd. They finally agreed upon "Your Excellency," and then someone suggested that the Vice President should be addressed as "Your Superfluous Excellency."

Senator KEFAUVER. I believe in the first draft of the Constitution there wasn't any Vice President.

Mr. MUSMANNO. In the original first draft, that is true.

Senator KEFAUVER. In the original first draft.

Mr. MUSMANNO. That is true; yes.

Senator KEFAUVER. And they decided upon one and they had to have something for him to do.

Mr. MUSMANNO. That was it.

Senator KEFAUVER. Who was it that said that the main job of the Vice President was to wake up in the morning and inquire about the health of the President?

Mr. MUSMANNO. I remember in that rather successful musical comedy, "Of Thee I Sing," there was the usual smoke-filled room of various politicians selecting a candidate for the Vice Presidency, and finally a man was called in and the spokesman for the committee that was considering vice presidential candidates, speaking for the committee, said to this man who was called in—I think they called him Winterbottom or some such ludicrous name—he said to him, "We placed all the names of potential vice presidential nominees in a hat, and unfortunately yours was drawn."

Senator KEFAUVER. On the more serious side, I think it should be said, though, that, particularly beginning with President Truman, important assignments had been given to our Vice Presidents.

Upon the suggestion of President Truman, Congress enacted a law making the Vice President a member of the Security Council and Vice President Barkley was given many responsible duties.

As you pointed out, this has been enlarged upon by Mr. Eisenhower.

Mr. MUSMANNO. Yes.

Senator KEFAUVER. In regard to Vice President Nixon?

Mr. MUSMANNO. Well, I do think that the office of the Vice President, now and for several decades, despite all the raillery which you can find in plays and cartoons, has achieved dignified stature, and under this proposed amendment of mine of course it will be almost on the level with presidential dignity.

Senator KEFAUVER. All right, sir, now let's consider section 5.

Mr. MUSMANNO (reading):

Sec. 5. The President of the Senate shall be chosen by the Senate from their body and he will not, because of such presidency be relieved of any of his duties or deprived of any of his authority as Senator. When participating in debate, he will relinquish the chair to the President pro tempore who will also be chosen by the Senate from their body. The President may, at his pleasure, authorize any Member of the Senate temporarily to preside in his stead.

Senator KEFAUVER. Then the President of the Senate would be just about the same as the Speaker of the House?

Mr. MUSMANNO. That is it exactly, Mr. Chairman.

Senator KEFAUVER. All right, sir.

Mr. MUSMANNO. Then the other two sections are really formal.
[Reading:]

Sec. 6. Congress shall have power to enforce this article by appropriate legislation.

Sec. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within 7 years from the date of the submission thereof to the States by the Congress.

Sec. 8. This article shall take effect immediately after ratification by the requisite number of States after submission thereof.

I thought that that was important because if we need--and of course we do need--some assistance in the discharge of the powers and duties of the President, that the incumbent President should have the benefit of that assistance immediately or as soon as it can be gotten to him.

SENATOR KEFAUVER. Mr. Smithey, do you have any questions?

MR. SMITHEY. Mr. Smithey is our very able counsel.

MR. SMITHEY. Judge, I would like to ask you a couple of questions.

MR. MUSMANNO. Yes, Mr. Smithey.

MR. SMITHEY. First of all, under the provisions of the present Constitution, on whom do you think the decision falls to determine the inability of the President?

MR. MUSMANNO. At the present time the Constitution does not indicate on whom the decision should fall.

Obviously if the President is able to determine himself, he would decide, because he merely makes a statement, "I am unable to discharge the powers and duties of my office," and the Vice President would then act as President. But the big problem, Mr. Smithey, is that if he should do that, if the President should voluntarily allow the Vice President to take over the powers and duties of the President's office, what would happen when the President would have recovered from his illness, or would have removed his inability? And it is because of that troublesome problem that Chester Arthur never took over the duties of the President during Garfield's incapacity, which lasted 80 days.

During those 80 days Garfield performed only one presidential act, and that was to sign a bill or rather a paper having to do with extradition. There was always the fear on the part of Garfield's friends and supporters that if Arthur took over the presidency, that Garfield could never become President again.

MR. SMITHEY. If the President is incapacitated and unable therefore to make the decision himself, do you feel that under the present provisions of the Constitution it is incumbent upon the Vice President to make that decision?

MR. MUSMANNO. I do not. I would look upon that as being very unfortunate.

SENATOR KEFAUVER. In line with that question, suppose the President were obviously incapacitated, unable to carry on, and was not even able to write a letter asking the Vice President to take over. I thought most constitutional lawyers had felt that in that circumstance the Vice President would have the power to take over the duties, and public opinion would be the judge as to whether he had done the right thing or not.

MR. MUSMANNO. That is true, but just as soon as that would happen, you would have litigation.

Once the Vice President would take over the office of the President and made Executive orders, all those who would be adversely affected

to an appreciable degree would question the power of the Vice President to be President.

Individuals who might be discharged from office or who might be demoted would question the right of the Vice President to act as President.

But there is a greater problem, a greater worry than those which I have just indicated.

Of course, this does not at all apply to the present incumbent of the Presidential chair or any who might in the foreseeable future have the honor of sitting in that exalted position. But we do know that when President Wilson was incapacitated, as he was for 18 months, it was assumed that he was incapable of performing the duties of the President, and there were overtures made upon Vice President Tom Marshall to take over the Presidency. But he never did, for the simple reason that he assumed that his assumption of the office would be questioned by the President himself, because while President Wilson was physically incapacitated, and to a certain extent paralyzed, he was mentally alert, and with that alertness he still had the tremendous power of the Presidency within his grasp.

He had his friends, his supporters, who would rally to his cause and might well contest, and would undoubtedly have contested the Vice President taking over the Presidency.

Dr. Grayson, who was the President's physician, said he would never sign a certificate of disability.

In fact, President Wilson resented very much that there were even Cabinet meetings during that time. Secretary of State Lansing called the Cabinet together on a number of occasions, and when Wilson was able to exert himself articulately, one of his first acts was to dismiss Lansing for having done what he thought Lansing had no right to do. Thus you have that problem, and it is an immediate problem.

What I think should be done is that this amendment, this or one similar to it, by the machinery which I have indicated, should be adopted at once as a constitutional amendment and submitted to the people. If the constitutional amendment is adopted by Congress—and of course as we know it can only be adopted by a two-third vote, and then it goes to the legislatures if the amendment is adopted and any catastrophe should occur along the lines you have indicated, you at least would have the expression of two-thirds of the representatives of the people as being in favor of a commission to determine whether the President is able or not able to perform the functions of his office.

Senator KEFAUVER. All right, Mr. Smith.

Mr. SMITH. In the correction of the ambiguity which exists in article II, section 1, clause 6, I take it from the fact that you submitted a proposed constitutional amendment, that you feel that any solution to the problem must come by way of constitutional amendment, and that a legislative enactment would be insufficient.

Mr. MUSMANNO. Categorically so.

Mr. SMITH. Thank you, sir.

That is all, Mr. Chairman.

Senator KEFAUVER. Judge Musmanno, we are certainly very grateful to you for this excellent presentation of your viewpoint and your discussion of this problem in such knowledgeable terms.

We thank you very much for coming here and being a witness with us today.

Mr. MUSMANNO. And I want to thank you very much, Senator Kefauver, for giving me this great privilege and opportunity to come here, and of having made it possible for me to come while I am still in Washington, after having just been released from the Naval Hospital in Bethesda.

I thank you very, very much.

Senator KEFAUVER. Now our next distinguished witness is Mr. Martin Taylor, chairman of the subcommittee on presidential inability of the New York State bar. Mr. Taylor has a long and distinguished record as an attorney and, as an attorney, has specialized on constitutional problems. He is, and for a number of years has been, the senior member of the law firm of Reed, Hoyt, Taylor, and Washburn of 52 Wall Street, New York City.

We appreciate very much your presence here today, Mr. Taylor.

STATEMENT OF MARTIN TAYLOR, CHAIRMAN, SUBCOMMITTEE ON PRESIDENTIAL INABILITY, NEW YORK STATE BAR

Mr. TAYLOR. This problem was stated in a very short sentence in 1787 by only one delegate to the Constitutional Convention, Dickenson. He said, "What is inability?"

Senator KEFAUVER. Off the record.

(Discussion off the record.)

Mr. TAYLOR. What Mr. Dickenson said was: "What is inability? Who raises the question and who determines it?"

That was all the debate there was about it. It was not until 1850 that a man named Curtiss wrote a book on constitutional law, and he repeated what Dickenson said, and wrote, "Nothing has been added to it."

The curious thing is that in that intervening period both Marshall and Storey, who wrote considerably on the Constitution, never mentioned the subject.

Now we get to the present problem. I think most people are agreed that there is no necessity to define "inability." Whatever tribunal, whether created by statute or by constitutional amendment, should have the authority to determine inability, whatever the cause may be. You might have physical inability, temporary or permanent; you might have mental inability, temporary or permanent; absence from the country, capture by the enemy theoretically, and any other circumstance.

Whatever the tribunal is, it should make the determination.

Second, you come to who should raise the question.

Senator KEFAUVER. On that first point, I believe that that is the general thinking of most of the constitutional students who have spoken on this subject: that "inability" is a term that should be left as it is.

Mr. TAYLOR. There is more agreement on that than on any other phase of it.

Senator KEFAUVER. Yes.

Mr. TAYLOR. You come to the second point: Who raises the question? That I think is again involved with the third one—Who determines it—because, whatever your method, whoever is given the power to determine, clearly might just as well have the power to raise the issue.

So we come to the major problem: Who determines it? That again divides itself into two sections.

Does it require a constitutional amendment or does the power exist in the Legislature?

Then you get to the last question: Whether it be determined by act of Congress or by constitutional amendment, how should it be done?

Now, as to the first question, as to whether it should be by constitutional amendment or by statutory enactment, there is a great deal of divergence of view.

In the Presidential Succession Act it was taken for granted that Congress had the power to pass it. A great many authorities, professors of constitutional law have expressed the view that the general clause at the end of section 1 of the Constitution, the broad comprehensive powers' section, is sufficient to give Congress that power. There has been much said so that it has raised a sufficient question so that, whether you agree with one view or the other, I think the practical view to take of it is that there must be a constitutional amendment in order to remove that doubt.

It may be as the gentleman who spoke before me said, the amendment is categorically necessary. We do not have to go as far as that. It is practical and necessary, whatever the fact may be about that.

And on that ground I think—

SENATOR KEEAUVER. Now will you enlarge?

MR. TAYLOR. I was going to.

SENATOR KEEAUVER. All right, sir.

MR. TAYLOR. The suggestion was made by the former Attorney General some months ago that it should be done on the ground that the Vice President already has the power, and that he should have with him, in making the decision, the advice of certain members of the Cabinet.

The Attorney General's argument was that, instead of clothing the Vice President with the power, his proposed amendment simply limited his power by giving some power that he had and sharing it with the Cabinet.

That view I think is not sound.

It certainly is not sound in the sense that we are interpreting the Constitution; because, at the time when this was written, the Vice President and the President were the people who got the most and the second greatest number of votes.

Very soon that crystallized into political parties.

It was not likely that it was contemplated that the candidate who had just been defeated by possibly a narrow margin would suddenly say to the President, "Well, I don't think you are able to perform the duties of your office." It has not been interpreted that way during all these years.

Certainly it was not contemplated that the Cabinet have anything to do with it because the Cabinet did not exist. It wasn't created until by statute in the early part of the 1800's, so that his proposal was not an interpretation of the constitutional provision. It was a suggestion of a method of solving it now, which is, of course, different.

I go back for a moment now to the actual text, which recites in the first three cases—death, removal, resignation, and so forth.

They obviously are self-determining and, therefore, there was no problem of whether the Vice President succeeded to the duties or to the office, which has been the controversial thing, because obviously anyone who was impeached or died or resigned could not resume the office.

The practice of swearing in the Vice President on the death of Presidents, which is the only one of those contingencies that has happened, has become an accepted practice, although there is nothing in the Constitution at all about it, there is no provision for doing that. It has become custom.

My own view is that those first three things contemplated succession to the office, and that the inability clause contemplated accepting the responsibility of performing the duties of the office.

There are several reasons that point to that. One is there are various State constitutions, even colonial charters, where a comparable provision exists as to a lieutenant governor and the governor.

The common case now, for example, is where a governor is out of a State, the lieutenant governor performs the duties of the governor in that period. That I think was what was meant by it. I do not think it meant anything more than that, that during inability the duties devolved.

That I realize is a controversial subject and much debated.

Now, as to the solution of it, assuming that it requires a constitutional amendment, then you get to the problem which confronts you gentlemen: What should it be?

There have been all sort of proposals. There has been the suggestion of the Cabinet, there has been the suggestion of a special tribunal, there has been the suggestion that the Vice President substantially not only take the initiative but make the determination, the suggestion that the President make the determination.

Obviously the President can.

I think there is no power, I think there is no interpretation that can be put on the Constitution language which indicates that it was expected to authorize the Vice President to assume the duties. I think it was deliberately omitted. The reason that I think that is because if you read the debates at that time, there were tremendous issues on which there were very strongly expressed views on both sides, and when Dickenson raised that, I think he had in the back of his mind, and some of the others had in the back of their minds, "Well, we will come to that later."

I think it simply never was done.

I do not think there is an indication of how it should be done. It clearly is a matter of commonsense that if the President simply said, "I am unable to perform my duties," that would raise the question.

I should doubt whether the Vice President had any power to raise it, and certainly there is no indication who else could raise it.

So I think it has to be met.

I think at the moment there is no way that you could, at least so far as the Constitution is concerned, no way you could say at a given moment such a person could, through such an act, have the Vice President begin to function.

My suggestion is somewhat shorter than that of the gentleman who preceded me. I think it is too short, but it is the beginning of something that could be amplified:

The commencement and termination of inability shall be determined by such method as Congress shall by law provide.

That omits any language as to whether or not the office or the duties are succeeded to, which is deliberately done because I think there would be no question about the fact that any act of Congress could clearly cover that.

In making it as general and brief as that, I had this in mind: As a broad principle of constitutional law, there should be expressed simply the enabling power; the basic chart to go by, and if some such thing as that is utilized, it has the benefit that Congress could correct, over the years, the method which was adopted.

Senator KEFAUVER. In other words, if one method was tried and some defect occurred?

Mr. TAYLOR. That is it.

Senator KEFAUVER. Then Congress would have in its power the power of correction without going through the constitutional amendment process.

Mr. TAYLOR. If you write into the Constitution the actual machinery, for example, if you permitted the Supreme Court judges you would have the problem, which is again a debated matter, as to whether a Supreme Court judge should function in any capacity except as a judge. You would have the difficulty of undoing constitutional amendments, let alone the difficulty of passing them, but if you give that broad general power to Congress, you can change that.

Senator KEFAUVER. Then on that score you and Judge Musmanno see eye to eye.

Mr. TAYLOR. That is right.

Senator KEFAUVER. One of the alternative resolutions which I had filed is Senate Joint Resolution 133, which has the same thing in mind of allowing Congress by legislation to determine inability and removal of inability. But your language seems to be shorter and more to the point.

Will you read it again, Mr. Taylor?

Mr. TAYLOR (reading):

The commencement and termination of inability shall be determined by such method as Congress shall by law provide.

Now I used the words "such method" intending by that that it should not be Congress as a whole, for the same reasons that Judge Musmanno pointed out, the difficulty of getting them together, perhaps too much debate, partisan feeling, and so on.

Senator KEFAUVER. In other words, you would interpret your language to not authorize Congress itself to—

Mr. TAYLOR. I said "by such method."

Senator KEFAUVER. To make a determination.

Mr. TAYLOR. I was hoping they would not adopt the method of doing it—

Senator KEFAUVER. In Senate joint resolution 133, which I referred to—

Mr. TAYLOR. I have not seen that.

SENATOR KEFAUVER. Which is one of the resolutions that I have filed, not that I am sure that is the method that should be followed, because I do have another resolution, it provides the Congress may provide by law for the procedure for—

(1) determining the inability of the President to discharge the powers and duties and (2) determining when the inability of the President to discharge the powers and duties of his office has ceased to exist.

MR. TAYLOR. Doesn't that say substantially the same thing in slightly more words?

SENATOR KEFAUVER. I suppose it does.

MR. TAYLOR. I mean it is implicit in that sentence that I read that if the President——

SENATOR KEFAUVER. Do you think it is clear in your language whether the President could recover his office?

MR. TAYLOR. Yes, certainly, because you see I use the words "commencement and termination of inability."

SENATOR KEFAUVER. And you would feel that the termination of inability would automatically carry with the reassertion of the duties of the President by the President?

MR. TAYLOR. I would think so, because the preceding language says, "In case of the inability." In the language at the end of article II, section 1, you have, "and such officer shall act accordingly until the disability be removed."

It may be a little too brief, but I would think it would be a necessary consequence that the termination carries with it the end of the period of inability.

SENATOR KEFAUVER. Now Mr. Taylor, let's point out some of the arguments against the proposal that you have made and the somewhat similar ones made in Senate joint resolution 133.

The first is that the President and the Executive Office itself would like to know before they give their approval to a proposal like this just what kind of machinery is going to be set up.

The Attorney General has expressed the ideas I read in the paper—and he will testify here sometime soon—that——

MR. TAYLOR. May I interrupt you? Is his proposal the same as was put forward by Mr. Brownell the former Attorney General, or don't you know that?

SENATOR KEFAUVER. As I get it, his proposal is that the Cabinet members should make the determination, but in any event, it should be an executive determination and not a legislative or a judicial one.

MR. TAYLOR. That is substantially the same.

SENATOR KEFAUVER. Yes; it is substantially the same, I take it, so that the first thing is that the executive department would like to know what the rule is going to be before they agree to it, and the second thing is that this is a matter of such great concern to the people that any amendment to the Constitution should not just delegate the power to the Congress but should enable the people themselves to decide by the ratification of the amendment what the new rule will be.

What is your answer to those arguments?

MR. TAYLOR. I had assumed that a statute would be drafted now at the same time that the amendment was proposed, which would set forth the method which would implement this section.

Senator KEFAUVER. In other words, so that everybody might have before them just what the Congress has in mind.

Mr. TAYLOR. There are two reasons for that. One is to meet the point which you brought up. The other is that the school of thought that it requires no constitutional amendment might regard the passage of such a statute as a stopgap. While I do not hold that view, it is very largely held.

Senator KEFAUVER. In other words, that as a stopgap measure the Congress go on and pass a statute, but in the meantime have submitted a resolution for an amendment.

Mr. TAYLOR. That is it.

Senator KEFAUVER. To give Congress the power.

Well, sir, do you not think that the passage of a stopgap amendment might deter or take away the interest in passing a constitutional amendment?

Mr. TAYLOR. You mean a stopgap statute?

Senator KEFAUVER. A stopgap statute.

Mr. TAYLOR. Yes, I do; but you would be better able to judge that than I would. I mean that is more a political question than a legal one.

Possibly all that would be necessary would be a statement which would satisfy the Executive as to the general theory of how the constitutional amendment was to be carried out by statute.

Senator KEFAUVER. Well, this Congress might make a statement about how we expected to carry it out, although I doubt that we would ever get everybody together on a statement. But the complexion of Congress might change very materially.

Mr. TAYLOR. Yes.

Senator KEFAUVER. From this session to the next one, and one would not be binding on the other.

Mr. TAYLOR. Even the fashion in constitutional amendments has changed.

Senator KEFAUVER. Assuming a stopgap statute, or assuming that the substance of a stopgap statute were presented as a constitutional amendment, what would be your preference or what would be your idea about who should do the deciding on inability and removal of inability?

Mr. TAYLOR. You mean what such a statute should be, in general?

Senator KEFAUVER. Yes.

Mr. TAYLOR. My own view is, and some of my committee members do not agree with me, that Congress should create a permanent and relatively small tribunal.

The objection to it which my colleagues make is that they would be responsible to no one and they might take too long to make a decision.

Senator KEFAUVER. You mean in the New York State bar committee there is a—

Mr. TAYLOR. That is right.

Senator KEFAUVER. There is a division of opinion?

Mr. TAYLOR. Yes.

Senator KEFAUVER. How many members, incidentally, are on the subcommittee?

Mr. TAYLOR. The full committee is about 15. The subcommittee is Elihu Root, Arthur Dean, and myself.

Senator KEFAUVER. Is it getting down to too much detail to tell the positions of each of you? You are each distinguished lawyers, Arthur Dean, Elihu Root, and Martin Taylor. You feel that some permanent commission should be established?

Mr. TAYLOR. The only divergence is Mr. Root does not agree with me about that. He leans toward the Cabinet idea.

Senator KEFAUVER. Mr. Root leans toward the Cabinet idea?

Mr. TAYLOR. Yes.

Senator KEFAUVER. And how about Mr. Dean?

Mr. TAYLOR. He has not expressed any special view about it either way on that point.

Senator KEFAUVER. And you in your own opinion, speaking as an individual, and not as chairman of this committee, what kind of commission would you have established?

Mr. TAYLOR. Well, not more than say 7 people. I have not thought out how to pick the 7 people or 9, if you please, but a small number, but to serve during the whole of the term of say 6 years or some such period.

Senator KEFAUVER. Serving during a term of 6 years.

Mr. TAYLOR. Well, a period longer than any given Congress is my idea or any given political party.

Senator KEFAUVER. I do not wish to particularize resolutions that I have filed, but I had another one here just for the purpose of discussion, S. J. Res. 134, which would have the question of inability and commencement and termination of inability determined by the Cabinet plus the four leaders of the two Houses of Congress, two in the House and two in the Senate, with the Chief Justice of the United States acting as the chairman of the committee, but with no power to vote. That I believe would be a committee with the present heads of the executive departments, or 10 in number, the four leaders of Congress would make 14, and provides that there must be the affirmative vote of a majority, which would make it 8.

Mr. TAYLOR. And the Chief Justice is 15.

Senator KEFAUVER. And the Chief Justice would be 15. He has no vote, but there has to be an affirmative vote of 8 members in order to find inability or removal of inability. Would you see any objection to bringing in the heads of the executive departments and the leaders of Congress?

Mr. TAYLOR. No.

Senator KEFAUVER. Do you think a committee of 15, 14 actually with the presiding officer who would have no vote, would be too many?

Mr. TAYLOR. I would not say too many, but I think the smaller the better, because if you are faced with the necessity of relatively quick action, the smaller tribunal you would have, the better. And as they obviously would have great responsibility, I do not think it is a power that would be abused by anybody, no matter how small the committee.

Senator KEFAUVER. The Chief Justice of the United States has written a letter speaking for all of the Court that the Supreme Court does not want to serve in the deciding commission, and I understand the logic of that, and I think it is sound, that the Court should not be the one to make the determination, because as Judge Musmanno has pointed out, they might have to decide upon the constitutionality or the legality of certain actions taken.

Mr. TAYLOR. There is a further objection to it. I think that you would probably have to amend the Constitution to enlarge the Judges' power.

Senator KEFAUVER. Yes.

Mr. TAYLOR. And also there is a considerable thought, I think, as the discussion at the time of the Nuremberg trial, indicates that the Judges should confine themselves to legal matters.

Senator KEFAUVER. That is correct. I think it goes beyond the jurisdiction that any of us would like to see the Court take on. But would you see any objection to the Chief Justice merely presiding at the committee meeting without the power of voting?

Mr. TAYLOR. I see no necessity for it.

Senator KEFAUVER. My thought in that connection was that it would add dignity and be a safeguard to action by the committee, and I had in mind similar action by the Chief Justice in impeachment proceedings in the Senate.

Mr. TAYLOR. I do not think that is really very important either way.

Senator KEFAUVER. Do you feel, sir, that the majority of the Commission or Committee should be of the Cabinet, who presumably would have more intimate knowledge of the President's ability and condition?

Mr. TAYLOR. They should have.

In the case of Wilson, that was not the fact. A small group of people surrounding the President had the facts and the Cabinet did not.

Certainly you would expect the Cabinet to have great knowledge.

Senator KEFAUVER. Mr. Smith, do you have any questions to ask of Mr. Taylor?

Mr. SMITH. Mr. Taylor, I think you submitted a letter to the House Judiciary Committee.

Mr. TAYLOR. That is right.

Mr. SMITH. At the time, that committee was undertaking a similar consideration of this problem. In the course of that submission you stated that shortly before the appearance of the Attorney General before that Committee, the Committee on Federal Constitution of the New York State Bar Association had presented a suggested amendment to the committee.

Mr. TAYLOR. That is right.

Mr. SMITH. What were the provisions of that proposed amendment?

Mr. TAYLOR. It covers the possibility of permanent—I will give you a copy of it.

Mr. SMITH. While you are looking for that, Mr. Taylor, I take it from the language of that letter that it was the position of the full committee, the 15-member committee on the Federal Constitution of the New York State Bar Association, that an amendment to the Constitution would be required in order to correct the defect in the Constitution.

Mr. TAYLOR. That is correct.

Senator KEFAUVER. So we can have it in this record, suppose we have copied in this record—

Mr. TAYLOR. It simply amplifies the short sentence that I gave you.

Senator KEFAUVER. Suppose we have placed in our record at this point the presentation by Mr. Martin Taylor of April 1, 1957, to the House Committee.

(The document referred to is as follows:)

COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES.

On April 1, 1957, a statement on Presidential inability was presented to your subcommittee by the Attorney General. Shortly before that the committee on Federal Constitution of the New York State Bar Association presented to your subcommittee a suggested amendment dealing with that problem. It did not then have before it the recommendations of the Attorney General. However, it agrees with him that in removal, death and resignation the office devolves but that in the case of inability the duties and not the office devolve upon the Vice President, that such inability may be terminated, resulting in the President taking up his duties. It agrees that a constitutional amendment is the best solution. It is true that by usage in those cases where it was impossible for the President to return, the Vice President has taken the oath of office, although there is no specific constitutional sanction therefor. A constitutional amendment would forever remove doubt as to this. Such diverse views have been expressed on the question of whether Congress has the power to legislate on inability that it may be contemplated that if such power were exercised by virtue of an act of Congress without constitutional sanction it would be tested in the courts. For those reasons the committee has advocated constitutional amendment.

Our subcommittee on Presidential inability, of which I am the chairman, and Messrs. Ellihu Root, Jr., and Arthur H. Dunn are the other members, have not met since the statement of the Attorney General so there has been time for informal discussions only. Hence this memorandum is submitted as an expression of my own views although in general concurred in by the others.

While the Attorney General advocates constitutional amendment, he does so on a completely different ground. His expressed view is that the Vice President could not be divested, without constitutional amendment, of the power of determination which he now has. The reason for divesting him of that power is that he should be given a more limited power to declare inability and then only with the consent of a majority of the cabinet who are executive officers. This memorandum is not primarily concerned with the policy of how to deal with the question of inability but is submitted in the hope that it may offer some suggestions to those having responsibility as to the interpretation of the Constitution. It is submitted that the interpretation of the Vice President's power advocated by the Attorney General and his recommendation as to the Cabinet acting with the Vice President could not have been within the contemplation of the framers for the following reasons:

First, it would have been a simple matter to have said that the determination of inability should be made by the Vice President. The debates rather indicate that they avoided who was to raise and determine inability. Nor was it likely that the framers expected that the Vice President would act deferred either by fear of the accusation of usurpation or reluctance induced by loyalty. Also the exercise of such a power without explicit direction would have been made at his peril and might lead to an extraordinary situation in some cases, as for example, where the President declared himself able to perform or resume his duties.

Second, at the time the Constitution was adopted, the Vice President was the candidate who received the second largest number of votes. The supporters of the rival candidates held quite strongly divergent views which very soon crystallized into a party organization. It seems unlikely that it was in the purview of the draftsman that a recently defeated candidate for President, then serving as Vice President, should be given power under any circumstances to determine the ability of the successful candidate to perform his duties.

Of course, it could not have been within the purview of the framers that the Cabinet should have any responsibility in the matter as the Cabinet was not then created.

As against the view that this power has been held since 1787 it should be considered that (a) it has never been exercised, possibly for the reason that it was feared that the office would be vacated; (b) that it required congressional action to implement it; (c) that such implied power was not sufficiently recognized to justify reliance on it.

The Attorney General argues that the Vice President has always had this power. He does not deal with the troublesome question which would arise if a President and a Vice President disagreed on the right of determination. His argument is based on the premise that since the Vice President has the duty of acting in certain contingencies he is clothed with the duty to determine when

that contingency exists. It does not, of course, so state in the Constitution but the Attorney General contends that it is a well-established rule of law that a contingent power gives its grantee the right to determine when to exercise it. In support of this legal generalization four cases are cited. (See citation 26 to Attorney General's memorandum.)

There was sustained in the Aurora case in 1813 the President's right to proclaim termination of embargo, in the Martin case in 1827 to calling out the militia, and in the Field case in 1881 and the Hampton case in 1828, the right to determine changing state of facts to vary tariff. Each of the above acts was done in pursuance of express authority given the President by Congress. This is an entirely different matter from saying that power may be implied where express direction is not given.

The logical conclusion in the interpretation of any constitutional language directing that something be done would be that someone was directed to do it. Unfortunately that does not appear to be so here unless Congress under its broad powers was expected to implement it. If by inference it was expected that anyone had the power without congressional implementation, it is submitted that it would be more likely to be the President himself at least where he was able and willing. The view of the Attorney General is that it requires constitutional amendment to give the President this power and a constitutional amendment to divest the Vice President of a power which he always had and apparently the President never had. It is submitted that not for this reason but for classification a constitutional amendment should be adopted to settle the question of succession to office where the President cannot resume his duties and of devolution of duties where he may be able to.

MARTIN TAYLOR.

April 9, 1957.

Copy for Information of Attorney General: Cornelius W. Wickersham, bar association committee chairman; Arthur H. Dean, Esq.; Elihu Root, Jr., Esq.

Mr. TAYLOR. On the page preceding the statement that I made there, you will find—

Senator KEFAEVER. It is on page 32, is it not, Mr. Taylor?

Mr. TAYLOR. What is the date of it?

Senator KEFAEVER. On the House hearings that we have here of April 1, 1957, the full text of Mr. Wickersham's letter is set forth. 1, 1957, the full text of Mr. Wickersham's letter is set forth.

Mr. TAYLOR. That is right.

Isn't the resolution of Mr. Wickersham contained in it?

Mr. KEFAEVER. The resolution is contained in it.

Mr. TAYLOR. That is right.

Senator KEFAEVER. We will have Mr. Wickersham's letter made a part of our hearing too.

(The document referred to is as follows:)

NEW YORK STATE BAR ASSOCIATION,
COMMITTEE ON FEDERAL CONSTITUTION,
March 29, 1957.

Hon. EMANUEL CELLER,

Committee on the Judiciary,

House of Representatives, Washington, D. C.

DEAR MR. CELLER: As you know, the committee on the Federal Constitution of the New York State Bar Association has studied the question of Presidential inability for some months and has given consideration to the many suggestions made to the Judiciary Subcommittee on the subject.

As a result 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 should 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 is clear that in its present form the fifth clause of section 1 of article II of the Constitution leaves open the matter of determination of what constitutes inability and fails to authorize anyone to deal either with the beginning or the end of the

disability. This fact has been a matter of embarrassment to the Government in the past and could be a matter of national disaster in the future.

The question of what happens on the death of a President and whether the Vice President then succeeds to the office or succeeds only to the powers and duties of the office has been settled by historical tradition. As we all know the Vice President is sworn in as President upon the death of the latter. Presumably the same thing would happen in case of the resignation of the President or of his removal from office.

On the other hand, it is not clear whether in case of Presidential inability the Vice President would become President or would only be authorized to act as President as one succeeding to the powers and duties of the office. The words "the same" have never been construed in this connection and this fact adds to the confusion which is so apparent in the recent discussions on the subject.

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.

Our committee concludes that a constitutional amendment is necessary for any final or authoritative solution of the problem and therefore recommends for your consideration that the fifth clause of section 1 of article II of the Constitution should be amended 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 Disability 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 Disability shall be earlier removed. The commencement and termination of any Inability shall be determined by such method as Congress shall by law provide."

If this amendment shall be adopted it would mean that in case of the death, resignation, or removal from office of the President, the Vice President would be sworn in as President. In case of the President's inability, however, the Vice President would only act as President, having his powers and duties, until the disability was removed. Congress would be called upon to enact legislation determining the method by which the commencement and termination of any inability should be determined.

In view of the amount of time that would necessarily pass before adoption of the amendment there would be plenty of time for your committee to consider what method should be adopted by Congress for this determination.

In case of the inability of both the President and Vice President, the change contained in the amendment proposed above is designed to make it plain that the officer who shall then act as President shall do so on a temporary basis until the disability is removed or a President elected.

It is believed that no amendment would be sufficient to meet the problem without providing for the determination of the question of commencement and termination of inability of the President or the Vice President, or without separating the provisions relating to inability from those relating to death, resignation, or removal, thus removing the ambiguity involved in the present language.

I sincerely hope that the foregoing will be of assistance to you and your committee in your consideration of this vital subject, and I am enclosing additional copies of this letter for the other members of the subcommittee, and am sending further copies to the committee's general counsel.

Respectfully and sincerely yours,

CORNELIUS W. WICKERSHAM, Chairman.

SENATOR KEFLAUVER. Mr. Wickersham's proposal for a constitutional amendment was, and the amendment should provide in substance:

(a) That the commencement and termination of any inability should be determined by such method as Congress should 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.

The first part of that is exactly what you have presented here.
Mr. TAYLOR. That is right.

Some of them felt that it ought to say in terms that it was the devolution of the duties and not the office should be covered in the amendment. I do not think that is particularly important.

I do not think it is necessary, but if it is, it could be added as it is in that draft.

Senator KEFAUVER. But the idea there was that inasmuch as there was a probability or a possibility that the President would resume the office, that during that interim the Vice President should—

Mr. TAYLOR. That view had been expressed so often that we thought possibly it would stop it forever if you said it in terms as it is in that proposed amendment.

Senator KEFAUVER. All right, sir. Anything else, Mr. Smithey?

Mr. SMITHY. This study that your committee undertook, how long was that study?

Mr. TAYLOR. I think it started about March 1956.

Mr. SMITHY. So that it has been underway almost 2 years?

Mr. TAYLOR. That is right.

Mr. SMITHY. You made a recommendation as a subcommittee to this full committee headed by Mr. Wickersham?

Mr. TAYLOR. That is right.

Mr. SMITHY. And they in turn adopted this report?

Mr. TAYLOR. That is correct.

Mr. SMITHY. Has it been presented to the State bar?

Mr. TAYLOR. That is correct.

Mr. SMITHY. Has it been adopted by the bar of the State of New York?

Mr. TAYLOR. No, it cannot be because it has just gone up there now. As you know, those things move rather slowly.

This printed record of it which I just got the other day is the submission to the State bar association. This is the report of the committee. There is a rubber stamp on it January 23, 1957.

Senator KEFAUVER. May I see that?

Mr. SMITHY. There is a statement in the letter of Mr. Wickersham to the House committee—

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.

Is that in accord with your thinking?

Mr. TAYLOR. Oh, yes.

Mr. SMITHY. And the thinking of your subcommittee?

Mr. TAYLOR. That is right. And the full committee as well. There is no great difference of view about it. I do not want to give a wrong impression about it.

As I say, simply Mr. Root leaned toward the Cabinet idea.

Senator KEFAUVER. In order that anyone reading this record may appreciate more fully the thought of people who have gone into this recommendation which has been submitted by Mr. Taylor here, I think it might be well to read the names of those composing the full Constitutional Committee of the New York Bar Association.

In addition to yourself, Cornelius W. Wickersham, Theodore Pearson, Eli H. Bronstein, Arthur H. Dean, Lewis R. Gulick, John W. MacDona, John J. Mackrell, Leonard P. Moore, Welles V. Moot, Archie B. Morrison, George Roberts, Churchill Rodgers, Elihu Root,

Jr., Arthur H. Schwartz, Harrison Tweed, and of course, Mr. Martin Taylor.

That is a very distinguished group of lawyers, Mr. Taylor.

Mr. TAYLOR. We still haven't solved the question.

Senator KEFAUVER. Mr. Smithey.

Mr. SMITHEY. Mr. Chairman, I have one further question and I think that will dispose of the questions that I have.

I think it was the position of the Attorney General before the House committee that the determination of a disability of the President was essentially a decision for the executive branch, and that under the separation-of-powers doctrine, it should be committed to that branch of the Government alone.

Mr. TAYLOR. Yes.

Mr. SMITHEY. Do you see any question of separation of powers involved in the determination of inability?

Mr. TAYLOR. No.

Mr. SMITHEY. I have no further questions.

Senator KEFAUVER. Would you amplify on that a little bit?

Mr. TAYLOR. I did not think there was anything to support that statement except the wish to have it so. It is a question basically, first of constitutional power, second of legislation under that power. The Constitution as such simply provides the basic rule. What you do in pursuance of that is a matter of statute.

There is nothing in the Attorney General's memorandum which indicates why it is so that that is an Executive decision.

Mr. SMITHEY. You would see no violation of the doctrine of separation of powers?

Mr. TAYLOR. No.

Mr. SMITHEY. If the decision as to inability was given to another branch of the Government?

Mr. TAYLOR. No.

Senator KEFAUVER. I think that, as a matter of practical application, it is well to have at least a majority of those who are going to pass upon the question, people who should be familiar with the ability of the President and in everyday touch with him and his actions, so that they could pass upon the question more intelligently.

But I agree with you that I see no constitutional reason why this should be the case.

Mr. TAYLOR. It may be practical and expedient but that is another matter.

Senator KEFAUVER. Well, we certainly do thank you, Mr. Taylor, for the consideration you and your committee have given this problem, and we have a great respect for the judgment and the conclusions reached by the committee of which you are the head, and your own individual conclusions and views upon this subject.

We thank you very much for coming down and giving us the benefit of your testimony.

I think it would be well to put the New York State Bar Association report dated December 31, 1957, in the record, if there is no objection.

(The report referred to is as follows:)

REPORT OF COMMITTEE ON FEDERAL CONSTITUTION

To the Members of the New York State Bar Association:

PRESIDENTIAL INABILITY

The Committee on the Federal Constitution has studied the question of Presidential inability under article II, section 1, of the Constitution, and has had the advantage of reports from a subcommittee consisting of Messrs. Martin Taylor, Arthur H. Dean, and Elihu Root, Jr., who made a special study of the question.

It is clear that in its present form the fifth clause of section 1 leaves open the matter of determination of what constitutes inability and fails to provide the method of determining either the beginning or the end of the disability. This fact has been a matter of embarrassment to the Government in the past and could be a matter of national disaster in the future.

At present the fifth clause of the section 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."

Thus Congress is authorized to provide for the case of removal, death, resignation or inability of both President and Vice President, declaring what officer shall then act as President, until the disability is removed, or a President elected. In consequence, Congress has enacted the so-called Succession Acts, designating who shall so act.

But the Constitution fails to give similar authority to Congress with respect to the matter here discussed. Only an amendment to the Constitution can cure this defect.

Several suggestions have been made proposing an act of Congress or an amendment, none of which appear to be adequate to meet the issue in a manner that would be understood by or acceptable to the American people, a consideration of highest importance. These include proposals that the President should make the determination, or the Vice President or the Cabinet or both; or that a commission either of selected officials or distinguished citizens should be appointed for the purpose. Another proposal is that the matter be referred to the courts. And there are other suggestions.

But these are matters that by proper constitutional practice should be decided by Congress, the representatives of the people of the country. Just as the Constitution now authorizes Congress to provide by law for succession where both President and Vice President are unable to act, so should similar authority be given to Congress to provide the method of determination of the vital question of inability to act.

Moreover, each of the various proposed methods of determination is untried and open to objections. To freeze any one method into the Constitution now would make correction in the light of future experience or change of circumstances extremely difficult, because it would require an additional constitutional amendment. This danger can be avoided by a constitutional amendment which gives Congress the power to select the method; then correction or improvement could be made at any time by Congress enacting a new law.

The question of what happens on the death of the President and whether the Vice President then succeeds to the office, or succeeds only to the powers and duties of the office, has been settled by historical tradition. As we all know, the Vice President is sworn in as President upon the death of the President.

Presumably, the same thing would happen in case of the resignation of the President or of his removal from office. Presumably also, in case of Presidential inability, the Vice President would only be authorized to act as President, succeeding to the powers and duties of the office only. But this conclusion has been questioned. The words "the same" have never been construed and this fact adds to the confusion which is apparent in the recent discussions on the subject in Washington and elsewhere. It is of the highest importance that the Constitution should be clear on this point, and that the text should be readily understandable not only to lawyers, but to laymen as well.

As a result 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."

At best it is extremely doubtful whether Congress has power to deal with the matter without a constitutional amendment and clearly any ambiguity of the present provisions cannot be cured by act of Congress alone.

This committee concludes that a constitutional amendment is necessary for any final or authoritative solution of the problem and recommends that the fifth clause of section 1 of article II of the Constitution should be amended 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."

If this amendment is adopted it would mean that in case of the death, resignation, or removal from office of the President, the Vice President would be sworn in as President. In case of the President's inability, however, the Vice President would only act as President, having his powers and duties, until the inability was removed or a President elected. Congress would be called upon to enact legislation providing the method by which the commencement and termination of any inability should be determined.

In view of the amount of time that would necessarily pass before the adoption of the amendment there would be plenty of opportunity for the congressional committees to consider what method should be adopted by Congress for this determination.

In case of the inability of both the President and Vice President, the change contained in the amendment proposed above is designed to make it plain that the officer who shall then act as President under and pursuant to the Succession Act shall do so on a temporary basis until the inability is removed or a President elected.

It is believed that no amendment would be sufficient to meet the problem without providing for the determination of the question of commencement and termination of inability of the President or the Vice President, or without separating the provisions relating to inability from those relating to death, resignation, or removal, thus removing any ambiguity involved in the present language.

The committee does not believe that the amendment should prescribe the method for determination of the facts relating to inability. It is better constitutional practice to leave that matter to Congress, which under our proposed amendment Congress would be authorized to provide for by legislation.

On March 20, 1937, the chairman of this committee wrote to Hon. Emanuel Celler, chairman, Committee on the Judiciary, House of Representatives, presenting the views of our committee with additional copies for other members of the subcommittee and for general counsel. Our letter was given wide publicity at the time and was later printed in the report of the hearing of April 1, 1937. In commenting on our views, Congressman Keating stated that he wanted to say parenthetically that he understood that our committee did not agree with anybody on this problem, adding "which is par for this course." His statement as to our nonagreement was something of an exaggeration since we do agree with the former Attorney General, Mr. Brownell, that at least a constitutional amendment is necessary.

THE NEW BRICKER AMENDMENT

For reasons stated in earlier reports of this committee we continued at our last meeting to oppose the so-called Bricker amendment as set forth in Senator Bricker's proposed treaty control amendment and accompanying statement (85 Congressional Record, Senate, pp. 250-260, Jan. 7, 1957).

Dated: December 31, 1957.

Respectfully submitted,

Cornelius W. Wickersham, Chairman; Theodoro Pearson, Secretary; Eli H. Bronston, Arthur H. Dean, Lewis R. Quirk, John W. MacDonald, John J. Mackrell, Leonard P. Moore, Welles V. Moot, Archie B. Morrison, George Roberts, Churchill Rodgers, Elihu Root, Jr., Arthur H. Schwartz, Martin Taylor, Harrison Tweed.

Senator KEFAUVER. We are glad to hear from any interested citizen, and Mr. Charles Kress of Binghamton, N. Y., who has been an official up there, has a suggestion he would like to make at this time.

STATEMENT OF CHARLES KRESS, CONSULTANT, BINGHAMTON, N. Y.

Mr. Kress. Mr. Chairman, I will be very brief, realizing the short-ago of time.

I would say my views represent perhaps the suggestions and opinions of the man on the street.

I am a former mayor of Binghamton, N. Y., and have been a consultant to various Senate and House committees.

I have been greatly intrigued by this problem and have given it considerable study.

Of course, I am somewhat abashed to testify in the presence of such legal genius and brilliance as there is here. The Constitution provides now that in case of death, resignation, or removal of the President, the Vice President automatically takes over the office without any action by Congress or the Supreme Court.

Is it not reasonable to assume that the same thing was intended by the Constitution makers in respect to Presidential inability, that the Vice President is to take over automatically without any action by Congress? If a President dies or resigns, Congress does not have to meet and elect the Vice President. He automatically takes the job. In fact, the Constitution seems to limit the powers of Congress to legislate in this field only in case both the President and the Vice President are out of the picture, and then only on the matter of succession.

A constitutional amendment could take considerable time to come into being, and the President himself has stated that he felt there is a present urgency in this matter.

Something along the lines of my plan could take effect immediately. I would not propose to change in any respect the present provisions or at least the intent of the Constitution that the Vice President automatically takes over when the President is unable to act. I would merely set up by legislation a formal procedure by which the Vice President does this. A speedy process is imperative in these jet-age days.

The Vice President cannot just go over to the White House door and shout, "I'm taking over." They might not even let him in. There has to be some official ceremony to be observed. But in the first analysis it seems up to the Vice President to initiate this process.

It seems that it is his duty to do so under the Constitution. This all presumes that there is the spirit of good will and mutual dedication to the public good existing between the President and the Vice President.

There has been some disposition I think in some of the plans suggested to make it easier for the Vice President, but that does not seem to jibe with the Constitution. It is a big part of his job whether he likes it or not. History may show that at least two Vice Presidents were reluctant or even refused to do what might be considered their duty in this respect. But that was in a different age and vastly different times. In these times of greater political education, of instantaneous public information over press wires, TV and radio, and the more powerful effectiveness of public opinion, I do not believe a Vice President would hesitate to do his duty if the safety of the Nation warranted it and start the operation of taking over when the President is unable to act.

I feel this important question must be approached with a perspective entirely disassociated from today and present personalities—and projected into the years ahead.

If a President finds his condition is such that he wants the Vice President to temporarily take over and act, and there is complete harmony and understanding between the two men, it does not appear to me that any new legislation is needed.

Suppose that as of now we had a President who had become hopelessly paralyzed, mentally as well as physically, and the Vice President, the Cabinet, and the White House staff all knew the President was incompetent, and they all agreed the Vice President ought to take over.

So he does take over, issuing a proclamation that the President has been unable to act, and as Vice President he is assuming the Presidential office. Who would there be to stop him?

Congress couldn't do it. Only the Supreme Court would have the power to say whether he acted within the Constitution or not.

All the discussions I have heard seem to relate to medical disabilities of the President which would render him unable to act. I can think beyond this to a situation where, fantastic as it may seem, the President might in time of war be captured by the enemy and thus be unable to act.

At one time President Roosevelt in wartime flew over enemy territory and one of his escort planes nearly had to ditch. It could have been the Presidential plane forced down in enemy territory. And wartime conditions could also make ineffective any plan of succession which required congressional action, because under thermonuclear war, the Washington Government might be completely wiped out.

Now the plan I have in mind was this:

1. The question of Presidential disability is a matter of deep public concern today.

The Constitution provides that the Vice President shall take over in event of the President's inability to act. But just how this process would take place is not made clear, and undoubtedly there will be a number of measures introduced in Congress at the coming session, trying to clarify the situation, these including proposed constitutional amendments.

2. I would leave the Constitution alone and try to clear the matter up with a bill which would provide as follows: When the President suffers a disability which prevents him from acting, the Vice President and the Senate and House leaders of the President's political party, would prepare a certificate setting forth the facts, including medical evidence, and declaring that the Vice President is temporarily assuming the Presidential powers at a certain time.

This certificate would then be filed with the Supreme Court which would then immediately convene, review the facts and circumstances set forth in the certificate, and determine if the proposed action was within the Constitution.

The Supreme Court will have the power, but only by unanimous vote, to disapprove the certificate, in which case the Vice President could not take over.

The Court would thus serve as a brake on any hasty or ill-advised action, but an emergency would not have to wait upon any possibly delayed formal Court approval. If the Court could not agree promptly to disapprove the certificate, then the proceeding would go ahead and the Vice President take over at the time declared.

3. Plainly the question of disability and inability to act cannot be left entirely to a President as he might have a paralyzing disability and be incapable of coherent thinking.

The question of replacing a temporarily disabled President is a constitutional one and it is the unquestioned proper function of the Supreme Court to interpret our Constitution. Thus under my plan the Court would always exercise disapproval powers in each case where the question of replacing a temporarily disabled President might arise.

4. To prevent the remote possibility that some overly ambitious Vice President might try to "steal" the Presidential Office by refusing to give it back to a fully recovered President, my method would further provide that once a disabled President has recovered, he would then file a certificate of such fact with the Supreme Court announcing the time he would resume his Presidential powers.

If the Supreme Court expressed no unanimous disapproval, the President would then automatically resume his office at the time set forth in his certificate.

The same procedure would be employed in case a Vice President temporarily acting as President, also became disabled and had to be replaced.

I realize that this is not a constitutional amendment suggestion, and I submit it perhaps as a stopgap measure which might possibly have some chance of enactment in this Congress.

I know I am asking now a question that is in the minds and hearts of every thinking citizen of the United States when I ask the honorable chairman, and I ask you from your point of legal brilliance, what is going to happen to this country today if our President tonight, God forbid that it should happen, would be stricken with a paralyzing ailment that left him mentally and physically helpless?

You, Mr. Musmanno, have said that if the Vice President did take over, there would be much litigation. I think the public would like to know exactly what will happen.

Do you feel that the Vice President under those circumstances is violating any law or constitutional provision if he does take over?

We have got to have a President. Somebody has got to act, and who else but him could do it?

Mr. MUSMANNO. You might address your question to the Chair.

Mr. KRESS. I do.

Senator KEFAUVER. That is a question we are considering here, Mr. Kress. I had always assumed that if there is no question of the President's inability, that the Vice President had the right to take over, but of course that does not avoid the fact that there might be litigation, confusion, chaos, as Judge Musmanno has pointed out, and that also public opinion and our dealings in the field of foreign policy are also grave questions that have to be considered, so that I think we are all agreed that certainly this is a field that ought to be clarified so that we can be sure that we have an able, responsible man acting and discharging the powers and duties of the Presidency at all times.

Mr. KRESS. Can I say this: If that disability did occur to the President as things stand today the Vice President would take over and wouldn't he receive the support of the Congress and the people of the United States?

Senator KEFAUVER. I am just a Senator who has ideas about the Constitution just like Judge Musmanno and many other people do.

Mr. KRESS. Thank you, Senator.

Senator KEFAUVER. Thank you very much. I think it should be pointed out that the views of the man on the street and the view of laymen is very important in the consideration of this whole problem.

I am glad that Mr. Kress has expressed his point of view, because public understanding is a very necessary ingredient of all of our actions under the Constitution and under our laws.

On Friday, the 14th, at 10 o'clock in this room we will hear from Mr. Henry Fowler, attorney of Washington, D. C., and former Director of the Office of Defense Mobilization. Also Prof. Edward Waugh, department of history and social sciences, Eastern Michigan College, who has written extensively on this subject.

On Tuesday, February 18, the Attorney General is scheduled to appear at 10 o'clock, and on Friday, February 28, Mr. Charles Rhyne, the president of the American Bar Association is to appear before our committee.

Is there anything to be put in the record at this time, Mr. Smithey?

Mr. SMITHHEY. Mr. Chairman, we have some statements from eminent persons in the field of constitutional law or in the field of Government, but in accordance with your wishes in other hearings, I had delayed submitting those for inclusion in the record until the last session, in order that they might be printed in the appendix, if that is your desire.

Senator KEFAUVER. Very well, we will not in any event place them in the record at this meeting today.

We stand in recess, then, until Friday, February 14.

(Whereupon, at 12:30 p. m., the committee was recessed, to reconvene at 10 a. m., Friday, February 14, 1958.)

which is the first step in the process of socialization. The second step is the family, which is the primary socializing agent. The third step is the school, which is the secondary socializing agent. The fourth step is the community, which is the tertiary socializing agent. The fifth step is the state, which is the quaternary socializing agent. The sixth step is the church, which is the quinary socializing agent. The seventh step is the media, which is the senary socializing agent. The eighth step is the peer group, which is the septenary socializing agent. The ninth step is the workplace, which is the octenary socializing agent. The tenth step is the leisure time, which is the non-socializing agent.

PRESIDENTIAL INABILITY

FRIDAY, FEBRUARY 14, 1958

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:15 a. m., in room 424, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senator Kefauver.

Also present: Wayne H. Smithey, member, professional staff, and Jerry A. O'Callaghan, legislative assistant to Senator Joseph C. O'Mahoney.

SENATOR KEFAUVER. We will get started now.

Mr. Fowler and Professor Waugh, I am sorry that more Members of the Senate are not present. It is the week of Lincoln's Birthday, and many members are away and some members of the committee are ill, but I assure you that all members will study and appreciate your testimony.

We are trying to build a record here of thoughts of our leading citizens and thinkers on this subject.

Mr. Fowler, you will be our first witness.

Will you come around and sit on this side of the table, please?

This is Henry Fowler, a well-known and distinguished lawyer of Washington, D. C. He is senior member of the firm of Fowler, Leva, Hawes & Symington of Washington.

Mr. Fowler has held many important governmental positions in various agencies, among which is Administrator of the Defense Production Administration and the former Director of the Office of Defense Mobilization.

We have a short biography of Mr. Fowler which will be placed in the record at this point.

(The biography referred to is as follows:

Fowler, Henry Hamill, lawyer; b. Roanoke, Va., Sept. 5, 1908; s. Mack Johnson and Bertha (Browning) F.; A.B., Roanoke Coll., 1929; LL.B., Yale, 1932, J.S.D., 1933; m. Trudy Pamela Hathcote, Oct. 19, 1938; children—Mary Anne, Susan Maria, Henry Hamill. Admitted to Va. bar, 1933; counsel Tenn. Valley Authority, 1934-38; asst. gen. counsel, 1939; spl. asst. to atty. gen. as chief counsel subcom. Senate Com. Edn. and Labor, 1939-40; spl. counsel Fed. Power Coman. 1941; asst. gen. counsel O.P.M., 1941, W.P.B., 1942-44; econ. advisor U. S. Mission Econ. Affairs, London, Eng., 1944; spl. asst. to administr. Fgn. Econ. Administr., 1945; dep. administr. N.P.A., 1951; administr., 1952; administr. Defense Production Administr., 1952-53; dir. Office of Defense Mobilization, 1952-53; sr. member Fowler, Leva, Hawes & Symington, Washington, 1948-51, since 1953. Epis. Club; Metropolitan (Washington). Home: 500 Queen St. Alexandria, Va. Office: 1626 Eye St., Washington 6.

Senator KEFAUVER. He is also a member of the bar of the State of Virginia.

Mr. Fowler, you have a statement. The entire statement will be printed in the record, but you may read it or discuss it as you wish.

**STATEMENT OF HENRY FOWLER, ATTORNEY, WASHINGTON, D. C.,
FORMER DIRECTOR, OFFICE OF DEFENSE MOBILIZATION**

Mr. FOWLER. Thank you, Mr. Chairman.

I shall attempt to extemporize and discuss the statement rather than read it verbatim.

I am very honored to be here as a witness before your subcommittee to participate in your deliberations on this very important question.

I am not going to attempt to take up any historical background or analysis of many of the questions because I know you have many scholarly studies that are much more inclusive that are available to you.

I want to, this morning, try to be helpful to the subcommittee, and I believe the only way I can be helpful is to try to present a very specific and concrete point of view that would promise a prompt and practical beginning on this very difficult problem.

I will say at the outset that it is my opinion it is legal and practical and desirable for the Congress by legislative enactment at this session to facilitate the orderly devolution upon the Vice President of the powers and duties of the President in the event of the President's inability to discharge them, and a resumption by the President upon the passing of his inability.

I do not believe a constitutional amendment should be necessary, in view of the very general language of the inability clause which omits any specific method for initiating or determining an inability, and the availability of the so-called necessary and proper clause in section 8 of article I of the Constitution.

There are two provisos to this opinion that Congress can act without constitutional amendment. They have to do with the nature of the enactment. The first is that the means chosen by the Congress would be appropriate to the simple objective of facilitating the devolution of powers in question by providing orderly procedures that would be reasonably acceptable to the officials concerned and the public.

The second proviso is that the means chosen should not violate the overriding constitutional principle of the separation of powers or disturb any conceivably existing constitutional authority in the President and the Vice President.

This is perhaps the salient point that I would like to bring out in this presentation. I believe this can be accomplished by making the statute and its procedures declaratory and permissive rather than mandatory, and by keeping those procedures substantially within the executive framework.

I shall develop this later in my statement.

I realize that Congress may deem it wise to dispell any doubts of its constitutional authority to enact this type of law in advance of a judicial test, or perhaps it might wish to make the procedures to be outlined mandatory on the officials concerned, the President and the Vice President, rather than declaratory and permissive.

If either of those conclusions is reached by the committee, I would suggest the initiation of a simple amendment to clause 6 of section 1 of article II affirmatory of the power of Congress, precisely along the lines proposed by you, Mr. Chairman, in Senate Joint Resolution 183.

That proposal would be in addition to the act of Congress to be discussed.

Now my written statement includes an identification of at least four objectives that should be sought to be accomplished by this corrective legislation.

Briefly, the act should help to make clear that, in event of a Presidential inability, the Vice President does not become the President, but only an Acting President, assuming the powers and duties of the office temporarily for the duration of the Presidential inability.

I believe declaratory action to that effect by the Congress would amount to a legislative construction of the nature of the Vice President's tenure, and would serve to minimize this troublesome question which has helped to plague and frustrate the purpose of the Founding Fathers in providing for effective continuity for the Executive power.

Senator KEFAUVER. Mr. Fowler, would you have that apply to the Vice President in the event he takes over upon the death or resignation of the President?

Mr. FOWLER. I have not covered that, Mr. Chairman, because it seemed to me that was not one of the more important problems at the moment, but it seemed to me that custom had rather established the fact that in six previous instances where a Vice President has succeeded to the powers and duties of the office, that, in fact, he became the President.

I think that the important gap to be filled is a construction of what the precise legal situation is when the Vice President takes over because of an inability, and you still have a living, eligible President once his inability should be removed. That is the situation on which we should be very clear, that the Vice President only assumes the powers and duties of the office, not the office itself, and therefore when the inability is terminated, the President may resume those powers.

Senator KEFAUVER. That would not be inconsistent with the custom that has been established of the Vice President taking the oath as President?

Mr. FOWLER. Not at all.

Senator KEFAUVER. Upon the death of the President?

Mr. FOWLER. Not at all.

They are two entirely different situations.

The second objective is that the act should provide a simple means for devolving temporarily the powers and duties of the Presidency upon the Vice President by act of public written notification by the President himself in cases where he is physically competent and willing to acknowledge his inability.

I believe this arrangement which is included in other bills which are before the committee would take care of a great number of likely cases.

Senator KEFAUVER. Some have suggested that the President should write the Speaker of the House of Representatives and the President pro tempore of the Senate. Others have suggested he should write the Secretary of State.

Do you have any feeling about to whom the letter should be written?

Mr. FOWLER. On page 14 under item 2 where I am describing or attempting to describe, or outlining the statutory proposal, it is suggested that the message by the President be transmitted to the Vice President with copies to the President pro tempore of the Senate and the Speaker of the House.

I think technically the President would tell the Vice President he wants him to take over and make that a matter of national record by the usual practice of sending a message up to the heads of the two Houses.

The third objective of the act should be to provide a method and procedure for the determination of a Presidential inability where the President is unable or unwilling to declare his own inability.

The greater part of my comments and statement is directed to that most difficult aspect of this overall problem.

Finally, the fourth objective of the act should be to provide a precise method for determining the end of the inability and the return to the President of the powers and duties of his office, after either a voluntary or involuntary inability determination has resulted in the assumption of those duties by the Vice President.

Now I should like to turn to what I think is perhaps the most crucial problem underlying this current situation, namely, whether Congress has in the Constitution a basis for taking helpful and corrective action without a constitutional amendment.

I believe the chairman knows that there is considerable authority other than the present witness for the proposition that in absence of any specific and well-defined constitutional provision for dealing with inability, Congress could under the "necessary and proper" clause undertake appropriate legislative action.

I cite here Dr. Corwin's views from his classic treatise on the Office of the President, and I think he expresses the basic underlying thesis when he says:

The framers meant to provide a functioning system of government and presumably did so. At least there is no apparent reason why Congress should take a less vigorous view of its own competence than it would when it provided a method for the settlement of the Hayes-Tilden disputed election in 1877 and therefore prevented a civil war.

I have included in my statement a reference to the considerable body of contemporary opinion that existed at the time of the illness of Garfield and Wilson, that action could be taken under the so-called implied powers of the "necessary and proper" clause.

I think the committee is of course aware of the fact that many contemporary scholars have gone on record similarly in the hearings before the subcommittee of the House Judiciary Committee.

I think the important thing to note here is that there is an element that is sometimes overlooked in that this "necessary and proper" clause 18 of section A of article I endows Congress not only with the power to make all laws which shall be necessary and proper for carrying into execution the so-called granted powers to the Congress which appear in the first 18 clauses, but also, and I quote:

all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

Now it is the latter part of this "necessary and proper" provision that attention should be directed to, and I suggest to the committee that

it means nothing if it does not give Congress some authority to enact legislation necessary and proper for carrying into execution the Executive powers endowed in the President and the Vice President which may become ineffective because of an inability of the President.

There are those, I think, who contend that, in view of the fact that Congress in clause 6 of section 1 of article II was specifically granted the authority to declare what officer should act as President in event of the inability of both the President and the Vice President, that the old rule applies that if a law specifies one power it thereby excludes any other power. They would suggest that this denies Congress any other authority in this area. But I do not believe that the grant of this broad and unlimited specific authority of the Congress to act in matters of Presidential succession when both the President and the Vice President are unavailable should be construed to preclude the Congress from exercising perhaps a more limited prerogative to enact necessary and proper measures designed to assist the President and the Vice President in keeping with this problem of Presidential inability.

Senator KEFAUVER. Mr. Fowler, do you agree that article II, section 1, clause 6, referring to the power of Congress to determine who shall act upon the death, resignation, or inability of both the President and Vice President refers only to who should act on down the line of succession, and not to the immediate thing we are considering here of how you determine inability?

Mr. FOWLER. I would so agree, Mr. Chairman.

Senator KEFAUVER. So any right of the Congress to act would have to be under the "necessary and proper" clause?

Mr. FOWLER. Precisely.

Senator KEFAUVER. I see.

Mr. FOWLER. I would suggest that this "necessary and proper" provision gives Congress the authority to aid or facilitate the discharge of the responsibilities lodged in other departments.

Otherwise, the express reference to the power to enact legislation necessary and proper to carry into execution all powers vested in the National Government or any officer thereof is relatively meaningless.

For over 169 years, as the committee has studied, this Nation has encountered a series of serious situations in which the problem of Presidential inability has not been met by a practical procedure or practical solution.

Today it seems reasonable that appropriate legislation to provide some such procedure to facilitate or aid in this transfer, where desirable, is necessary and proper to carry out the execution of the powers vested in the National Government, and particularly in the Executive.

Indeed, I would suggest that a failure to take some action simply continues the risk that a situation may arise where the powers and duties of the President cannot be executed because of an inability, in the absence of any appropriate or practical formula for dealing with such inability.

Now I do not want to trespass on the committee's time to elaborate and analyze many instances in which the Supreme Court has relied upon this "necessary and proper" clause in upholding congressional enactments, including instances that give orderly procedure to the operations of other coordinate power, namely, the Executive and the

judicial, but I should like to suggest a couple of areas which I think are analogous, where the Congress has acted.

One of the striking ones is the various enactments that Congress has passed over the years to promote efficiency and integrity in the discharge of the official duties of all the employees of the executive department, and to provide proper discipline in the executive public service. That is pursuant to no specific granted power to the Congress, and yet Congress has not hesitated historically over the years to enact a series of civil service laws and laws designed to protect the integrity of the public service, on the theory that it is necessary and proper to the functioning of the executive departments and agencies that a high standard of conduct and probity should be provided for.

Again the Constitution only authorizes the Congress to specifically define and punish crimes of piracy, felony on the high seas, and offenses against the law of nations, treason and counterfeiting.

Nonetheless, because it is necessary to effectuate the overall authority of the National Government, as the Senator of course knows, we have an extensive Federal Criminal Code with hundreds of enactments set forth in title XVIII of the code, and the courts have said repeatedly in cases that the authority to enact Federal criminal laws other than those specifically referred to in the Constitution is necessary and proper to an execution of the powers granted the National Government.

Another analogous situation is the power which Congress has exercised repeatedly to make effective the operation of the Federal courts.

An example, just to cite one, the Congress may direct the removal of a case from a State to a Federal court in a criminal prosecution against a Federal officer for acts done under color of Federal law, and other examples.

Finally, just to cite one more, the legislation that has to do with the claims against the Government. There have been a series of enactments, as the chairman will recall, in which Congress has given special direction to the honoring of claims by various groups or citizens against the Government.

There are other examples, but I will pass on.

Assuredly, care must be taken in any legislative enactment of the type referred to to assure that the means chosen are appropriate to facilitating this devolution of the powers and duties of the President upon the Vice President in a practical and workable manner. The method selected should avoid any arrogation of authority to determine that inability to forces or groups in a manner that would be destructive of the principle of balance of power in the Constitution.

I believe if these precautions were observed, they should place the legislative enactment beyond substantial risk of successful challenge on constitutional grounds.

Of course anybody could bring a case and undoubtedly there would be one in the future regardless of how insubstantial the claim might be, but in my opinion, with the type of enactment to be outlined, such a challenge will not be successful.

Senator KEPAUVER. Mr. Fowler, on that point, quite a number of witnesses, such as Mr. Taylor and, I understand, the Attorney General before the House Committee—Mr. Taylor representing a committee of the New York State Bar Association—have stated that while it might be possible that a statute would take care of the situation, that it should not be left to statutory enactment for two reasons.

First, there is the fact, as you say, that a suit would be brought and the acts of the Acting President, particularly in the event some dispute might arise between the acting President and the President who has been declared to be unable, might be questioned, and litigation and confusion would result.

You would not know until after a case reached the Supreme Court whether he had acted constitutionally or not.

Secondly, that this is such an important matter that, even conceding the legality of a statutory enactment, it is something that people themselves ought to decide upon by way of a constitutional amendment.

Do you think there is much validity to those arguments?

Mr. FOWLER. I have reflected on that position considerably, Mr. Chairman, and I have tried to put my own position here as clearly as I could.

It really boils down to this. I do not believe the Constitution should be changed for frivolous reasons. If we did so, we would sooner or later end up with a very cumbersome and unworkable document. I believe it was the intention of the Founding Fathers, and that is the great genius of the Constitution, that it is phrased for the most part in general terms, thereby giving us a certain flexibility to its operation and adaptability to new conditions and situations.

I think, for example, it would be very unwise for the Congress to initiate an amendatory process through some proposal that would burden the Constitution with a detailed and rigid description of the means and methods to be utilized in handling the inability problem.

That would not only encumber the Constitution, but would tend to freeze the procedure into a form that might prove impractical in some later situation.

However, I would certainly have no substantial objection to accompanying the legislative enactment proposed by a simple constitutional amendment affirmatory of the powers of Congress along the lines you propose, or at least a resolution introduced by the chairman of this committee, that is S. J. Res. 133.

Senator KEFAUVER. Just affirming that Congress should have the power to deal with this problem by statute.

Mr. FOWLER. Yes. I recognize that the Congress may conclude after further analysis of the legal and constitutional considerations concerning the authority of the Congress to act that there is a substantial doubt there. There are differences of opinion on it. Or it might feel that it is better policy to move for an affirmatory constitutional amendment rather than wait for the action to be challenged because of the reasons the chairman has suggested.

Or it might wish that the procedures that are proposed here as declaratory and permissive be made mandatory on the President and the Vice President.

In any of those eventualities, it should certainly initiate the amendatory process.

I have only one more point to make on this constitutional problem, and that is to point out what the committee is fully aware of.

There are some who contend that the Constitution already by implication has given the final authority to act as judge of the President's inability to the Vice President, by providing that he should take over the duties of the office. There is the implication that he should be the final authority to determine the inability, and accord-

ingly it is urged that the Vice President's implied authority could not be constitutionally divested without some constitutional amendment.

I believe there is both a practical and a legal answer to this contention.

The practical answer is that the Vice Presidents themselves have never adopted this theory, and they are not likely to in the future. It would be certain that the exercise of any such prerogative by the Vice President solely, without any assistance from any other procedure, would undoubtedly envelop the administration of the Executive Office in a cloud of controversy and debate, and his effectiveness would be diminished and the country would suffer.

Now for the legal answer, there are two parts for the legal answer. The first is that the Constitution does not provide in express terms that the Vice President has the sole authority to determine an inability, and I do not believe it is likely that the members of the Constitutional Convention would have relied upon some so-called rule of law that in contingent grants of power to the one to whom the power is granted is to decide when the emergency has arisen.

I do not believe they would have relied on that doctrine in such a highly important and significant matter as the transfer of the powers and duties of the Presidency from one elected to his next in line.

The second part of the legal answer is that the procedure established by legislation can be, as I have mentioned earlier, declaratory and permissive rather than mandatory, by providing that the advice and recommendation on inability made available to the Vice President by the procedure established shall not be binding or controlling, but advisory on the Vice President.

Such a declaratory and permissive enactment would, I think, eliminate any grave constitutional question of displacing an implied constitutional power inherent in the vice presidential office.

Now so much for the constitutional argument on the power of Congress to act under the existing circumstances.

The next section of my statement is devoted to a development of some of the considerations, assuming Congress does have a residuum of authority to act in this situation without constitutional amendment, some of the considerations that should attend the exercise of that legislative choice of means.

The chairman knows the guiding light for the exercise of legislative power, based on this necessary and proper clause, is contained in Chief Justice Marshall's classic opinion in *McCulloch v. Maryland*.

That statement always bears repeating and I will quote it:

Let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Now what are some of these considerations?

The first as the Chief Justice's statement indicates, the method chosen should be consistent with the letter and spirit of the Constitution.

Let us suppose that the means chosen leave the authority in making determinations of inability or the termination thereof predominately in the executive branch so as not to be destructive or impair the independence of the executive branch.

In that case I suggest they are consistent with the letter and spirit of the Constitution and its overriding principle of the separation of powers.

Let us also suppose that the means chosen are declaratory and permissive rather than mandatory, designed to assist, rather than to compel. In that event, there can be no real question that the means are prohibited by some grant of power, implicit in the Constitution, to the principal officials concerned; namely, the President and the Vice President.

The second consideration is that the means chosen should be practical and plainly adapted to the end of facilitating the required action where needed.

They should encourage and make possible the ready initiation of the procedures looking to a transfer of powers in case of an inability.

In short, they must be designed to overcome the inertia which has marked previous occasions in which the country has been confronted by this problem.

Those in a position to know and understand the seriousness of the situation and its effect on the functioning of Government should be in a position to initiate the process of determination.

These include the President, when he is physically able to make such a determination, and the Vice President, the members of the Cabinet and the Speaker of the House of Representatives and the president pro tempore of the Senate, who incidentally are the officials named, pursuant to the Constitution, by the Presidential Succession Act as the officers upon whom the responsibility rests for maintaining effective continuity of executive authority.

By the same token, those chosen to assist in and facilitate the making of this determination should be, I suggest, predominantly those close to the elected leader of the people, close to him personally, politically and in the day-to-day discharge of their official duties.

The inquiry into inability should be calm, friendly, sympathetic and, in no sense partisan or analogous to impeachment.

Given a procedure embodying this concept, with the clear right of the President to resume his powers and duties when the inability is ended, not seriously jeopardized, the means chosen can be said to be practical and I would hope that they would be readily exercised in event of any necessity.

Now the third consideration is that the procedures instituted by legislative enactment to facilitate this very delicate transfer of authority should be politically acceptable. They have to satisfy the people, the public at large, the Nation, as to their fairness or as to the fairness and propriety of the action when taken, and thereby serve to rally the country and the various instruments of the Government behind the Acting President for the time in which he must serve.

There may be other standards and tests suggested. There is certainly room for considerable debate as to whether any given procedure properly accords with those principles.

Of a certainty, of this one thing I know the chairman will be certain, that no solution suggested is going to be acceptable to everyone. If you can get a solution that is acceptable to let's say an 80 percent satisfaction of those interested in the problem, I think a very constructive legislative achievement would have been accomplished.

I have been presumptuous enough to try to outline a statutory method that is within the present constitutional competence of the Congress and responsive to these considerations.

It of course would be an act of Congress subject to presidential veto, and if passed, would indicate both the approval of the legislative and the executive branches.

This plan is based primarily on one originally proposed by Mr. Arthur Krock of the New York Times, who has studied this subject intensively and presented testimony dealing with it to the special subcommittee of the House Judiciary Committee on April 12, 1956.

I have taken the liberty of making some modifications in Mr. Krock's plan which have been suggested by intervening observations of a number of experts, by the constitutional question which was raised from various quarters.

There is a particular debt to some of the observations of Prof. Joseph E. Kallenbach of the department of political science of the University of Michigan. I do not know Mr. Kallenbach, but his observations appear at length in his testimony before the House committee and in the report of the House Judiciary Committee on Presidential Inability dated January 31, 1956, where he submitted a response to the questionnaire from the chairman of that committee.

Now the plan in brief would be as follows: The first section would include a declaration of policy or purpose—a statement why Congress believes it is necessary and proper in advance of the inability of the President to prescribe a practical procedure to facilitate the orderly and prompt determination of that inability and the proper devolution of those duties on the Vice President, and the circumstances and procedure for a resumption of those powers and duties.

Another section, simple in form, to which I have already referred, should provide for the devolution by the act of the President himself when he is physically able and willing to take the action that involves the transmission of a message, a written message to the Vice President, with copies to the Speaker and the President pro tempore of the Senate.

The next section should create a special body of limited function, known as the Inability Advisory Council, composed of the 11 persons named in the Presidential Succession Act of 1948 to assure continuity of executive power in event neither the President nor Vice President is available.

As the chairman knows, these include the Speaker of the House, the President pro tempore of the Senate, and the Secretaries of State, Treasury, Defense, the Attorney General, the Postmaster General, and the Secretaries of Interior, Commerce, Agriculture and Labor.

Senator KEFAUVER. Somehow when the Department of Health, Education, and Welfare was established, the succession act was not amended so as to include the Secretary of that Department.

Mr. FOWLER. Yes.

Senator KEFAUVER. So you would leave that Secretary out of this committee.

Mr. FOWLER. I have no opinion on that, Mr. Chairman.

I think it would be perfectly appropriate to amend the succession act to include the Secretary of Health, Education, and Welfare as

part of this framework, because he does have a very important role, and I do not think it would detract from either the Presidential Succession Act or this proposed Inability Advisory Council to have it so included.

The next section should treat of the situation where the President's inability concerns his physical or mental condition from a health standpoint.

In such cases it would provide that, upon the request of the Vice President or any two members of the Inability Advisory Council filed with the Secretary of State, the Secretary of State would convene the Council by due and proper notice, to consider the desirability of instituting a formal determination of the inability.

Upon affirmative vote of a majority of the Council in a meeting called for this purpose, the Surgeon General of the Public Health Service should designate a medical panel of five leaders of the medical profession, from the heads of the medical departments of volunteer hospitals. After an examination of the facts and the submission of a report by the medical panel, the Inability Advisory Council, by a majority finding, is empowered to declare the inability of the President to discharge the powers and duties of his office, and to advise the Vice President in writing, recommending that he should forthwith assume the powers and duties of the President, provided that nothing in this section shall make the advice and recommendation binding or controlling on the Vice President.

The findings of the medical panel shall be advisory only and not binding on the Inability Advisory Council, but a copy of the report of the findings of the panel, together with a copy of the report of the Inability Advisory Council, shall be made public at the time the Council shall make a formal report to the Vice President of the inability of the President.

A subsection should also provide that the Council, at a meeting called for the purpose, at the written request of the President, or any member of the Council, may determine, by a majority finding, that the inability of the President is at an end, provided that nothing in this section shall make the advice and recommendation of the Council binding and controlling on the President.

He may follow this procedure, in other words, if he so wills. He may assert that he is able and this act would not in and of itself prevent him from resuming his office.

The next section should provide a procedure for the operation of the Council where the Presidential disability is due to reasons other than health. That would dispense with the requirement for consultation with the medical panel and the publication of a report containing the findings of any medical panel which would be academic under those circumstances.

Finally, in such legislation, it would seem to me to be desirable to provide some modus operandi for the devolution and the powers of the office pursuant to the terms of the Presidential Succession Act when because of war or hostile enemy attack, such as might occur in case the Capitol should be subjected to an atomic bomb, the President, the Vice President and a number of members of the Council would be not available for action.

I have no suggestion as to the form of a provision that this provision should take for this extraordinary and unusual emergency, but I

would suggest that one might be developed with the advice of the Director of Defense Mobilization in the light of plans of that office for the maintenance of government and public authority in the case of enemy attack.

There are both problems of communication and succession involved there, and I do not think I have the knowledge and am sufficiently in touch with the situation to suggest a practical answer.

Mr. Chairman, that concludes my statement. I am again deeply honored and appreciative of the opportunity to appear before the Committee.

(Mr. Fowler's statement is as follows:)

**STATEMENT OF HENRY H. FOWLER RELATING TO PRESIDENTIAL
INABILITY LEGISLATION**

Mr. Chairman and gentlemen of the committee, my name is Henry H. Fowler. I am a practicing attorney with the firm of Fowler, Levy, Hawes & Symington, 1701 K Street NW., Washington, D. C.

I am very much honored to be here as a witness before this subcommittee to participate in your deliberations on the very important and complicated question of Presidential inability legislation.

I. CORRECTIVE LEGISLATION AT THIS SESSION IS CONSTITUTIONALLY FEASIBLE

Any résumé of the historical background and analysis of the many issues of law and statecraft surrounding this topic would be repetitious and presumptuous in view of the availability to the committee of many scholarly studies and comments. If I can be of any help to this subcommittee this morning, it would be by endeavoring to present a specific and concrete point of view that promises a prompt and practical treatment of the problem. Accordingly, that will be my purpose.

In my opinion it is legal, practical, and desirable for the Congress, by legislative enactment at this session to facilitate the orderly devolution upon the Vice President of the powers and duties of the President in the event of the President's inability to discharge them and their resumption by the President upon a passing of his inability.

No constitutional amendment should be necessary in view of the very general language in the inability clause of the Constitution (clause 6 of section 1 of article II) omitting any specific method for initiating and determining an inability finding, and the availability of the so-called necessary and proper clause (clause 1, section 8, article I). There are two provisos to this statement. The first is that the means chosen by the Congress be appropriate to the objective of facilitating the devolution of the powers in question by providing orderly procedures reasonably acceptable to the public and the officials involved for assisting in determining the inability of the President, the assumption of his duties by the Vice President, and their resumption by the President. The second proviso is that the means chosen should not violate the overriding constitutional principle of separation of powers or disturb any conceivably existing constitutional authority. This can be accomplished by making the statute and its procedures declaratory and permissive, rather than mandatory, and by keeping the procedures substantially within the executive framework.

Perhaps, the Congress may deem it wise to dispel any doubts of its constitutional authority to enact this type of law in advance of a judicial test when action is taken pursuant to it, or, perhaps, it may wish to make the procedures prescribed mandatory on the principal officials concerned (the President and Vice President), rather than declaratory and permissive. If either of these conclusions is reached, I would suggest initiation of a simple amendment to clause 6 of section 1 of article II affirmatory of the power of Congress, along the lines proposed by the chairman of this committee in Senate Joint Resolution 133, in addition to the act of Congress to be discussed.

II. SOME MAJOR OBJECTIVES OF CORRECTIVE LEGISLATION

At the outset, it would be well to identify some of the major objectives of corrective legislation:

(a) The net should help to make clear that, in event of a Presidential "Inability," the Vice President does not become the President, but only an acting President, assuming the powers and duties of the Office only temporarily for the duration of the Presidential "Inability." This action by the Congress would amount to a legislative construction of the nature of the Vice President's tenure, in case of a Presidential "Inability." It should serve to minimize this troublesome question that has helped to plague and frustrate the purpose of the Founding Fathers in providing for effective continuity for the Executive power when the President is unable to discharge it.

(b) The net should provide a simple means for devolving temporarily the powers and duties of the Presidency upon the Vice President by act of public written notification by the President himself in cases where he is physically competent and willing to acknowledge his "Inability." This arrangement undoubtedly would take care of a great number of the likely cases.

(c) The net should provide a method and procedure for the determination of a Presidential "Inability" where the President is unable or unwilling to declare his own "Inability." The greater part of my comments will be devoted to this most difficult aspect of the overall problem.

(d) The net should provide a precise method for determining the end of an "Inability" and the return to the President of the powers and duties of his Office, after either a voluntary or involuntary determination of an "Inability" has resulted in the assumption of those powers and duties by the Vice President.

III. THE NATURE OF THE CONSTITUTIONAL BASIS FOR ACTION BY CONGRESS WITHOUT AWAITING CONSTITUTIONAL AMENDMENT

There is a considerable respectable authority for the proposition that in the absence of any specific and well-defined constitutional provision for dealing with the "Inability" problem, Congress under the "necessary and proper" clause of the Constitution (clause 18, sec. 8, art. I) may undertake appropriate legislative action. In urging this view, Dr. Edward S. Corwin, one of our outstanding constitutional authorities, in his book, *The President: Office and Powers*, had this to say:

"The framers meant to provide a functioning system of government and presumably did so. At least there is no apparent reason why Congress should take a less vigorous view of its own competence than it would when it provided a method for the settlement of the Hayes-Tilden disputed election in 1877 and therefore prevented a Civil War." (See 1037, ed. p. 55).

In times of previous discussion prompted by the illness of Garfield and Wilson, there was considerable opinion to the effect that this clause embodying the so-called implied powers gives Congress power to implement the "Inability" clause since this is a power necessary and proper to make effective the Executive power and guarantee that it shall not become dormant.¹

Many contemporary legal scholars have also gone on record to this effect, as reflected in the hearings before the subcommittee of the House Judiciary Committee and in the report of January 31, 1950, setting forth responses to a questionnaire.

It should be noted that clause 18 of section 8 of article I endows Congress with the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [Italics supplied.] The latter part of this provision means nothing if it does not give Congress some authority to enact legislation necessary and proper for carrying into execution (in addition to the express powers of Congress set forth in preceding 17 clauses of sec. 8), "all other powers" vested by this Constitution in the Government of the United States or any "Officer" thereof.

¹ See Ruth C. Silva in her article, "Presidential Succession and Disability," in *Law and Contemporary Problems*, Duke University School of Law (Autumn 1956), at footnote 64, where she attributes this view to the following: 2 John Randolph Tucker, *Constitution of the United States*, 713 (1899); Cooly, *Presidential Inability* 133, *North American Review*, (1881) at 425-427; Curtis, *Presidential Inability*, 25 *Harper's Weekly* at 631 and 593; Judge Samuel Shellabarger and Gov. John Davis Long quoted in the *New York Herald*, September 5, 1881, p. 8, cols. 1 and 2; former Attorney General A. Schoonmaker, Jr., of New York, quoted in *New York Herald*, September 17, 1881, p. 6, cols. 1-2; Congressman George Robeson, *New York Tribune*, September 2, 1881, p. 5, col. 1; former Vice President Schuyler Colfax, *New York Tribune*, September 8, 1881, p. 5, col. 3; Representative Clifton N. McArthur, Hearings before Committee on the Judiciary on H. R. 12609, 12620, 12649, and H. J. Res. 297, 66th Cong., 2d sess. (1929), at 35.

There are those who contend that, in view of the fact that the only power specifically granted to Congress in clause 6 of section 1 of article II is to declare what officer shall act as President in case of vacancy or inability in both the President, and Vice Presidency, the rule of "inclusio unius, exclusio alterius" denies Congress any other authority in this area. This grant of broad and unlimited specific authority to the Congress to deal with presidential succession in case of the unavailability of both the President and the Vice President should not be construed to preclude Congress from exercising its more limited prerogative to enact necessary and proper measures, for example, designed to assist the President and Vice President in coping with the problem of Presidential "Inability."

This "necessary and proper" provision gives Congress authority to aid or facilitate the discharge of the responsibilities lodged in other departments. Otherwise, the express reference to the power to enact legislation necessary and proper to carry into execution all powers vested in the National Government or my "Office" thereof is relatively meaningless. For over 180 years the Nation has encountered a series of serious situations of practical Presidential "Inability" without the development of an effective procedure by the Executive for devolving the powers and duties of the Presidency temporarily upon the Vice President. Today, it seems reasonable that appropriate legislation to provide some procedure to facilitate this transfer where desirable is necessary and proper to carry into execution all powers vested in the National Government. Indeed, a failure to take some action continues the risk that a situation may arise where the powers and duties of the President cannot be executed because of an "Inability" and the absence of any appropriate and practical formula for dealing with it.

I shall not trespass upon the committee's time to elaborate and analyze the many instances in which the Supreme Court has relied upon this "necessary and proper" clause in upholding congressional enactments, including instances that give orderly procedure to the operations of other coordinate powers, namely, the executive and the judicial.

Assuredly, care must be taken in any legislative enactment of the type referred to to assure that the means chosen are appropriate to assisting or facilitating a devolution of the powers and duties of the President upon the Vice President in a practical and workable manner. The method selected should avoid any arrogation of authority to determine the inability and the transfer of authority to forces that would be destructive of the delicate balance of power embodied as an overriding principle in the Constitution. These precautions, if observed, should serve to place the legislative enactment beyond substantial risk of successful challenge on constitutional grounds.

Some mention should also be made at this point of the contention, sometimes advanced, that the Constitution has already given by implication the authority to act as Judge of the President's "Inability" to the Vice President. Accordingly it is urged that the Vice President could not constitutionally be divested of this power without a constitutional amendment.

There is a practical and a legal answer to this contention. The practical answer is that Vice Presidents themselves have never adopted this theory and are not likely to in the future. Also, it is quite likely that the exercise of such a prerogative by a Vice President would envelop the administration of the Office in a cloud of controversy and debate. His effectiveness would be diminished and the country would suffer.

The legal answer is in two parts: The first is that the Constitution does not so provide in express or implied terms. It is not likely that the Founding Fathers would have relied upon the so-called rule of law that in contingent grants of power the one to whom the power is granted is to decide when the emergency has arisen, in such a highly important and significant matter as the transfer of the powers and duties of the Presidency from one elected to his next-in-line. The second part of the legal answer is that the procedure established by legislation can be declaratory and permissive, rather than mandatory. By providing that the advice and recommendation on "Inability" made available to the Vice President by the procedure established shall not be binding or controlling but advisory to the Vice President, any grave constitutional question of displacing an implied constitutional power inherent in his Office can be avoided. So much for the existing constitutional power of Congress and the argument that Congress is without present authority to pass a law designed to facilitate the devolution of Presidential powers to the Vice President in an orderly and appropriate fashion.

We come now to the related question of whether or not a constitutional amendment is necessary or desirable to enable Congress to act. Some of the

reasons why a constitutional amendment is not necessary have been indicated. Congress should deal promptly with this problem by a legislative enactment. Its constitutional authority to act along certain lines seems sufficiently clear. Action need not be further delayed because of the desire of some to establish the constitutional authority to handle the problem beyond any possible doubt.

While, as indicated above, it is not my view that a constitutional amendment is necessary, it does not follow that an affirmatory effort to amend the Constitution on this score is undesirable.

The Constitution should not be changed for frivolous causes. It would be unwise for the Congress to initiate the amendatory process through some proposal that would burden the Constitution with a detailed and rigid description of the means and method to be utilized in handling the inability problem. This course might tend to freeze the procedure into a form that might prove impractical in the future.

However, there should be no substantial objection to accompanying the legislative enactment proposed by a simple constitutional amendment affirmatory of the power of Congress along the lines proposed by the chairman of this committee in Senate Joint Resolution 183.

The committee may conclude after further analysis of the legal and constitutional considerations concerning the authority of Congress to act in an appropriate manner that there is a substantial doubt. Or it may feel that it is better policy to move for an affirmatory constitutional amendment rather than wait for action pursuant to its legislative enactment to be challenged in the courts. Or it may wish to make the procedures mandatory. In these eventualitys it should certainly initiate the amendatory process.

IV. SOME CONSIDERATIONS WHICH SHOULD ATTEND THE LEGISLATIVE CHOICE OF MEANS OR PROCEDURES IN TREATING THE "INABILITY" PROGRAM

The guiding light for any exercise of legislative power, based on the necessary and proper clause, is contained in Chief Justice Marshall's classic opinion in *McCulloch v. Maryland* (4 Wheat. 316 (1819)) where he wrote:

"Let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional" (p. 421).

What are some of the major considerations which should affect the congressional choice of appropriate means in this situation in keeping with the spirit of Marshall's statement?

First, the means chosen should be consistent with the letter and spirit of the Constitution. Let us suppose that the means chosen leave the authority in making determinations as to Presidential inability or the termination thereof predominantly in the executive branch so as not to be destructive of the independence of the executive. In that case they are consistent with the letter and spirit of the Constitution and its overriding principle of the separation of powers. Let us suppose also that the means chosen to facilitate the devolution of the powers and duties of the President upon the Vice President in event of a Presidential inability and their orderly resumption upon a determination that the inability has passed, are declaratory and permissive rather than mandatory, designed to assist rather than compel. In that event, there can be no real question that these means are prohibited by some grant of power, implicit in the Constitution, to the principal officials concerned, namely, the President and Vice President.

Second, the means chosen should be practical so as to be plainly adapted to the end of facilitating the required action where needed. They should encourage and make possible the ready initiation of procedures looking to a transfer of powers and duties when the executive authority cannot be fully and effectively exercised because of a Presidential inability. In short, they must be designed to overcome the inertia which has marked previous occasions. Those in a position to know and understand the seriousness of the situation and its effect on the functioning of government should be in a position to initiate the process of determination. These include the President, when he is physically able to make such a determination, and the Vice President, members of the Cabinet and the Speaker of the House of Representatives and President pro tempore of the Senate, i. e., those who are named, pursuant to the Constitution, by the Presidential Succession Act as officers upon whom the responsibility rests for maintaining effective continuity of executive authority.

By the same token, those chosen to assist in and facilitate the making of a determination of inability or the end thereof should be predominantly those close

to the elected leader of the people personally, politically and in the day-to-day discharge of their official duties. The inquiry should be calm, friendly, sympathetic and, in no sense partisan or analogous to impeachment. Given a procedure, embodying this concept, with the clear right of the President to resume his powers and duties when the inability is ended, not seriously jeopardized, the means chosen can be said to be practical.

Third, the procedures instituted by legislative enactment to facilitate this delicate transfer of authority should be politically acceptable. They should satisfy the people and public opinion as to the fairness and propriety of the action and, thereby, rally the country behind their new acting president for the time he must serve.

Perhaps other standards or tests may be considered. Also there may be room for considerable debate as to whether a given procedure properly accords with these considerations. Of a certainty no precise solution acceptable to everyone can be devised. Nonetheless, I have been presumptuous enough to try to develop an outline of a statutory method, within the present constitutional competence of the Congress and responsive to the foregoing considerations. It would be provided by an act of Congress, subject, of course, to the usual Presidential veto so that, in event of Presidential approval the procedure described would have the backing of both legislative and executive branches.

This plan is based primarily on one originally proposed by Mr. Arthur Krock of the New York Times, who has studied this topic intensively and presented testimony dealing with it to the Special Subcommittee of the House Judiciary Committee on Presidential Inability on April 12, 1950 (see hearings before Special Subcommittee to Study Presidential Inability of the Committee on the Judiciary, House of Representatives, p. 61 et seq.).

I have taken the liberty of making some minor modifications in his plan suggested by intervening observations of a number of experts, with a particular debt to some of the observations of Prof. Joseph E. Kaltenbach of the Department of Political Science of the University of Michigan. I have not had the pleasure of meeting him but his observations appear at length in the testimony before the House committee and in the report of the House Judiciary Committee on Presidential Inability dated January 31, 1950.

V. OUTLINE OF PROPOSED PLAN

The plan suggested for your consideration would include the following provisions:

(1) A declaration of policy or purpose—a statement of the reasons why it is necessary and proper, in advance of the inability of the President to discharge the powers and duties of his office, to prescribe a practical procedure to facilitate the orderly and prompt determination of that inability and the proper devolution of those duties on the Vice President, as provided in clause 6 of section 1 of article II of the Constitution, and the circumstances and procedure for a resumption of those powers and duties by the President.

(2) A section simple in form providing that upon the transmission by the President of a message to the Vice President with copies to the President Pro Tempore of the Senate and the Speaker of the House stating his inability to discharge the powers and duties of his office, the same shall devolve on the Vice President, until the transmission by the President of a message to the same parties stating his resumption of the powers and duties of his office.

(3) A section creating a special body of limited function, known as the "Inability Advisory Council," composed of the eleven persons named in the Presidential Succession Act of 1948 to assure continuity of executive power in event neither the President nor Vice President is available (3 USCA sec. 10). These include the Speaker of the House of Representatives, the President pro tempore of the Senate and the Secretaries of State, Treasury, Defense, The Attorney General, the Postmaster General and the Secretaries of the Interior, Commerce, Agriculture, and Labor.

(4) The next section should treat of the situation where the question of the President's inability concerns his physical or mental condition from a health standpoint. In such cases it would provide that, upon the request of the Vice President or any two members of the Inability Advisory Council filed with the Secretary of State, he (the Secretary of State) shall convene the Council by due and proper notice, to consider the desirability of instituting a formal determination of the inability of the President. Upon an affirmative vote of a majority of the Council in a meeting called for this purpose, the Surgeon General of the

Public Health Service shall designate a medical panel of five leaders of the medical profession, from the heads of the medical departments of voluntary hospitals. After an examination of the facts and the submission of a report by the medical panel, the Inability Advisory Council, by a majority finding, is empowered to declare the inability of the President to discharge the powers and duties of his office and to advise the Vice President in writing, recommending that he should forthwith assume the powers and duties of the President, provided that nothing in this section shall make the advice and recommendation binding or controlling on the Vice President. The findings of the medical panel shall be advisory only and not binding on the Inability Advisory Council but a copy of the report of the findings of the panel, together with a report of the Inability Advisory Council shall be made public at any time the Council shall make a formal report to the Vice President of the inability of the President. A subsection should also provide that the Council at a meeting called for that purpose at the written request of the President or any member of the Council may determine, by a majority finding, that the inability of the President is at an end, provided that nothing in this section shall make the advice and recommendation of the Council binding and controlling on the President.

(5) A further section should provide a procedure for the operation of the Inability Advisory Council where the Presidential disability is due to reasons other than health, dispensing with the requirement for the consultation of the medical panel and the publication of a report containing the findings of that panel.

(6) An additional section should provide a modus operandi for the devolution of the powers and duties of the Office of the President pursuant to the terms of the Presidential Succession Act when because of war or hostile enemy attack, such as might occur in case the Capital should be subjected to atomic bombing, the President, the Vice President, and a number of members of the Inability Advisory Council would be killed or wounded. The provision for this extraordinary and unusual emergency should be developed with the advice of the Director of Defense Mobilization in the light of the plans of that Office for the maintenance of Government and public authority in the case of enemy attack by atomic bombing, since both problems of communication and succession are involved.

Senator KEFAUVER. Mr. Fowler, one question. If the present law is as you have stated, that the Vice President has no legal right to decide on his own to determine the matter of inability of the President and to take over in that case, how would this declaratory and permissive statute strengthen his position?

Mr. FOWLER. Mr. Chairman, I believe you misunderstood me. I did not mean to imply that the Vice President is without authority under the Constitution. My comments went to the practical fact of history.

Senator KEFAUVER. Yes.

Mr. FOWLER. That in previous instances he, the occupant of that office, has been unwilling to exercise any such power if it exists, or to assert that he has the authority. I think that his reluctance has been probably for factual or practical reasons for fear that he might be thought to be a usurper or for fear that his action would be considered improper and disloyal; that these considerations have held back the Vice Presidents who have been in this situation from acting.

The whole purpose of this particular procedure proposed here would be to provide an arrangement or a procedure where the advice and recommendation of such a body along the lines indicated here would fortify the Vice President and indeed make it clear that the responsible officials of Government deemed it his duty to assert the inability.

I think as a practical matter with this procedure available, it would be much more likely that in event of any future situation, a Vice President would assert his authority. The act as proposed here, if

it is kept in declaratory and permissive form, would not collide with any existing implied authority in the Constitution today, but it would body up and buoy up and support and make practical the exercise of that authority.

If, on the other hand, Congress should desire to make this procedure mandatory, and make the determination of the Inability Council not advisory but final, I would suggest under those circumstances that a constitutional amendment along the lines suggested by you, simply affirmatory, would be in order.

Senator KEFAUVER. As I understand the advisory part, it would require the acquiescence both of the Vice President and of the President.

Mr. FOWLER. Well, in a case where the inability was a matter of health or mental condition, it would not require the assent of the President. Upon the vote of the majority of the Inability Advisory Council, they would recommend to the Vice President that he assume the powers and duties of the office.

Now it is always possible that for reasons that exist at the time, a given Vice President might refuse to assume those powers and duties, despite the availability or the existence of this advice and recommendation.

Commentators considered that possibility and there has been discussion of whether a writ of mandamus should be issued. I think under those circumstances, where the Vice President is unwilling, despite this kind of a finding and determination, actually there is little recourse that the country can have.

Some have suggested that under those circumstances impeachment proceedings might be proper because of a failure of the Vice President to assert or to carry out what are the duties of his office, but except for that possibility of impeachment proceedings, I would think that there would be no way in which you can force a man to assume the powers and duties of the office in such a situation.

Senator KEFAUVER. And then likewise there would be no way you could force the old President back in upon a finding that inability had terminated.

Mr. FOWLER. If he did not want to serve.

Senator KEFAUVER. Unless he wanted to serve.

Mr. FOWLER. That is correct, sir.

Senator KEFAUVER. Mr. Fowler, you have given us a statement that reflects a great deal of thought and study and background. It is a scholarly presentation. I know it will certainly be considered a substantial and a worthwhile contribution to the thinking on this subject, and we are very grateful to you.

Mr. FOWLER. Thank you, Mr. Chairman.

Senator KEFAUVER. Mr. Smithey, do you have any questions to ask?

Mr. SMITHEY. I have just a couple of questions, Senator.

You touched on one briefly in your remarks just now.

Does not any statutory solution, Mr. Fowler, carry with it some legal uncertainty as to the ability of a recovered President to reassume the duties of the Presidency?

Mr. FOWLER. It does carry some uncertainty. The passage of an act along the lines indicated here and also suggested by, I believe,

Senator Payne in one of the sections of his suggestion would amount to a legislative construction of what the Constitution means when there is a Presidential inability.

Now, in the past there have been several instances where congressional acts amounting to legislative construction have set at rest the questions of this sort.

Actually, I think in the First Congress there was an act passed constraining the Constitution to give the President the power to remove persons appointed to office by him and that took care of that problem for a long time, until we got into the question of the mixed legislative and executive agencies.

It would not complete or settle with any finality that constitutional question, but I believe for all practical purposes this legislative construction by the Congress would clear it up.

I believe in the 20th amendment and also in the Presidential Succession Act, this concept of a transfer of the powers and duties of the office rather than the office itself has been the subject of both constitutional enactment and legislative enactment. I think that it is a very insubstantial risk in the terms of the present situation.

Mr. SMITH. Is there not a further weakness in the statutory approach, in that any test of the legality of that approach would come at the most inopportune time?

Mr. FOWLER. That is true, and I have referred to that. I think it would come at an inopportune time, although I would personally think it would be a very unwise principle to say that the Constitution should be amended every time Congress undertook a very important enactment, because somebody might later challenge it in the courts.

You would very shortly, I think, get a constitution that would be like the Napoleonic Code. It would lose a good deal of what has made it the great instrument it is today.

That point of view does not appeal to me, amending the Constitution because somebody is going to bring a case in the future, unless the committee and the Congress feel that this is really a substantial doubt, unless it is a very close question in the opinion of the committee, then the kind of affirmatory constitutional amendment that Senator Kefauver has proposed would seem to me to be the desirable course.

Mr. SMITH. Isn't it true historically that in the instances where this Nation has experienced some Presidential inability, that Vice Presidents have hesitated to take over the office of the Presidency, and Cabinets have failed to propose that the Vice President take over the Presidency, because they were uncertain.

Mr. FOWLER. Precisely.

Mr. SMITH. As to the power of the recovered President to resume the powers and duties of the office.

Mr. FOWLER. I believe that is the historical fact. I would also suggest that if Congress should pass this type of law, declaring in event of the inability of the President, simply the powers and duties, if not the office, should devolve upon the Vice President, I believe that would put the question pretty much to rest, and I would suggest that a President would not hesitate under those circumstances, and his Cabinet would not hesitate to arrange for an orderly transfer of the powers and duties because of this vague fear that once there had been a devolution, that the Vice President would serve out the term regardless of the recovery of the President.

Mr. SMITH. Do you feel it wise in your plan to have such large representation of the members of the executive branch in making this determination, and such an imbalance between the legislative and the executive in making this determination?

Mr. FOWLER. In an effort to bend over backward to avoid any serious constitutional question under the doctrine of separation of powers, it seems to me that the predominant determination should be on the executive side.

My choice or my suggestion that that be the medium used arises primarily out of regard to devise a method that avoids any suggestion that the Congress or the Court or that some other branch of Government is encroaching upon the independence of the Executive in this regard.

As a practical matter, I think there are two arguments. One, that because these men are so close to the President, that they would not be likely, in event of his illness or incapacity, to move or to recommend that the Vice President take his powers and duties.

That is a matter of opinion. It seems to me that on the other side for such a serious act you want the judgment made by people who are close personally and officially in day-to-day operation, who can see what the President's condition is doing to the affairs of government, and yet who are very loyal and friendly to him, so that if this group of men made the recommendation or advised the Vice President, the country at large would be satisfied that the President's friends and those who were in the best position to know both about his condition and the effect it was having on the affairs of government, would have made the determination.

I point out—I am not too familiar with it, but my understanding is—the British House of Commons has taken a step some years ago, they passed a now Regency Act, in which they selected five people who would determine when the Monarch was unable to discharge his duties. They were his spouse and four officials, who were very close, would be very close to the King or the Queen as the case might be, in their discharge of their official responsibilities, and people whose offices would tend to make them sympathetic and friendly rather than antagonistic.

Mr. SMITH. Just one further question, Mr. Chairman. You will notice, Mr. Fowler, that in article II, section 1, clause 6, the language is in sequence. It speaks of death, resignation, and inability in the same clause so that, whatever it is that the Vice President takes at that time, he takes it in all those instances.

The precedent having been established by Vice President Tyler and later affirmed in the succession of 6 other Vice Presidents, and on 1 occasion in Johnson's impeachment, having been confirmed by the Congress, do you think that the Congress would now find itself under some difficulty in asserting that it has authority to determine that it is really the powers and duties that devolve upon the Vice President, rather than the office itself?

Mr. FOWLER. I do not think that presents any difficulty. It seems to me it is so clear that in the case of the death of the President, the question of whether the powers and duties are assumed or the office itself is assumed, there is no real question there.

In the case of an inability, the reference back can certainly be in terms of construction to the powers and duties, rather than to the

office, and if Congress declared this particular meaning, I would think that would pretty well set the question at rest.

Mr. SMITH. Thank you, Mr. Chairman.

Senator KEFAUVER. Mr. Callaghan, the legislative assistant to Senator O'Mahoney is present.

Do you have any questions?

Mr. CALLAGHAN. I have no questions, Mr. Chairman.

Senator KEFAUVER. Another question, Mr. Fowler.

You have the Committee consisting of the Vice President and the President of the Senate plus certain Cabinet members. I am sure it is ridiculous for anyone to think seriously that the Speaker and the President pro tempore of the Senate might color their actions or thinking in matters of this kind by the fact that their action might put them one step nearer to the presidency itself, but might not they be reluctant to serve on such a committee on the basis that somebody might think that they had some personal or political interest?

Mr. FOWLER. I wouldn't know, I have no way of knowing what their attitude would be on that.

It does seem to me as the chairman has indicated, that in such a matter of this sort that men who through long periods of public service have risen to that situation, that the thought that their action in replacing a President or a Vice President temporarily would be colored is just so remote to me that I would think that the other argument should prevail, namely, that the Congress, with the approval of the President, has determined in the Presidential Succession Act, that these particular officials are the ones who are responsible for maintaining a continuity of executive power, and they have already been chosen, as it were, as the persons with that responsibility.

In the case of the two officials mentioned, in addition to their legislative duties, and that under those circumstances it seems to me that we avoided the problem of a separation of powers by selecting those officials, and if we provided for the determination to be made by any other group, you might get into, at least I can see where there might be objection from the executive side.

Senator KEFAUVER. My anxiety would not be that they might take some action for their own benefit, but that they might lean over backward the other way to avoid any criticism that they were enhancing their own political closeness to the presidency.

Mr. FOWLER. Mr. Chairman, in a very close case where it was just touch-and-go as to whether an inability should be determined, I would see no reason why in such a situation they could not in effect decline to serve in that kind of a case, and a majority finding of the group would be sufficient under the law for the action to occur.

And if it was a close case and any individual did not want to be placed in a position where he felt he might be criticized, I should not think there would be any reason for insisting that the whole panel act and vote, and they could excuse themselves or disqualify themselves in that particular situation.

That would leave the remaining 9 persons available as a majority for a vote of 6 of the remaining 9, that would be sufficient to trigger this mechanism.

Senator KEFAUVER. I know you observed in 1 of the resolutions that I have sponsored that I had the 4 leaders of Congress as mem-

bers of the committee along with the members of the Cabinet. What is your thinking about that? That is the four leaders of Congress, plus the Cabinet, but not the Speaker and not the President pro tempore.

Mr. FOWLER. I would not quarrel at all with that choice of persons. I think it would still leave the predominant control of the situation in the executive branch and not arrogate the authority to make the determinations away from the executive branch, and in my opinion it would be consistent with the principle of separation of powers.

The only reason that I could see against it is it could be argued by some that this is bringing the legislative branch too much into the problem.

I do not think that argument is a sound one against including the four persons you have mentioned, and I individually could hardly subscribe to it.

I have made the other suggestion here on the theory that Congress has already in the Presidential Succession Act defined the people who are concerned with the problem of executive continuity, and that is a useful precedent for this purpose here.

Senator KEFAUVER. Well, we are certainly very grateful to you, Mr. Fowler.

Mr. FOWLER. Thank you, sir.

Senator KEFAUVER. Our next witness is Prof. Edgar W. Waugh. Professor Waugh is head of the department of history and social sciences at Eastern Michigan College. He has had a long experience as a teacher of political science and the Constitution and has written two books dealing with this and related problems.

We are glad to have you here, Professor Waugh. Your biography as we have it will be printed in the record at this point.

(The autobiography referred to is as follows:)

EDGAR W. WAUGH

Born Goodman, Mississippi, November 10, 1901. B. A. & M. A., University of Mississippi. Further studies, Columbia University, George Washington University and University of Michigan Law School. Has taught in public education systems of Mississippi, Texas and Michigan. At present Professor of Political Science, Eastern Michigan College. Member of American Federation of Teachers—AFL-CIO, American Political Science Association and Authors Guild. Democratic nominee for State Superintendent of public Instruction of Michigan, 1951.

Author of two books—Heaven Speaks American (Cedar Rapids, Iowa 1939) and Second Consul: The Vice Presidency—Our Greatest Political Problem (Indianapolis and New York) 1950.

STATEMENT OF PROF. EDGAR WAUGH, DEPARTMENT OF HISTORY AND SOCIAL SCIENCES, EASTERN MICHIGAN COLLEGE

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

Senator KEFAUVER. Professor Waugh, your statement in full will be printed in the record.

Any part that you summarize or omit will be printed as if you had read it. Now you proceed in your own way, sir.

Mr. WAUGH. Thank you, Mr. Chairman.

I wish to state that I appreciate very much the opportunity to present my views to this subcommittee.

I know the enormous time pressure under which you operate, and I am going to try to make my testimony just as brief as I can.

I would like to make one correction for the record, Mr. Chairman.

I am not head of the department of history and social sciences. I am professor of political science at Eastern Michigan College. We have various social sciences in one department.

Senator KESAUVER. Well, sir, you are very modest to correct the record, but here in the political life of the Nation, we always elevate good people a little bit if we can.

Mr. WARREN. Thank you.

It was very kind of you, Mr. Chairman, to invite my good wife to sit by my side, and I do not wish to inject political considerations, but it is most appropriate because I think in 1952 she was the most enthusiastic Estes Kefauver fan in the United States.

Senator KESAUVER. Well, I am very glad to hear that. I didn't know it, but seeing how intelligent and pleasant she is, I am not surprised.

Mr. WARREN. As I proceed, Mr. Chairman, as you said, my statement will go in the record so it will not be necessary for me to repeat the bulk of the statement.

In the first place, I would like to say that I fully agree with the previous witness that the Congress has power to act.

I would even go further than the previous witness, Mr. Fowler, did. I believe the Congress has such full power to act not only under the elastic clause as he elaborated it, but I think also we must look at the Constitution as a whole, and many times the Supreme Court has done so.

I agree with the previous witness that the subsection clause in article II, section 1, that is clause 6, where it gives Congress power to declare who shall act in case both the President and Vice President are disabled or removed or resigned or deceased, does not specifically give Congress the power to act on the point we are considering.

I agree to that. But I do not agree that it is without significance even on this point, because it seems to me that when we look at the Constitution, as a whole, Congress is given power in the last resort to see that there is a President, and we must presume that the Constitution meant a President able to function. It would be foolish to think that Congress would have the power to see that there is a President without meaning that there is a President functioning.

So I think that is with significance as we look at the Constitution as a whole.

We notice that in article II, section 1, clause 3, now repealed by the 12th amendment, but not without historical significance, the Congress had a responsibility. In case the electoral college failed to yield a majority for President, it was up to the House to step in and choose from the highest 5 and then if there was a tie for runnerup which would be Vice President, it was up to the Senate to make the choice.

In the 12th amendment which succeeds that, if the electoral college fails to yield a majority, again it is up to the House to step in and to choose a President from the highest 3, and the Senate to choose a Vice President from the highest 2. And also we get to the 20th amendment, and where we have neither a President-elect nor a Vice

President-elect who was qualified, again it is up to the Congress to declare by law who shall act as President.

What I am saying is, if we look at the Constitution as a whole, Congress is charged with seeing that there is a President, and it must mean that it is a President who is active.

Now this is a strange way to start, and yet to wind up advocating a constitutional amendment. I am among those who believe that a statute would be sufficient, who believe there is constitutional power for Congress to act, but I observe that there is a wide difference of opinion.

There are many able students of the Constitution within the Congress and without who believe that a constitutional amendment is necessary, and it is such a serious question that I believe the happiest solution would be both a constitutional amendment and a statutory approach.

I do not believe there can be a happy solution without both.

Now very briefly, I have started with the proposal made by then Attorney General Brownell and President Eisenhower, that is, with the President's endorsement, to the House Judiciary Subcommittee on Presidential Inability on April 1, 1957.

Now why do I start with this? I will be very frank.

I think we have had so many proposals and so many solutions offered that I think it is time we begin to reduce them.

I am on record as proposing a different solution, but I think it is time to reduce them.

Now my feeling is this: When the President of the United States endorses a proposition, it does not necessarily mean that it should go through but it does mean it should have weighty consideration, and when it concerns his office and his office alone, I think it should have distinct priority of consideration. It should be considered, adopted or defeated with priority over all propositions that have been presented to the Congress.

Now you will notice that I have made a draft with modifications of that plan, and that I have underscored all of the places where I advocate either change or addition. Mr. Chairman, I do not pretend to be an expert at draftsmanship. I am pretty well satisfied with my own teaching job and am not applying for a job in the drafting service here in Congress.

I feel pretty amateurish at it, but I felt I could do this more briefly if we followed this:

As you will notice in this draft which I have presented, section 1 is identical with section 1 of the plan presented by Mr. Brownell with the endorsement of President Eisenhower. That means it finally clears the situation that when the Vice President takes over for a disabled President, he becomes an acting President.

In other words, what it does, it establishes the same rule—I beg your pardon. Section 1 makes it clear that the Vice President taking over for a President in case of death or in case of resignation or in case of removal, becomes the President for the unexpired portion of the then current term.

It adds nothing new except one thing. 117 years of history since the Tyler precedent have established that the Vice President becomes President on the death of the elected Chief Executive.

This only establishes the same rule in case of his resignation or in case of his removal from office.

It would appear sensible, because if the President dies, the Vice President becomes President. If the President resigns, he is out for the rest of his term. There is no temporary character about it.

The same rule should be logical. If the President is removed, he is out, and therefore the same rule should apply. But that really adds nothing new.

Of course, there are many able scholars who believe the framers of the Constitution did not intend that the Vice President become President, but with 117 years of history back of us since the Tyler precedent, it is rather late to label that as a period of constitutional error.

I believe it would be well to settle the question for all time in a constitutional amendment.

Section 2 of this draft I am submitting is exactly the same as section 2 of the proposal which Mr. Brownell submitted with the endorsement of President Eisenhower.

That merely makes it clear that if the President declares in writing that he is unable to serve, then the Vice President shall exercise, shall discharge the powers and duties of the office as acting President.

That I think is the sense, Mr. Chairman, of virtually everyone who has testified before your committee, that in case the Vice President takes over for a disabled President, it should be temporary and he should merely be acting President and should not, would not oust the elected Chief.

Senator KEFAUVER. Professor Waugh, in considering whether you might have added something to section 2 rather than just let it stand as submitted by the Attorney General with the approval of the President, did you think about the emoluments? There is quite a discussion as to whether the Vice President when acting as President should receive a higher salary, whether he should receive the Presidential salary, whether he should live in the White House, whether he should have the benefit of the emoluments of the office.

Mr. WAUGH. Yes. Mr. Chairman, I have added one section providing that Congress could implement this proposed amendment by appropriate legislation, and as to your question, the first part I would answer very definitely this is a very wealthy nation, and we have no reason to be bothered about the extra salary. If we were a poor nation we might, but I would say that while the Vice President is acting as President, he is performing those very heavy burdens, and my opinion is that an act of Congress should grant him the same salary which the President receives.

I do not think in case the President is declared disabled, where he has himself declared his own inability, the Vice President should occupy the quarters which the elected Chief occupies.

Now I believe that if a President became so disabled that he believed really that he was not going to be able to serve any more, he would tender his resignation, and that would bring section 1 into execution.

So I believe that he should not occupy the White House quarters, but should get the salary attached to the office.

Senator KEFAUVER. I agree with you that is a minute matter that should not be dealt with in a constitutional amendment directly.

Mr. WAUGH. Yes. Thank you, Mr. Chairman.

Now when we come to section 3, section 3 of the proposal made by Mr. Brownell, if you will recall, and I have underscored the changes here, it said if the President does not so declare, the Vice President, if satisfied of the President's inability and upon approval in writing of a majority of—it used the expression "the heads of executive departments who are members of the President's Cabinet." Now I have struck out those terms and have substituted a majority of the principal officers of the executive departments.

The reason for that is this. I thought in the hearings before the House subcommittee, Mr. Keating made a very substantial observation. He said in substance, "You are using this term 'majority of the heads of the executive departments who are members of the President's Cabinet'", and he said that the term "Cabinet" is unknown to our Constitution and virtually unknown to our laws.

In other words, he pointed out the fact that the Cabinet was a kind of expansive thing.

It can be as large as the President wants it or it can be as small, and I think we all agree that is constitutionally true. The President could say today, "I want the Secretary of State and Secretary of Treasury and Secretary of Defense in my Cabinet. The rest of you stay down in your offices and do your work, but I do not want you collectively functioning with me," and he would have constitutional authority to do so.

So he felt that something very indefinite was being left there. I also think so. I think it was a valid criticism. I believe the Cabinet is the proper body to advise the Vice President.

But I do not believe that we should leave it vague and indefinite.

Therefore, I have substituted the words "principal officers of the executive departments."

That is a term distinctly known to our Constitution. If you will recall, this term expressly appears in our Constitution, article II, section 2, clause 1. There it authorizes the President to require in writing the opinion of the principal officer in each of the executive departments. That is known to our Constitution and we are told that it is really the origin of the Cabinet. President Washington sought to get the Senate to serve as an advisory council, was unsuccessful, and thereupon he looked for advice elsewhere and he read this and reasoned thus: "If he could require the opinion in writing of the principal officers, why couldn't he require their verbal opinions in a collective cabinet?" And that is a good part of the origin of the cabinet system.

But then using the term "principal officers of the executive departments" would alone leave it still somewhat indefinite because who are the principal officers? I suppose you would say 10. Now with your 10 major executive departments, but you have 3 subdepartments, and you might say 13 then.

But I have proposed adding this:

The Congress may by law declare which officers, numbering not less than seven among those heads of executive departments appointed by the President by and with the advice and consent of the Senate, shall for the purposes of this article be deemed to be principal officers of the executive departments.

Now I think clearly that indicates the Cabinet, and that is exactly what the Congress would do in implementing this article. I did not put in 10. We say that there are 10 major departments. The reason I did not put 10 in is this: I felt that some day the Congress and the President both might wish to carry out executive reorganization, and if they wished to carry out executive reorganization, we would not want to freeze the necessity of a minimum of 10.

I cannot conceive, though, of any executive reorganization which would reduce our major departments to less than seven.

So that is the purpose here. That seems to me clearly to describe what we think of today as the Cabinet, but it does not erase the indefinite features of the same, and I believe would make the matter satisfactory.

So much for section 3.

Now section 4 is an exact repeat of section 4 of the Eisenhower-Brownell proposal:

Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

That I think is something in principle that we all agree with. That if the President says, "I am able to perform," it should normally be conclusive, and I think that is what is involved in section 4.

However, again I think Mr. Keating in the House subcommittee hearings called attention to a very substantial weakness.

Mr. Keating said you might get under section 2, section 3, and section 4 a situation where some day the Vice President, with the written approval of a majority of the Cabinet, might say, "You are unable," and the next day the President might say, "I am able," and the next day the Vice President, with the approval of a majority of the Cabinet might say "You are unable," and the next day the President would say, "I am able," and we might have a ridiculous and chaotic situation.

Mr. Chairman, I think a chance of such is most remote, but if we are going to close the gap, we ought not leave a gap. That is why I have suggested adding section 5 to this proposition.

Sec. 5. Whenever the Congress, two-thirds of each House concurring therein, shall find that a grave crisis has arisen with regard to a question of the inability of the President to discharge the powers and duties of his office and that a prompt and satisfactory determination cannot be concluded under the provisions of sections 2, 3, and 4 of this article—

Now I pause there. Whenever they find such, certainly I cannot conceive of the Senate and House of Representatives, if that ridiculous situation were going on, of one day the President saying, "I am able," and the next day the Vice President, with the approval of a majority of the Cabinet, saying, "You are unable." I cannot conceive, regardless of the political complexion of the Congress, of a failure to dig up that two-thirds vote to so declare.

Now why the extraordinary two-thirds majority? I believe that Congress should never interfere in this situation until the condition has gotten out of hand, even though under our present Constitution it could.

I am asking the Congress to limit its own power. That may seem very naive and optimistic to do so, but I am asking that the Congress limit its power for the good of this Nation, and the first Congress

showed a very fine example when it proposed our Bill of Rights. It did considerably limit its own power, and I think here it would be wholesome to do so.

Now then, once by a two-thirds vote of each House the House and Senate have found that under these sections a satisfactory solution cannot be concluded, then the Senate and House of Representatives "assembled and voting as one body shall forthwith proceed to make a determination of the question by majority vote"—the reason I have said by majority vote and one body is because, Mr. Chairman, we do not want a deadlock when it comes to this, and if we had an extraordinary majority we would get a deadlock.

But when we say "by majority vote, and both Houses voting as one body," we are not going to get a deadlock.

The vote is going to go one way or it is going to go the other, and we are going to get a definite determination.

Then:

and such a determination of the inability of the President or its termination, by the Senate and House of Representatives, shall be conclusive—in other words, that is it—

any provisions of sections 3 and 4 of this article to the contrary notwithstanding.

Now this limit on congressional power I believe is wholesome.

I believe it is in keeping with the spirit of the past Constitution.

As I said in the beginning, when was Congress called in? As a last resort, if the electoral college did not give us a President, the Congress would come in. This is as a last resort.

Now this leaves the matter in the executive family where it should be, I believe, in respect to the separation of powers. But if the executive family cannot settle its own internal problem, then I insist that it invites and deserves the intrusion of the legislative body, and I do not believe that the legislative body should ever totally divest itself of power to intervene.

I would like to say one word, Mr. Chairman, before I conclude.

Section 6 we can all see is simply:

The Congress shall have power to implement the provisions of this article by appropriate legislation.

I did not use the term "enforced" though I wouldn't object to it.

I used the term "implement" because actually sections 2, 3, and 4 are in a sense somewhat or virtually self-executing, except for that one case where Congress would declare who are the principal officers of the departments.

I think it requires implementing more than enforcing. It requires Congress to act under section 3, and also I think it would require that Congress would have to act under section 5.

When the Senate and House of Representatives come together assembled as one body, there would have to be some legislation about its organization and procedure, so I have used the term "implement."

Section 7 is an exact copy of section 5, I believe it is, section 5 of the Eisenhower-Brownell proposal. It is routine and self-explanatory.

Now one other word, Mr. Chairman, and I am ready to close. I am one who on record has proposed in the past the association of members of the legislative body with the Cabinet in an inability decision, but I have come to the conclusion that it is better not to. I would

say, though, Mr. Chairman, if we are going to include them, I rather agree with the implication of one question you presented to Mr. Fowler. I rather agree if we are going to include them, that it would be better not to include the Speaker or the President pro tempore, for the simple reason that you indicated.

The great danger is that they would be conscious that the public might think that their close relation to Presidential duties in the Succession Act would influence their judgment.

I believe if we are going to include them, I would agree with the implication of your question, it would be to use the leaders, say the majority and minority leaders. This I think would be a very wholesome thing.

I think, as you doubtless know, that our good neighbors in England have established really an official standing and I believe in Canada, for the minority leader. In other words, the minority leader in the House of Commons is paid an extra salary for his services to Her Majesty's Government. If we are going to associate the Congress with it, I believe it would be wholesome to give an official recognition to the services performed by party leadership in the Congress.

But I would prefer that it be left in the Executive family, and with the Cabinet, and I will proceed very briefly to state why I believe that would be true.

The first thing I would say on that, to leave it with the Cabinet to advise, Mr. Chairman, is the simplest plan that has been proposed.

In fact, I am inclined to believe in this plan over a great many others, because it was so simple that we overlooked it, and on a complicated problem I believe we should invite all of the simplicity that we can get.

The second thing that I would state with regard to it, Mr. Chairman, this involves no additional machinery of government. We live in an age when as the price for modern civilization and our security, we have to have mounting numbers of boards and commissions and agencies, and I think whenever we can solve a problem without creating a new one, it is a very happy thing, and this does not. It leaves it with the Cabinet going on from day to day and it never becomes an inability council, unless a case of inability comes up.

A third reason, it refrains—

Senator KEFLAUVER. When you use the term "Cabinet," you are speaking of heads of the principal administrative offices?

Mr. WAUGH. That is right, Mr. Chairman. I am glad you asked the question. I mean within that section where Congress describes which are the principal offices according to this proposal, principal officers in the departments.

Since we think of it as a Cabinet, that is why I am using the term "Cabinet."

So in using these heads of executive departments, the third advantage would be we would not impose on the President the psychological hazard and potential embarrassment of having an inability council hovering over him. I think to have an inability council, a special one, we are going to remind the President all the time that he has a danger of breaking down in health and breaking mentally, and he has a hard enough job. I would prefer not to do it.

In fact, I think Mr. Brownell made an excellent statement when he said we ought not to put the President constantly on trial as to his health.

I think the Presidency is the most magnificent contribution that the American people have made to the science of government, and we must be very careful that nothing is done to in any way diminish the dignity of that Office.

A fourth reason I would like to mention is this: We live in an age of earth satellites and speed may be of the very essence. What could be more speedy! Here are the heads of the departments close to the President, close to the Vice President, since for a quarter of a century Presidents have invited their Vice Presidents to sit in the Cabinet, which is a very wholesome development, I think, and close to the problems which cluster around the White House door.

I think we could get the most speedy decision there of any that we could get, and it could be done quietly and calmly, and without the kind of a to-do which might impair the dignity of the Office of the President.

Another reason, I believe it would offer us the most abundant assurance against resort to inability proceedings born of political bias.

I do not care how fair it is. If this country ever suspects there is political bias, in an inability determination it would dangerously disrupt the unity of the Nation. Here then the Vice President is regularly a member of the President's political party. All of the heads of his departments are either members of his political party or if not, they are normally in sympathy with him, so they are persons who are in political sympathy with him. They are highly fiduciary. On the record as a whole they have a record of loyalty and they would not tolerate an inability proceeding that was born of political bias.

So I think that that is a very important consideration.

Another one, briefly: It would be in keeping with our principle of separation of powers because there would be normally no intrusion of either of the other two branches into the situation. The matter would be settled within the executive family and, very important, I think, it would be settled by members of that political party with whom the American people have in a sense entrusted executive power for 4 years, and if we believe in party responsibility, I think that would be quite important.

Finally, perhaps the most important of all, this plan would give the President satisfaction and comfort that he is not going to be subjected to political assaults on the grounds of inability.

Now in brief, I submit President Eisenhower has thought more about this problem than any President—than any man in America. Three times illness sufficient to threaten his continued working capacity has attacked him. He undoubtedly has given it serious thought, and he has indicated that these department heads are the ones he would feel satisfied with having associated with the Vice President.

I believe that it is good. I think it is fine reasoning.

Now finally, Mr. Chairman—

SENATOR KEFAUVER. Professor Waugh, you are making a very fine statement, an interesting and useful one. You take all the time you wish.

MR. WAUGH. Thank you very much, Mr. Chairman.

Now the objection has been raised to the department heads, Mr. Chairman, and a very intelligent question came from our attorney for the committee to Mr. Fowler, about whether these department heads, because of loyalty to the President or some reason would be

reluctant to act, and we point to the Garfield and Woodrow Wilson incidents.

Mr. Chairman, I believe those incidents should be entirely discounted in our day, and I have three reasons for saying so:

First, as was indicated in your questioning, Mr. Attorney, with Mr. Fowler, when the Garfield and Wilson Cabinets failed to take affirmative action, there was serious doubt whether an attempted installation of Mr. Arthur as the Acting President, thinking they would be doing so, or Mr. Marshall as Acting President, might turn out to be installation as President, and they might oust the elected Chief. That was certainly a constitutional hazard at the time, and no Cabinet would wish to perform an act which might have the result of ousting their Chief.

In this proposal that danger is entirely and completely erased.

The Vice President becomes the Acting President, and he acts only until the President's ability is restored. So that is gone.

Now the second reason I would like to state is this:

In the time of the Garfield and Wilson incidents, the Cabinet (department) heads had neither statutory nor constitutional authority or duty to make such a decision.

Now, if the Cabinet, the Garfield Cabinet or the Wilson Cabinet, had ruled the President disabled and called on the Vice President to take over, undoubtedly large elements of the population would have said, "You have usurped a power that is not given to you by the Constitution, is not given to you by statute and your behavior is most presumptuous."

This is entirely erased. In this proposal these department heads not only have a power, but a constitutional duty to approve in writing a temporary accession of the Vice President as Acting President, if the President is disabled and he does not announce his disability. That makes, I think, a substantial difference.

The third thing and perhaps as significant as the others, in the days of the Garfield and Wilson incidents, Mr. Chairman, this country had ocean barriers in which we trusted. In both those cases we felt an enormous degree of smug security because of our geographic position across the oceans. No Cabinet in the Garfield days or the Wilson days would feel that our national security was seriously jeopardized by a failure to bring the Vice President in as Acting President.

But every one of us knows that day is gone, and the Cabinet knows it. This Congress has considered so many measures of national security that it would be idle for me to say, Mr. Chairman, why it is recognized that day is gone, and any Cabinet knows it is gone.

All department heads today know that with the President as not only the defender of American security but the defender of free men everywhere in the world, if the President is disabled and unable to act at all, serious jeopardy to our national security is threatened. Can you imagine any Cabinet, any department heads, with the Secretary of State, with the enormous responsibilities for the foreign relations of our country and with the Secretary of Defense with an enormous responsibility for the military security of this country, can you imagine that they would shield a disabled President, knowing that it jeopardized the security of the country?

I think we ought to give the Cabinet credit today for knowing that we live in an atomic age. I think this would be true but, I think

with the department heads advising the Vice President we would never get the installation of a Vice President as Acting President unless you had the simultaneous occurrence of two things:

First, Executive power so inactivated by the President's inability to act that Executive power simply was not functioning with any degree of satisfaction, and, second, a state of public affairs, a situation in public affairs that made it very serious for him not to act, and I think with the Office of President we should never undertake, without a voluntary declaration by the President, to hold that he is disabled unless the need is imperative.

I thank you very much, Mr. Chairman. I shall conclude my statement.

Senator KEESAUVER. Professor Waugh, we are very grateful to you. (Professor Waugh's statement is as follows:)

PLAN FOR A CONSTITUTIONAL AMENDMENT WITH REGARD TO PRESIDENTIAL INABILITY, PREPARED BY EDGAR W. WAUGH, PROFESSOR OF POLITICAL SCIENCE, EASTERN MICHIGAN COLLEGE, BASED UPON THE EISENHOWER-BROWNELL PROPOSAL, WITH CHANGES AND ADDITIONS ITALICIZED

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

ARTICLE --

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

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

Sec. 3. If the President does not so declare, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the principal officers of the executive departments, shall discharge the powers and duties of the office as Acting President. *The Congress may by law declare which officers, numbering not less than seven among those heads of executive departments appointed by the President by and with the advice and consent of the Senate, shall for the purposes of this article be deemed to be principal officers of the executive departments.*

Sec. 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

Sec. 5. Whenever the Congress, two-thirds of each House concurring therein, shall find that a grave crisis has arisen with regard to a question of the inability of the President to discharge the powers and duties of his office and that a prompt and satisfactory determination cannot be concluded under the provisions of sections 2, 3, and 4 of this article, the Senate and House of Representatives assembled and voting as one body shall forthwith proceed to make a determination of the question by majority vote; and such a determination of the inability of the President or its termination, by the Senate and House of Representatives, shall be conclusive, any provisions of sections 3 and 4 of this article to the contrary notwithstanding.

Sec. 6. *The Congress shall have power to implement the provisions of this article by appropriate legislation.*

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

STATEMENT OF EDGAR W. WAUGH, PROFESSOR OF POLITICAL SCIENCE, EASTERN MICHIGAN COLLEGE

Mr. Chairman, and members of the subcommittee, I appreciate very much the opportunity to present my views to you on this very important and delicate problem. I am well aware of the enormous time pressure under which you work and I shall endeavor to come to the point with dispatch.

It appears that the constitutional scholars, the public, and the Congress which includes among its Members many able students of the Constitution, are all somewhat divided over the question as to whether we should seek a solution through an act of Congress or through an amendment to the Constitution. While I am among those who believe the Congress has power to enact a solution, I have reluctantly but firmly come to the conclusion that both approaches are necessary to a happy conclusion. I proceed first to the matter of an amendment.

I am submitting to you a plan for an amendment to the Constitution. I have based the plan upon the proposal made by then Attorney General Brownell, with the approval of President Eisenhower, to the House Judiciary Committee's Subcommittee on Presidential Inability, April 1, 1957. I have made some changes and some additions, as you will observe, but it still retains the fundamentals of the administration's plan. I have chosen to start with that proposal as a basis for two reasons. First, I believe it is a good and constructive approach; second, I believe any proposal on a national problem endorsed by the President should have serious consideration and when the problem concerns his office and his office alone, as is the case here, I think his ideals should have distinct priority. They should receive the first and foremost consideration. I have embodied my proposed touch-up of the administration's plan in a draft for an amendment to the Constitution. I do not pretend that I am in any way an expert at this sort of thing—indeed you will doubtless observe that I am no more than an amateur—but I believe I can convey my thoughts to you in less time by following a definite proposal.

Section 1 of this plan is identical with section 1 of the administration's plan as presented by Mr. Brownell. I have copied it word for word. It should provoke no controversy. It merely declares that upon the removal or death or resignation of the President, the Vice President becomes President. It establishes the same rule regarding removal or resignation that we have always followed in case of the death of the President. With regard to the situation at the death of a President it adds nothing to our established practice. Whatever may have been the intention of the framers of the Constitution—and it was probably that the Vice President should be Acting President—the 117 years of history that have followed the John Tyler precedent would appear to have provided a settled answer. All seven Vice Presidents who have succeeded deceased Presidents have taken the Presidential oath, have regarded themselves as Presidents, and the Nation as a whole in both official and private circles has generally accepted their view. It would be rather late to label all these years as a period of constitutional error.

Section 2 of this plan is an exact copy of the same section of the Eisenhower-Brownell plan. It merely states that the President may declare in writing his own inability, thus calling on the Vice President for temporary service as Acting President. It ends all danger that the elected President would be ousted. This section seems to me to be no more than plain commonsense and it should stir little controversy. I think Mr. Brownell made a correct observation when he expressed the opinion that "this provision, standing by itself" would take care of most of the cases of Presidential inability that we will ever face. It is a patent fact that the President has a job of maulkilling proportions and we surely should not hesitate to grant him this avenue of temporary respite.

Section 3 of this plan carries the substance of the Eisenhower-Brownell plan, i. e., that if the President fails to declare his own inability, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the Cabinet (department head component), shall discharge the powers and duties of the office of President as Acting President. The administration's proposal used the expression "heads of executive departments who are members of the President's Cabinet * * *." Serious objection was raised as to this expression before the Cellar subcommittee of the House (using the term Cellar subcommittee after its chairman for brevity). The objection centered around the fact that the term "Cabinet" is entirely unknown to the written Constitution and only remotely known to our laws and that it can be expanded or contracted as to membership at the pleasure or even at the whim of a President. Mr. Keating, I believe was disturbed by this indefinite character of the proposal and I think his observation was valid. The plan submitted here contemplates the Cabinet but puts the matter in more definite terms. It substitutes the words "principal officers" of the executive departments—terms expressly used in the Constitution, article II, section 2, clause 1. This expression, we are told, had a direct relation to the development of the Cabinet. President Washington, after unsuccessful efforts to use the Senate as an advisory council, noted that the Constitution authorized

him to require "the Opinion, in writing, of the principal Officer in each of the executive Departments . . ." It was just a short step from this to the idea of calling on the department heads to meet with him collectively and give their verbal opinions and thus operate as a Cabinet. This revision of section 3 of the administration plan fully indicates the Cabinet without using the words and yet, for the purposes of such an amendment, avoids the indefinite elements. The Congress would be empowered to declare which of the principal officers are to share with the Vice President an inability decision. The qualification "numbering not less than seven" is used rather than the number 10 in order that such an amendment would not by indirection pose obstacles to future executive reorganization in requiring 10 department heads. The chances, however, are most remote that any future reorganization plans would call for less than 7 department heads.

The use of the Cabinet for such a purpose seems to me to offer innumerable advantages. Time forbids that we note but a few of the virtues of the plan.

It is refreshingly simple—in fact so simple that many of us, including myself, unconsciously shied away from it in the early stages of the current discussions—and with a complicated problem we ought to welcome all of the simplicity that we can get.

It involves no additional machinery—no addition to the ever mounting number of boards and commissions and agencies, however necessary, that seem to be visited upon us as a sort of price for the comforts of modern civilization and for our security in a dangerous age.

By this plan we would refrain from imposing on the President the psychological hazard and potential embarrassment of having ever hovering over him the shadow of a special inability commission, perhaps looking for a way in which to make itself useful, and serving as a constant reminder to the President that any day he may break down physically or become a mental incompetent. As Mr. Brownell expressed it, we do not want to place a President "constantly on trial as to his health."

If time should be of the essence—and it certainly may be in this age of man-made earth satellites and the like—we can devise no agency which would be in better position to give a prompt, informed judgment. The Cabinet is close to the President, close to the Vice President—since Vice Presidents by courtesy of successive Presidents have now held Cabinet seats for a quarter of a century—and close to the problems which cluster around the White House door.

It would offer us the most abundant insurance against resort to inability proceedings born of political bias. The Vice President is regularly a member of the President's political party. The department heads are appointed by the President, with senatorial approval as little more than a formality in most cases. They are normally members of the President's political party, and if there is an occasional exception, he is usually a political supporter of the President. Their relation to the President is highly fiduciary and they have a tradition of firm loyalty on the record as a whole. They would be among the last to tolerate a politically inspired move to embarrass the President with a groundless inability proceeding. This is an extremely important point for it might be less dangerous to leave the whole inability problem unsolved than it would be to adopt a plan which would leave the door ajar for political assaults. It would leave the primary responsibility for the maintenance of active executive power to members of that political party to which the American people have in a sense intrusted the executive power for 4 years. If we believe in party responsibility, then this should be wholesome.

It would be in keeping with our principle of separation of powers and would afford the maximum of protection of the independent status of the executive. The decision would be made inside the executive branch. The President's official family would give the answer. No intruders would be interfering. The official family could make its decision quietly and informally and without the sort of ado that might impair the dignity of the office of President, by all odds our most magnificent contribution to the science of government.

The public would have the greatest assurance that there would be no temporary and involuntary displacement of the elected Chief Executive unless we should experience a simultaneous occurrence of two grave situations, namely, high level executive power inactivated by a President's disability and a state of public affairs which requires immediate directives from an active executive head. Any precipitate and ill-advised effort to displace the President without his consent for ever so short a time might disturbingly disrupt the unity of the Nation.

Finally, and perhaps most important of all, it is a plan in which the President can have confidence. To adopt a scheme which involves a source of anxiety to the President would be worse than to leave the matter unsettled as it is today. The President, as the Congress fully recognizes, carries crushing burdens and we must by all means have a plan which is satisfactory to him. On this point President Eisenhower is surely the most competent man in America to speak. On three occasions since he became Chief Executive he has been stricken with illness sufficiently serious to threaten his continued working capacity. There is no question but that he has given the matter we are discussing most serious thought. I think his ideas on the subject should carry great weight and he has made it plain that the Cabinet is the proper body to share with the Vice President in making an inability decision.

As you know, some able students of the problem have expressed serious doubts about the suitability of the Cabinet (department head component) for such a function. They contend that the Cabinet by reason of its loyalty to the President will tend to shield him and, therefore, it can not be relied upon to give approval of a temporary accession by the Vice President even if the need is quite patent. They point to the historical record—to the failures of the Garfield and Wilson Cabinets to take affirmative action. I think those cases should be discounted entirely today for three reasons. First, at the time of the Garfield and Wilson affairs the Cabinet had neither statutory nor constitutional authority to take affirmative action. Many would have regarded affirmative action by them as extraordinarily presumptuous behavior. By contrast, under the current proposal the Cabinet heads would have expressed constitutional authority and indeed the duty to approve a temporary Acting President status for the Vice President if the need should clearly arise. Second, in the former cases the Cabinet definitely feared that by affirmative action they might be instrumental in ousting their Chief permanently. That danger is completely erased in the Eisenhower-Brownell plan as it is made perfectly clear that the Vice President would merely become a temporary Acting President. Third, at the time of the Garfield and Wilson cases our ocean barriers provided us with a rather snug national security and a Cabinet could go ahead and shield a disabled Chief without patently hazarding the security of the Nation. That situation is gone and we all know it. It is incredible that a Cabinet today, having within its ranks the Secretary of State who is supposed to keep in close touch with foreign developments and the Secretary of Defense who has a large responsibility for our military safety, would refuse to approve the temporary accession of the Vice President to the post of Acting President if our national security would otherwise be jeopardized. If our Cabinets in this day have such confused notions of loyalty there is little hope for us as a nation anyway. Why not give the Cabinet credit for knowing, at the very least, that we live in an atomic age?

Section 4.—This plan copies the Eisenhower-Brownell proposal word for word as to section 4. It means that when the President declares in writing that his inability is terminated he performs again as President and the Vice President's function as Acting President has been concluded. This needs no elaboration.

Section 5 would be an addition to the Eisenhower-Brownell plan. During Mr. Brownell's testimony before the Cellar subcommittee, Mr. Keating raised a very significant point. As he saw it, we might get a chaotic condition. One day the Vice President with Cabinet approval might say the President is unable and the next day the President might say that he was able and so on ad infinitum. I think he was right. While the chances of such a situation are most remote, it is a possibility and if we are going to close a gap we ought not to leave a gap. Section 5 would completely close the gap. Congress could then step in. By a two-thirds vote of both Houses, Congress could declare the patent fact that a prompt and satisfactory determination could not be attained under sections 2, 3, and 4. The two-thirds vote is suggested as assurance that Congress will not interfere unless the situation is really out of hand. On the other hand, if the situation should become chaotic I cannot imagine a failure of the two Houses of Congress to come up with the two-thirds vote. Once Congress has made its declaration, it would proceed to take positive action. With both Houses voting as one body and by majority vote it would make the necessary determination of the inability question, and its determination would be conclusive. The joint body and majority vote are suggested in order that we will not risk a congressional deadlock. Congressional action would be a last resort. Primary responsibility for the settlement of an inability question would be left within the executive household. There would be no congressional interference until the executive family exhibited its incapacity to handle the matter, and in such a case it would invite and deserve the congressional intrusion.

Section 6 is also an addition to the Eisenhower-Brownell plan. I have suggested the word "implement" rather than the usual word "enforce" as the amendment would be in the larger sense self-executing. However, some legislation would doubtless be necessary with regard to the organization and procedure of the 2 Houses operating as 1 body under section 6.

Section 7 is an exact copy of section 5 of the Eisenhower-Brownell proposal. It is routine and self-explanatory.

THE STATUTORY APPROACH

I said in the beginning that I thought both amendment and statute would be necessary to a complete solution. Even if we wait until an amendment is ratified it will then doubtless be necessary for Congress to implement the amendment by law. With an amendment such as is suggested here it would certainly be necessary for Congress to implement sections 3 and 5 by laws. Furthermore, it might be well, and I think it would be, for Congress to consider going ahead and enacting the substance of sections 2, 3, and 4 into law. I believe Congress has ample power to do so under the Constitution. The statute would hold the line pending the ratification of the amendment and I do not believe it would have to hold very long. I believe the States would be quite prompt in ratifying the amendment. There has been so much discussion of the inability matter and its gravity during the past 2 years that the public has been made well aware of the need of action. I am sure that the States will speedily ratify any reasonable amendment dealing with the situation.

(Discussion off the record.)

Senator KERNAUVER. I have 1 or 2 questions to ask you, sir, and then I shall ask Mr. Smithey and Mr. Callaghan if they want to ask any questions.

You say you think that this problem can constitutionally be handled by statute?

Mr. WATSON. Yes, Mr. Chairman.

Senator KERNAUVER. What would you think of the proposal made by Mr. Fowler that we pass a law which would be an interim measure, and then reinforce it with the submission of a constitutional amendment simply giving the Congress the power to act in this field?

Mr. WATSON. Mr. Chairman, I agree with the first part of your question. I think by all means that Congress should pass an interim statute. I think they have power to and should.

I disagree—and I also think a constitutional amendment should be submitted parallel or even before, I believe the constitutional amendment should be submitted and then immediately after its submission, there should be a statute.

My reason for saying first a constitutional amendment is this: I have no doubt this has been discussed so much, Mr. Chairman, by the people, any reasonable amendment to the Constitution is going to be ratified by the States, and it is going to be ratified very rapidly by the States if it is submitted.

But I would think you should propose the amendment first; then pass the statute.

Then I think you are much less likely to experience an Executive veto.

Now I am not going to be presumptuous enough to speculate on the interrelations between the Congress and the Executive but I can see where there is a great chance of an Executive veto, regardless of who is President or of what party, unless an amendment is submitted first, and I disagree with merely authorizing Congress to act.

My position is that while they now have the power to act, I do not believe Congress should have the power to act except in a last resort, and I prefer a proposal such as I have presented where we give Con-

gress the power to act in section 5, I believe it is, of what I propose, only if the Executive family does not settle it.

But if we propose an amendment that Congress can interfere, then we are proposing, I suppose, that Congress can interfere at any time, and I think the Executive would be frightened by it.

If we propose an amendment such as this, limiting congressional power, Mr. Chairman, than I do not believe the Executive would be nearly so constrained to veto a statutory approach, because the Executive would feel confident the amendment was going to be adopted.

But if you do not have an amendment which limits congressional power, the Executive might feel, "Any act of Congress which I approve sets a precedent for congressional intrusion."

That is my answer to that question, Mr. Chairman.

Senator KEFAUVER. It has been suggested that rather than just an amendment authorizing Congress to act, that is a constitutional amendment authorizing Congress to act, that the resolution might be worded to authorize Congress to set up procedures for determining, which would be the distinction—it would mean that Congress itself was not to be the determining body.

Mr. WAUGH. Yes.

Senator KEFAUVER. Would that make any difference in your thinking?

Mr. WAUGH. Mr. Chairman, I believe that would still have some of the weakness—I should not say weakness, but some of the source of anxiety to the Executive that a simple amendment empowering the Congress to act would have, because if Congress is empowered to set up the procedures, I suppose they could set up procedures which might frighten the Executive. They might set up procedures requiring physical examinations and that sort of thing, and, as Mr. Brownell suggested, to require the President to have one doctor after the other come in and examine the President, to make the White House a clinic, it might be frightening to the Executive, I think, Mr. Chairman.

Senator KEFAUVER. Professor Waugh, you said that there was great public interest in this and you felt an amendment would be readily adopted.

I agree with you. I think there is great public interest, but you are closer to the people out in the country, their thinking about this in the universities.

Do you find this is a subject that is being discussed and thought of and debated by students in universities and people here and there?

Mr. WAUGH. Mr. Chairman, certainly among student groups it is.

I may say that repeatedly, for instance, members of the political science faculty in the institution where I teach at least have been interviewed by students in recent months on the question, because of what they say are their intercollegiate debates, debating with other colleges on the question.

I think the public is interested, though I really think this has happened, that the matter has been studied so long—now it has been some time since Mr. Celler submitted his questionnaire and then the House held hearings, and the Senate is now holding hearings—I think a great many of the public are, you might say, getting to feeling, "Oh well, they are going to discuss it, but we don't believe anything is

going to be done. There will be some more plans presented." But they do not believe anything will be done.

I think the public has gotten lethargic about it, but I think the public, if something were proposed, would say yes, and I think it would be ratified.

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

Mr. SMITHEY. Yes, sir.

Professor Waugh, I notice that your proposal here would place the initial determination of the inability of the President in the Cabinet. Now the subcommittee has had witnesses who have objected to that procedure on the basis that it interjects appointive officers into a determination of who should occupy an elective office.

Now what is your comment with respect to that objection?

Mr. WAUGH. Mr. Smithey, I am not very much impressed by that objection. My feeling is that in the processes of democracy, election is a means to an end. Just casting a ballot for the purpose of voting for someone means little. It is a means to an end.

So I feel that when we go out to vote for President, we cast a ballot for that candidate for President, of course we know the electoral college indirectly is in there, but now it is virtually direct election. I think the people say, "This is the person we believe will carry out policies that we believe in. We believe in this man. Now if we believe in this man, we believe in this man's ability to appoint people who believe as he does."

I look upon the appointments made by the President, as the instrumentalities of carrying out the people's will at the time of election.

They are, as I see it, indirect representatives of the people themselves, because they are appointed by a person the people have virtually chosen.

Furthermore, they are confirmed by the Senate. In most cases it is a formality with the Cabinet and I think that is proper, but they are confirmed by the Senate.

So they have appointment by a President chosen by the people indirectly and confirmed by the United States Senate, now chosen by the people.

So I think there is enough popular representation there to erase that objection.

Mr. SMITHEY. I take it that you would define one of the powers and duties of the office of the presidency as being the power to remove or replace members of the Cabinet?

Mr. WAUGH. I do, yes.

Mr. SMITHEY. Do you perceive any difficulties which might arise in the recovery of the office by the President if the Vice President were to assume the duties of the presidency and then discharge members of the Cabinet and appoint people of his own persuasion?

Mr. WAUGH. I do perceive a difficulty there, Mr. Smithey. I feel this way about it, though. There is no way on earth that we can remove every difficulty, and I like to quote what Alben Barkley, the late and lamented Vice President, said. On one occasion I remember Mr. Barkley was addressing a group, and when he went to this group he was with a newspaperman, as I recall the incident now, and it happened to be a Democratic group.

Senator KEFAUVER. That wouldn't have been unusual for the Vice President.

Mr. WAUGH. Not unusual, Mr. Chairman, for Mr. Barkley to be with a Democratic group. And some of the younger Democrats remarked that Warren Harding was dishonest. Mr. Barkley immediately took issue. He said:

Warren Harding was not dishonest, however regrettable the scandals in his administration were.

He said:

Once a person becomes President of the United States, it does something to him, and any citizen of the United States when he becomes President, that office does something to him and gives him one purpose, and that is to do his best for the American people.

I think that same thing applies to a Vice President when called temporarily into the chambers of that office to perform those duties, and I myself believe the chance is most remote that a Vice President acting as President would take advantage of the stricken President. I believe the public would resent it.

I think if it is a temporary illness, let's say it was such as President Eisenhower's ileitis attack or something like that, should the Vice President come in and tear up things, there would be such public resentment that it would ruin things and I believe—

Mr. SMITHLEY. In other words, you believe he would forgo one of his prerogatives in order to maintain stability?

Mr. WAUGH. That is right.

Senator KEPAUWER. He would likely have the feeling that he may just be acting for a few weeks or months and that there would be public resentment if he changed the team drastically.

Mr. WAUGH. Yes, Mr. Chairman, exactly.

Mr. SMITHLEY. I notice in your plan that you call for the initial action by the Cabinet or by the principal officers of the executive departments.

Mr. WAUGH. Yes.

Mr. SMITHLEY. And that you leave a residual power in the Congress to settle the matter should they fail to act.

Mr. WAUGH. Yes.

Mr. SMITHLEY. For some reason, or should some difficulty, as you have suggested, occur.

Mr. WAUGH. Yes.

Mr. SMITHLEY. Now do you see any issue of separation of powers involved in any amendment such as this?

Mr. WAUGH. Mr. Attorney, I do not. I feel the separation of powers principle is one that should protect the independence of the Executive, but already in the Constitution we have all the way through congressional participation in the choice, even the choice of an Executive, if the electoral college fails.

So if this is any violation of separation of powers, certainly the Fathers put in the Constitution something that would be.

But I do believe that any amendment which gives the Congress substantive power to intrude at once would go further into the invasion of the separation of powers than anything that the Fathers had in mind.

Here is the last resort proposition.

Only if the executive household does not settle its own problem, then somebody has to, and I cannot see anything better than the

Congress. I do not think the Supreme Court should, Mr. Attorney. I think it is something of a political question, and I think the Supreme Court might have to review, for instance, in later cases, action in which it has taken part, and if I am correct, the Chief Justice has spoken out that he himself would be reluctant to see the Supreme Court brought into it. So what is left of the three branches? There is the Congress as a last resort. That is the way I see it.

Mr. SMITHLEY. I notice that you have no specific or no direct provision for the recovery of the powers and duties.

Do you feel that the only requirement on that point should be the decision by the President as to whether he is able to resume?

Mr. WATSON. The decision by the President as to whether he is able to resume his powers and duties, yes, Mr. Smithley, I do. But when we come to section 5, when we come there, I think the language is broad enough under section 5 if the Congress now has reached a determination of the inability of the President, if it got to that place, if the executive family did not settle it and it got that bad, something terrible has happened in the executive department. Then in that case I do not believe this proposal would indicate that the President's own statement would be conclusive. If the Congress declares him in a state of inability, and then he states that he is able again, I think that Congress is still in position there to interject itself under section 5.

Mr. SMITHLEY. How would you resolve the issue of the recovery of the powers and duties of the office?

Mr. WATSON. Under section 5?

Mr. SMITHLEY. Under the situation you outlined. You did suggest an instance in which the President might not recover on his own initiative the powers and duties of the office,

Mr. WATSON. Yes.

Mr. SMITHLEY. In that event, how would they be resolved?

Mr. WATSON. They would be recovered in that event—in the first place, he would normally recover them under section 4. That would normally be the recovery, in any case. In any case if the President has declared his own inability or if the Vice President, with the approval of the majority of the department heads in writing, has declared him unable, section 4 still would come into being if he says, "I am able now," and he recovers his powers and duties.

Then suppose the next day the Vice President disagrees. If that happens and you get a quarrel, then section 5 comes into operation.

Mr. SMITHLEY. Wouldn't it be better to resolve the issue by providing some mechanism for the resumption of the powers and duties of the office rather than leaving it to the President's own initiative?

Mr. WATSON. Normally I do not think so. Normally I think that we should leave it as section 4 does, with the President's own announcement.

If I may explain it this way, Mr. Brownell said before—may I say the Celler subcommittee for short, Mr. Chairman, because those subcommittee have long terminologies—Mr. Brownell said section 2 and section 4 would settle alone nearly every case of inability that we are going to face. That usually the President, if he really is disabled and he knows he is not going to be ousted in the situation, he is going to invoke No. 2. And then certainly when he is able to act, he is going to invoke No. 4, and that would be conclusive at that moment.

Under sections 2, 3, and 4 his statement is conclusive, but only when the department heads again say "You are mistaken," do you have a quarrel there.

Or I think section 5 is broad enough, Mr. Smithey, for this. Suppose a Cabinet would shield a President. If things were going to the dogs, if they were just all failing to do anything about it, if it was a patent situation, the Congress by two-third vote could come in there. The language does not confine them to a quarrel. But I myself have great confidence. I have heard criticisms of Congress, but I have spent a year in Washington in studying and visiting, and my own opinion is that with regard to the Members of Congress, their integrity is certainly equal to or above the average of the American people. Therefore, I do not believe two-third of both Houses would declare a grave crisis unless there was one. I do not believe they would. Then I think if they had to step in and declare the President disabled, their power would still be retained without another two-thirds vote, because that resolution would be standing still in a grave situation.

If the President stepped up and said, "I am able to act," and he really was not, suppose he was insane, Congress has still that substantive power.

Mr. SMITHEY. Mindful of the fact that we are here dealing with the Constitution, it occurs to me that we should examine all contingencies.

Mr. WAUGH. Yes, sir.

Mr. SMITHEY. Now, one of the contingencies which might occur would be that the President might become, by virtue of the great weight of his office, mentally incapacitated. That fact would not prevent him, however, from declaring in writing—

Mr. WAUGH. That is right.

Mr. SMITHEY. That he thought he was able to resume the powers and duties of his office.

Mr. WAUGH. That is right.

Mr. SMITHEY. Now, if there is no direct provision for the recovery of the powers and duties of his office other than the President's own act, wouldn't the possibility just outlined present a gap in your proposal?

Mr. WAUGH. I do not think so, Mr. Smithey, under section 5. I think it would present a gap under section 4, as Mr. Brownell left it. That was one thing I was worried about, that the President, and with no offense to the office, has such problems we wonder sometimes why a President doesn't lose his mind with all the problems that he has.

If he lost his mind, he could, as you stated, write, "Yes, I am perfectly able, more able than I ever was," and that would put right back in, but then the Vice President, with majority approval of the Cabinet, could put him right back out, you see. Then that situation would call for congressional action under section 5. That is my feeling, and my feeling is when Congress once declares by a two-thirds vote, that the situation is grave, the substantive power of Congress is now in full force, and their decision as to inability or its termination then becomes conclusive.

Mr. SMITHEY. Mr. Chairman, I have no further questions.

Mr. CALLAGHAN. I have none, Mr. Chairman.

Senator KEFAUVER. Professor Waugh, your statement is entitled to and will receive very serious consideration.

Mr. WAUGH. Thank you, Mr. Chairman.

Senator KEFAUVER. It is quite apparent that you have given this matter a tremendous amount of study and you have also taken into consideration the realities of political life in the Nation. We are very grateful to you and to Mrs. Waugh.

Mr. WAUGH. Thank you very much, Mr. Chairman, for the opportunity to speak.

Senator KEFAUVER. Our next hearing will be on Tuesday at 11 o'clock, at which time we expect to hear from the Attorney General of the United States.

We will stand in recess until then.

(Whereupon, at 12:30 p. m., the subcommittee was recessed to reconvene at 11 a. m., Tuesday, February 18, 1958.)

PRESIDENTIAL INABILITY

TUESDAY, FEBRUARY 18, 1958

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess and subsequent postponement, at 2 p. m., in room 457, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver (presiding), O'Mahoney, Wiley, Langer, Dirksen, Hruska, and Carroll.

Also present: Wayne H. Smithey, counsel, and Richard F. Wambach, clerk to the subcommittee.

Senator KEFAUVER. The committee will come to order. Off the record.

(Discussion off the record.)

Senator DIRKSEN. Can I note for the record, Mr. Chairman, that Senator Langer and I may leave at 2:30 briefly, to conduct a short hearing on a nomination in room 424, and we will come right back.

Senator KEFAUVER. We are pleased to have the distinguished Attorney General of the United States to give us his views in connection with the problem of Presidential disability.

Mr. Rogers, you proceed in your own way.

STATEMENT OF HON. WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

Mr. ROGERS. Mr. Chairman, members of the subcommittee, a matter of serious concern to the people of this country is the problem of what happens when a President is unable to discharge the powers and duties of his Office in the case of illness or other unexpected emergency. There is agreement that there should be clarification and improvement of our constitutional system relating to such inability. The question is what is the most desirable and appropriate procedure for accomplishing this objective.

After careful study, I believe that action to amend the Constitution is necessary to eliminate uncertainty and to provide for the orderly conduct of government in time of future crises due to a President's inability to act. The plan which the administration has recommended for favorable consideration by Congress, I believe, provides a workable and satisfactory solution.

Senator KEFAUVER. It will be printed in the record without objection.

(The material referred to is appendixes I, II, and III, beginning on page 177.)

Mr. ROGERS. I think that the subcommittee is in a general way familiar with that, and I will cover the provisions of the administration proposal at a little greater length in a moment. You will notice that the proposal would amend section 1, article II, of the Constitution, and would be substituted for part of paragraph 6.

Now, the whole of the said paragraph in the Constitution is set forth in my statement on page 3. And the portion of such paragraph for which the new proposal is a substitute is underlined in this statement.

I would like to first, if I may, talk about why action is needed. Strong disagreement prevails today concerning the status and tenure of a Vice President during the inability of the President. Distinguished students of the Constitution have contended that a Vice President would merely act as President for the duration of the inability. Other respected students of the Constitution have argued that a Vice President would actually become President and replace the disabled President for the remainder of the term. This difference in opinion respecting a Vice President's status and tenure during a President's inability fully demonstrates the compelling need to remove the existing doubt and confusion once and for all.

Soon after President William Henry Harrison died in 1841, Senator William Allen of Ohio objected to establishing the precedent of a Vice President's becoming President upon the death of the latter, because he thought that the precedent would complicate the situation in the future when a President became disabled. As Senator Allen indicated, study of the records of the Constitutional Convention shows that a Vice President was not intended to become President under the succession clause, but merely to exercise the powers and duties of the President until his inability was removed.

The subcommittee's attention is directed to a chart which is attached to my statement. That is appendix II, and I think if you will look at that for a moment, you will see the reason why there has been confusion throughout our history on this matter of Presidential inability.

Turning now to appendix II, you will notice that the Constitutional Convention agreed to two provisions, and they are set forth in the lefthand column of that appendix. And you will notice that in both cases, the express language was stated, that the Vice President shall exercise those powers and duties until another President be chosen or until the inability of the President be removed. And you will see in the second one set forth that the same language is included. So it is perfectly clear that those two articles as passed and agreed to by the Convention were intended to provide that the Vice President, in the event he exercised the powers and duties of the President who was unable to act, would act only until the inability of the President was removed.

Now, those two articles agreed to by the Convention were then sent to the Committee on Style. And the function of the Committee on Style was merely to improve the language, but not in any way to change the substance that had been agreed to by the Convention.

But it was in the process of correcting the style, in the Committee on Style, that the confusion arose. And you will see why it arose.

If you look at article II, section 1, as changed by the Committee on Style and finally adopted, you will notice that the language at the end—

And such officer shall act accordingly and until the disability shall be removed or a President shall be elected—

it is arguable as to whether that applies to the last section or the whole section of that article.

Now, as I say, that is the real reason why the Constitution is indefinite today, because of that change made by the Committee on Style which made the decision as to final language that appeared in the Constitution.

Regardless of the intent of the framers of the Constitution, seven Vice Presidents have, upon the death of the President, been recognized as having become the President in fact. As a result of the precedents established whenever a President died, it seems to be assumed without question that the Vice President becomes President and does not merely act as such when the President dies. This appeared to be Daniel Webster's view at the time of President Harrison's death—i. e. that Vice President John Tyler actually became President. These precedents make it easier to argue that a Vice President supersedes the President whenever he exercises Presidential power. As we will note in a moment, in both the Garfield and Wilson cases, the Vice President was not asked to act as President largely because of the fear that he would become President and thereby oust the incapacitated incumbent. As a result, the full extent of the disabilities was carefully guarded because of personal loyalty to the disabled President. More important, the public interest could not help but suffer from being deprived of an active President in both cases.

The things I am going to talk about next I think are probably familiar to the subcommittee, but I would like to review them, because I think it points up the most important aspect of this problem which I believe has been to some extent overlooked in this whole discussion of presidential inability. Since Harrison's illness was short, no question of inability was involved. However, President Garfield lingered for 80 days after he was shot on July 2, 1881. During this 80 days he performed only 1 official act—the signing of an extradition paper. Although his mind was clear during the first days of his illness, he was unconscious and it was reported that he suffered from hallucinations during the last days of his illness. Moreover, he was physically unable to discharge the duties of his office during a substantial part of the 80 days involved. It cannot be seriously contended that there was no important business requiring the President's attention. Actually, officers were unable to perform their duties because the President was unable to commission them. There was a serious crisis in our foreign affairs. Yet the Department heads transacted only such routine business as could be transacted without the President's supervision. It was claimed that important questions of public policy which could be decided only by the President were simply ignored.

Equally important, public opinion was sharply divided about the manner in which public business was handled. There was objection to having the affairs of the executive branch managed by the Cabinet, objection that Secretary of State Blaine was guilty of usurping the

President's duties, and insistent demands that the Vice President exercise this power and that Secretary Blaine's alleged usurpation be ended immediately.

After Garfield's illness had already dragged on for 60 days, his physicians thought he would recover; but his convalescence was expected to take another 60 days. Therefore, the Cabinet considered the possibility of asking Vice President Arthur to act as President during Garfield's recuperation.

Now, this is the significant thing, it seems to me, about that incident in our history. All seven Cabinet members agreed on the desirability of having Arthur act as President. In other words, there was no question, no dispute as to the inability of the President. Four of the seven, however, thought that Arthur's exercise of presidential power would actually make him President for the remainder of the term and thereby oust Garfield from office. It was reported that Attorney General Wayne MacVeagh shared these views. Consequently, the Cabinet decided that Garfield should not be advised to ask Arthur to act as President without first telling him of this possibility. Therefore, the whole matter was deferred because the physicians feared that the shock caused by such a discussion might result in the President's death. Garfield's death on September 20, made it unnecessary to solve the problem in 1881.

Now, the important thing I want to call attention to in that case is this. The question there was not the decision about the inability of the President. Everybody in Garfield's Cabinet was of one mind, that he was unable to act. The reason that no action was taken was because of the constitutional uncertainty of the meaning of that act. In other words, it was felt that if Vice President Arthur took over he would become President in fact, and that Garfield never could then claim the office again.

Now, that is the weakness, as we see it, in the present Constitution.

Let's go to the Wilson case for a moment. There can be no doubt that President Wilson was actually unable to perform the duties of his office during some part of the period after his collapse on September 25, 1919, and until the end of his term on March 4, 1921. Numerous domestic and international matters failed to receive his attention. More important, this inability occurred during the Senate debate on the Versailles Treaty.

The exact degree of Wilson's inability is uncertain. Whatever Wilson's condition, Vice President Marshall, the Cabinet, and the public were not fully advised concerning it. The President's family, his White House staff, and the Cabinet discharged public business in such manner and by such methods as to them seemed appropriate.

History seems to indicate that Mrs. Wilson and Dr. Cary T. Grayson, the President's physician, played an important part in many questions of public policy.

Soon after Wilson's stroke the Cabinet joined with the White House staff in keeping the Government operating. Secretary of State Lansing called 21 Cabinet meetings to transact executive business. When Wilson heard of these meetings, he accused Lansing of usurping presidential power and forced him to resign. Wilson seemed to think that the Constitution did not authorize the Cabinet to act in his absence, with the result that Government business was interrupted during his illness.

Patrick Tumulty, Wilson's secretary, reported that Secretary of State Lansing had suggested that, in view of the President's inability, they should ask the Vice President to act as President. He quotes himself as saying:

You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him.

Tumulty also reported that, when Lansing resigned, Wilson said:

Tumulty, it is never the wrong time to spike disloyalty. When Lansing sought to oust me, I was upon my back. I am on my feet now and I will not have disloyalty about me.

Because of the belief that the Vice President would actually become President, asking Marshall to act as President during Wilson's inability was viewed as disloyalty. Consequently, Marshall was looked at with antagonism instead of as a person who could lighten the disabled President's burden. Instead of asking Marshall to exercise the powers devolved upon him by the Constitution, they attempted to keep the Government operating in their own way in order to forestall any serious attempt to declare the President's inability.

A study of the Garfield and Wilson cases shows that there is a real need for a means of supplying an active President during periods of presidential inability. The belief that a Vice President actually becomes President when called to act as such has nullified the constitutional provision for the administration of the Government when a President is incapacitated. In the other two serious cases of presidential inability to date, the Vice President was not called to act as President and thereby supersede the disabled President for the remainder of the term.

The problem of providing for the exercise of presidential power during periods of inability would not be solved merely by providing a means by which the inability could be established. Unless the President, his Cabinet, and his other friends are absolutely certain that he may resume his powers after the termination of his inability, they will tend to oppose any attempt to declare the existence of inability, viewing such a declaration as equivalent to removing the President from office.

I might say that this administration does not support that view. We believe, and as I will point out later, that in the event a Vice President should act as President, that he would act only temporarily, and the President would be able to take over the powers and duties of the office as soon as he recovered from that inability. And Attorney General Brownell testified to that in the House, and I fully subscribe to that. I think the history of the Constitution fully supports that view.

With this history to guide us, and with a need for uninterrupted continuity of Government, we must conclude that action is vital to solve the problem of Presidential inability.

Now I would like to talk for a moment about the administration's plan.

Section 1 confirms the present generally accepted interpretation of the Constitution—that in case of removal of the President from office, or his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. This affirms the result accepted by the Nation seven times in cases of death of a President.

Section 2 of the proposal states that, if a President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President. This section authorizes a President to announce his own inability and allows him to do so, knowing that his powers and duties will be restored to him when he recovers. Section 2 of this proposal also would require the President to make this announcement in writing. The reason for adding this requirement is to preclude a dispute about whether a President actually declared his inability. The existence of a written document will prevent anyone from seriously denying that the President recognized his inability. I believe that section 2 encompasses most of the cases of Presidential inability which are likely to arise. It removes the reason which caused responsible Government officials to fail to act in the Garfield and Wilson cases.

The only objection I have heard to section 2 is that a President might use this section to shirk his duties and responsibilities. The obvious answer is that a President who used this section to shirk his duties would be breaking his oath to faithfully execute the Office of President and, therefore, would be subject to impeachment for high crimes and misdemeanors. If a President should ever become so anxious to be relieved of his duties and responsibilities, he would not need to declare his inability—he could simply resign in conformity with article II of the Constitution.

Section 3 of the plan deals with cases in which the President is unable or unwilling to declare his own inability. In such cases, the Vice President with the approval of a majority of the President's Cabinet would make the decision.

The Cabinet is the proper body to participate along with the Vice President in declaring a President's inability. The Cabinet is an executive body, the President's official family. Its loyalty to the President is generally unquestioned. A decision of this body is least likely to be suspected of enabling a Vice President to usurp powers on the pretext of inability. Moreover, the Cabinet is in a position to know at once whether a President is disabled.

Under section 3, there are several possible courses of action. The Cabinet could notify the Vice President when a majority of that body believed that the President's inability was sufficient to warrant a devolution of presidential power on the Vice President. The Cabinet has always notified the Vice President when a President has died; and section 3 would extend this custom to the case of inability. Under section 3 the Vice President might take the initiative without the Cabinet's first inviting him to make the decision. Unlike the provision of the present Constitution, however, section 3 would require approval by a majority of the Cabinet before the Vice President could undertake the exercise of presidential power.

A Vice President who undertook the exercise of presidential power would be assured that his action could not seriously be branded as usurpation because that action was previously approved by the President's own appointees in the Cabinet.

In addition to the safeguard provided in section 3 by the Cabinet's role in the process, section 4 contains a second safeguard. It provides that, whenever the President declares in writing that his inability is terminated, the President shall immediately resume the exercise of

the powers and duties of his office. Thus, section 4 does, I think, provide a disabled President with a constitutional guarantee that he can 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.

As a practical matter, if the determination of presidential inability is left where the Constitution places it now—in the Vice President, or if it is placed in the Vice President and Cabinet—as suggested, the Vice President would never venture to assume the duties of the Presidency unless it were clear beyond challenge in any quarter that the President was in truth and in fact actually disabled from performing the functions of his office. With a constitutional provision spelling out that the Vice President only acts as President in a case of inability, and a constitutional provision granting to the President the right to reassert his powers at any time, the Vice President as a practical, political necessity in all probability would secure the approval of the Cabinet, of the leaders and a great majority of the Congress, and of a large segment of public opinion before venturing to assume the presidential duties. On the other hand, with a constitutional provision negating any motive of usurpation in the Vice President by clear language that he only acts as President for a temporary period, no Vice President would hesitate—as did Vice Presidents Arthur and Marshall in the two most serious examples of this problem—to perform his constitutional duty of serving as the alternate executive for a temporary period. The President's immediate family and friends would be stripped of any motive to oppose the Vice President, as in Wilson's case, for on regaining his health the President could simply assert his right to the office.

Senator LANGER. May I ask one question before we leave? Wouldn't it also be well to provide that the Vice President before assuming office should agree to vacate the office as soon as the President said that the disability had passed?

Mr. ROGERS. I think that would be all right. But if we had a constitutional amendment such as we suggest here, that would be expressly in the Constitution. So that it would not be necessary, I think, in that case.

Senator LANGER. In other words, in that case the Constitution would agree for the Vice President?

Mr. ROGERS. That is right. Now, that is exactly the point. That is the reason why there is this confusion. And until the Constitution is amended, in my opinion, it will never be clarified, because any Vice President who assumes the powers and duties of the office, can be accused of trying to take over the office. And historically in our country that has been the cause of the difficulty.

Senator LANGER. If he signed this agreement I mentioned, he would be barred absolutely in claiming the office in opposition to the President, if he agreed in writing to step down as soon as the President said the disability had been removed.

Mr. ROGERS. Well, there are a lot of students of the Constitution who think otherwise. For example, Daniel Webster said he felt that any man who exercised the powers and duties of the President was the President and could not be replaced. And as I say, in Garfield's time, a majority of his Cabinet thought that.

Now, this administration does not subscribe to that view. I think we are all in agreement that any Vice President who exercised the powers and duties of the office during the inability of a President would be just temporary President, not Acting President. He would not take over the office. But as I say, that has not been clear. And several Attorneys General have felt to the contrary.

Senator KEFAUVER. Off the record just a minute.

(Discussion off the record.)

Senator KEFAUVER. While we are interrupted, are there any questions at this point, Senator Hruska, or Senator Carroll?

Senator Hruska. If the chairman pleases—I assume, Mr. Rogers, that you will deal with this idea of the President, by his being able to say his inability is over, at all times possesses the right to veto the action or nullify the action of a majority of the Cabinet and the Vice President to the contrary, doesn't he?

Mr. ROGERS. That is right.

Senator Hruska. Is that dealt with later in the statement?

Mr. ROGERS. Yes, sir. That is the very next thing.

Senator KEFAUVER. Mr. Rogers, would this be a good time to ask you about the objections—not the objections, but the possibility, extreme though it might be, raised by Congressman Keating, to sections 3 and 4 of Attorney General Brownell's proposal? These possibilities were dealt with by Professor Waugh, of Eastern Michigan College in his presentation the other day to this committee. Or would you rather wait until you finish your statement before discussing that?

Mr. ROGERS. I will tell you, I am not familiar with that criticism. Suppose you outline it to me, and then I can decide. I may have covered it later on in my statement.

Senator KEFAUVER. Mr. Smithey, our counsel, says that you deal with this in the next few pages of your statement, so we will wait until later on to discuss that.

Mr. ROGERS. All right, Mr. Chairman.

Now, as I said, Mr. Chairman, and Senator Hruska, I don't believe that a problem would arise if the Constitution were amended, as the administration has suggested. I think that in the discussion of this problem, everyone has focused a great deal of attention on the question of how the inability of the President is decided. And, in my opinion, that is the wrong emphasis.

The emphasis really is once you decide the inability of the President, what is the result? Because if the result is merely a temporary thing, then it is not so difficult to decide the inability of a President. But if the result is that the man who succeeds him is going to become President for good, then the question of inability of the President is a very difficult and drastic decision.

I think once the Constitution clarified that point, and made it clear that the Vice President merely acted for the President while he was unable to act, then you would not have this same problem about the difficulty of determining the inability of the President.

As I say, actually there was no difficulty either in Garfield's time or Wilson's time about the inability of the President. Most people agreed he was unable to act. The difficulty was that they did not dare have the Vice President move in—the Vice President didn't want to move in because he was not sure that the President could then take over the office again. I think if you remove that obstacle and had a con-

stitutional amendment to make perfectly clear that that was not a question, that the Vice President was merely acting as President—

Senator KEFAUVER. Senator O'Mahoney, we are glad to have you here.

Mr. ROGERS. Senator O'Mahoney, I was just saying there has been a wrong emphasis on this matter, I think. There has been a great deal of discussion about how the inability of the President would be determined. I don't believe that problem would assume very serious proportions if it was clear in the Constitution that the Vice President was merely acting as President.

Senator O'MAHONEY. That was my own theory.

Mr. ROGERS. That is right. And I have dwelt on that for some length. Now, that does leave open this one contingency. And I doubt that the contingency would ever arise—it never has arisen. But I think we should consider it here. What will be the machinery for resolving questions of the President's inability where there is a difference of opinion between the President and the Vice President as to whether the former's inability is ended?

My predecessor was of the opinion that the Federal courts would disclaim jurisdiction in such a case upon the ground that the question presented was political, and that the only remedy was impeachment. The consensus of opinion is in agreement with Mr. Brownell that the sole remedy is impeachment where there is a wrongful assertion of authority to exercise the powers and duties of the office. The attempt of a President to perform his duties when he was in fact clearly unable to perform might be classed as a wrongful assertion of authority.

It should be noted, however, that impeachment proceedings may be delayed if Congress is not in session. Article II, section 3 of the Constitution provides that the President may on "extraordinary occasions, convene both Houses, or either of them." It is unlikely, however, that a President under attack for attempting to assert the powers while still suffering inability would convene the Congress to conduct impeachment proceedings against himself. Further study is required to determine how Congress may be convened in the event impeachment proceedings are required in a dispute involving Presidential inability.

Therefore Congress may think it wise to avoid the odium of an impeachment by providing another but a similar process whereby the question of inability could be determined in the unlikely event a President and Vice President were at an impasse. The administration plan could be modified by the addition to section 4 of such a provision. And I refer the members of the committee to appendix III.

Referring to appendix III, this alternate section 4 would still allow the President to resume the functions of his office at any time, but provide for the immediate action of Congress, whether then in session or not, to resolve the question of Presidential inability raised in writing by the Vice President, supported by a majority of the Cabinet. This would only occur after the Vice President has taken over temporarily, and after the President then asserted his ability to perform, and then the Vice President and the Cabinet still were of the opinion the President was unable to act. By making the charge one of inability rather than impeachment for some offense, the necessary

proceedings could be conducted in a more appropriate atmosphere. Members of Congress who might be reluctant to impeach the President would not have the same reluctance in removing a President physically unable to perform the duties of his office.

In my opinion this alternate section 4 would place the President, Vice President, and Congress in exactly the proper relationship to the question of inability. The President could always reassert his power, the Vice President would acquiesce except in the unfortunate situation where the President had misjudged his true capacity. In that event Congress would step in and by its consideration of a charge of inability determine the issue. A two-thirds vote of the Senate would determine the existence of a President's inability; a majority vote of both Houses would restore the powers of his office to him. Impeachment would remove the President permanently; a determination of inability would leave to the President an opportunity later to reassume the powers of his office. The difference between the result reached by impeachment and by an inability proceeding would justify the enactment of the separate inability proceeding, and would render the whole proposed solution more acceptable, I believe, to the public.

Let me stress that the very existence of this ultimate power in Congress—which is the only power it needs in relation to this question—would in all probability insure that this extreme situation would never arise. No Vice President would resist a President reasserting his claim to the powers of the office unless the President were in fact unable to perform. I mean for obvious reasons it would destroy a Vice President—if he claimed the President was unable to perform and the President in fact was able to perform. So no Vice President would ever do it, and the majority of the Cabinet would not support him. No President—in fact unable to perform—would be permitted by his family and close personal counselors to reassert his claim and precipitate an issue likely to be resolved against him by Congress.

So I believe, if this alternate section 4 were included in the administration proposal, that it would never have to be used, and that the decision of inability would be easy to make and could be really made by the executive branch of the Government.

We must recognize that in this area as in others, not everything is soluble and not everything may be controlled by law. Whatever machinery is adopted, it must not be able to be used as a vehicle for harassing the President. So long as the determination of inability is left within the executive branch, either by the President, or by the Vice President as is now true under the Constitution, or by the Vice President and Cabinet under the circumstances proposed by the administration, there can be no harassment of the President or diminution of his stature in the eyes of the people. The Vice President is of the President's own party; the Cabinet is of the President's own choice; if there is a provision that the President can reassume the duties of his office at any time, he is safeguarded.

But if we transfer the power of initial determination of inability out of the executive branch, or in some fashion share it with others outside the executive branch, then the way is opened for a harassment of the President for political and personal motives. We may not always have as President a figure of the national and international stature of President Eisenhower, nor one who has so completely demonstrated his respect for Congress as a coequal branch of Government, whether

dominated by his own or the opposition party, as has President Eisenhower. Our solution must contemplate the testing of it, if need be, in circumstances similar to the time of President Johnson and the Reconstruction Congress, when violent personal differences and party controversy would invite the Congress to use any power it had to determine Presidential inability as a weapon of harassment—if such a weapon were easily at hand. A possibility of such political harassment could severely impair the Presidency at the very time when assertion of its full power was most needed.

With these guiding principles in mind, let us now examine some other proposals.

Senator KEFAUVER. I would like to ask you a question at this point, Mr. Rogers.

Professor Waugh, who made a very good impression upon the committee, and who has studied and written extensively on this subject matter, testified before us some days ago. His general feeling was that this was a matter so closely related to the office of the Presidency, that the President's own feelings, wishes, and ideas in the matter should be given extremely sympathetic consideration. And so he started as the basis for his suggestion with the recommendation of Mr. Brownell and of yourself.

He did make two additional suggestions. First, that in section 8, there is some confusion as to just which were the executive departments, and whether in the Defense Department, for instance, there is one executive department under the Secretary of Defense, or whether the Army, the Navy and the Air Force were considered as executive departments. And so he suggested that Congress should by law have the right to declare what officers were to be considered as executive departments for the purpose of the interpretation of section 8.

He pointed out that former Attorney General Brownell's original suggestion had been upon approval in writing of a majority of the Cabinet. I see that you have changed it here to "heads of the executive departments." And that it was rather difficult to determine who was in the Cabinet. One President might have certain people, and another President might have others.

I have always felt that the law was pretty clear that we had 12 executive departments, and that since the passage of the law setting up the Office of Secretary of Defense—I mean 10 executive departments—the Secretary of Defense, that the Army, Navy and Air Force were not considered executive departments within the meaning of this language. Is that your interpretation?

Mr. ROGERS. That is my interpretation, Mr. Chairman.

Senator KEFAUVER. So you do not think that needs any further clarification?

Mr. ROGERS. I don't. I think the Professor is right in suggesting that Congress would have the authority under the "necessary and proper" clause to make that determination, if there was uncertainty about it.

Senator KEFAUVER. They have the right to abolish an executive department, whether it is specified here in the constitutional amendment or not.

Mr. ROGERS. That is correct.

Senator KEFAUVER. I agree with you about that.

The second suggestion he made was in addition to alternate section 4. As I understand in alternate section 4 you go through the same procedure as in the case of impeachment. But it would not be impeachment—it would be determining inability, and therefore would not have the stigma of impeachment.

Mr. ROGERS. That is correct.

Senator KEFAUVER. And once inability was determined by a two-thirds vote of the Senate, then the Congress, both Houses of Congress, by a majority vote, could determine that the President's inability had terminated.

Mr. ROGERS. That is correct.

Senator KEFAUVER. Now, he suggested a section that the two Houses of Congress determine by a two-thirds vote, and then by a majority vote the second question to be determined—in lieu of going through something similar to the system of impeachment.

I will furnish you with his detailed suggestions and his testimony about it.

Mr. ROGERS. I would like to look at that, Senator.

I might just mention a couple of other thoughts in connection with this alternate section 4.

It would have about three advantages over impeachment, as I see it. First there is the one you mentioned—that it would not have the stigma attached to it that impeachment would. Two, impeachment could only occur if Congress happened to be in session. If Congress is not in session, you could not get an impeachment started, because you could not get Congress back here probably. And this section would provide that once the Vice President had filed an inability petition supported by a majority of the Cabinet, that Congress would automatically convene under the provisions of this. So you would not have a hiatus in time.

Impeachment would be a permanent act—that would mean you would permanently remove the President—while this provision of the Constitution would be merely a determination of inability, and if the President recovered, the Congress could restore him to his office. So I think for those three reasons, this is preferable to impeachment, and I think it is in accord with the constitutional impeachment proceeding. In other words, it gives ultimate authority to the Congress when the President and the Vice President are unable to agree on inability.

Senator KEFAUVER. Well, we always think of impeachment as being for high crimes and misdemeanor. This is not a high crime or misdemeanor. As a matter of fact, I seem to recall that one of the efforts to impeach a Federal judge, the main charge against him was that he was just dilatory and wouldn't do any work. I have forgotten the Federal Judge's name. He drew his salary and would not try any cases, and they brought an impeachment case against him. The Senate held that just being lazy and indiligent was not a high crime or misdemeanor.

Senator O'MAHONEY. Mr. Chairman, I am under obligation to return to a joint meeting of the Interior Committee, and the Committee on Public Works. I have a leave of absence for half an hour in order to come up here and listen to the Attorney General.

Senator KEFAUVER. We appreciate that, and I know the Attorney General would be glad if you would ask him any questions.

Senator O'MAHONEY. I would like to ask 1 or 2 questions.

I have skimmed through your statement. In general I agree pretty heartily with it. I think, as a matter of fact, that you have disposed pretty well of the suggestion of having a commission appointed to handle these things.

I think also you have disposed of the impeachment procedure, although you adopt something similar to that in the alternate section 4.

But it seems to me that there is a variance here from the original Constitution which is not at all necessary. I am convinced from my reading of the Constitution and the records at the time, and of the analysis that you have placed in your paper that it was the intention of the framers of the Constitution to have the Vice President become Acting President and not President. I think it was only the political differentiation between the members of the cabinet of William Henry Harrison and the Vice President that made Tyler insist upon being sworn in as President.

You have pointed out that Senator Allen of Ohio held for the interpretation I am raising now.

So I question section 1 of your proposed amendment. This provides that 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. That is a change from the Constitution as it originally was and as it has been. But it adopts the theory as brought about by the action of Tyler, and makes the Vice President President, when it was intended that he should be only the Acting President.

Section 2 of your proposal seems to me to be unexceptionable. 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, however, contains what I think to be a loophole for future disagreement in the succession. Section 3 begins:

If the President does not so declare—that is, if he does not declare that he is unable to discharge the powers and duties of his office—

the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the heads of the departments—and so forth—

shall discharge the powers as Acting President.

The question that arises in my mind is what is the period within which the Vice President is to act? How much time will he give a sick President to declare or to make his judgment? There is no time limit on this. So it could be within 24 hours.

Mr. ROGERS. That is correct.

Senator O'MAHONEY. Now, do you want that?

Mr. ROGERS. Well, Senator, I think you do, because you might have—I don't think you can measure this in terms of time. It depends upon the circumstances. You might have a situation develop where 24 hours could be just as critical as a week.

I think that the reason that it is perfectly feasible and would work is that no Vice President is going to assume the powers and duties of the office on a temporary basis unless he has a good deal of support.

I mean he would have to have the support of the Cabinet, he would have to have the support of the legislative leaders. He would have to have a good deal of public support. The problem is not a problem of the Vice President moving too fast. Really the problem is to make him take some action, in other words, to assume his responsibility.

As you know, in the case of Wilson, Marshall had no interest in it at all. And he was beseached by a lot of the leaders of the United States to act.

So I think if we put in emphasis on trying to be sure the Vice President does not usurp the office, we are not facing up to the problem. The problem is how do you get the Vice President to act when he should.

Senator O'MAHONEY. Well, my feeling is that we are not quite facing up to the problem. I have read an amendment which has been before this committee which constitutes an invitation to the President and the Vice President to agree among themselves. If it has the same virtue as section 2—if the President shall declare in writing—that is the same idea in this other amendment of which I speak. That affords the opportunity for the President and the Vice President to agree among themselves. And the same amendment has none of the points which you have criticized with respect to the commissions outside of existing public offices to judge. And it leaves the matter for the Congress only when the President and the Vice President don't come to an agreement.

Mr. ROGERS. Well, I want to say, Senator, I agree with practically everything you have said. I don't want you to misunderstand me and think I am disputing you.

Senator O'MAHONEY. I don't mind dispute.

Mr. ROGERS. I don't want to give you the wrong impression, because I may have to dispute you later on, but this time I agree with you.

But insofar as the point you are making now is concerned, I think maybe you have overlooked the fact that the President might not be in a position to agree. Suppose he were forced down at sea and could not be located, or suppose he is in a coma. Now, in those cases, certainly the Constitution as it now stands, we think, would permit the Vice President to temporarily take over the office until the President was able to act.

But because there is—

Senator O'MAHONEY. I think it would now, as is stands—except for the fact that the precedent has been created of the Vice President declaring himself President.

Mr. ROGERS. I agree with what you say about Tyler, too. The only reason I think section 1 is all right, and I don't think should be challenged, is because it just recognizes the fact. I mean seven Vice Presidents have become President, and we certainly have accepted that as part of our history, and the constitutional interpretation. So all it is is restating what we have accepted to be the fact.

Senator O'MAHONEY. Well you know, I am such a conservative, I like to stand by the old Constitution.

Mr. ROGERS. I think if Tyler had not become President in fact, if he had continued on as Acting President, I agree with you that is what the framers of the Constitution intended, then we probably wouldn't have had this uncertainty as to inability. That is exactly what Senator Allen pointed out. He said if Tyler becomes President

in fact, it is going to cause a good deal of doubt on the inability provision of the Constitution.

Senator O'MAHONEY. Exactly. And now in this alternate section 4, in which you bring Congress in, you provide for a majority vote in the House to determine that the President's inability has not terminated, and then you provide for trial by the Senate like the impeachment proceedings.

Mr. ROGERS. That is right. It is analogous to the impeachment proceedings.

Senator O'MAHONEY. Yes. And I think it would probably be interpreted in that light. And therefore I raise the question for your consideration whether it would not be better to have the determination made by, say, a two-thirds vote of the Congress, when the President, being disabled, declines or is unable to determine it.

That is all I care to say, Mr. Chairman. I don't want to take the time of the Attorney General. I must go back to this other committee meeting at which I am presiding.

Senator KEFAUVER. Thank you very much, Senator O'Mahoney. We are glad for your presence and your questions.

Any other questions at this point?

Senator O'MAHONEY. Thank you very much, Mr. Chairman. Thank you, Mr. Attorney General.

Mr. ROGERS. Thank you, Senator.

Senator CARROLL. Mr. Chairman, I would like to ask a question here. I have not had a chance to read all of your statement.

Do I understand that if the President declares in writing that he is unable to discharge the duties of his office, that the Vice President will be the Acting President?

Mr. ROGERS. That is correct, Senator.

Senator CARROLL. Is there anybody or group to pass judgment on the validity of the President's writing?

Mr. ROGERS. You mean the authenticity?

Senator CARROLL. Yes. If the President establishes it in writing, that is in a sense a transfer of Presidential power. Now, if I correctly understood some of the other testimony, if the President should recall that power by a subsequent writing, that that subsequent writing can be contested by the Vice President and a majority of the Cabinet.

Mr. ROGERS. Yes, that is correct.

Senator CARROLL. In other words, the thought running through my mind is that the initial power belonging to the President is now transferred by virtue of a written instrument. That written instrument, I suppose, in writing means it could be dictated, and if his hand touched a pen with his "X" that would be an instrument in writing—that would be a transfer of power. Is that your concept of a writing?

Mr. ROGERS. No, I would think that—

Senator CARROLL. Well, that is the law of instruments, isn't it? When we affix a signature to a writing—

Mr. ROGERS. I think it would have to be more than an "X", though.

Senator CARROLL. Well, if he touched the pen, that would be a writing. It would be valid in law.

I am thinking in terms of the conditions that obtain here. I think in your previous testimony you had a President who is not conscious. Supposing you had a President who is conscious but paralyzed—who

knew what was going on and could not perform the manual task, but touched the pen. That would transfer the power under our concept here, would it not?

Mr. ROGERS. I think it would depend upon the circumstances. I suppose there could be circumstances of paralysis so that the signature could be something other than a complete name.

Senator CARROLL. Well, really what I had in mind was the idea that he could transfer the power to act as President. When he sought to regain that power, even though in writing, there is a question of the validity of his desire to recapture that power, and that would be passed upon by the agent whom he first designated, the Vice President, because the power is the President's power, the constitutional power.

Mr. ROGERS. Well, let me see—

Senator CARROLL. Perhaps I will simplify it this way. If he seeks to regain the power which he has given the Vice President, that can be challenged.

Mr. ROGERS. Well, that is right. He regains it all right. He becomes President. But then the Vice President, with a majority of the Cabinet, can file a petition with the Congress asking that they consider the inability question. But the President would still continue to act. He would have the authority unless Congress found his inability.

I want to emphasize again, Senator, that I think if there was a provision like this in the Constitution, this contingency would never arise, because it never has arisen, and I don't think it ever would, because no Vice President would—and the members of the Cabinet would never assert the inability of the President after he reclaimed the office, unless they were sure he was unable to act. That would destroy them in the public mind.

Secondly, if the President and the people around him realized that if he tried to regain his office when he actually was unable to act, that the Congress might overrule him, they would be most loath to suggest he do that, because they would realize that would be a very odious thing for him, and they would urge him not to do it. So I think the fact that you had power in the Congress, to determine inability in the event of that kind of a dispute, would in my opinion only arise when the issue was clear one way or the other, because no Vice President would ever claim that the President was unable to act if he thought there was any uncertainty about it.

Senator CARROLL. Well, there is considerable logic in that. What I had in mind in the first place, was that when he releases the power, there is no branch or body of the Government that can question that release.

Mr. ROGERS. That is right.

Senator CARROLL. But when he seeks to regain that power safeguards are proposed. So it is the question of the power of relinquishment as to the first, and then the President's possible desire to recapture the power later there is this difference between the two provisos.

Mr. ROGERS. That is correct.

Senator CARROLL. Had you thought at all in any of your investigations whether or not the President's disability is such that he should release his power?

Mr. ROGERS. I am not sure that I understand your question, Senator. I am sorry.

Senator CARROLL. Well, supposing the disability is of such a nature that we question whether it is that type of disability. I am just thinking aloud here on this subject. Clearly the President could resign, and by a resignation he confers his powers on the Vice President. That is clearly under the Constitution.

Mr. ROGERS. Yes, I covered that, I think, before you came in, Senator. I pointed out the argument has been made that a President might, just because he was lazy or didn't want to perform the duties of his office for a while—he might temporarily turn them over to the Vice President. But as I pointed out in the statement, if he did that he could be impeached, because that would be a violation of the oath of office. If he improperly said he was unable to act, it would be grounds for impeachment. I don't think any President would say he was unable to act if he was not in fact unable to act. And if he just wants to get out of the office, he has the power to resign. So I cannot imagine the President would declare his inability if in fact he was not unable to act.

Senator CARROLL. You think, therefore, there is no necessity for anybody or any branch of the Government to pass upon his ability or lack of ability at the time he makes this transfer of power?

Mr. ROGERS. Well, not more than you already have. You have the power to impeach him—if you think he has declared his inability when in fact he is able to act, then you have the power of impeachment. But I don't think there is any likelihood that the President would do that, because it is so much easier to resign.

Senator CARROLL. That is all, Mr. Chairman.

Senator DIRKSEN. Mr. Attorney General, it runs in my mind—and I am drawing strictly on memory—that the shortest period of time in which a constitutional amendment has been ratified was 9 months. It has been years since I have examined into it.

Mr. ROGERS. I have that in the statement here a little later.

Senator DIRKSEN. Well, the reason I raise the question only is this. In the nature of things, in legislative sessions and State laws being what they are, and the problem of bringing together conventions that might conceivably ratify a constitutional amendment, a considerable period of time might go by before such an amendment is ratified. Now, in the light of that reality, is it your proposal that the administration would sponsor only one measure here, namely a proposal for a constitutional amendment, and not a statutory proposal to meet any interim or emergency situation?

Mr. ROGERS. That is correct, Senator.

Senator DIRKSEN. So there would be no proposal for a legislative enactment by Congress to cover this same matter?

Mr. ROGERS. That is correct.

Let me say on that point that the 17th amendment providing for the election of Senators by popular vote was ratified in 13½ months. To repeal the 18th amendment on prohibition by ratification of the 21st amendment, it took less than 10 months. For ratification of the 19th amendment, dealing with women's suffrage, 15 months. The lame duck amendment, 20th amendment, 11 months.

Now, actually the time is not very long. You can get them ratified fairly soon.

The objection I have to the statute—well, there are two objections. Some statutes that have been suggested I think are clearly unconstitutional. Now, I don't suggest you cannot have a statute that is constitutional. Some of the statutes that have been suggested I think are constitutional. But they would not eliminate or eradicate the weakness that now exists in the Constitution. In other words, you would still have the same doubt that now exists as to whether the Vice President became President or became Acting President that you now have. And the same doubts that prevailed in Garfield's administration might prevail in another administration if you merely had a statute, because certainly a statute would not correct the constitutional weakness that exists now.

Senator KEFAUVER. Is it your feeling, Mr. Rogers, that the necessary and proper clause is not sufficient to validate a statute providing for the resumption by the President of his duties?

Mr. ROGERS. That is correct.

Senator KEFAUVER. Do you deal with that?

Mr. ROGERS. I do deal with that.

Senator KEFAUVER. Very well, I won't ask you about it then.

Senator CARROLL. Just one further question along this line. Senator Dirksen gives me this thought.

In this constitutional amendment, if the Congress should act on it, we will say by June of this year, it would probably take another year or longer for this—it could be brought up in the next session of Congress?

Mr. ROGERS. I think that is correct.

Senator CARROLL. So we would really be talking about a situation that perhaps would come in 1959 or even the forepart of 1960?

Mr. ROGERS. I think that is correct.

Senator KEFAUVER. Well, legislatures in most of the States meet in the early part of 1959. Practically all of them do.

You may proceed, Mr. Rogers.

Mr. ROGERS. Thank you, Mr. Chairman.

Senator KEFAUVER. One point. I am sure that no one would ever suggest that the powers of the President are divisible. But for the legislative history, it is your feeling that if he declares he is unable to discharge the powers and duties of the office, he cannot say that "I am unable to discharge the powers and duties as Commander in Chief" and keep the rest, or "I am unable to discharge domestic duties" and keep the Commander in Chief. It is all or nothing.

Mr. ROGERS. That is correct.

Senator KEFAUVER. I have never heard anyone seriously propose that.

Mr. ROGERS. I think that probably a few duties that have been assigned to the President by statute might be delegated. But certainly the constitutional powers and duties could not be divided.

Senator KEFAUVER. Yes. I just wanted to get clear your opinion about that. You may proceed, Mr. Rogers.

Mr. ROGERS. All right, Mr. Chairman, and members of the committee.

I want to discuss various plans for the creation of a special commission to determine ability. Some people have suggested that the

commission be empowered to employ physicians and require the President to submit to physical and mental examinations, and there have been different proposals for makeup of the commission and the vote of the commission and so forth. We think these plans should be rejected for a number of reasons.

First, it seems unwise to establish elaborate legal machinery for giving the President physical and mental examinations. This would give a hostile commission power to harass the President constantly, and risk danger of irresponsible demands for commission action. Not only would provision for such physical and mental examinations be an affront to a President's personal dignity but it would also degrade the presidential office itself.

Second, it seems ill advised to establish complicated procedures which would prevent immediate action in case of emergency, because there is a need for continuity in the exercise of Executive power and leadership—especially in time of crisis. Investigations, hearings, findings, and votes of a commission could drag on for days or even weeks and result in a governmental crises, during which no one would have a clear right to exercise Presidential power.

Third, such a commission would be totally unnecessary except where there was a dispute between the President and the Vice President in the executive branch itself. In my opinion such a situation would be most unlikely, once the principle is constitutionally established that the Vice President's assumption of power is only temporary and the President can resume his power at any time.

I think I have discussed the other matters in that paragraph.

Some constitutional authorities have pointed to the extraordinary ad hoc commission of 15 members set up to decide the disputed Hayes-Tilden election in 1876. This was a desperate remedy for a desperate situation. In my opinion it forms no basis for a carefully considered long-term constitutional arrangement which will be tested at some indefinite time in the future with unknown personalities involved.

You recall the law that set that commission up was repealed right after, so there was never any constitutional test of it.

Let us now consider some of the objections to the particular composition of proposed commissions.

I think it is now generally agreed that the Supreme Court should not be represented on any Presidential Inability Commission. I think the Chief Justice expressly stated that the other day.

Senator KEFAUVER. Yes; his letter is in the record.

Mr. ROGERS. I fully concur in that view, and I think most legal scholars feel it would be unwise to have members of the Court on any such commission.

This leaves Congress and the Cabinet as the logical source from which the members of such a commission would be drawn.

It would appear to be a violation of the doctrine of separation of power for officials of the Congress to participate in any initial decision of Presidential inability. Especially is it the case where under a proposed plan more than a majority of the commission empowered to vote would come from the legislative branch. In effect, it would enable congressional leaders to put the President out of office, and to keep him out, by declaring that he lacks the ability to perform his duties.

The lack of wisdom in any such proposal, I believe, is indicated by considering a converse proposal. Consider for a moment a proposal under which a commission, composed of 4 members of the Cabinet and 1 member either from the House of Representatives or Senate was empowered to look into the alleged inability of Members of the House and Senate.

Any such proposal would promptly and accurately be branded as an unwarranted intrusion by the executive branch into the affairs of the legislative branch. It seems equally unwise to give a committee consisting of a majority of Members of Congress the power to remove the President of the United States.

The framers designed the President as the sole repository of the Executive power of the Nation. He and the Vice President—the alternate Executive—are the only two officials to be chosen by all the people. In the time the Presidency has grown as the national symbol, a unifying symbol in any time of stress or crisis. No solution to the problem of temporary disability should dilute the prestige of the Presidency, diminish its stature, or endanger its tenure.

Summarizing my views on the various proposals of a Presidential Commission on Inability, I am convinced that this type of scheme is unnecessary, would be unworkable in practice, and would drastically alter the concept of separation of power which has worked so well throughout our Nation's history.

SENATOR KEFAUVER. Mr. Rogers, would you mind an interruption at that point?

MR. ROGERS. Not at all, Senator.

SENATOR KEFAUVER. I see Mr. Henry Fowler back in the audience, and he testified here the other day very convincingly on this subject matter. His proposal was—if you would rather not discuss it now, I won't ask you to—the heads of the agencies, plus the Speaker, plus the President pro tempore of the Senate would be the ones to make the decision.

In other words, he would add those two from Congress.

I pointed out to Mr. Fowler that both the Speaker and the President pro tempore might have some hesitancy in acting on the grounds that someone might accuse them of having a personal interest in getting one step closer to the Presidency.

Have you given Mr. Fowler's proposal any thought, or do you wish to express your opinion about it?

MR. ROGERS. Yes, I have; I have not really studied it carefully. Let me speak just for a moment to the question of a statute.

As I said earlier, I think a statute which would transfer the power of determining inability outside the executive branch or in a commission, part of whose people were outside the executive branch, would be unconstitutional.

Now, I have also pointed out that there may be statutes that could be passed that would not be unconstitutional. And I think maybe Mr. Fowler's suggestion would fit that category.

In other words, as I understood his proposal, he would leave the decision in the Vice President where it exists now, under the Constitution, but he would set up, by statute, an advisory group to advise with the Vice President, the ultimate decision being the Vice President's.

I don't think that would—

Senator KEFAUVER. Yes; that was his proposal.

Mr. ROGERS. I don't believe that would change the constitutional situation any, but I think it would probably have the effect, as a practical matter, of making certain that the Vice President consulted that group.

Senator KEFAUVER. And of giving him backing for whatever action he might take.

Mr. ROGERS. I think, as a practical matter, the Vice President would do that anyway. As I have indicated, I don't believe any Vice President would act to take over the powers and duties of the office unless he had a great deal of support, because it would destroy him politically, if he acted in a manner which seemed to be usurping the powers of the office.

In other words, the power has never been that the Vice President acted too hastily. The problem is, How do you get enough support for the Vice President so he will take over the responsibility? He has always hesitated to do it because he was afraid he would be charged with trying to get the Office for good.

Now, getting back to the point of a statute, the only objection I have to a statute is that it might suggest that that was a solution to the problem, and I don't think it would. I don't think it would resolve the doubt that exists today in the Constitution. The doubt is, Is it a temporary or a permanent thing? Now, that cannot be resolved by statute. As long as that doubt exists, I think certainly future administrations will be plagued with this problem.

A Vice President, I think, just as in Garfield's time, would hesitate very much to act if he thought that he was taking over the Office permanently. And until the Constitution is clarified to make it clear that he is acting temporarily, then you are going to have a serious constitutional problem every time the President is ill.

So I don't rule out all possibilities of a statute. Maybe a statute would have some public relations value, but it would not have any constitutional value.

Senator DIRKSEN. One difficulty that I see with an advisory group in a matter of such importance as this is that they could wield tremendous influence and yet have no responsibility, if it was only an advisory group, because the ultimate decision would have to be made by somebody else.

Mr. ROGERS. That is right. Another thing that would be bad about an advisory group. As I recall, I am not too clear on Mr. Fowler's suggestion, because I have not seen it except through the paper, but I think it provided that two members of an advisory group could call a meeting.

Now, if you can permit 2 or 3 people to start a formal proceeding to bring an inability charge against the President, I think it would have a serious adverse effect on the Office, because throughout the history of the country, there has been a great deal of hostility between Congress and the President from time to time.

I certainly would be opposed to permitting anyone outside the executive branch to have the power to initiate inability proceedings.

Senator CARROLL. Mr. Chairman—Mr. Hruska, go ahead.

Senator HRUSKA. When you make the suggestion that such a proposal would be unconstitutional, is that conclusion based on the idea

of drawing on officials outside of the executive department to participate in such a Commission's activities? Largely a violation of the concept of the doctrine of separation of powers.

Mr. ROGERS. Yes. Let me see if I can state it a little more simply and directly.

The President—I think most constitutional authorities agree that the power to determine inability rests with the executive branch of the Government. Most authorities agree that the power now rests with the Vice President. Most constitutional authorities agree that the power—that once he determines inability, it is a temporary thing, and the President can take it back any time, but there is general agreement that the power now rests in the Vice President.

Now, the necessary and proper clause, as I pointed out here, permits Congress to implement a power which is already provided by the Constitution. In other words, it says that Congress can pass necessary and proper legislation to implement a power that is already granted. But the necessary and proper clause of the Constitution does not give Congress the right to transfer the power.

In other words, if Congress says, "Well, the power is now in the executive branch, but we are going to provide, by statute, that we have the power," that would be clearly unconstitutional. You cannot transfer the powers granted by the Constitution by statute. You can implement the power and you can permit the power to be exercised, and clarify what the Constitution provides, but you cannot transfer the power, because if you do, you would not have a Constitution.

That would mean that you could transfer all the power of the judicial branch of the Government and executive branch of the Government by statute. So you won't have a Constitution.

Senator HRUSKA. Well, then, the objection to the Commission would lie, on these grounds, whether the Commission were drawn exclusively from the executive department or partly from the executive and partly from the legislative, would it not?

Mr. ROGERS. No; I think that the constitutional argument is stronger if you have everybody outside the executive branch, or if you have a split Commission. But I think if you try to transfer the power from where it now exists in the Vice President to any other group, and it was on a mandatory basis—I mean advisory is something else again—but on a mandatory basis if you transfer the power from where it exists to somebody else, even in the same branch of the Government, I think you would run into constitutional problems.

Senator KEFAUVER. You also run into a constitutional problem on this basis, do you not? If you are wrong about the Vice President, in your understanding of the Constitution, only acting as President, and not in fact becoming President—that is, if he does, in fact become President—then there is nothing in the Constitution which would enable the President to get his Office back. So that the necessary and proper clause does not cover getting the power back if the Vice President did, in fact, become President.

Mr. ROGERS. That is correct. In other words, those people who argue, as Daniel Webster did, and as the majority of Garfield's Cabinet did, and as a great many other people have, that the exercise of the powers and duties of the Office in fact makes you President—if

that is correct, if that is a correct constitutional interpretation, that could not be changed by statute.

Senator KEFAUVER. Anything else, Mr. Hruska?

Senator HRUSKA. That is all. Thank you.

Senator KEFAUVER. Senator Carroll.

Senator CARROLL. Do I understand, then, that the proposals here you are offering, that no person, no commission, no group has the right to make the determination of the President's disability, except the President himself?

Mr. ROGERS. And the Vice President.

Senator CARROLL. Well, initially does the Vice President make such a determination?

Mr. ROGERS. We think, and I think the majority of constitutional authorities think, that the Vice President has that power today, under the Constitution.

Senator CARROLL. How would he initiate it? I am talking now in the first instance of the President's disability. Is it your proposal that the Vice President and a majority of the Cabinet, without the President's consent—

Mr. ROGERS. That is correct.

Senator CARROLL. Well, that clarifies in my mind that, and that raises the next question. Let's assume that the President decided to act on disability. He makes the decision, the designation of the Vice President to act for him. Would there be anything wrong with having the other branches of Government, whether it is the Supreme Court or the Speaker, the majority leader, to be witnesses to the document which gives this—it would be a very important document, the delegation. As long as the President makes the decision, would there be anything wrong with them affixing their signatures as witnesses to the delegation?

Mr. ROGERS. No, I don't think there would be anything wrong. I don't quite—

Senator CARROLL. My reason for it is this. This would be a very important document delegating the President's authority, even temporarily. And its impact upon the people, its newness, the innovation—it would seem to me it would strengthen the President's hand to have the coordinate branches of Government witness what has taken place in a public meeting.

Mr. ROGERS. Well, I would not have any objection to that. As I say, I think the President signs his name to a lot of important documents, and you don't have much problem in establishing his signature. And I don't think you would have any difficulty here establishing the authenticity of his signature. I assume if a President signs such a document, that he would do it in a way that—

Senator CARROLL. It would be a very historic document.

Mr. ROGERS. Yes. He probably would have it properly witnessed.

Senator DIRKSEN. You are referring to section 2?

Senator CARROLL. I am referring to the first action on the part of the President himself, who has the power, and he exercises it. And it is just a question of having the coordinate branches of Government there. I was thinking a little earlier about the possibility of a President who is completely paralyzed and how his statement in writing would be expressed.

Mr. ROGERS. I might say, Senator, that would be filed with the Secretary of State, as other state documents are filed. And I am sure that the President would have it properly witnessed. I don't believe it is necessary to have other branches of the Government witness it. I don't believe you would have a question of authenticity of the signature.

Senator HRUSKA. Isn't it true to assume if there were a question of paralysis in which the situation would be that he could not sign his name, isn't it reasonable to assume any mark or designation he might make on that paper with the intent it would be his signature would be properly witnessed and I suppose recorded in some fashion which would appear likewise in a contemporaneous document?

Mr. ROGERS. Yes, I am sure that that would be the case.

Senator KEFAUVER. All right, Mr. Rogers. You may proceed.

Mr. ROGERS. Well, I have really covered to a good extent the next portion of the statement here, why I think a constitutional amendment is necessary.

Professor Sutherland states it quite well:

The problem seems to me to involve a constitutional amendment * * *. The Founding Fathers wisely wrote into our Constitution the doctrine of separation of powers, from which the country derives many benefits, but which somewhat complicates provision for Presidential inability * * *. However, under the Constitution as it was well drafted, Congress can no more remove the President than the President can remove a Congressman. An exception, of course, is the provision for impeachment * * *. To turn over provision for suspending or ending his duties to ordinary legislation would alter, in an important respect, the present distribution of governmental powers between the executive and the legislative branches.

I pointed out that those who feel it can be done rely on the necessary and proper clause of the Constitution, and I don't believe that it applies for the reasons I have stated. There is quite a lot of authority for that, that the necessary and proper clause does not—I don't think I will repeat what I said. It is a little more detailed in this statement than I have given it.

Senator KEFAUVER. All this statement will be printed in the record.

Mr. ROGERS. Fine.

It seems clear to me that the necessary and proper clause of the Constitution does not give the Congress power to determine the inability of a President.

I also have discussed the time it has taken constitutional amendments to be passed.

In summary, I think, first, the sounder logic is strongly in favor of a constitutional amendment, and second, if there is this large body of opinion which regards a constitutional amendment as necessary, it would be illogical, to say the least, to deal with this problem by statute, and leave it in the same state of uncertainty as it is now.

Finally, I should like briefly to comment on the plan under which the Congress would enact a statute and submit an identical constitutional amendment to the States at the same time. There is a precedent for this dual procedure. In 1866 Congress passed the Civil Rights Act over President Johnson's veto. During debate on the bill in Congress, opponents to it pressed with great force their arguments to demonstrate that the bill was unconstitutional. The 14th amendment was adopted to obviate these objections that threatened the validity of the act.

There is, however, grave danger in this procedure when applied to Presidential inability cases. Resort to the constitutional amendment route at the same time that a statute was enacted would be construed as a confession of the unconstitutionality of the statute, and lead to great public tension and unrest if there were any attempt to invoke it in a crisis. Indeed, it might well stir up heated litigation in a national emergency—the very time that the country can ill afford to await the outcome of protracted litigation, or be divided by it.

For still another reason the 1868 precedent involving civil rights is not an apt one in connection with the Presidential inability issue.

There is no question but that the Federal courts have the jurisdiction to consider the validity of civil-rights statutes and to hold them invalid when they do not meet constitutional standards. In keeping with our traditions, decisions of the courts in cases of this kind which the courts have long determined, would generally be acceptable to the people. But, as several scholars have pointed out, statutes dealing with Presidential inability involve political questions—questions which the courts have steadfastly refused to assume. In the leading case of *Colegrove v. Green*, Mr. Justice Frankfurter speaking for the Court stressed once again that it should stay out of political controversies.

The Court said:

From the determination of such political issues the Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

What would the result then be if a statute were enacted? It would merely invite a long drawn out legal battle at the end of which the Court might decide that it has no power to decide the matter, and that it is bound by the Vice President's decision; or if it did decide it, either the President or Vice President might claim that its decision was worthless because the Constitution never gave the Court authority to determine such a case. Thus we would be back where we had started from, except that now the confusion, chaos, and dissension among the people would be greater than ever.

In other words, to summarize, I think that would create more confusion than there is today. I think there is less confusion now than if we pass a statute that could be attacked on the grounds of constitutionality.

If we are ultimately to rely on a constitutional amendment anyway, it is my considered opinion that we should follow this course exclusively now, and set all doubts to rest for the future. The machinery to be provided to resolve the inability dispute under any plan, must not only be such as to achieve a just result, but also to insure its widespread acceptance by the people. And this can only be accomplished by a constitutional amendment, simple on its face, plain for everyone to understand, free of radical change, and so eminently fair to all parties involved as to have universal appeal.

(The complete statement of Mr. Rogers is as follows:)

STATEMENT OF HON. WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ON PRESIDENTIAL INABILITY

A matter of serious concern to the people of the country is the problem of what happens when a President is unable to discharge the powers and duties of his

office in case of illness or other unexpected emergency. There is agreement that there should be clarification and improvement of our constitutional system relating to such inability. The question is what is the most desirable and appropriate procedure for accomplishing this objective.

After careful study, I believe that action to amend the Constitution is necessary to eliminate uncertainty and to provide for the orderly conduct of Government in time of future crises due to a President's inability to act. The plan which the administration has recommended for favorable consideration by Congress I believe provides a workable and satisfactory solution.

The administration plan is attached as appendix 1.

Strong disagreement prevails concerning the status and tenure of a Vice President during the inability of the President. Distinguished students of the Constitution have contended that a Vice President would merely act as President for the duration of the inability. Other respected students of the Constitution have argued that a Vice President would actually become President and replace the disabled President for the remainder of the term. This difference in opinion respecting a Vice President's status and tenure during a President's inability fully demonstrates the compelling need to remove the existing doubt and confusion once and for all.

Soon after President William Henry Harrison died in 1841, Senator William Allen, of Ohio, objected to establishing the precedent of a Vice President's becoming President upon the death of the latter, because he thought that the precedent would complicate the situation in the future when a President became disabled. As Allen indicated, study of the records of the Constitutional Convention shows that a Vice President was not intended to become President under the succession clause, but merely to exercise the powers and duties of the President until his inability was removed.

This committee's attention is directed to a chart which is attached to my statement.

Regardless of the intent of the framers of the Constitution, seven Vice Presidents have, upon the death of the President, been recognized as having become the President in fact. As a result of the precedents established whenever a President has died, it seems to be assumed without question that the Vice President becomes President and does not merely act as such when the President dies. This appeared to be Daniel Webster's view at the time of President Harrison's death, i. e., that Vice President John Tyler actually became President. These precedents make it easier to argue that a Vice President supersedes the President whenever he exercises Presidential power. As we will note in a moment in both the Garfield and Wilson cases, the Vice President was not asked to act as President largely because of the fear that he would become President and thereby oust the incapacitated incumbent. As a result, the full extent of the disabilities was carefully guarded because of personal loyalty to the disabled President. More important, the public interest could not help but suffer from being deprived of an active President in both cases.

Since Harrison's illness was short, no question of inability was involved. However, President Garfield lingered for eighty days after he was shot on July 2, 1881. During this eighty days he performed only one official act—the signing of an extradition paper. Although his mind was clear during the first days of his illness he was unconscious and it was reported that he suffered hallucinations during the last days of his illness. Moreover, he was physically unable to discharge the duties of his office during a substantial part of the eighty days involved. It cannot be seriously contended that there was no important business requiring the President's attention. Actually, officers were unable to perform their duties because the President was unable to commission them. There was a serious crisis in our foreign affairs. Yet the department heads transacted only such routine business as could be transacted without the President's supervision. It was claimed that important questions of public policy which could be decided only by the President were simply ignored.

Equally important, public opinion was sharply divided about the manner in which public business was handled. There was objection to having the affairs of the executive branch managed by the Cabinet, objection that Secretary of State Blaine was guilty of usurping the President's duties, and insistent demands that the Vice President exercise this power and that Secretary Blaine's alleged usurpation be ended immediately.

After Garfield's illness had already dragged on for 60 days, his physicians thought he would recover; but his convalescence was expected to take another

60 days. Therefore, the Cabinet considered the possibility of asking Vice President Arthur to act as President during Garfield's recuperation. All seven Cabinet members agreed on the desirability of having Arthur act as President. Four of the seven, however, thought that Arthur's exercise of Presidential power would actually make him President for the remainder of the term and thereby oust Garfield from office. It was reported that Attorney Wayne MacVeagh shared these views. Consequently, the Cabinet decided that Garfield should not be advised to ask Arthur to act as President without first telling him of this possibility. Therefore, the whole matter was deferred because the physicians feared that the shock caused by such a discussion might result in the President's death. Garfield's death on September 20 made it unnecessary to solve the problem in 1881.

There can be no doubt that President Wilson was actually unable to perform the duties of his office during some part of the period after his collapse on September 25, 1919, and until the end of his term on March 4, 1921. Numerous domestic and international matters failed to receive his attention. More important, this inability occurred during the Senate debate on the Versailles Treaty.

The exact degree of Wilson's inability is uncertain. Whatever Wilson's condition, Vice President Marshall, the Cabinet and the public were not fully advised concerning it. The President's family, his White House staff, and the Cabinet discharged public business in such manner and by such methods as to them seemed appropriate.

History seems to indicate that Mrs. Wilson and Dr. Cary T. Grayson, the President's physician, played an important part in many questions of public policy.

Soon after Wilson's stroke the Cabinet joined with the White House staff in keeping the Government operating. Secretary of State Lansing called 21 Cabinet meetings to transact executive business. When Wilson heard of these meetings, he accused Lansing of usurping Presidential power and forced him to resign. Wilson seemed to think that the Constitution did not authorize the Cabinet to act in his absence, with the result the Government business was interrupted during his illness.

Patrick Tumulty, Wilson's secretary, reported that Secretary of State Lansing had suggested that, in view of the President's inability, they should ask the Vice President to act as President. He quotes himself as saying: "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him." Tumulty also reported that, when Lansing resigned, Wilson said: "Tumulty, it is never the wrong time to spike disloyalty. When Lansing sought to oust me, I was upon my back, I am on my feet now and I will not have disloyalty about me."

Because of the belief that the Vice President would actually become President, asking Marshall to act as President during Wilson's inability was viewed as disloyalty. Consequently, Marshall was looked at with antagonism instead of as a person who could lighten the disabled President's burden. Instead of asking Marshall to exercise the powers devolved upon him by the Constitution, they attempted to keep the Government operating in their own way in order to forestall any serious attempt to declare the President's inability.

A study of the Garfield and Wilson cases shows that there is a real need for a means of supplying an active President during periods of Presidential inability. The belief that a Vice President actually becomes President when called to act as such has nullified the constitutional provision for the administration of the Government when a President is incapacitated. In the only two serious cases of Presidential inability to date, the Vice President was not called to act as President because of the fear that he would actually become President and thereby supersede the disabled President for the remainder of the term.

The problem of providing for the exercise of Presidential power during periods of inability would not be solved merely by providing a means by which the inability could be established. Unless the President, his Cabinet, and his other friends are absolutely certain that he may resume his powers after the termination of his inability, they will tend to oppose any attempt to declare the existence of inability, viewing such a declaration as equivalent to removing the President from office.

With this history to guide us, and with a need for uninterrupted continuity of government, we must conclude that action is vital to solve the problem of Presidential inability.

Section 1 confirms the present generally accepted interpretation of the Constitution—that in case of removal of the President from office, or his death or resignation, the Vice President shall become President for the unexpired portion of the then current term. This affirms the result accepted by the Nation seven times in cases of death of a President.

Section 2 of the proposal states that, if a President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President. This section authorizes a President to announce his own inability and allows him to do so, knowing that his powers and duties will be restored to him when he recovers. Section 2 of this proposal also would require the President to make this announcement in writing. The reason for adding this requirement is to preclude a dispute about whether a President actually declared his inability. The existence of a written document will prevent anyone from seriously denying that the President recognized his inability. I believe that section 2 encompasses most of the cases of Presidential inability which are likely to arise. It removes the reason which caused responsible Government officials to fail to act in the Garfield and Wilson cases.

The only objection I have heard to section 2 is that a President might use this section to shirk his duties and responsibilities. The obvious answer is that a President who used this section to shirk his duties would be breaking his oath to faithfully execute the Office of President and, therefore, would be subject to impeachment for high crimes and misdemeanors. If a President should ever become so anxious to be relieved of his duties and responsibilities, he would not need to declare his inability, he could simply resign in conformity with article II of the Constitution.

Section 3 of the plan deals with cases in which the President is unable or unwilling to declare his own inability. In such cases, the Vice President with the approval of a majority of the President's Cabinet would make the decision.

The Cabinet is the proper body to participate along with the Vice President in declaring a President's inability. The Cabinet is an executive body, the President's official family. Its loyalty to the President is generally unquestioned. A decision of this body is least likely to be suspected of enabling a Vice President to usurp powers on the pretext of inability. Moreover, the Cabinet is in a position to know at once whether a President is disabled.

Under section 3, there are several possible courses of action. The Cabinet could notify the Vice President when a majority of that body believed that the President's inability was sufficient to warrant a devolution of presidential power on the Vice President. The Cabinet has always notified the Vice President when a President has died; and section 3 would extend this custom to the case of inability. Under section 3 the Vice President might take the initiative without the Cabinet's first inviting him to make the decision. Unlike the provision of the present Constitution, however, section 3 would require approval by a majority of the Cabinet before the Vice President could undertake the exercise of presidential power.

A Vice President who undertook the exercise of presidential power would be assured that his action could not seriously be branded as usurpation because that action was previously approved by the President's own appointees in the Cabinet.

In addition to the safeguard provided in section 3 by the Cabinet's role in the process, section 4 contains a second safeguard. It provides that, whenever the President declares in writing that his inability is terminated, the President shall immediately resume the exercise of the powers and duties of his office. Thus, section 4 does, I think, provide a disabled President with a constitutional guaranty that he can 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.

As a practical matter, if the determination of Presidential inability is left where the Constitution places it now—in the Vice President, or if it is placed in the Vice President and Cabinet, as suggested—the Vice President would never venture to assume the duties of the presidency unless it were clear beyond challenge in any quarter that the President was in truth and in fact actually disabled from performing the functions of his office. With a constitutional provision spelling out that the Vice President only acts as President in a case of inability, and a constitutional provision granting to the President the right to reassert his powers at any time, the Vice President as a practical political necessity in all probability would secure the approval of the Cabinet, of the leaders and a great majority of the Congress, and of a large segment of

public opinion before venturing to assume the Presidential duties. On the other hand, with a constitutional provision negating any motive of usurpation in the Vice President by clear language that he only acts as President for a temporary period, no Vice President would hesitate, as did Vice Presidents Arthur and Marshall in the two most serious examples of this problem, to perform his constitutional duty of serving as the alternate Executive for a temporary period. The President's immediate family and friends would be stripped of any motive to oppose the Vice President, as in Wilson's case, for on regaining his health the President could simply assert his right to the office.

My predecessor was of the opinion that the Federal courts would disclaim jurisdiction in such a case upon the ground that the question presented was political, and that the only remedy was impeachment. The consensus of opinion is in agreement with Mr. Brownell that the sole remedy is impeachment where there is a wrongful assertion of authority to exercise the powers and duties of the office. The attempt of a President to perform his duties when he was in fact clearly unable to perform might be classed as a wrongful assertion of authority.

It should be noted, however, that impeachment proceedings may be delayed if Congress is not in session. Article II, section 3 of the Constitution provides that the President may on "extraordinary Occasions, convene both Houses, or either of them." It is unlikely, however, that a President under attack for attempting to assert the powers while still suffering inability, would convene the Congress to conduct impeachment proceedings against himself. Further study is required to determine how Congress may be convened in the event impeachment proceedings are required in a dispute involving Presidential inability.

Therefore Congress may think it wise to avoid the odium of an impeachment by providing another but a similar process whereby the question of inability could be determined in the unlikely event a President and Vice President were at an impasse. The administration plan could be modified by the addition to section 4 of such a provision.

Referring to appendix III, this alternate section 4 would still allow the President to resume the functions of his office at any time, but provide for the immediate action of Congress, whether then in session or not, to resolve the question of Presidential inability raised in writing by the Vice President supported by a majority of the Cabinet. By making the charge one of inability rather than impeachment for some offense, the necessary proceedings could be conducted in a more appropriate atmosphere. Members of Congress who might be reluctant to impeach the President would not have the same reluctance in removing a President physically unable to perform the duties of his office.

In my opinion this alternate section 4 would place the President, Vice President, and Congress in exactly the proper relationship to the question of inability. The President could always reassert his power, the Vice President would acquiesce except in the unfortunate situation where the President had misjudged his true capacity. In that event Congress would step in and by its consideration of a charge of inability determine the issue. A two-thirds vote of the Senate would determine the existence of a President's inability; a majority vote of both Houses would restore the powers of his office to him. Impeachment would remove the President permanently; a determination of inability would leave to the President an opportunity later to reassume the powers of his office. The difference between the result reached by impeachment and by an inability proceeding would justify the enactment of the separate inability proceeding, and would render the whole proposed solution more acceptable, I believe, to the public.

Let me stress that the very existence of this ultimate power in Congress—which is the only power it needs in relation to this question—would in all probability insure that this extreme situation would never arise. No Vice President would resist a President reasserting his claim to the powers of the office unless the President were in fact unable to perform. No President, in fact unable to perform, would be permitted by his family and close personal counsellors to reassert his claim and precipitate an issue likely to be resolved against him by Congress.

We must recognize that in this area as in others, not everything is soluble and not everything may be controlled by law. Whatever machinery is adopted, it must not be able to be used as a vehicle for harassing the President. So long as the determination of inability is left within the executive branch, either by the President, or by the Vice President as is now true under the Constitution, or by the Vice President and Cabinet under the circumstances proposed by the admin-

istration, there can be no harassment of the President or diminution of his stature in the eyes of the people. The Vice President is of the President's own party; the Cabinet is of the President's own choice; if there is a provision that the President can reassume the duties of his office at any time, he is safeguarded.

But if we transfer the power of initial determination of inability out of the executive branch, or in some fashion share it with others outside the executive branch, then the way is opened for a harassment of the President for political and personal motives. We may not always have as President a figure of the national and international stature of President Eisenhower, nor one who has so completely demonstrated his respect for Congress as a coequal branch of government, whether dominated by his own or the opposition party, as has President Eisenhower. Our solution must contemplate the testing of it, if need be, in circumstances similar to the time of President Johnson and the Reconstruction Congress, when violent personal differences and party controversy would invite Congress to use any power it had to determine Presidential inability as a weapon of harassment—if such a weapon were easily at hand. A possibility of such political harassment could severely impair the Presidency at the very time when assertion of its full power was most needed.

With these guiding principles in mind, let us now examine some other proposals.

First, it seems unwise to establish elaborate legal machinery for giving the President physical and mental examinations. This would give a hostile commission power to harass the President constantly, and risk danger of irresponsible demands for commission action. Not only would provision for such physical and mental examinations be an affront to a President's personal dignity but it would also degrade the presidential office itself.

Second, it seems ill-advised to establish complicated procedures which would prevent immediate action in case of emergency, because there is a need for continuity in the exercise of executive power and leadership, especially in time of crisis. Investigations, hearings, findings, and votes of a commission could drag on for days or even weeks and result in a governmental crisis, during which no one would have a clear right to exercise Presidential power.

Third, such a commission would be totally unnecessary except where there was a dispute between the President and the Vice President in the executive branch itself. In my opinion such a situation would be most unlikely, once the principle is constitutionally established that the Vice President's assumption of power is only temporary and the President can resume his power at any time.

Some constitutional authorities have pointed to the extraordinary ad hoc commission of 15 members set up to decide the disputed Hayes-Tilden election in 1876. This was a desperate remedy for a desperate situation. In my opinion it forms no basis for a carefully considered long term constitutional arrangement which will be tested at some indefinite time in the future with unknown personalities involved.

Let us now consider some of the objections to the particular composition of proposed commissions.

I think it is now generally agreed that the Supreme Court should not be represented on any Presidential inability commission. This leaves Congress and the Cabinet as the logical source from which the members of such a commission would be drawn.

It would appear to be a violation of the doctrine of separation of powers for officials of the Congress to participate in any initial decision of Presidential inability. Especially is it the case where under proposed plan more than a majority of the commission empowered to vote would come from the legislative branch. In effect, it would enable Congressional leaders to put the President out of office, and to keep him out, by declaring that he lacks the ability to perform his duties.

The lack of wisdom in any such proposal, I believe, is indicated by considering a converse proposal. Consider for a moment a proposal under which a commission, composed of four members of the Cabinet and one member either from the House of Representatives or Senate was empowered to look into the alleged inability of Members of the House and Senate.

Any such proposal would promptly and accurately be branded as an unwarranted intrusion by the executive branch into the affairs of the legislative branch. It seems equally unwise to give a committee consisting of a majority of Members of Congress the power to remove the President of the United States.

The framers designed the President as the sole repository of the executive power of the Nation. He and the Vice President—the alternate executive—

are the only two officials to be chosen by all the people. In time the Presidency has grown as the national symbol, a unifying symbol in any time of stress or crisis. No solution to the problem of temporary disability should dilute the prestige of the Presidency, diminish its stature, or endanger its tenure.

Summarizing my views on the various proposals of a Presidential commission on inability, I am convinced that this type of scheme is unnecessary, would be unworkable in practice, and would drastically alter the concept of separation of power which has worked so well throughout our Nation's history.

In summary, I think, first, the sounder logic is strongly in favor of a constitutional amendment, and second, if there is this large body of opinion which regards a constitutional amendment as necessary, it would be illogical, to say the least, to deal with this problem by statute, and leave it in the same state of uncertainty as it is now.

Finally, I should like briefly to comment on the plan under which the Congress would enact a statute and submit an identical constitutional amendment to the States at the same time. There is a precedent for this dual procedure. In 1866 Congress passed the Civil Rights Act over President Johnson's veto. During debate on the bill in Congress, opponents to it pressed with great force their arguments to demonstrate that the bill was unconstitutional. The 14th amendment was adopted to obviate these objections that threatened the validity of the act.

There is, however, grave danger in this procedure when applied to Presidential inability cases. Resort to the constitutional amendment route at the same time that a statute was enacted would be construed as a confession of the unconstitutionality of the statute, and lead to great public tension and unrest if there were any attempt to invoke it in a crisis. Indeed, it might well stir up heated litigation in a national emergency—the very time that the country can ill afford to await the outcome of protracted litigation, or be divided by it.

For still another reason the 1866 precedent involving civil rights is not an apt one in connection with the Presidential inability issue.

There is no question but that the Federal courts have the jurisdiction to consider the validity of civil rights statutes and to hold them invalid when they do not meet constitutional standards. In keeping with our traditions, decisions of the courts in cases of this kind which the courts have long determined, would generally be acceptable to the people. But, as several scholars have pointed out, statutes dealing with Presidential inability involve political questions—questions which the court have steadfastly refused to assume. In the leading case of *Colegrove v. Green*, Mr. Justice Frankfurter speaking for the Court stressed once again that it should stay out of political controversies.

The Court said:

"From the determination of such political issues the court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."

What would the result then be if a statute were enacted. It would merely invite a long drawn out legal battle at the end of which the Court might decide it has no power to decide the matter, and that it is bound by the Vice President's decision; or if it did decide it, either the President or Vice President might claim that its decision was worthless because the Constitution never gave the Court authority to determine such a case. Thus we would be back where we had started from, except that now the confusion, chaos and dissension among the people would be greater than ever.

If we are ultimately to rely on a constitutional amendment anyway, it is my considered opinion that we should follow this course exclusively now, and set all doubts to rest for the future. The machinery to be provided to resolve the inability dispute under any plan, must not only be such as to achieve a just result, but also to insure its widespread acceptance by the people. And this can only be accomplished by a constitutional amendment, simple on its face, plain for everyone to understand, free of radical change, and so eminently fair to all parties involved as to have universal appeal.

APPENDIX I

Resolved by the Senate and House of Representatives of the United States in Congress (two-thirds of each House concurring therein), That in lieu of so much of paragraph six of section 1 of Article II of the Constitution of the

United States as relates to the powers and duties of the Presidential office devolving on the Vice President in the 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 following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

~~"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"~~

"ARTICLE.—

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

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

"Sec. 3. If the President does not so declare, the Vice President, if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet, shall discharge the powers and duties of the office as Acting President.

"Sec. 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

"Sec. 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."

APPENDIX II

Articles as Agreed to by the Convention As Reported by Committee on Style and Finally Adopted

Art. X, § 2: " * * * and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and 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.

Art. X, § 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; (semicolon)

and such Officer shall act accordingly, until such disability be removed, or a President shall be elected." (2 Max Farrand, *Records of the Federal Convention of 1787*, 575, 578 (1911 and 1937).)

Art. II, § 1, cl. 6: "In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, (comma)

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, (comma)

and such officer shall act accordingly, until the disability be removed, or a President shall be elected." (2 id. 598, 599, 626.)

APPENDIX III

(Alternate sec. 4)

Sec. 4. Whenever the President declares in writing that his inability has terminated, the President shall forthwith discharge the powers and duties of his office: Provided, however, that if the Vice President and a majority of the heads of executive departments who are members of the President's Cabinet shall signify in writing that the President's inability has not terminated, thereupon:

(a) The Congress shall forthwith consider the issue of the President's inability in accordance with procedures provided for impeachment, and if the Congress is not in session, shall forthwith convene for this purpose;

(b) If the House of Representatives shall on record vote charge that the President's inability has not terminated, and the Senate so finds by the concurrence of two thirds of the members present, the powers and duties of the office of President shall be discharged by the Vice President as Acting President for the remainder of the term, or until Congress by a majority vote of the members of both Houses determines that the President's inability has terminated.

Mr. ROGERS. Mr. Chairman, that completes my statement.

Senator KEFAUVER. Mr. Rogers, in section 8, you have that—

upon approval in writing of a majority of the heads of the executive departments who are members of the President's Cabinet—

do you think the clause "who are members of the President's Cabinet" should be there, because as I understand it, the President is not by the Constitution bound to have any number in his Cabinet? He might just have the Secretary of State and the Secretary of Treasury.

Mr. ROGERS. I would agree with that, Senator. I would be agreeable to leaving that out—just leaving it as "majority of heads of the executive departments."

Senator KEFAUVER. Any questions of Mr. Rogers? Senator Wiley?

Senator WILEY. I have listened to the discussion, and it sounded very logical. You called attention here to section 8:

If the President does not so declare, the Vice President, if satisfied with the President's inability, and upon approval in writing of a majority of the heads of the executive departments who are members of the President's Cabinet, shall discharge the powers and duties of the office.

Is it your opinion that, if this were to become an amendment, you would be making the Vice President's power subject to the approval, or is it the idea that this is simply advisory to the Vice President?

Mr. ROGERS. No, it is the former, Senator. I think according to our present interpretation of the constitution, I think it would be a limitation on the Vice President's power.

Senator WILEY. That is what you want to do about it?

Mr. ROGERS. That is correct.

Senator WILEY. Unless you were to provide that it should be advisory only, you would be taking away from an executive officer power in order to meet a situation that may arise, as I see it.

Mr. ROGERS. That is correct. As a matter of fact, speaking for myself, Senator, I would not object to elimination of that. I think that it might be helpful to the Vice President to have it in there, because I think it would give him support. And I think that, as long as it was clear that this was a temporary thing, then the Cabinet would support the Vice President; just as they did in Garfield's time. And I think they would in any case.

In other words, I cannot imagine a Vice President assuming the powers and duties of the office if the Cabinet opposed him.

Senator DIRKSEN. Well, the whole purpose is to fortify him and dissipate the fear that arose in the Garfield case and the Wilson case.

Mr. ROGERS. That is correct, Senator.

Senator KEFAUVER. Senator Dirkson.

Senator WILEY. May I just ask one other question that bothers me? When President Wilson was stricken, there was considerable dis-

oussion. We know that a man may be physically disabled, but mentally able. Or vice versa—mentally disabled and apparently physically able. You can see that in the asylums. But, to return to the current problem, there is no definition of the President's inability. As the situation is now, it devolves upon the Vice President to define that term. If this amendment were to become part of the Constitution, you could have a great deal of discussion among a number of officials as to what the meaning of "President's inability" is. In other words, it could not be one man's decision. That is what I am getting at. And it may be getting into a situation which involves personal interest.

Now, you had that Wilson situation. Some said he was disabled and some said he was not. Some said that he, through his wife, carried on, and so forth. We hope we will never have to meet that situation. But I think it is important to get the phraseology clarified, so we will know what we are talking about.

Carry on, sir.

Senator DIRKSEN. Do you have in mind reciting in greater detail in section 3 how the inability shall be determined?

Senator WILEY. No, I don't know. I was just trying to get it clear that that phase presented a vast field of uncertainty.

Mr. ROGERS. That is correct, Senator. I think, though, that the framers of the Constitution were wise in using that language. We have not changed that language any, because I think it depends on all the circumstances, and I don't think you could define it in a constitutional provision. The only change that this makes in the Constitution is to make it clear that it is temporary and not permanent.

In other words, the language is just the same insofar as inability is concerned—it is just the same as it is now.

Senator WILEY. I realize that. But I also realize now that it is one man's decision virtually at present.

Mr. ROGERS. That is correct.

Senator WILEY. Now, what you propose is to leave it up to the majority of the heads of the executive departments?

Mr. ROGERS. And the Vice President.

Senator WILEY. Well, a majority has to approve, according to this.

Mr. ROGERS. That is correct.

Senator WILEY. And that, to me, is where you are running into the snag. But you always have to have snags, I guess.

Mr. ROGERS. Well, as I have said, Senator, I personally would not be opposed to leaving that out of the constitutional provision, because I think, as a practical matter, any Vice President would insist on getting the support of the Cabinet.

Senator WILEY. So do I. In an hypothetical situation, exercise of unusual authority often goes to a man's head, and inflates it.

Mr. ROGERS. Well, as long as it is temporary, and the President could reassert his ability to perform, I don't think there would be much temptation on the part of the Vice President to take over the powers and duties of the office, unless he was absolutely sure that the President was unable to act.

Senator CARROLL. Will the Senator yield.

How soon could the President reassert that?

Mr. ROGERS. I think he could reassert it right away.

Senator CARROLL. And when he reasserted that, what would be the next step, in your proposal?

Mr. ROGERS. Well, as I say—

Senator CARROLL. Would that immediately divest the Vice President?

Mr. ROGERS. Yes, sir.

Senator DIRKSEN. The language there is "forthwith."

Senator CARROLL. Now, what is the next step after that?

Mr. ROGERS. Well, I pointed out here in the statement that the only step that could be taken then would be if the Vice President and the majority of the Cabinet still felt the President was unable to act, they then could file an inability petition with Congress, and Congress would immediately act on that, and make the determination.

Senator HRUSKA. But that would be only under the alternative section 4?

Mr. ROGERS. That is correct. Now, what I have also pointed out, Senator, is that I don't think that would ever happen, just because of the practical realities of the thing. No Vice President is going to say the President is unable to act unless he is sure he is right and has a lot of popular support. And that is not the problem. The problem is how to get him to act. It is not to prevent him from acting.

Certainly no Vice President would ever assert the inability of the President unless he was sure that the President was unable to act.

Now, once the Vice President took over the powers and duties of the office temporarily, I cannot imagine the President reasserting his ability to act unless he was able to act, because he would then know that, if he did that, Congress could overrule him. And the Vice President would not want to assert the inability of the President unless he was sure he was unable to act, because it would disgrace and destroy him. And no President would want to assert his ability to act, and his friends and family won't let him, unless he was able to act. And if he was not able to act, and Congress said so, he would be disgraced.

So, as a practical matter, unless you had the final authority in the Congress, in the unlikely event you had that conflict between the President and the Vice President, I do not think you would ever have the conflict. And I think unless you do have some final authority like that, there is an extreme contingency that might arise. You might have a President who was mentally incompetent. But the Vice President and the majority of the Cabinet would never file an inability petition in Congress unless they were sure they were going to win.

Senator CARROLL. What vote would be necessary to sustain the Vice President?

Mr. ROGERS. The same as an impeachment. It is analogous to impeachment—a majority of the House and two-thirds of the Senate.

Senator CARROLL. The reason I was bringing this out is the question of power politics.

Supposing it arose, where there was this conflict between the Vice President and the President and the Cabinet threw in with the Vice President, and they took this action, by this majority vote. The President could then counter forthwith, and then this precipitates the

real legislative situation where the Congress, by two-thirds vote, has to sustain the Vice President and the Cabinet.

Is that it in substance? I mean if there is a ruling on the President's inability?

Mr. ROGERS. Well, as I say, I can't imagine the Vice President and the majority of the Cabinet bringing that proceeding unless they were sure they were right. The only situation where that would occur is if you had a mentally incompetent Vice President and mentally incompetent Cabinet. In other words, I can't imagine a Vice President and the members of the President's own Cabinet asserting his inability and asking Congress to decide it, unless they knew he was unable to act.

Senator CARROLL. What you do, then, is finally come back to the Congress to take positive action in support of the position of the Vice President and the Cabinet.

Mr. ROGERS. In the very unlikely event that would ever arise.

Senator CARROLL. I know. But nevertheless it is a constitutional safeguard.

Mr. ROGERS. That is correct.

Senator CARROLL. So by setting up that constitutional safeguard, it takes me back to my first question: should we set up any other constitutional safeguard on the original act of the President himself?

Mr. ROGERS. I do not think it is necessary, but I would not have any objections to it.

Senator CARROLL. There would not be any reason why the Congress could not pass upon it in the first instance.

Senator KEFAUVER. You mean the validity of the signature?

Senator CARROLL. The validity of the signature itself. In other words, you have two things, as I understand it, from your testimony—and I assure you I am not a student of this subject, and I am just sort of shooting from the hip on this. But the question arises first when the President says, "I am disabled and I cannot fulfill the functions of my Office, and I want to transfer it temporarily to the Vice President," who becomes an Acting President.

Now, if it should require congressional approval of such an unprecedented act, there would be nothing wrong with it, I assume. It might slow down the process some, but there would be nothing wrong with it. Because in the second instance, if the Vice President and the Cabinet try to assert a power, which some of you constitutional lawyers say reposes in the Vice President, to make it permanent, if there is objection on the part of the disabled President, it has to be done by two-thirds of the Senate. That is an impeachment.

Well, I merely offer the suggestion for you to think about. I will not belabor the point.

Senator KEFAUVER. Senator Hruska.

Senator HRUSKA. Mr. Chairman, I should like to say that I want to commend the Attorney General for coming in here with this very splendid statement. I think he has cleared up a good many things in a very logical way which otherwise could be misunderstood and probably the emphasis placed in the wrong place.

I do know that since the discussion of this subject has arisen, that in my many discussions of it with laymen and lawyers' groups and

lawyers themselves, that there has been a tendency to make the mistake of placing emphasis upon the difficulty of determining disability. And I think it is quite clear, from a consideration of the historical examples, that that is not the problem.

Mr. ROGERS. That is correct.

Senator Hruska. Likewise, there is the second mistake commonly made that the problem is to slow up the Vice President from assuming duties, whereas that is contrary, again, to historical records.

Now, I would like to ask this question, Mr. Attorney General:

You have an appendix I, section 4, which, of course, is different from the alternate section 4. I should like to ask you whether you have any preference as between the two, or if you would have any disposition to say that one would be preferable to the other in the light of your study of this entire subject.

Mr. ROGERS. Yes, sir. I prefer the alternate section for three reasons:

One, the impeachment proceeding does not provide a method of calling Congress in session when they are out of session.

Senator Hruska. I understand the three points which you have advanced.

Mr. ROGERS. Secondly, an impeachment would be a permanent act, and the President could never get back in office, even if he recovered his ability to act.

And so far those two reasons and the other reason I mentioned, I, myself, prefer this alternate section.

Senator Hruska. I understand and I appreciated the reasons which you had assigned, but I did not know you had gone to the point of saying you preferred the one over the other.

Mr. ROGERS. Yes. I submitted them this way because appendix I is the proposal that Mr. Brownell made in the House, and I think it is the original proposal of the Department. And on reconsideration, particularly in the light of some of the objections that were made to the impeachment proceeding, we have reconsidered, and I think that we all feel that the alternate section is better. I think it removes the objections that have been made to the impeachment proceeding.

Senator Hruska. That is all I have, Mr. Chairman.

Senator KEFAUVER. Senator Dirksen.

Senator DIRKSEN. Mr. Rogers, in summary we are in this position: In your considered opinion, the enactment of a statute will not solve this problem, or resolve the confusion.

Mr. ROGERS. That is correct.

Senator DIRKSEN. Therefore, the constitutional amendment is not only preferable, but ought to be pursued separately and alone, and not in conjunction with a statutory remedy.

Mr. ROGERS. That is correct, Senator.

Senator DIRKSEN. No. 2, with respect to these proposals that are now pending before the committee, some of which invoke the powers of the Supreme Court or the presence of the Chief Justice presiding without a vote, that those would be fatal on the ground that, first, it does violate, in your judgment, the separation of powers and, secondly, the Supreme Court has already recognized that in the statement it put in the record.

Mr. ROGERS. That is correct.

Senator DIRKSEN. No. 3, with respect to those proposals pending before us, formally or otherwise—and there are some, as the letter from President Hoover and the letter from President Truman, which are not formalized in bills—they would be equally fatal on the ground that again the separated powers are violated because there it imposes a duty on Congress and also confers an authority on Members of Congress in the legislative division.

Mr. ROGERS. That is correct.

Senator DIRKSEN. So out of all it is your opinion that this matter is going to have to be resolved wholly within the executive branch.

Mr. ROGERS. Correct.

Senator DIRKSEN. Through the Vice President and heads of the executive departments, or whoever else in the executive departments that Congress might add. But in any event, limited exclusively to the executive branch.

Mr. ROGERS. That is correct, Senator.

Senator KEFAUVER. Mr. Rogers, just 1 or 2 questions for the record and for the legislative history.

Mr. ROGERS. Just to answer the last question—you realize the initial decision, with the proviso that if the two executive heads disagree, they go through this procedure—then Congress has the ultimate authority, but not the initial authority.

Senator DIRKSEN. Yes.

Senator KEFAUVER. Article II, section 1, clause 6 gives the power for the passage of the succession act which we now have, of course. It is not intended that this amendment would take away or alter the right of Congress to deal with the problem of succession, where both the President and the Vice President are unable to act or are dead.

Mr. ROGERS. Not at all, Senator. It would not affect that at all.

Senator KEFAUVER. Now, the next question is this. In the alternate section 4, how do you visualize Congress would be called into session? And if the Congress is not in session, shall it forthwith convene for this purpose? Is it your idea that this gives the Speaker and the President pro tempore or somebody the power to call Congress?

Mr. ROGERS. I think it would be automatic with the filing of the writing. In other words, once the Vice President and the majority of the Cabinet file the inability petition, then I think Congress would automatically be convened, under the constitutional provision.

Senator KEFAUVER. All right.

Now, the next question is on subsection (b) of section 4—who presides at a hearing before the Senate on the question of disability? Would it be contemplated that the Chief Justice of the United States would preside?

Mr. ROGERS. I think it would be just like an impeachment proceeding. I tried to make it clear in my statement that the same rules as for impeachment would apply. In other words, it is analogous to impeachment, and the theory is the same—to give Congress the ultimate authority when this problem arises, just as you do in impeachment. And all the procedures would be the same, except you would automatically convene Congress and it would be temporary rather than permanent.

Senator KEFAUVER. The procedures are the same, but the issue is different.

Mr. ROGERS. That is right.

Senator KEFAUVER. And then the presiding of the Chief Justice, I assume, would automatically disqualify him in case of a court test about the matter.

Mr. ROGERS. That is correct, sir.

Senator KEFAUVER. Well, Mr. Rogers, I want to join in complimenting you on a very scholarly presentation. You have developed this matter logically and well. Whether we agree with all parts of your suggestions or discussions or not, we will give it a great deal of attention. We appreciate your coming here today.

Mr. ROGERS. I appreciate your courtesy and the courtesy of the subcommittee.

Senator KEFAUVER. Our next session is on the 28th of February, at which time we shall hear Mr. Charles Rhyne, president of the American Bar Association.

(Whereupon, at 4:10 p. m. the subcommittee was recessed to reconvene, at time to be designated, on Friday, February 28, 1958.)

W. H. G. - 1930-1931 - 1932-1933 - 1934-1935 - 1935-1936

PRESIDENTIAL INABILITY

FRIDAY, FEBRUARY 28, 1958

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10 a. m., in room 457, Senate Office Building, Hon. Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver (presiding), Wiley, Dirksen.

Also present: Wayne H. Smithey, counsel, and Richard F. Wambach, clerk to the subcommittee.

Senator KEFAUVER. The subcommittee will come to order.

Senator Dirksen and other members of the subcommittee will be here shortly.

We are honored this morning to have with us the very able president of the American Bar Association, Charles S. Rhyne, for whom I have had great admiration and respect for many years. I have had the privilege of knowing Mr. Rhyne as a lawyer and as an interested public citizen who has expressed himself on public matters. I think he is one of the ablest men in the country to speak on the subject we have before us today. His views and testimony will carry great weight.

Mr. Rhyne, I believe, is the youngest president of the American Bar Association. He was elected unanimously, which is a great compliment to him.

I have a detailed biographical sketch of Mr. Rhyne's activities and background, which will be made a part of the record at this point.

(The biographical sketch referred to is as follows:)

Charles Sylvanus Rhyne, lawyer; b. Charlotte, N. C., June 28, 1912; s. Sydneyham S. and Mary (Wilson) R.; student Duke U., 1928-29, 1932-35; LL.B., George Washington U., 1937; m. Sue Cotton, Sept. 16, 1932; children—Mary Margaret, William Sylvanus. Admitted to D. C. bar, 1937 and since practiced in Washington; gen. counsel Nat. Inst. Municipal Law Officers; professorial lecturer on aviation law George Washington U., 1948—; gen. counsel Comm. Jud. and Congl. Salaries, 1953-54. Mem. Internat. (patron, mem. house of depts. 1948-56). Am. (ho. of dels. 1944—; chmn. rules and calendar com. 1954-56; chmn. coms. on aero. law 1946-48, 51-54, draft 1950-54; chmn. Internat. and comparative law sect. 1949-49, sec. 1st and 2d vice-chairman, council mem., chmn. UN com.; nat. chmn. Jr. Bar Conf. (1944-45), Fed. Communications and Federal Power Com., D. C. (pres. 1955-56, dir. 1945-46, chmn. program and other coms.) bar assns., Am. Judicature Soc. (dir. 1954-55), Am. Law Inst., Am. Soc. Internat. Law, Nat. Aero. Assn. (dir. 1945-47), Washington Bd. Trade, Duke U. Alumni Assn. (chmn. nat. council 1955-56), Delta Theta Phi, Order of Coif, Omicron Delta Kappa, Scribes. Clubs: University, National Press, Barristers, Congressional, Aero. Author: Civil Aeronautics Act, Annotated, 1939; Airports and the Courts, 1944; Labor Unions and Municipal

Employee Law, 1046; Aviation Accident Law, 1047; Airport Lease and Concession Agreements, 1048; cases on Aviation Law, 1050; The Law of Municipal Contracts, 1052. Editor: Municipalities and Law in Action, 1938-52, NIMLO Municipal Law Rev., 1952—, Municipal Law Jour., 1940—, Municipal Law Court Decisions, 1042—, Municipal Ordinance Rev., 1953—. Author articles in field. Home: 2621 Foxhall Road, Washington 7. Office: 726 Jackson Place, Washington, D. C.

Senator KEFAUVER. We are glad to have you with us, Mr. Rhyne. You have a statement which will be printed in full in the record. You can read it or summarize it or handle the matter as you wish.

Mr. RHYNE. Thank you very much, Senator. I especially appreciate the kind and very undeserved words with which you have presented me.

Senator KEFAUVER. Before we start, Mr. Rhyne, you are accompanied by your administrative assistant in the American bar activities. Will you introduce him?

Mr. RHYNE. He is Charles A. Dukes, Jr., who is a member of the Bar of the District of Columbia, and a member of my law firm, and this year he is devoting all of his time to helping me in connection with my duties as president of the American Bar Association.

Senator KEFAUVER. We are glad to have you here, Mr. Dukes.

Mr. DUKES. Thank you.

Mr. RHYNE. I would like to say that I have known the chairman of this subcommittee for some 20 years, or probably more, and I certainly have great admiration and respect for him, and for the tremendous public service he has rendered to his native Tennessee and to our Nation.

Senator KEFAUVER. That is appreciated very much, Mr. Rhyne.

STATEMENT OF CHARLES S. RHYNE, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. RHYNE. I do have a written statement. I think I will present it in that form, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I welcome this opportunity to present my views on this extremely vital problem of Presidential inability. I have been pleased to note the nonpartisan approach you have taken to this problem, and the full and deliberate treatment which is being given the important issues involved. Though certainly I do not pretend to be an expert on this matter, I have a great interest in common with all Americans in its resolution. While serving as General Counsel to the Federal Commission on Judicial and Congressional Salaries, I did have occasion to study the duties and responsibilities of the office of Vice President rather closely, and gave some thought to this matter in that connection at that time.

The American Bar Association has not considered or taken an official position on the issues now before this subcommittee. I am here today in response to Senator Kefauver's invitation to present my personal views. So nothing I say can be attributed to the association or any other member thereof.

I. THE NEED FOR CHANGE

Recent recurrent periods of illness suffered by President Eisenhower have created a wave of national concern over the present constitu-

tional provision pertaining to Presidential disability. The existing 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 (United States Constitution, art. II, sec. 1, clause 6).

The fear is that the above provision is not sufficiently clear as to how, when, for how long and under exactly what conditions the President is to be replaced for inability. A brief survey of our Nation's history would appear to support this fear, despite the fact that no serious disaster has ever occurred as a result of the prevailing uncertainty.

As early as 1841, upon the succession of John Tyler to the Presidency, objections were voiced to establishing the precedent of the Vice President becoming President upon the latter's death for fear that complications might arise in the future in the event of Presidential inability. Certainly the possibility of Presidential disability is clearly evidenced by history. On seven occasions the Vice President has been required to fill unexpired Presidential term. Three of these men, Andrew Johnson, John Tyler and Harry S. Truman, served 3 years and 11 months of that term. Chester A. Arthur and Theodore Roosevelt served 3½ years each. Millard Fillmore and John Calvin Coolidge served over 2½ years. In each instance, it is apparent that had history been only slightly different there could have been a protracted period of Presidential disability.

There have been two historical periods of actual Presidential disability. The first was in 1881 during the final illness of President Garfield. For 80 days he performed only one official act, the signing of an extradition paper. Daily physicians' reports clearly indicated his inability to perform the duties of his office. During this time foreign relations were completely neglected and only very routine matters were handled. There was great dispute over whether the powers and duties of the President could be only temporarily devolved on the Vice President. President Garfield's death resolved the need to determine the issue and nothing was done; but one point stood out. The constitutional provision upon Presidential disability was a matter of great uncertainty.

When President Wilson fell ill in 1919, the situation was even more serious. For almost 1½ years, he was unable to function except periodically. During the special session of the 66th Congress, 28 acts became law owing to the President's failure to pass on them within the requisite 10 days. The President did not meet his Cabinet for 8 months during this illness. Many students of the period agree that public business in general and the fate of the Versailles Treaty in particular were affected by the President's inability. But aside from any conclusion as to the seriousness of this period of disability, it cannot be denied that existing law was inadequate to handle the situation. This same uncertainty which has restricted and hindered action throughout history still exists today.

In this critical era in which we live, with cold war in full swing and hot war hovering in the shadows, it is more than ever necessary

that executive leadership be in one man and that this man be ready to act upon a moment's notice. Large areas of our Nation could be destroyed in a matter of minutes, and it is vital to our security to have a President ready to respond to emergency instantly. I note that President Eisenhower has announced that he has taken care of his own situation. But a matter of such paramount importance should not be left to informal arrangements, and the President himself has recommended permanent clarification of our legal provision for handling Presidential inability.

I believe President Eisenhower has performed a great public service in revealing the existence of his understanding with Vice President Nixon on this important subject. Our people are greatly concerned over this problem of Presidential disability, and the President's statement will reassure them that no lapse will occur in the exercise of Presidential power and that all emergencies will be met. It will end some of the uneasy feeling here and abroad which a necessary discussion of this important problem has created and serves as a stopgap until a permanent solution can be achieved.

With respect to secrecy, I did not read the President's comment as denying the public the details. I feel sure that at the proper time and place he will reveal the understanding in full.

Not only our people, but all the people of the free world have a vital stake in the Presidency, as it is the most important office in the world. I am certain they will not be left in uncertainty by the President.

The President should be commended for his foresight and candor. What the President has done is in the public interest and along the lines of the objectives of the plan under consideration by this sub-committee.

II. HOW THE CHANGE SHOULD BE ACCOMPLISHED

Having recognized the historical background, the present importance of the problem, and statutory law to provide a solution, I now examine the means by which a solution may be provided. Heretofore there have been two views: (1) That a change should be accomplished simply by passage of a law by Congress under the existing constitutional framework, and (2) that a change should be accomplished by constitutional amendment, possibly implemented by congressional statute.

Many who expound the latter view believe that passage of a statute alone would be violative of the existing Constitution, since nowhere is Congress specifically given the power to act in this matter. Furthermore, they contend that congressional action to remove the Chief Executive would be contrary to the historical separation of powers between the legislative and executive branches of the Government as tacitly provided for in the Constitution.

Those who support the view that congressional action alone is sufficient generally find authority for such action in the "necessary and proper" clause of the Constitution which provides as follows:

The Congress shall have power * * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof (United States Constitution, art. I, sec. 8, clause 18).

Relying upon the latter part of this clause, they find authority for the Congress to enact a law which is necessary and proper for carrying into execution the powers vested in the executive department in the event of the disability of the Chief Executive Officer.

Both views can claim support from segments of the public, legal scholars and Members of the Congress who are among our most able authorities on constitutional law. I am informed that both views have found support among the eminent authorities who have already testified as witnesses in this hearing.

I am convinced of only one thing, and that is that there is no clear answer to the constitutional power problem. I do not think that the Supreme Court has decided the issue, in cases such as *United States v. Harris* (106 U. S. 629 (1883)) and *Kansas v. Colorado* (206 U. S. 46 (1907)), which are sometimes cited. Both of these state the general proposition that Congress can legislate only on subjects where power to legislate has been given by the Constitution. The *Harris* case decided that the Constitution gave Congress no power to make it a criminal offense for private persons to conspire to deprive someone of equal protection. The *Kansas* case decided that the Constitution gave Congress no power to reclaim arid lands not the property of the United States. Neither case decided whether the Constitution gives Congress the power to provide for a procedure for determining Presidential disability and the power to transfer Presidential power to a new executive in the event of such disability.

Moreover, even if a decision on this point could be read into the language of the cases, it would still not provide absolute certainty. The Supreme Court has been known to change its mind, particularly where its previous decisions are not precisely on the point involved. The constitutional validity of a statute on Presidential disability can be tested only upon occurrence of such a disability—a time which I submit would be too late.

The gravity of the disability problem and the uncertainty over the question of the constitutional validity of a congressional statute on Presidential disability absent a constitutional amendment is persuasive to me of the necessity of acting by constitutional amendment. The certainty of a constitutional amendment, I believe, fully warrants the lengthy process involved.

I recognize that amending our Constitution is a very serious matter. The fact that so few amendments have been adopted demonstrates the people of our country so believe. The office of President of the United States is the most important office in the free world. People all over the world are watching every action and suggestion here. We must approach this problem with these considerations in mind. The seriousness and importance of the matter lends weight to the view that action should be by constitutional amendment. When one adds the substantial constitutional doubt created by the controversy over the proposed statutory plan increased substance is given to the constitutional amendment plan.

Again, I stress that this matter of constitutional amendment is one of necessity, to remove all possible doubts, rather than that those who sincerely believe that a statute alone would be sufficient are wrong beyond all doubt. The issue is not so clearly one-sided either way. But the only way to avoid adding uncertainty upon uncertainty is to act through constitutional amendment, with the amendment so crystal clear that all who run can read and understand.

Now, having stated my preference for a change by constitutional amendment, let me sketch broadly the scope of that amendment. First, I would make it more than a mere authorization to Congress to act. This abbreviated type of amendment leaves the way open for partisan legislative interference with the Executive—a violation of the spirit behind the constitutional separation of powers.

But our Constitution, including its amendments, is written in general language, and I would be loath to see a great deal of extraneous detail included in this amendment. While Congress should not be given a blank check to legislate on Presidential disability, it should be empowered to implement the amendment by legislation which spells out the details of procedure following the broad outlines laid out in the amendment.

III. WHAT THE CHANGE SHOULD BE

I shall now state my own views as to the procedural outlines which should be contained in the amendment, breaking them roughly into the procedure for initiation of proceedings, procedure for determination of disability, and procedure for reinstating the President after the disability has ceased to exist.

Initiation of proceedings for determination of the President's inability: Many learned and workably acceptable proposals have been made concerning how the proceedings to determine a President's inability should be initiated.

If the President deems himself incompetent, as a practical matter, he is the one to initiate the proceedings for his removal which may either be permanent under our existing Constitution or temporary under various proposals now before this committee. This provision need not be included in the amendment proper. It is good commonsense.

As to voluntary removal in situations where the President is himself incapable of making a declaration of inability or he refuses to declare his inability, the various proposals as to who should initiate a series of events that would ultimately result in an Acting President are many and mention virtually all of our highest Government officials. They include proposals that Congress by concurrent resolution be permitted to initiate the proceedings. Another would authorize the Vice President and other persons authorized by Congress. Various advisory councils have been proposed. The Cabinet alone and the Cabinet and Vice President were suggested. Some have proposed that Congress, the Cabinet, and the Vice President should all have this power. Several proposals obviate the necessity of requiring a formal initiation of these grave proceedings by any one individual or group if Presidential inability is self-evident and generally known.

I personally feel that the Vice President would be the logical person to initiate such proceedings. The views of the Cabinet, the Congress, and the others would, of course, be taken under advisement by any American elevated to the increasingly important office of Vice President, but the decision should be his as to whether the proceedings should be started.

Procedure for determining that the inability exists: I have suggested that the Vice President initiate proceedings to determine in-

ability. That leaves open the question of who should decide the question once it has been raised by the Vice President. Determining that an inability exists involves two processes, an inquirer and a method. The latter, or the "how" of determining inability, is so distinct a process that it will be given separate consideration. This, it is hoped, will withdraw the process of how one should determine inability from the variety of opinions centering around which of our officials should determine inability.

Unquestionably, who should determine Presidential inability is one of the most controversial, hotly debated issues of constitutional law of our generation. The officials and agencies proposed to determine inability are as many and all-inclusive as those proposed in the prior section dealing with initiation of the procedure. The proposals may be summarized as follows:

1. Let the President decide. Letting the President decide his own inability, without more, imposes a responsibility with too many uncertainties and is in reality our current situation. No man can really judge himself. There may be instances when a President would think he is capable of performing his duties when everyone else would conclude the opposite. There may also be Presidents who with an abundance of patriotism and love for their country would seek to step aside to avoid criticism when undue pressure is placed upon them with respect to their health.

2. Let the Vice President decide. This plan would cast a tremendous responsibility upon a Vice President. He would decide whether to make himself Acting President. Such a responsibility understandably created hesitation in a Vice President to act, when he should act, for fear of being criticized unjustly as a usurper or for acting disloyally or improperly, and at the same time would allow an ambitious Vice President to seize power under circumstances when he should not do so. This plan could envelop an Acting President and the office of President in such controversy and debate as to diminish the Acting President's effectiveness and possibly make the whole Nation and the free world suffer irreparable harm.

The proposal that would permit the Vice President to succeed if he and the Cabinet were satisfied that the President was disabled in effect requires the consent of the Vice President for such a Cabinet determination.

3. Commission representing executive, legislative, and judicial branches. The objections to this plan are that the judiciary would through participation be disqualified from deciding legal questions that might subsequently arise and that the legislative branch would be allowed to harass a President they were in disagreement with. Legal considerations involved in building another bridge across the historical gap between our Constitution's separation of powers are also involved. It is, of course, imperative that all branches of Government cooperate in such times of contemplated crises as we are considering today. Creating a commission composed of the officials of the legislative branch as proposed could also lead to unfair accusations of partisanship.

4. The Supreme Court. Various proposals have placed the duty to make this determination upon the Supreme Court, emphasizing that here is an agency of our Nation that would least be apt to be

partisan. Apart from constitutional questions involved in the Supreme Court's deciding such a political question, it is also certain that disqualification of the members of our highest judicial tribunal would work a distinct disadvantage to our Nation if a subsequent judicial decision were called for.

5. The Cabinet. The use of the Cabinet to make the decision on inability has many things to recommend it. These are: (1) It involves the creation of no additional machinery; (2) it offers a very simple mechanism; (3) it prevents a special inability commission from encountering embarrassing moments by creating a crisis in the Nation by being called together unnecessarily and of constantly watching over the health of the President; (4) the Cabinet is in the best informed position to give a prompt judgment; (5) our people in effect vote to entrust a political party with executive power for 4 years, and the Cabinet plan places responsibility upon this entrusted executive machinery and avoids any change or decisions on disability dictated by political bias; and (6) in keeping with our separation-of-powers doctrine, the Cabinet idea gives maximum protection to the independent status of the executive branch.

The argument on the other side about the Garfield and Wilson Cabinets and their indecision is not entirely valid because the Cabinet then had neither statutory nor constitutional authority to take action. Any action by them would have been regarded as a usurpation of power. In the cases of the Garfield and Wilson Cabinets there was also no way in which those Cabinets believed they could have the Vice President take over as Acting President temporarily and then reinstate President Garfield or President Wilson if their inability was later removed. The proposed statutory and constitutional amendments eliminate that possibility by providing for the office of Acting President. But the most important consideration is that the Cabinet knows more about our security picture than any other group of people and if the President is ill, they would not risk the security of our Nation through his inability to act. In this shrinking and perilous world that reasoning appeals to me very much.

How should inability be determined? Historically, the real problem of Presidential inability has not stemmed from a question of determining the existence of any Presidential inability. This is the error of those people who focus on some sort of a commission plan with a staff of medical experts to make the determination. The inability usually has been clear and undisputed. Nevertheless, various proposals have suggested a requirement that a finding of disability be arrived at only after medical evidence has been presented and considered. But it is also true that any rational decision would have to be based on a certain amount of such evidence, so that it would manifestly appear unnecessary to require medical testimony and public hearings in a constitutional amendment. To require such a procedure might well be burdensome and subject the existing head of our Nation to unfortunate publicity that can easily be avoided. We must do nothing that leads to diminution in the stature of the Presidency.

Then, too, in certain instances it might be impossible to provide for medical inspection and evidence as in circumstances when the President is captured by the enemy or is otherwise inaccessible. Requiring a hearing would tend to further prolong the early return of our Presi-

dent in the public confidence, lessen morale and provide unnecessary delay at a moment when the Nation would vitally need its leader. I say unnecessary delay since the President's own Cabinet selectees would presumably act upon some form of competent information. They would obviously act only if the inability was clear.

Who should determine that the President's inability has terminated? One proposal would permit the President to resume his duties upon a simple declaration of his ability to do so. The chief objection to such a procedure is that it might enable a man to resume the office of President while still factually incapable.

It has been further suggested that in case of dispute the Congress could be empowered to determine the termination of the President's inability in a hearing similar to impeachment proceedings but denominated by some other name. The constitutional objection that the legislative branch would be determining Presidential succession would not apply since a mere resumption of duties would be the only issue before Congress.

CONCLUSION

I would summarize as follows:

First, a constitutional amendment is the only way to end the uncertainty resulting from the controversy over the constitutional power of Congress to resolve the Presidential inability problem by statute.

Second, the initial determination of Presidential inability should remain in the executive branch.

Third, the President should have the power to return to his office on his own volition when his capacity is restored.

Fourth, the ultimate power of review in case of dispute over restoration of the President to his office should rest in the whole Congress.

You have before you a problem which is not new but which is more pressing for solution today than at any other time because of the disasters that could befall our country and the free world from any lapse in the exercise of the office of President of the United States. Congress has a grave responsibility to perform here. I have every confidence in your judgment and again congratulate you on the thorough manner in which you have gone about your consideration of the important issues which are before you.

I stress again that I have great admiration and respect for those entertaining views different from those that I have expressed here. I recognize that you have many different proposals before you which have merit. I have not in this statement attempted to cover all of the many ramifications of the many questions involved in this matter of Presidential inability, but only to discuss what appears to me to be the controlling issues. The ultimate decisions which this subcommittee must make will be extremely difficult.

I conclude by assuring you of my lasting interest in this whole matter and of my willingness to be of assistance in any way I can either personally or by persuading other members of the American Bar Association to assist you in any way that you may desire.

Again I want to thank you for your invitation to appear here and for the courtesy with which you have heard me.

SENATOR KEPFLAUVER. Well, Mr. Rhyne, we are certainly grateful to you for giving us a statement that is well considered, both from the legal viewpoint and from the viewpoint of practicality. And it is

quite obvious that you have given this problem much consideration, and I know that the Members of the Congress, this subcommittee, and the public generally will appreciate the importance of you and the American Bar Association assisting in presenting this very important matter to the public in an intelligent way. We are grateful to you.

Now, may I ask you 2 or 3 questions?

In your statement you would recommend that the Cabinet—and I suppose you are referring to the heads of the administrative agencies, because they may be different.

Mr. RHYNE. Senator, I recognize the distinction there. And while I used the term "Cabinet" I believe in a constitutional sense that many of the constitutional experts use the term "heads of executive departments." And every place that I used "Cabinet" I intended it to be the heads of the executive departments.

Senator KEEAUVER. Well, we will use the Cabinet for convenience. You recommend that the Cabinet be the agency charged with termination of certain questions here having to do with inability and removal of inability, and you state strong reasons why this is true, which we all recognize—that they are close to the President, and know the situation of the country.

But arguments are made by some that they do not like the idea of nonelected people having the right to make such an important decision. Argument is made by some of our colleagues that they feel that some group of people who have been elected should have this responsibility.

Do you see anything inconsistent or wrong in giving this responsibility to people who have selected by the President, with the advice of the Senate?

Mr. RHYNE. Senator, I do not. I feel there is a matter of separation of powers which is involved here, and certainly this is an executive matter. And if you are going to take it away from the executive and give it to any other group, like the Congress, for example, on this initial determination of disability, whether true or not, you would inject charges of unfair partisan bias. And of course the Vice President, under the provisions that I have seen, would also participate with the Cabinet in making this decision. And the Vice President is an elected officer. I think the provision that I like best provides with the consent of the Vice President the decision will be made by the Cabinet. And of course he is the man who is most vitally affected by this whole thing. So I think there is a safeguard insofar as elected officials are concerned.

Senator KEEAUVER. Well, Mr. Rhyne, I want to say on my own that I first approached the proposition, this proposition, with a feeling that there should be some participation in the decision by the leaders of Congress, along with the Cabinet. That is included in the resolution I have filed. I have been impressed more and more by the arguments that you and others have made that the Cabinet approach is a sound approach, and I think you have forcibly stated it here in your statement.

Now, the other question is, you set forth on page 15 that in case of a dispute over the restoration of the President to his office, that the settlement of that dispute should rest in the whole Congress?

Mr. RHYNE. Yes, I have, Senator, and my feeling about that is this. I first of all start out with the conclusion that the President

himself should at any time on his own volition be able to reassume his office. And if there is a dispute on his ability to do so at that time, it seems to me that we must have some mechanism, other than his own Cabinet at that time, to decide that dispute, because the Cabinet and the Vice President would have participated in the decision to, in effect, displace the President temporarily. So it was my feeling that since the Congress is the traditional body that has passed upon such matters as impeachment, which is a matter, it seems to me, more related to the issue that would arise at that time, that there would be no infringement of the powers doctrine if the Congress as a whole would pass upon the issue of whether or not the President does have the capacity to reassume his office.

Senator KEFAUVER. I think that is a logical conclusion.

But now one question remains which you do not deal with, and that is, during the pendency of the dispute, who shall exercise the power of the President. That is, assuming that the President has declared his inability, or assuming that the Cabinet has determined the inability, and the Vice President takes over, and then the President wishes to resume his office, feeling that his disability has terminated, but there is a dispute as to whether he is capable of doing so or not—do you feel that the President should be restored to his duties and carry them out while the issue is being decided by the Congress?

Mr. RHYNE. Well, I would feel something like this: That the President should give a proper notice of his desire to reassume.

Senator KEFAUVER. You mean have some short waiting period?

Mr. RHYNE. Yes—of a certain number of days, say 10 days—if the President would decide he wanted to reassume his office, and he was capable of doing it, and if he gave that public notice, and the Vice President and the Cabinet did not agree that he had the capacity to reassume, I would say that the Congress would have to act within the length of time, or if it did not, the President should be allowed to resume his office.

The office of the President is, as I have said before, the greatest office in the whole world, and I don't think we ought to do anything that will diminish it. And I think that would be a protection against a long, drawn-out discussion or hearing in the Congress. I think the Congress could now, before any questions arise, draw up proper rules of procedure for passing upon the issue so that within a period of 10 days if there were any question it could pass on it, and would pass on it because of its overwhelming importance.

Now, I am quite certain, Senator, that some mechanics could be worked out so as to prevent any questions arising with respect to passing on that issue by the Congress. I don't attempt to state any definite, concrete plan. But within that broad framework.

Senator KEFAUVER. But you would not write that into the constitutional amendment?

Mr. RHYNE. No. I would put in a constitutional amendment, Senator, the provision that upon giving notice, the President could, within a certain number of days, resume his office. I think it is extremely important that we protect the stature of the office of the President. And then I would provide that the Cabinet, if any question is raised with the Vice President and Cabinet, could call the Congress into session if it was not in session, and have the Congress pass on it. If the

Congress did not pass upon it within that length of time, the President would absolutely have a right to his office.

Senator KEFAUVER. Senator Dirksen.

Senator DIRKSEN. I have only one question.

Actually, if a dispute arises, as indicated in your fourth conclusion, that is a dispute within the executive branch itself. It can be between the President, of course, and the Vice President, and the members of the Cabinet.

Now, there would be only one way to resolve that dispute, as I see it, and that is to find some arbiter on the outside of the executive branch. And that is the basis for bringing Congress into it, probably by means of a concurrent resolution or something.

Mr. RHYNE. Yes, that is right.

Senator DIRKSEN. So actually, I quite agree. I don't believe it does violence at all to the whole concept of the separation of powers, because if within that branch, itself, you have a dispute, how shall it be resolved? You would either have to go to some other instrumentality within the executive branch. But if they pair up on one side or the other, you are not any better off than you were before, and you have a continuing dispute. So you have got to get an arbiter on the outside.

Mr. RHYNE. Yes, I certainly agree with you, Senator, and I think that Congress is the proper arbiter.

Senator DIRKSEN. I think that is all.

I want to say that I think your capsule summation here under the four heads pretty well sets up the whole case, Mr. Rhyne.

Mr. RHYNE. Thank you. Coming from a great constitutional lawyer like you, Senator, I thank you very much.

Senator KEFAUVER. Any other questions, Senator Dirksen?

Senator DIRKSEN. No, thank you.

Senator KEFAUVER. Senator Wiley?

Senator WILEY. Well, I shall, of course, take time to read this. I am sorry I could not be here this morning, but there were just too many requirements on my time.

I got, from the interrogation of Senator Dirksen, that you felt that it was necessary for a constitutional amendment to provide that if the legislative branch were going to have anything to do about it, it had to be written into the Constitution.

Mr. RHYNE. Yes, Senator, I feel that is absolutely necessary because of the separation powers doctrine that is inherent in our Constitution.

Senator WILEY. I think there is a general concensus on that conclusion.

Now the whole question, then, goes to the matter of disability. We had the Attorney General up here, and he gave a pretty good statement. I guess you agree with it. His conclusion was that in the first analysis, the matter of disability would devolve possibly for a determination upon the Vice President. Do you agree to that—as it stands now?

Mr. RHYNE. As it stands now, yes, sir.

Senator WILEY. That is what I am talking about.

Mr. RHYNE. Although I admit there is some dispute about it, that would be my interpretation—that now the Vice President does because he is the one who—

Senator Wiley. He is the successor.

Mr. RUYNE. He is the successor, and he would have that duty.

Senator Wiley. Now, the matter of disability itself creates a ground for a great deal of argument. A man might be physically disabled and not mentally--you agree to that?

Mr. RUYNE. Oh, yes, certainly.

Senator Wiley. He might be incapacitated so he could not even sign his name, and yet be fully equipped to make determinations or decisions.

Mr. RUYNE. I am not a medical doctor, but I would assume that that situation could exist.

Senator Wiley. Well, you are a doctor of laws, not a medical doctor.

We had that instance in the case of President Wilson, you remember. And there was considerable dispute there back and forth between the Cabinet and others. Some of them wanted to take over the show, and Wilson said "No."

But now there is only one final question, and that is, the general overall advisability and need for placing at this time before the American people an amendment such as you have outlined.

Now, let's have your reaction to that.

Mr. RUYNE. Well, Senator, my feeling about it is simply this. The Office of the President of the United States is the most important office in the whole world. Because of President Eisenhower's illnesses, this question has received attention, not only here in our country, but throughout the whole world. I have traveled some 90,000 miles in the last 6 months, and I have traveled in Europe and South America. And they are just as much concerned--and I am speaking of the leaders of the bar and some of the leaders of government that I have met--about this problem.

I feel there is a certain amount of uneasiness among our people about it, because they have the very justified impression that the existing situation rather clouds the whole problem. And I feel that the people are looking to the Congress to act on this.

Everyone feels now, because it has been pointed up in the press and stressed repeatedly, that Moscow is only about 30 seconds from Washington, that there may come a time on a moment's notice when the Commander in Chief of our Army, the President, must be prepared to throw everything we have into some emergency. And no one wants to feel that there could be any possible lapse or gap in the Office of the President of the United States.

So on your question about need, I feel that there is a need for the Congress to provide an answer to this, and to provide it now.

Senator Wiley. Well, of course, we have had a good many instances in English history where kings have become incapacitated, and so forth, and it has been taken over by some successor when kings have been insane.

But I agree fully that in this space age, where the world has been contracted by man's ingenuity, that we have got to have new instrumentalities.

What I was really getting at was whether or not this creates a situation for more chaos. For instance, you have got the Vice President in the first place. Then, as I understand it, there is some provision for Cabinet action; is that right?

Mr. RHYNE. Yes; Cabinet action in conjunction with the Vice President.

Senator WILEY. And then, if that is not determinative, for congressional action?

Mr. RHYNE. Well, my suggestion, Senator, was that the Cabinet, with the consent of the Vice President, act in the initial determination of Presidential inability, and then if the President announces that he is ready to resume his office, and there is any question as to his capacity to do so, that that question be resolved by the Congress.

Senator WILEY. Well, we have had instances in history of people clutching for power. One might seek to maintain power and the other to take power. You have had kings dethroned, and you have had a Cromwell, and others that have marched in. And the human equation is always a thing that has got to be considered. And as I heard the Attorney General the other day, I was just thinking out loud—and I am just thinking out loud now—whether we were creating a mechanism that is more difficult to handle than the present Constitution as it is. That is really the basic question.

It seems to me that here you have, according to the public papers, an understanding between the President and the Vice President, and what the exact terms are we don't know, but apparently there is complete agreement in case of any incapacity. If he should become so incapacitated, that he himself felt that he could not handle the job, and so stated in writing, do you agree that under the constitutional provisions at present that the Vice President would have the authority to take over?

Mr. RHYNE. Oh, yes; I think that the Vice President could. But I don't believe, Senator, that the announcement of the President—I think it was a very laudable and praiseworthy announcement, and he is to be commended for it—intended to suggest that as a permanent solution to this very difficult problem. And I feel that an answer must be given, and that the real answer is for a constitutional amendment containing the provisions that I have outlined to be enacted.

Senator WILEY. Well, you know that more cooks spoil the pie is an old saying. You have got the Constitution outlining the situation as it is. I am not suggesting anything in my opinion. I am just thinking out loud in terms of complicating the constitutional machinery. And I am thinking in terms also of—you talked about the atomic age, when it is probably some 16 minutes away from Moscow we are, and probably less. How in the devil would you ever get a Congress together if you got into a war? You know you couldn't do that. We have got to get adequate machinery—if we are awake now, we have got to get adequate machinery to make it so that we could have probably the Congress in session without assembling in Washington, or even assembling in one place. All that has got to be thought out. And if you are going to make this condition of action, of a congressional action, the question in my mind is whether you have got the remedy.

Mr. RHYNE. Well, Senator, I am not suggesting on the initial determination that Congress have anything to do with it. I am suggesting that the Cabinet with the consent of the Vice President do it. And that can be done in a few minutes.

With respect to the President reassuming, I am suggesting that if the President notifies in writing the Vice President and I assume the Speaker of the House that he is ready to resume his office, that he do so in 10 days, or whatever days would seem to be reasonable. And if, in the meantime, there is any question about his ability to do so, that the Congress pass on it. And if the Congress cannot meet to pass on it, that the President resume his office in that 10 days. He gets his office back in 10 days absolutely, unless the Congress meets in the meantime and passes upon the issue or thereafter passes upon the issue. So there would be no gap.

Senator WILEY. Well, then, according to your suggestion, the congressional action would only take place after the Vice President has taken over and there is a question then of whether the President has regained his health.

Mr. RHYNE. That is right. And I would hope that no such dispute would ever arise. I mean it is an "if" question, Senator, and I would think it is almost inconceivable that any President who didn't have his full capacities would ever raise such an issue, or that any Vice President would ever try to maintain his power if the President was capable.

Senator WILEY. Oh, I couldn't agree with that statement. The human mind is an unpredictable contraption and history demonstrates that men have gotten notions about their own superiority, and their ego has unbalanced them. And that is why I am thinking in terms of the machinery.

Senator KEFAUVER. Are there any other questions of Mr. Rhyne? Mr. Smithey, you have some?

Mr. SMITHEY. Yes; I would like to ask a few questions, if you don't mind, sir.

Mr. RHYNE. I noticed that, in your suggestions of a moment ago, you said that the President ought to be permitted to resume his office upon his own initiative.

Mr. RHYNE. Well, I said after a certain period of notice.

Mr. SMITHEY. All right. After a certain period of time. That if there was a dispute, the Cabinet or the heads of the executive departments could then, with the Vice President, disagree and send the issue to the Congress by that action, is that correct?

Mr. RHYNE. Yes.

Mr. SMITHEY. I presume that you would want to have some mechanism to insure that the decision would be by the Cabinet then in office, the members of the Cabinet then in office?

Mr. RHYNE. Yes.

Mr. SMITHEY. You would want to preserve the persons then acting?

Mr. RHYNE. Yes; I think so.

Mr. SMITHEY. Now, in addition to that consideration, would you limit the membership in that deciding body to the persons who have actually been nominated and confirmed for that office, rather than the acting heads of the departments?

Mr. RHYNE. Well, I would think that I would limit it to those who have been nominated and confirmed by the Senate, because I think that is important.

Mr. SMITHEY. All right. Now, with respect to the statutory approach, I don't recall that you covered this in your statement.

If the statutory approach is used, do you feel that there is authority in the Constitution for the President to recover his powers and duties once he has been replaced by the Vice President?

Mr. RHYNE. Well, that is one of the great uncertainties, certainly based on the experience with the Garfield and Wilson incidents. And I would say that because of those uncertainties, there may not be—and that is the reason why I think the constitutional amendment should be used to eliminate all doubt. It is a close question. I think there are probably views both ways. But the only way to relieve the uncertainty is through the constitutional amendment rule.

Mr. SMITHY. Now, you made allusion, in your statement, to the fact that it has been suggested to the subcommittee that in the case of a dispute as to the President's ability to resume his powers and duties, that resort be had to some proceedings similar to impeachment.

I take it from your failure in your conclusions to endorse that specific suggestion, that you would suggest something else besides impeachment proceedings?

Mr. RHYNE. Oh, yes. I think, as I thought I intended to say, that it should be a procedure that Congress could set up under this constitutional amendment that would allow it to pass on this very simple issue. And so it would not be necessary to go through the machinery of impeachment.

Mr. SMITHY. As an aid in understanding your suggestion in that regard, would you require, in the event the issue was to be determined by the Congress, that a vote adverse to the President's recovery of his powers and duties require two-thirds of the Members of the Congress—more than a simple majority, in other words?

Mr. RHYNE. Yes; I think so.

Mr. SMITHY. Now, if—

Mr. RHYNE. That would remove all possible political bias charges.

Mr. SMITHY. Now, suppose for the moment that a President sought to return to his office at a time when he had not recovered, and the Congress made that determination. Would you thereafter allow him to go through the same proceedings again?

Mr. RHYNE. I haven't considered that problem, Mr. Smithy, but I would not foreclose him, I don't think. The Office of the President, as I say, is such a great Office, that I think there ought to be some limitation on it—he should not be allowed to force the Congress to go through this repeatedly. But after one adverse vote, it might be the issue is so close as to his inability that at some later time there would be no question as to his capacity.

Mr. SMITHY. Mr. Chairman, I have no further questions.

Senator KEFAUVER. Mr. Rhyne, I was interested in your additional statement, commanding the President and the Vice President on discussing this matter and reaching some understanding. And then your further statement that you were sure that at the proper time and place that a full revelation of any understanding would be made.

Mr. RHYNE. Well, I have no basis on which to base that except this, Senator—that it seems to me that in connection with the President's various illnesses, they have made the most complete and full disclosure in all history of all facts, and so I would assume they would follow that basic principle.

Senator KEFAUVER. Well, you think it is a matter of public importance that any arrangement or agreement should in due course be made public?

Mr. RHYNE. I feel so, Senator, because as I say, this office is so all-important, and everyone is interested in it, and everyone has so much at stake in the Office of the Presidency, that I would sincerely feel that at the proper time and place, the understanding should be fully revealed.

Senator KEFAUVER. Well, I agree with you. And as a Senator and chairman of this subcommittee, I want to make four points in connection with this matter which is being discussed at the present time:

First, I am glad that the President and the Vice President have considered the matter together. And I have no desire to know of their personal discussions of it. I think that is a matter that they have a right to keep in confidence.

But, second, as to any arrangement or agreement that may have resulted from that personal discussion, I can see no reason in the world why the Congress and the people of the United States should not be told what it is. After all, it is our life as a country, and perhaps our lives as individuals which would be involved should there be another sudden attack on the President's health at a critical time in our existence.

Third, that no stopgap arrangement, however meritorious the motive might be in making it, should be allowed to deter the Congress in trying to deal with the fundamental problem which this situation creates. Furthermore, we are legislating here for all time to come, and not just for this particular situation now presented.

Fourth, it seems to me that the fact that the President and the Vice President feel that this matter is so important as to make an agreement shows the added urgency of and necessity of Congress itself submitting a resolution to the people for an amendment, so that there can be no question as to the legality of any actions that may be taken.

Do you agree generally with that?

Mr. RHYNE. I certainly do, Senator. I think that is a very good statement.

Senator KEFAUVER. At this point, we will have some communications that we want to place in the record.

A statement from Arthur E. Sutherland, professor of law at Harvard University, in response to a letter of ours. He attached an article that he has written, which will also be made a part of the record.

(The material referred to is as follows:)

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., January 24, 1958.

Senator ESTES KEFAUVER,

*Chairman, Standing Subcommittee on Constitutional Amendments,
Committee on the Judiciary,
United States Senate, Washington, D. C.*

DEAR SENATOR KEFAUVER: Thank you very much for your courteous letter of January 10 to which I have been giving a good deal of thought. Last month I wrote a little article for the New York Herald Tribune which set forth my ideas about Presidential Inability. I was interested in your Senate Joint Resolution 133, for a constitutional amendment, introduced January 9, 1958, which indicates that your views are very much like mine. I enclose a copy of the Tribune article. I suppose one of the most controversial aspects of these proposals and similar ones is participation by the Supreme Court, or by the Chief Justice. Today's New

York Times indicates that the Justices are opposed to any participation, and this attitude is in accord with the traditional and proper aloofness of the Court from everything suggestive of politics. On the other hand, the great gravity of the decision to be made concerning Presidential inability, and the necessity that the American people be assured that the decision is made impartially, solely upon the evidence, tends to suggest a judicial element in the Commission which passes on disability. With full realization of the advantages and disadvantages involved, I am inclined to feel that the choice of the Chief Justice as the presiding officer would be advantageous to the country. But I am impressed by the reported contrary view of those directly concerned.

With my best wishes, I am

Sincerely yours,

ARTHUR E. SUTHERLAND.

[From the New York Herald Tribune, December 11, 1957]

A NOTED JURIST'S PREDICAMENT ON PRESIDENTIAL DISABILITY

(By Arthur E. Sutherland)

Mr. Sutherland, a former secretary to Justices Holmes and professor of law at Harvard since 1930, is one of the Nation's outstanding authorities on constitutional law. In this article especially written for the Herald Tribune he discusses the question of Presidential disability.

President Eisenhower, according to press reports, is reviewing his insistence that the Congress take some action to clarify the ancient problem of Presidential disability. This is more a problem of procedure than of substance.

"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 is removed, or a President shall be elected." (Constitution, art. II, sec. 1, clause 6.)

Any one who has worked at drafting laws soon senses the difficulty of the task; it is not surprising that the great men who drafted the Constitution should have left 1 or 2 ambiguities. Under this clause it has been suggested that, if the Vice President takes over even for a single day, he becomes President for the remainder of the term. Such a result scarcely seems sensible, however, and probably most Americans would say that the President whom they have elected should be relieved of duty only during his inability to discharge the functions of his office.

Since 1787, however, there has been a persistent question as to how disability will be determined. On August 27, 1787, when the disability clause was before the Constitutional Convention, John Dickinson of Delaware remarked that it was too vague. "What is the extent of the term 'disability' and who is to be the judge of it?" he asked. Dickinson's question has never been answered; it caused particular concern during the months that preceded President Garfield's death, and during President Wilson's long illness.

President Garfield was shot by an assassin on July 2, 1881; until his death on the following September 19 he performed only one official act—he signed a paper having to do with extradition. The Presidential duties of that simpler time were much less exacting than they have since become, and the United States was worried but not gravely prejudiced by the state of the President. A much more serious situation arose when Woodrow Wilson suffered a paralytic stroke on September 26, 1919. He was incapacitated at the White House for at least 6 weeks, and attended no Cabinet meeting until April 18, 1920. Secretary of State Lansing called a number of Cabinet meetings during the autumn and winter, and the President's resentment at Lansing's initiative is thought to have brought about Mr. Lansing's resignation in February 1920.

Not one of President Eisenhower's illnesses has presented such a serious situation. Nevertheless, as both the President and prominent Members of the Congress have recognized, the time has come to provide some procedure to determine when a President is so disabled that the duties of his office devolve upon the Vice President. The importance of establishing some such procedure and the variety of solutions possible, appeared in the hearings held in April 1956 before the House Judiciary Committee's Special Subcommittee To Study Presidential Disability.

The point was there made that while, fortunately, in the long history of the Presidency there has been no instance of a mentally ill Chief Executive, this is a possibility, and such a situation would present serious embarrassments to the whole Nation. One can easily imagine some future President, thus afflicted, still confident of his own continuing judgment and bitterly resentful of any suggestion that his intellectual powers had failed. As in President Wilson's illness, some of his associates in the administration, out of loyalty to the President and a belief in his continued abilities, might continue to uphold his competence, while others equally conscientious might feel that the situation called for the Vice President to take over. There is no existing machinery to resolve such an impasse. The time to provide it is now, when the problem has not yet arisen. If need ever arises, there will be no time to provide for it, and no reasonable means.

At the outset a question arises as to whether a constitutional amendment is necessary, or whether an act of Congress will do. Here we are embarrassed by what seems an oversight of the constitutional draftsmen, and in the absence of a clear constitutional directive, constitutional amendment seems the desirable course. Lacking such a mandate, the Congress seems no more authorized to unseat the President, whether for temporary or permanent disability, than the President is authorized to unseat a Senator or a Congressman. The Constitution provides only one procedure for removing a President from office—"Impeachment for and conviction of, treason, bribery, or other high crimes and misdemeanors" (art. II, sec. 4). The careful constitutional prescription for this procedure, with its connotations of criminality, makes more conspicuous the absence of any similar provision for disabling illness. A constitutional amendment accordingly seems required.

Several types have been suggested. The simplest amendment would authorize the Congress to legislate for the case of Presidential inability to perform his duties. But during a period of bitterness between Congress and President, as occurred during the Johnson administration, control of the Presidency by legislation might be unfortunate. Whatever the procedure is, it belongs in the Constitution itself.

Not only does the country need the most accurate possible judgment as to the President's condition, but that determination should be made in a way which will gain a maximum of public confidence and acceptance. To this end representatives of all three branches of the Government should participate in the decision. If the question is illness (rather than some such question as capture by an enemy force), the best possible medical opinion should of course be sought by the body deciding on inability. The Cabinet has been suggested to decide; but its proper loyalty to a chief in his day of misfortune might defer decision too long. Congress has the advantage of representing the national electorate, but the case of President Johnson suggests that Congress had best not bear the sole responsibility. The Supreme Court of the United States is detached from politics and widely respected, but it should not be charged along with displacement of the Chief Executive. A better Disability Commission would represent all three branches. It could consist of the Secretaries of State, Treasury, Defense, and the Attorney General; the majority leaders of the two major parties in the Senate and House; and, as presiding officer, the Chief Justice, with power to cast a deciding vote in the case of a tie. The Disability Commission should assemble to determine disability on the call of any two members. The disabled President, or any two members, should be similarly empowered to call the Commission together to determine Presidential recovery.

Such a commission would have the great advantage of sparing the Vice President the burden of announcing his own succession. And if it seems that four Cabinet officers might delay a finding of inability, one good answer is that the elected President should not be unadvisedly or lightly displaced.

Senator KEPAUVER. A communication from Prof. Joseph E. Kellenbach, professor of political science at the University of Michigan, to be made a part of the record.

(The material referred to is as follows:)

UNIVERSITY OF MICHIGAN,
DEPARTMENT OF POLITICAL SCIENCE,
Ann Arbor, January 20, 1958.

Hon. ESTES KEFAUVER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR KEFAUVER: In reply to your letter of January 10, I am enclosing herewith a statement of my views on the subject of Presidential inability, with particular reference to proposed bills and joint resolutions pending before the standing Subcommittee on Constitutional Amendments of the Committee on the Judiciary.

I have previously had the opportunity to express my views on this matter before the Special Committee To Study Presidential Inability of the House Committee on the Judiciary in the 84th Congress. You may find them in the House Committee Print on Presidential Inability, 84th Congress, 2d session, and in the hearings before the special committee for April 11 and 12, 1958, of that session. I have continued to give thought to the subject and to follow developments in connection with it. In general, my views on how the problem should be met have not changed fundamentally, although I recognize the merit of other proposals at variance with the approach I outlined at that time. I think that the Congress should submit constitutional amendment on the subject clarifying the question of the status of the succeeding officer in different types of situations where there is a devolution of Presidential powers and duties on a succeeding officer. The amendment should also establish beyond any doubt the authority of Congress to provide, by legislative act, a procedure to be utilized in determining when a situation has arisen calling into play the disability provision. I believe that the Congress, under the terms of article II, section 1, paragraph 3, and the necessary-and-proper clause of article I, section 8, of the Constitution, now has the authority to provide such a procedure and that it should take steps immediately to do so. I think that if it did so, the procedure outlined would be respected and utilized if a situation to which it applies should arise.

However, I recognize that there are some grounds for questioning whether Congress, at present, has the power to circumscribe by statute the freedom of judgment and action of the President and Vice President in a case of alleged Presidential disability, especially in a situation where the President is unwilling or unable to acquiesce in a finding and declaration of his own disability. A finding that the President is unable to exercise the powers and discharge the duties of his office under these circumstances would have the effect of temporarily suspending him from office without his express consent. This is a most serious step and could conceivably result in grave political controversy. Furthermore, the usage to the effect that a Vice President who has succeeded to the Presidency "becomes" the President, rather than the "Acting President," has given rise to the belief, entirely erroneous in my opinion, that any succession to the powers and duties of the Presidency by the Vice President forecloses resumption of them by the displaced President. This view of the matter has been a stumbling block for efforts by Congress in the past to implement the disability clause by legislation, and has deterred Presidents and Vice Presidents from acting under this provision on their own initiative. To resolve any doubt regarding the possibility of temporary devolution of Presidential powers and duties on a succeeding officer, I think a constitutional amendment approach to the matter should also be employed.

I have appended to my statement the substantive language of a proposed draft of a constitutional amendment which would clarify these points. Also appended is a proposed draft of a statute to implement the Presidential disability provision. You will note that the proposed amendment is similar to Senate Joint Resolution 133 in that it would leave to Congress the responsibility of prescribing by statute the details of the procedure to be used for determining a Presidential inability which the President himself does not recognize and declare.

I recognize the advantage in employing the "one-shot" approach by including in the language of a constitutional amendment an outline of the procedure to be followed in determining a Presidential inability. However, a great amount of detail must be included to deal with all possible contingencies and questions, and supplementary legislation would probably be necessary in any event. In my opinion it would be undesirable to place such matters of detail in the Constitution.

I believe that the Congress can be properly trusted to devise an acceptable statute on the subject. If it be argued that the power might be abused for partisan reasons, the same can be said of almost any other power Congress now has relative to the organization and functioning of the other two branches of the National Government. Enactment forthwith of an implementing statute would allay fears that a Congress hostile to the Executive would seize the opportunity to enact a statute on the subject converting the disability clause into an instrument for effecting removal of a President from office on a trumped-up charge of "disability," ratified by officers of Congress' own choosing. The welter of views and opinions on this subject which the current situation has called forth, I realize, has complicated the task of the Congress in choosing a proper course of action. I think it highly important that in considering the problem the Congress keep in mind that no system it can devise will be absolutely foolproof, airtight, and incapable of abuse in the hands of partisan-minded, unpatriotic, and self-seeking human beings. There has to be an assumption that a procedure prescribed for dealing with a Presidential inability crisis will be used to achieve the proper ends for which it was devised—the filling of an intolerable vacuum in the Presidential office. The force of public opinion and the good judgment and sense of public duty of the officers involved can and must be relied on in the end to insure the realization of this objective through appropriate machinery provided by law.

Thank you for the opportunity to express my views on this matter.

Very sincerely yours,

JOSEPH E. KALLENBACH.

PROPOSED CONSTITUTIONAL AMENDMENT ON PRESIDENTIAL SUCCESSION AND DISABILITY

ARTICLE —

SEC. 1. If the President dies, resigns, or is removed from office, the Vice President shall become President for the remainder of the term to which the President was elected.

SEC. 2. If the President becomes unable for any reason to discharge the powers and duties of his office, they shall devolve upon the Vice President, who shall then act as President until the disability of the President be removed, or the term of office of the President shall expire. Congress shall by law establish the procedure by which the inability of the President to discharge the powers and duties of his office shall be determined, and 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.

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

PROPOSED STATUTE IMPLEMENTING THE PRESIDENTIAL INABILITY CLAUSE

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That (a) the analysis of chapter 1 of title 3 of the United States Code (entitled "The President") is amended by inserting at the end thereof the following new item:

"**SEC. 21.** Ascertainment of the inability of the President to discharge his duties."

(b) Such chapter is amended by inserting at the end thereof the following new section:

"**SEC. 21.** Ascertainment of the inability of the President to discharge his duties:

"(a) In case the President is temporarily unable to discharge the powers and duties of the office of President, he shall so notify in writing the Vice President, the Speaker of the House of Representatives, and the President pro tempore of the Senate. Upon transmission of such communication the powers and duties of the office of President shall devolve upon the Vice President, who shall discharge them until the President notifies in writing the Vice President, the Speaker of the House of Representatives, and the President pro tempore of the Senate that he is able to reassume the powers and duties of his office, or until a new President is inaugurated, whichever occurs sooner.

"(b) If at the time a President shall declare his inability to discharge the powers and duties of his office there is no Vice President, or the Vice President shall declare his own inability to discharge the powers and duties of the Presidency, such powers and duties shall devolve, for the duration of the President's inability or until the end of the then current Presidential term as provided in subsection (a), upon the officer next in line of succession, as determined pursuant to section 19 of this chapter.

"(c) In case of the inability of the Vice President, while acting as President by reason of the inability of the President, to discharge the powers and duties of that office, such powers and duties shall devolve in like manner upon the officer next in line of succession, as determined pursuant to section 19 of this chapter: *Provided, however, That the President, or the Vice President, as the case may be, may give notice in writing of his ability to reassume the powers and duties of the office of President, and so reassume them, as provided in subsection (a).*

"(d) There is hereby created a Committee on Presidential Inability to consist of the officers named in the line of the Presidential succession by section 19 of this chapter, the leader in the Senate of the political party having the greatest number of Members of the Senate, the leader in the Senate of the political party having the second greatest number of Members of the Senate, the leader in the House of Representatives of the political party having the greatest number of Members of the House of Representatives, and the leader in the House of Representatives of the political party having the second greatest number of Members of the House of Representatives. If the Vice President has reasonable cause to believe that the President is unable to discharge the powers and duties of his office and the President has not acted under the procedure provided in subsection (a) to cause the powers and duties of the Presidency to devolve upon the Vice President, he may request the Committee on Presidential Inability to render a judgment on the question of the ability of the President to discharge the powers and duties of his office. If a two-thirds majority of the members of the committee find that the President is unable to discharge the powers and duties of his office, it shall so notify the Vice President and he shall forthwith act as President until such time as the President shall notify in writing the Vice President, the Speaker of the House of Representatives, and the President pro tempore of the Senate that his disability has ceased, or until the end of the Presidential term, whichever occurs sooner.

"(e) The Congress may, by concurrent resolution approved by a majority of the Members of each House, declare that it has reasonable cause to believe that the President, or the officer acting as President, is unable to discharge the powers and duties of the office. Upon the passage of such a concurrent resolution the Committee on Presidential Inability shall render a judgment on the question of the inability of the President, or the officer acting as President, to discharge the powers and duties of his office, as provided in subsection (d).

"For the purpose of considering such a resolution the President pro tempore of the Senate may convene the Senate and the Speaker of the House of Representatives may convene the House of Representatives.

"(f) If at any time there is no Vice President, the officer next in the line of Presidential succession, as determined pursuant to section 19 of this chapter, is hereby authorized to proceed and act in the same manner as the Vice President, as provided in subsection (d). In such case, however, the officer next in the line of Presidential succession shall not serve as a member of the Committee on Presidential Inability.

"(g) Any officer who shall, as provided in this section, assume the powers and duties of the office of President shall be entitled to receive compensation equivalent to that of the President for the duration of the period during which he shall discharge the powers and duties of the office of President. During the period he may act as President, such officer shall retain the title to the office by reason of which the duty of acting as President shall have devolved upon him; but he shall not exercise the powers and discharge the duties thereof. Any provisions of section 19 of this chapter inconsistent herewith are hereby repealed."

MEMORANDUM ON PRESIDENTIAL INABILITY

(By Joseph E. Kallenbach)

Any plan for implementing the constitutional provision concerning Presidential inability must provide answers to the questions and problems which follow:

1. How shall inability be defined?

I believe that it is unnecessary and unwise to attempt to define by statute the term "inability" as used in article II, section 1, paragraph 6 of the Constitution. The framers in adopting this term undoubtedly had in mind any contingency or condition that might render a President unable to discharge the powers and duties of his office as the public interest and necessities may require. It should not be restricted to physical inability as proposed in S. 238. The Presidency is an office that makes extraordinarily heavy demands upon the physical, mental, and spiritual capacities of the occupant. For this reason, inability should be determined in this connection by a much more rigorous test than that applied in determining mental competence or capacity of an individual to act in a personally responsible manner.

2. By whom shall the inability of the President be determined?

A statute on the subject of Presidential inability should first of all make clear the right of the President himself to declare his own temporary inability. If he regards his disability as a transient thing, as he might well do in the case of a temporarily incapacitating illness, for example, he should have the option of divesting himself of the powers and duties of his office, without on the one hand surrendering the office irrevocably by resigning or on the other hand pursuing a course of inaction and drift.

In the event there is reason to believe the inability clause should be made operative, and the President fails or is obviously unable to act to give effect to it, the statute should provide an agency for rendering an authoritative judgment on the matter, after due deliberation. My suggestion is that this body be made up of the heads of major executive departments and congressional leaders. The judgment to be rendered is one involving the evaluation of the public need and necessity for a continuing responsible discharge of the powers and duties of the office of Chief Executive in the light of conditions which seriously impair or totally prevent the incumbent President from making a judgment himself on the matter. Whether such a situation exists is a political decision of great delicacy and importance. It requires the evaluation of many political facts bearing on the question. For this reason I question the advisability of making it a matter for the courts to decide. To refer the matter to the Supreme Court for resolution, as proposed in Senate Joint Resolution 100, would have the advantage of placing the prestige of that body behind the decision, of course, and that would contribute greatly to popular acceptance of the judgment reached. However, I question the advisability of vesting this responsibility in the Supreme Court. The decision to be rendered is not one based simply on application of legal principles but on a weighing of various facts having political implications and overtones lying beyond the realm of legal logic and medical science.

I believe the officers placed in the line of the Presidential succession have a special interest in and competence to make this decision. I favor the idea of associating with them in this also the majority and minority leaders of the two Houses of Congress, as proposed in Senate Joint Resolution 134. This would insure a wider representation of congressional views, including spokesmen for both major political parties. At the same time the composition of the body would insure that a majority of them are executive officials representative of the administration and presumably loyal to the President's interests. No recommendation could be made for a temporary devolution of Presidential powers and duties except with the concurrence of some of the members, at least, of the President's Cabinet. I think this is a proper and workable arrangement, tending to insure that no decision authorizing devolution of Presidential powers and duties will be made unless there is a strong and publicly defensible case for it.

3. Who shall initiate consideration of the question of Presidential inability?

As I have indicated in the discussion of point (2) above, I believe the initiative in bringing about a devolution of Presidential powers and duties could and should, normally, be left to the President, acting solely on his own judgment. The initiation of an inquiry into his ability to act when he fails to do so, or is

obviously unable to do so, should be left in the first instance to the officer next in line of succession, normally the Vice President. He has a constitutional obligation and duty to discharge the powers and duties of the President in case of the latter's inability. Hence he should be expected to raise the question of the existence of conditions calling this aspect of the succession rules into play. Political considerations and loyalty to the President, however, may inhibit him from taking the initiative in presenting the question to the body empowered to render an official judgment. For that reason, I think the statute on the subject should also clearly recognize the authority of the Congress to initiate a consideration of the question. I believe these two alternative modes of presenting the issue of a President's inability to the body empowered to make a judgment would suffice.

4. What should be the status of the officer acting as President during a period of Presidential inability?

My belief is that the statute should clearly state that the position of the succeeding officer is that of Acting President. He should be regarded as an officer to whose office there have been temporarily annexed the powers and duties of the Presidency. He should retain the office by virtue of which he succeeds to the responsibility of exercising the powers and performing the duties of the Presidency; but he should be freed from the necessity of discharging the powers and duties of his own office. Otherwise, in the case of the first three officers in the line of succession, the Vice President, the Speaker of the House, and the President pro tempore of the Senate, there would be an illogical and conceivably unconstitutional joining of legislative and executive responsibilities in the hands of one person.

The temporarily displaced President should be regarded as retaining title to the office of President, but without the responsibilities of acting as such. The devolution of his powers and duties under these circumstances must be considered complete, embracing the totality of Presidential powers and responsibilities. Unless the President retains title to the office itself, however, there would be no basis for any action restoring to him the authority to exercise the powers and duties of his office. The conception that there can be no separation of the powers and duties of the office of President from the office itself has, up to the present, stood in the way of making the disability provision of the Constitution effective. It has been given support by the usage of treating a Vice President who succeeds to the powers and duties of the Presidency in case of the death of the incumbent as having become President. Unless this conception that the succeeding officer becomes President is clearly disallowed in legislation designed to implement the disability clause there is no point in trying to establish a procedure for dealing with the disability problem as such. Otherwise the procedure established becomes simply a special procedure for removing a President on the ground of inability. There would be no point in providing a procedure for reinstating the displaced President in an office he has ceased to hold.

5. Who shall determine the question of whether a President's inability has been terminated?

In my opinion there is only one authority who can be expected to determine this question, viz., the President himself. Regardless of whether he himself voluntarily declared his own disability, or acquiesced by his silence and inaction in a devolution of the powers and duties of his office brought about through the special procedures for determining his inability, he must be recognized as having the right to exercise the powers and duties of his office if he asserts that right, so long as he retains title to it. His power to do so should not be made subject to the approval of any body created to give sanction and political support for the temporary assumption of the President's functions by a succeeding officer. If there has been a devolution of Presidential powers and duties by default, so to speak, accompanied by a finding to that effect by a responsible special organ of the Government representing both political branches of the Government, it may be assumed that the President, before attempting to reassume the powers and duties of his office, will be able to demonstrate beyond all doubt that the reasons which led to the judgment that he was incapacitated no longer are valid. He should not be regarded as having been tentatively ousted from office.

If the President's judgment on the point of the restoration of his ability to discharge the powers and duties of his office is not to be trusted, then the whole

problem takes on a different form. It becomes one of devising a system for suspending the President from office without his consent on the alleged ground of inability. If that is what is to be provided for rather than a plan for facilitating the operation of the disability provision of the Constitution, obviously there is a great deal more being attempted through the plans proposed than I had assumed. I should think, at any rate, that if provision is to be made whereby a temporarily disabled President would be required to secure the approval of some special body or court before he could reassume the powers and duties of his office, the matter would have to be dealt with by a constitutional amendment. The statute I have suggested for dealing with the question of disability is based on the assumption that the President is still President, even when there has been a temporary devolution of his powers and duties upon a successor. That being so, I doubt that the Congress can limit, by statute, his discretion in determining his fitness to reassume the powers and functions of his office.

Senator KEFAUVER. A thoughtful letter from David Fellman, professor of political science at the University of Wisconsin, to which he attaches a more detailed statement to be made a part of the record.

(The material referred to is as follows:)

THE UNIVERSITY OF WISCONSIN,
DEPARTMENT OF POLITICAL SCIENCE,
Madison, Wis., January 15, 1958.

Senator ESTES KEFAUVER,
Chairman, Subcommittee on Constitutional Amendments,
Senate Office Building, Washington, D. C.

DEAR SENATOR KEFAUVER: I am writing to you in response to your letter of January 10, which is concerned with the question of presidential inability.

I made a fairly detailed statement of my views on this subject to the Committee on the Judiciary of the House of Representatives, on December 12, 1955, in response to a request from Congressman Celler. I am enclosing a copy of my statement, which will be found in the House committee print, 84th Congress, 2d session, presidential inability, dated January 31, 1956, at pages 21 to 26. This statement still represents my views on this subject.

In the light of the several proposed bills or resolutions now pending before your subcommittee, I should like to make a few additional observations.

I do not believe that a constitutional amendment is really necessary in order to authorize Congress to pass legislation on this subject. I think that normal canons of constitutional construction would amply support extensive legislation to implement what the Constitution now says on the subject.

Nevertheless, I see no great harm in adding an amendment, if it will remove serious doubts as to the power of Congress to act in the premises. If an amendment is added, however, it is perfectly clear to me that your S. J. Res. 133 is infinitely superior to S. J. 100 or S. J. 134, merely as a matter of form. The Constitution is simply no place for the sort of detailed legislation proposed in these latter resolutions. It is not wise, in my opinion, to load the Constitution down with procedural and substantive details as to which the Congress and the country may some time want to change their minds. It is wholly sufficient, and much wiser, I believe, merely to authorize Congress to pass appropriate legislation, spelling out clearly the area which the legislation is designed to cover. In this light I think S. J. Res. 133 is altogether adequate, just as it is.

As my enclosed statement indicates, I take the position that the determination of the fact of Presidential inability should be vested in the hands of a specially constituted body. I arrived at this conclusion by a process of elimination. In my opinion, and with all due respect, Congress is not the appropriate body to make this decision, first, because such a numerous assemblage of men and women is unfitted to decide a question involving the ability of a single person to hold the office of President, on the basis of evidence, and secondly, because there are long periods of time during which Congress is not even in session. I would rule out the Cabinet altogether, since the members of the Cabinet serve entirely at the pleasure of the President, have no wills of their own independently of his, and have a vested interest in the President's hanging on to his office under any circumstances. I would also eliminate the Vice President entirely from the process of making a finding of Presidential inability for the rather simple reason that he would be sitting in judgment of his own cause. This is contrary to the most elementary rules of justice. Since the Vice President takes over the reigns

of power when a President is found unable to discharge his duties, he should not, in my opinion, be put in the position of having anything to do with the making of the crucial decision.

By a process of elimination, we are led to the conclusion that since no available governmental institution is the appropriate agency for making a decision on the question of Presidential disability, one must be contrived. Thus, I believe that some sort of commission or committee must be set up which can make an authoritative and binding decision. The only remaining question is: Who shall participate in the decision?

This brings me to the details of S. 238. I think it is extremely unwise to delegate the power to make the critical decision to a panel of doctors. While I think any commission must act on the advice of doctors, I also believe that a politically responsible commission in whose judgment the country will have confidence must make the actual decision. Your own Senate Joint Resolution 184 does not make this mistake, since the special commission makes the concrete decision, though I would prefer to specify that the commission shall act on the advice of physicians. But I am very dubious about the wisdom of permitting members of the opposition political party to have anything to do with the decision. I should think that a decision will command greater public confidence—which, I may suggest, is probably the key to the whole problem—if the President's ability to discharge his duties is judged only by his own party people. I would exclude Democrats from participating in a decision regarding a Republican President, and vice versa, because of the ease with which the charge of "politicking" can be bandied about. The only way to avoid the injection of party politics in this connection, it seems to me, is to involve only the members of the President's own party. Surely the country will be readier to accept a decision by Republicans that a Republican President is unable to discharge his duties than one in which Democrats had a hand.

I should add that in order to buttress public confidence in the decision of the special commission, the Supreme Court Justices ought to be involved to the extent at least of the Chief Justice and perhaps the ranking Associate Justice.

I recommend once more that the committee be kept very small, that it be empowered to act by majority vote, that it be required to consult physicians, and make findings in writing. I would allow any member of the commission to take the initiative in setting the machinery to work. I would authorize the commission to make findings both as regards disability and the termination of disability.

The only other point to which I would draw special attention is the fact that in all cases to date, whenever a vacancy occurred in the presidential office, the Vice President took over as President. This was due to the fact that in every instance the President had died. But the Vice President cannot become anything more than Acting President if he takes over merely for the duration of an illness, since we cannot have two Presidents at the same time. Thus I think that section 1 of Senate Joint Resolution 184 is very wise in making a distinction between the situation where the Vice President serves as President, and the situation in which he merely exercises its power. Such a provision is absolutely essential if the problem is to be solved, because we have no precedents dealing with temporary inability, and a solution demands that a distinction be made between the case where the President has died, or resigned, or been impeached, and the case where he is temporarily ill, and for the time being incapacitated.

If I can be of any further assistance to you in connection with this legislation, please do not hesitate to call upon me. I am eager to help your subcommittee find a proper solution of the problem.

Sincerely yours,

DAVID FELLMAN,
Professor of Political Science.

REPLY OF DAVID FELLMAN, THE UNIVERSITY OF WISCONSIN

DECEMBER 12, 1955.

Congressman EMANUEL CELLER,
House Office Building, Washington, D. C.

DEAR CONGRESSMAN CELLER: I am writing in response to your letter of November 29, in connection with your questionnaire on Presidential inability. It is interesting to note that the questions raised therein are almost identical with those raised by Chester A. Arthur in his first annual message to Congress, December 6, 1881. See Richardson, *Messages and Papers of the Presidents* (vol. 8,

p. 05). His questions arose from the fact that President Garfield was utterly incapacitated for some 2½ months before his death. He was shot on July 2, 1881, and died on September 10. Mr. Arthur did not undertake to discuss, much less to answer, the questions he raised.

Before coming to your specific questions, I want to make the preliminary point that the British have a specific procedure for determining the disability of a reigning sovereign, and that we can learn much by examining it. It is, of course, in any system of government a delicate problem which is extraordinarily difficult to resolve, and any solution is bound to be something less than perfect, but nevertheless the problem is not insoluble by any means.

The British statute was adopted on March 19, 1937, and is entitled the Regency Act of 1937. (The citation is 1 Edw. 8 & 1 Geo. 6, ch. 16.) This statute was the result of apprehensions, which Parliament itself acknowledged, arising from the illness of George V in 1928 and in January 1930. Those sections of this act which deal with a regency while the sovereign is under 18 years of age need not concern us here. But section 2 of the act is pertinent. It reads, as follows:

"(1) If the following persons or any three or more of them, that is to say, the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice of England, and the Master of the Rolls, declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the Sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions or that they are satisfied by evidence that the Sovereign is for some definite cause not available for the performance of those functions, then, until it is declared in like manner that his Majesty has so far recovered His health as to warrant His resumption of the royal functions or has become available for the performance thereof, as the case may be, those functions shall be performed in the name and on behalf of the Sovereign by a Regent."

Section 6 of the act is also pertinent. It reads as follows:

"(1) In the event of illness not amounting to such infirmity of mind or body as is mentioned in section two of this Act, or of absence or intended absence from the United Kingdom, the Sovereign may, in order to prevent delay or difficulty in the despatch of public business, by Letters Patent under the Great Seal, delegate, for the period of that illness or absence, to Counsellors of State such of the royal functions as may be specified in the Letters Patent, and may in like manner revoke or vary any such delegation."

Subsection (2) of section 6 designates who shall serve as counselors of state: the wife or husband of the Sovereign (if the Sovereign is married) and the four persons next in line of succession to the Crown. This portion of the statute was amended on November 11, 1943 (6 and 7 Geo. 6, ch. 42) to provide that the heir apparent shall be one of the counselors of State if over 18 years of age.

I should like to focus attention on the principal features of this statute, particularly in the light of the questions raised in your questionnaire.

1. A committee of five is created to make the decision concerning the Sovereign's disability.

2. The committee need not be unanimous, but may act by majority vote.

3. One member of the committee is the Sovereign's wife or husband; two are high-ranking judges holding office for life, the Lord Chief Justice, who is the presiding judge of Queen's Bench, and the Master of the Rolls, who presides over the court of appeals; the Lord Chancellor is at once a Cabinet minister, the presiding officer of the House of Lords, head of the Judicial system, and a leading figure in the majority political party; the Speaker of the House of Commons presides over the elective body of Parliament, but it is important to note that unlike our Speaker in the House of Representatives, the English Speaker is a nonpartisan presiding officer who enjoys something approaching life tenure, since he is usually reelected to the House of Commons by his constituency without opposition, and is reelected to the Speakership by the House, whatever may have been his original party affiliation, and whatever may be the party situation in the House itself. Thus, of the five persons who are eligible to serve on this committee, only the Lord Chancellor may be regarded as a party man. But it is important to note, in this connection, that the Sovereign is not a party man either.

4. The committee is required to make a finding of inability in writing on the basis of evidence which must include the evidence of physicians. The number and identity of the physicians are not specified.

5. The statute covers infirmity of both mind and body.

6. Incapability of performing the royal functions is not defined.

7. The possibility that the Sovereign may be incapable for some reason other than infirmity of mind or body by not being available to perform his functions is also taken into consideration. What might lead to such unavailability is not specified. Presumably capture by a foreign enemy would be an example.

8. The statute recognizes that the Sovereign may overcome his disability by becoming well, and the committee declares that he has recovered his health so as to warrant resumption of the royal functions in the very same way that it acts to make a finding of disability.

9. In the case of less serious illness, or absence from the kingdom, the Sovereign may delegate such powers as may be necessary to carry on the public business to a group of 6 counselors of state, his spouse and the 4 people next in the line of succession, but he may revoke the delegation in the same manner that he made it.

I come now to the questions put down in the questionnaire.

I. I do not know what the authors of the Constitution intended by the term "inability," except that they obviously intended to have the Vice President serve as Acting President during a period of Presidential disability. Disability was never defined, and was mentioned only once in the debates of the Constitutional Convention. A search of the Records of the Federal Convention, edited by Max Farrand (New Haven: Yale University Press, rev. ed., 1937), does not yield much. It is of interest to note that on August 27, according to Madison's Notes, Mr. Dickinson expressed the thought that the section under discussion was "too vague." He asked: "What is the extent of the term 'disability' and who is to be the Judge of it?" But so far as we know, no one answered the question, and the matter was then postponed. All other references to the disability clause are in the successive drafts of the document as it developed in the deliberations of the Convention. So far as I can discover, there is no evidence that the Convention ever discussed the questions raised by Mr. Dickinson. Whether anything was said on this subject in the State ratifying conventions I do not know, but I have not searched the records on this point. Perhaps someone should do just that.

I think it would be extremely unwise to try to define the term "inability" in legislation. Any attempted definition would, I believe, do more harm than good, and the more prolix the definition, the worse it would be. Any attempt to spell out just what is meant by disability would either be tautological, repetitious, or misleading, and in any event, a sure basis for unnecessary disputation. But the law is full of undefined and undefinable terms, e. g., "reasonable man," "due process of law," "right and equity," etc. But certainly common sense dictates that disability may be due either to bodily or mental infirmity, and if there is any possible doubt about it, then the law should say as much. It is certainly common knowledge that mental disability occurs, and that it can be as crippling as physical disability. If a special group or committee is created to make a finding of disability, the law should provide that (1) the finding should be in writing; (2) the finding should be based on evidence; (3) the evidence should include the testimony of physicians.

Clearly the Constitution contemplates that the President may get over his disability, since it uses the phrase "until the disability is removed." Obviously a sick man may get well, and the law should be clear on this point, that the President resumes all of his powers when his disability is ended.

II. I think any member of the group or committee which would be authorized by law to determine the question of the President's inability to discharge the powers and duties of his office should be eligible to initiate the question. I do not believe Congress should undertake to perform this function, mainly because the question may arise suddenly when Congress is not in session. Nor do I believe that such a numerous assemblage of men and women is equipped to make a specific decision bearing upon the qualifications of a single person upon the basis of evidence. I should think it highly improper to entrust the Vice President with the initiative, since his personal stake in the decision precludes general confidence in the objectivity of any affirmative step he may take. Since the Cabinet is made up of personal appointees of the President who serve at his pleasure, I would regard the Cabinet as wholly unsuitable to make a decision of the sort under discussion. So far as the Cabinet is concerned, the cards are stacked so heavily in favor of one disposition of the issue and against the other that an objective answer based entirely upon pertinent evidence cannot be expected in all cases.

III. I think Congress ought to provide for a procedure to deal with the problem of Presidential inability. For the reasons given above, the decision should not, in my judgment, be entrusted to Congress, or the Vice President, or the Cabinet. I suggest the creation by statute of a special continuing Committee which would be empowered to make the critical decision of inability. While I have not given a great deal of thought to the matter of the makeup of the Committee, and further reflection might suggest a somewhat different composition, I would tentatively suggest, as a basis for further discussion, as follows:

1. The Committee should be very small, so that it can act expeditiously and decisively. I suggest a Committee of five.
2. The members of the Committee could very well be the following:
 - (a) The President's spouse, or if there is none, the next of kin, providing he or she is an adult.
 - (b) The Chief Justice of the United States.
 - (c) The senior Associate Justice of the Supreme Court of the United States.
 - (d) The leader of the President's political party in the Senate.
 - (e) The leader of the President's political party in the House of Representatives.

Thus, such a Committee would include a member of the President's family, 2 life-tenure Justices holding positions of great prestige and public confidence, and 2 ranking members of the Houses of Congress. I would insist that members of the political party in opposition to the President should not be put in the position of participating in the decision that the President is unable to discharge the duties of his office. I think there will be greater public confidence in the participation of two important members of the President's own party. Our situation is quite different from that of Great Britain, whose Sovereign is required to be nonpartisan. Our President is always a partisan, and it is right that he should be a party man, since our governmental system rests upon the foundation of the party system. It is therefore altogether proper that leaders of his own party should share directly in the responsibility of making a decision of Presidential inability. Leaders of the opposition party would necessarily act under a heavy cloud of suspicion about their motives if they had a hand in the matter, however much their opinions are grounded in objective, weighty, and reliable evidence.

IV. I think a statute of the sort I have discussed in II and III is perfectly constitutional. An act of Congress seems to be fully justified by the language and purposes of article II, section 1, clause 6, of the United States Constitution.

V. As I have indicated, I believe that the same body ought to have authority both to initiate the question and determine its merits. I see no reason for setting up any ponderous or complex machinery. On the contrary, there is every good reason to keep the procedure uncomplicated, so that a small group of responsible people commanding public confidence can move swiftly and decisively. It might be wise to authorize the Chief Justice to take the initiative of setting the machinery in motion, but I do not see why any one of the five important people who would serve on the Committee could not request a meeting of the Committee for the purpose of making a decision. For example, under some circumstances the President's wife may very well be the most suitable person available to raise the question of inability. I am sure that no one of the five persons I have in mind for service on this Committee would initiate action irresponsibly, partly from the very nature of their positions, and partly because the public would not stand for irresponsibility in this connection.

VI. The Committee should be free to declare that the President is permanently disabled, if the facts warrant such a finding. Certainly it is common knowledge that there is such a thing as permanent disability. And there is no reason to believe that a Committee constituted as I have suggested would make a finding of permanent disability if it were at all possible to avoid doing so. If the disability is temporary, the Committee should be authorized, by the same procedure utilized to make a finding of disability, to make a finding that the President is sufficiently well to resume his duties and functions.

VII. If the disability is temporary, I think, as I have indicated, that any member of the Committee should be authorized to raise the question that the disability has ceased to exist. Once the question has been raised, it should be determined by a majority vote of the Committee. As in the case of findings of disability, a finding that the disability has ended should be made in writing, on the basis of evidence, including the evidence of physicians.

VIII. The question whether, in the event of a finding of temporary disability, the Vice President would succeed to the powers and duties of the office, or to the office itself, is in my judgment the critical question on the list. For there is a wide gulf between what I think was the plain intention of the framers of the Constitution and actual practice in the several instances when Vice Presidents took over upon the death of a President. The Constitution declares, in article II, section 1, clause 6, that "In case of the removal of the President from Office, or of his death, resignation or inability to discharge the powers and duties of said Office, the same shall devolve on the Vice President . . ." Clearly, the term "the same" refers to "the powers and duties of said Office." If it was intended that the Vice President should become President, it would have been a simple matter to say so, as it is said in section 3 of the 20th amendment. This view is supported by other language in the Constitution. Thus, in the same paragraph it is provided that in case both the President and Vice President are unavailable for the office, Congress shall declare "what officer shall then act as President." This language is consistent with the previous part of the paragraph; it does not say that this officer shall be President, but only that he shall act as President, "until the disability be removed, or a President shall be elected." Note that this clause does not say, "until another President shall be elected," or "until the next President shall be elected," but only "until a President shall be elected."

All other pertinent clauses in the Constitution are consistent with the language of article II, section 1, clause 6. The 12th amendment, taking note of the fact that it might happen that neither the electoral college nor the House of Representatives may succeed in electing a new President in time, provides that "the Vice President shall act as President, as in the case of the death or other constitutional disability of the President." Article I, section 3, clause 5, of the Constitution provides that the Senate shall elect a President pro tempore who shall preside in the absence of the Vice President, "or when he shall exercise the Office of President of the United States." Note that it does not say, "when he shall have become President," which would have been very easy to say, if such had been the intention of those who wrote the Constitution.

The language of the Constitution, that the Vice President succeeds to the powers and duties of the President, or acts as President, or exercises the office of President, supports the view that it was not intended that he should become President. Furthermore, this is consistent with the requirements of a situation where the President's disability is only temporary. Obviously it makes more sense to say that for the duration of such a disability the Vice President shall act as President, than to say that for this period of time he shall be President, for in the latter event we would have two Presidents at the same time, which is ridiculous. But it makes sense if, while the President is too sick to discharge his duties, we have an Acting President in the person of the Vice President. Of course no such problem is posed if the President dies, or resigns, or is removed from office by impeachment, for in such cases he ceases to be President at all, and no difficulty arises if the succeeding Vice President becomes President. The real harm has been that because he is now regarded as becoming President, a solution of the problem posed by temporary Presidential disability has been frustrated.

It is only constitutional custom which decrees that when the Vice President takes over, he becomes President. This custom, of course, is due to the fact that in the seven instances where the Vice President has taken over, he did so on the death of the President. The Presidency has never been vacated in any other way. It will be recalled that when President William Henry Harrison died, on April 4, 1841, only a month after his inauguration, and Vice President John Tyler succeeded him, there was considerable debate over the question whether Tyler became President or only Acting President. But Tyler had no doubt about it, and from the outset insisted that he was the President. The country accepted the decision, and thus every succeeding Vice President who went to the White House on the death of the President became President in the full sense of the term. Thus, when President Roosevelt died, Vice President Truman became President of the United States; and, as every preceding Vice President in the same situation did, he took a separate oath of office when he assumed the Presidency. This point is fully canvassed in Herbert W. Horwill, *The Usages of the American Constitution* (Oxford University Press, 1925), chapter III, Accidental Presidents.

Custom has established the proposition that when a President dies the Vice President becomes President. But since we have no custom dealing with a situation created by the temporary disability of the President, I think it is altogether reasonable if a distinction is made by legislation between the two situations.

We can continue on the assumption that in case the President dies, the Vice President becomes President; while at the same time we provide that in case of a temporary disability he shall serve only as Acting President, and that upon his recovery the President will reassume the powers and duties of his office. Legislation to this effect would be clearly consistent with the language and intent of article II, section 1, clause 6. As Acting President the Vice President would have all the powers of the office, such as the veto and appointive powers, but he would have to relinquish these powers upon the recovery of the President.

IX. If a finding of permanent disability is made, I should think the Vice President would succeed to the office itself, and not merely to its powers and duties, just as he succeeds to the office if the President dies, as is now decreed by our "unwritten Constitution." It may of course be assumed that the committee which is authorized to make findings of disability will in the nature of things be extremely reluctant to make a finding of permanent disability, and that so long as any ray of hope exists the country would expect that the disability be regarded as temporary, if it is at all possible so to designate it. However, there is such a condition as permanent disability, and in that event I would think the existing constitutional custom would control. There does not seem to be any very good reason why it should not.

X. In the event of a finding of permanent disability, I believe the language of the Constitution, "or a President shall be elected," does not require but only authorizes the immediate election of a new President. Clearly this clause permits Congress to say, for example, that if as much as 2 years of the term still remain, there shall be a new election. Whether Congress ought to use this power, and provide for special elections, is therefore, in my judgment, a matter of policy and not of constitutional principle. My own feeling is that, in the light of our complicated State and Federal laws dealing with elections, the pattern of primary selections, the structure of party conventions, etc., our institutions are not geared to holding presidential elections except according to the sequence of events that occur according to the normal rhythm of the Constitution. But if there should be a special election, I should think that it would be merely for the unexpired term of the disabled President, for otherwise the sequence of events upon which the Constitution operates would be disturbed.

XI. I believe that Congress has authority to enact legislation on all the questions raised here under the Constitution as it now stands, and that constitutional amendments are not necessary. Such legislation, based upon the language and purposes of the relevant constitutional clauses, would be justified by normal canons of constitutional construction.

I would like to add several thoughts:

1. If legislation on this subject is to be drafted, attention should be given to the fact that a Vice President serving as Acting President may also become unable to discharge the duties and powers of the position. The legislation should therefore extend to anyone serving as Acting President, whether it be the Vice President, or the Speaker of the House of Representatives, or the President pro tempore of the Senate, or anyone else.

2. State constitutions usually provide for the contingency that the governor may be so ill as to be unable to discharge his duties, and the lieutenant governor is authorized to act as governor. This has happened often. The experience with gubernatorial disability must by now be a considerable one, in the aggregate, and perhaps there is much we may be able to learn from such experience. I suggest that the committee staff make a study of gubernatorial disability, or, alternatively, the Legislative Reference Service can be requested to do so. Such a study might very well shed a great deal of light upon the problem, and tell us something about what the American people are willing to put up with. I know of no such study available in print today.

3. If legislation is prepared on this subject, I believe it would be wise to take into the account the possibility that the President may be unable to discharge his duties for some reason other than illness. That is to say, in the larger sense, the problem is one of unavailability as well as one of inability in the medical sense. I do not believe that it would be either wise or necessary to try to spell out the situations that might conceivably arise in which the President would be unable to discharge the duties of his office. It is sufficient if the statute made some provision on the subject, so that the necessary adjustments can be taken legally, and with a minimum of dispute or lost motion when necessary. Suppose, for example, a President were kidnaped, or captured by an enemy army? I do not anticipate either of these things ever happening, but since it is at least theoretically possible for the President to be unavailable for a variety of unfore-

seen and perhaps unforeseeable reasons, the statute ought to cover such contingencies. It can be done in a simple phrase, as it is done in the English Regency Act.

If I can be of any further service to the committee, please do not hesitate to call upon me.

Sincerely yours,

DAVID FELLMAN,
Professor of Political Science.

Senator KEFAUVER. A letter from Prof. Mark D. Howe, of Harvard Law School, which will be made a part of the record.
(The material referred to is as follows:)

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., January 20, 1958.

Hon. ESTES KEFAUVER,
Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR KEFAUVER: I have received your letter of January 10 concerning the matter of Presidential inability. The enclosed copy of a letter which I addressed to Congressman Celler some 2 years ago summarizes the views which I then held and which today I still maintain. There are but two specific points on which I appreciate this opportunity to say a further word.

It is my earnest hope that neither by constitutional amendment nor by legislative action will any attempt be made to involve the Supreme Court or any of its Justices in the adjudication of the issues of inability. It seems to me clear that an effort by statute to make the Chief Justice or any of his associates a participant in the resolution of that issue would be unconstitutional. That fact reflects not merely a settled rule of law but a wise policy of government. I should, therefore, greatly regret any effort to alter the rule of law, for if that were done we should jeopardize the tradition which separates, so far as possible, our Federal Judiciary from participation in the resolution of political issues.

The other point which I should like to emphasize, though of lesser importance, seems to me to be of some significance. Believing as I do that under the Constitution as presently written there is adequate congressional authority to make provision for the devolution of the powers and duties of the Presidential office I should oppose the effort to put the formulation of principle in the form of a constitutional amendment. I think that the position which I summarized in my letter to Mr. Celler adequately indicates the reason for this belief. I realize that there has been much discussion of the problem during the last 2 years. I still remain convinced, however, that it would be inadvisable to seek a constitutional answer to what is essentially a legislative question.

Respectfully yours,

MARK DEW. HOWE.

JANUARY 19, 1958.

Hon. EMANUEL CELLER,
Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN: Since receiving your questionnaire on Presidential inability I have been turning the problem over in my mind. It is not, I am sorry to say, a question on which I feel myself peculiarly qualified to speak and my thoughts, accordingly, are essentially casual. Because you have asked for an expression of my views, however, I shall do my best to formulate them.

Of basic importance, in my judgment, is recognition of the fact that any attempt to find a single answer to the unpredictable contingencies of the future would be seriously mistaken. This principle leads me to believe that it would be most unfortunate to attempt by any means to define "inability". It seems to me that it is better to preserve the vagueness of the constitutional provision than to attempt to achieve an undesirable, and perhaps an unattainable precision. It seems to me, for instance, that an inability which might present major problems if it should occur at the beginning of a President's term of office might involve no truly significant issues for the Government if it should arise during the concluding months of his administration. To produce a single definition and to seek a single answer for problems which the accidents of time make essentially different would seem to me most unfortunate. I should, therefore, be

opposed to an effort to define "Inability" by statute, constitutional amendment, or otherwise.

To say this, however, is not to say that no action is desirable at the present time. In my judgment it is desirable that Congress by joint resolution or by statute, but in any case with the President's concurrence, should assert one basic principle concerning the problem of inability. That principle is that the power to inquire and ultimately to decide whether inability, temporary or permanent, exists, is to be exercised by the Congress. In my judgment the Vice President is clearly disqualified for interest from initiating or determining this issue. I realize that the size of the Cabinet would, on the face of it, make it a more appropriate body than Congress to determine whether the President is able to execute his powers. On the other hand, I believe that the intimate association between the President and his Cabinet makes it an inappropriate body to decide the matter. I should see no reason why the Cabinet might not initiate congressional action, but I take it that no statute or resolution need assert that right. I believe it important, however, that Congress should, before the issue arises, assert its responsibility to determine the fact of inability and its determination that the consequences of inability will be resolved by congressional action, within the Constitution, in the light of circumstances as they exist when action is required.

From what I have said I take it that you will understand that I believe that it would be unwise to attempt in advance to state by whom the President's powers are to be exercised during his inability. A solution appropriate when the Nation is at peace might be totally inappropriate when it is at war. As I have already suggested, the course advisable at the beginning of a President's term of office might well be entirely unsuitable if his inability should occur near the end of his term.

Behind my particular answers to your questions lies a strong conviction with respect to our constitutional system. That is the belief that the framers of the Constitution showed great wisdom in their fidelity to generalities. I feel sure that if we now seek to provide rules for matters which they preferred to dispose of by principle we will jeopardize the future. It is far wiser to leave some questions unsettled for in doing so we preserve for later generations the power to resolve their own problems in accordance with their own needs. I should allow this principle to govern action with respect to the problem of the nature of the Vice President's powers when the Congress has determined that the President is permanently or temporarily disabled. I therefore believe it unwise to seek a present resolution of the 8th, 9th, and 10th questions presented in your questionnaire.

From everything that I have said you will realize that I believe that the Congress possesses today the sole power which it seems to me to be desirable for it to exercise. That is the power to assert an exclusive authority over the matter of a President's inability. I believe that such an assertion of authority, concurred in by the President, would serve usefully to clarify an important issue and would do so without imposing unfortunate limitations on an authority which should be largely unlimited.

Respectfully yours,

MARK DEW. HOWE,
Professor of Law.

Senator KEFAUVER. I have a letter from the Women's National Republican Club, Inc., which will be made a part of the record.

(The material referred to is as follows:)

WOMEN'S NATIONAL REPUBLICAN CLUB, INC.,
New York, N. Y., January 13, 1958.

Hon. ESTES KEFAUVER,
United States Senate,
Washington, D. C.

DEAR SENATOR KEFAUVER: The nationwide membership of the Women's National Republican Club has approved by referendum a resolution:

"That the Women's National Republican Club urges Congress to take immediate and decisive action to provide legislation designed to make it absolutely clear as to who would decide that a President is not able to carry out his duties."

We are following the administration's lead in recommending that a law be passed early in the session, concerning delegation of presidential powers. We

should like to see spelled out by legislation, clearly and without ambiguous phrases, what individual or groups of individuals would be authorized under the law to declare a Chief Executive disabled.

We have pleasure in transmitting to you this resolution.

Sincerely yours,

BERNICE W. ALEXANDER
Mrs. Stewart F. Alexander,
President.

JACQUELINE S. GUTWILLIG
Mrs. William S. Gutwillig,
Chairman, Committee on National Legislation.

Senator KEFAUVER. We have a study about this whole problem which has been conducted by the Foreign Affairs Division of the Library of Congress, which has a lot of interesting background. It shows, among other things, what has been done by constitutions of other nations. That will be made a part of the record.

(The material referred to is as follows:)

PRESIDENTIAL DISABILITY: PROVISIONS IN FOREIGN CONSTITUTIONS—A BRIEF REVIEW¹

CONTENTS

- I. Introduction.
- II. The Chief Executive.
- III. Executive power.
- IV. Presidential disability: Latin American constitutions.
- V. Concluding comments.
- Annex.
Presidential disability: Constitution of the Confederate States of America.

1. INTRODUCTION²

Among the world's some 2½ billion human beings there are now approximately 91 political entities which claim national sovereignty, and are in greater or lesser degree recognized as sovereign. Of the total, approximately 90 percent possess written constitutions containing the outline and the definition of the powers and functions of the organs of the government. Although the precedents and traditions embodied in current constitutions may date back many years, a high percentage of the documents themselves are of relatively recent origin. For example, about 45 percent were drafted within the past decade and about 70 percent are less than a quarter of a century old. The United States, strange as it may seem for such a relatively young nation, has the oldest of all written constitutions presently in effect.

II. THE CHIEF EXECUTIVE

The functions and powers of government in the majority of the nations are divided into the three major areas of executive, legislative, and judicial. Some 41 countries, or about 46 percent of the total number of nations, give the title "President" to the Chief Executive of the nation, namely, Argentina, Austria, Bolivia, Brazil, Burma, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Guatemala, Haiti, Honduras, Iceland, India, Indonesia, Ireland, Israel, Italy, Korea, Lebanon, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Syria, Turkey, United States of America, Venezuela, and Yugoslavia.

Royal personages are designated as Chiefs in the executive hierarchy in the constitutions of some 28 countries, or about 31 percent of the nations: Afghanistan, Australia (the British Crown), Belgium, Bhutan, Cambodia, Canada (the British Crown), Ceylon (the British Crown), Denmark, Ethiopia, Greece, Iran,

¹ Prepared by Mary Shepard, Foreign Affairs Division, Legislative Reference Service, the Library of Congress, Washington, D. C., January 23, 1958.

² This review relies heavily throughout on Amos J. Pease's *Constitutions of Nations*, 2d edition. The Hague, Martinus Nijhoff, 1956.

Iraq, Jordan, Laos, Libya, Luxembourg, Monaco, Muscat and Oman, Nepal, Netherlands, New Zealand (the British Crown), Norway, Saudi Arabia, Sweden, Thailand, the Union of South Africa (the British Crown), the United Kingdom, and Yemen. A governor general acts for the Crown in the majority of the members of the British Commonwealth.

The executive authority is vested in a collective body, sometimes called a Council, or the Government, or Praesidium, in Albania, Bulgaria, Egypt, Hungary, Poland, Rumania, Switzerland, the Union of Soviet Socialist Republics, Uruguay, and a few others.

Selection of the Chief Executive is by popular vote of the people in these 28 countries: Argentina, Austria, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Finland, Guatemala, Haiti, Honduras, Iceland, Indonesia, Ireland, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Uruguay, and Venezuela. In the United States presidential electors, elected by the people, in turn elect the President.

The legislative branch of the Government selects the Chief Executive in the following countries, among others: Albania, Bulgaria, Burma, Czechoslovakia, France, Germany, Hungary, Israel, Italy, Japan, Korea, Lebanon, Poland, Rumania, Spain, Switzerland, Syria, Turkey, U. S. S. R., and Yugoslavia.

III. EXECUTIVE POWER

So-called cabinet government, where principal Executive power is vested in a cabinet responsible to the legislature, is found among many nations of the free world, notably the members of the British Commonwealth. Among the dictatorships also many constitutions contain provisions for the dismissal or resignation of the heads of the executive administration (the equivalent of the prime minister and his cabinet) if the legislative body ceases to support them. In the constitutions of 48, or about 54 percent of all nations, Executive power is made subject to the legislature. Included among these are the constitutions of Albania, Australia, Austria, Belgium, Bulgaria, Burma, Cambodia, Canada, Ceylon, Denmark, Finland, France, Germany, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Lebanon, Laos, Libya, Netherlands, Norway, New Zealand, Pakistan, Poland, Rumania, Sweden, Syria, Thailand, Turkey, Union of South Africa, Union of Soviet Socialist Republics, the United Kingdom, and Yugoslavia.

In the constitutions of 28 countries the terms of office of the Executive powers are made independent of the legislature, and the ministers heading the various departments of the executive branch are made answerable to the Executive power. This is so in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iceland, Korea, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Switzerland, United States of America, Uruguay, and Venezuela.

Systems comparable to that of the United States, where major Executive power is vested in one person, the President, who is elected directly or indirectly by the people and controls the Cabinet, are found principally among the Latin American States. The constitutions of all of these have been influenced by that of the United States. In the postwar era the constitutions of some of the new countries, the Philippines and Korea for example, have also drawn largely on it and reflect the basic outlines of the American governmental system. It is among these constitutions that the best basis for a comparative analysis of procedures for coping with Presidential disability exists.

IV. PRESIDENTIAL DISABILITY: LATIN AMERICAN CONSTITUTIONS¹

Following are some questions relating to Presidential disability to which answers are sought in Latin American constitutions:

1. What persons or agencies should initiate the question of the President's inability to discharge the powers and duties of this office? What persons or agencies should determine that a Presidential disability exists? Should a distinction be made between permanent and temporary disability? If so, how?

In only a few of the Latin American constitutions are these aspects of the disability of an executive touched upon and even then with less than adequacy.

¹ See annex for excerpts quoted from Latin American constitutions.

In general, two modes of procedure are provided: First, it is left to the President himself to raise the question of his own inability; second, the Congress is designated to determine disability. A distinction is usually made between temporary and permanent disability, or absence from office, with corresponding distinctions in procedure.

The Colombian Constitution, for example, provides that "The President may, on account of ill health, retire, for such time as may be necessary, from the exercise of the executive power" by giving due notice to the Senate or, in recess of the Senate, to the Supremo Court. If there is an absolute default of the President in his first 2 years, new elections are called by the substitute President. In the Costa Rican Constitution the President may call upon either of two Vice Presidents to replace him in his temporary absence but the line of succession comes into effect automatically if the absence is permanent. Under the Dominican Constitution, a line of succession is provided for during either a temporary absence or permanent vacancy, with no specifications as to who should determine a temporary or permanent disability. However, the President may, by decree, empower a designated Secretary of State who fulfills the conditions required for President to exercise the Executive power temporarily. In the Venezuelan Constitution the President is empowered to fill temporary vacancies in the Office of President by a Minister of the National Executive Office designated by him.

The Congress is made the responsible initiating agency in the Constitutions of Ecuador and Peru. In the former it is provided that the President ceases to exercise his functions if he abandons his office or demonstrates permanent physical or mental incapacity, as declared by the Congress. If the Congress is in recess, the Council of State is empowered to call to office provisionally the substitute President, if it considers that the President is physically or mentally incapacitated, at the same time convoking a special session of the Congress. The Council of State is composed of the Chief Justice of the Supreme Court, a Senator, a Deputy, the Attorney General, the Comptroller General, the Chief Justice of the Supreme Court of Elections, and five other persons. However, the Council is not allowed to consider Presidential incapacity except in response to a written petition of the Supreme Court, accompanied by supporting documents. In Peru the Presidency of the Republic is declared to be vacated in the case, among others, of the permanent physical or moral incapacity of the President as declared by Congress. The exercise of the Presidency is suspended by the temporary physical incapacity of the President as declared by Congress. In case of vacancy, Congress elects a President for the rest of the Presidential period.

In most cases a substitute President is called upon to act until the disability is removed, in the interim of an absence, or for the duration of the impediment. In at least two instances, however, a definite limitation is placed on the time a President may be absent on the basis of temporary disability without losing the Presidency, permanently or temporarily. The Ecuadorian Constitution stipulates that, "If the reason which incapacitates the President from exercising his position endures more than 6 months, the person replacing him * * * shall complete the Presidential term. Under the Mexican Constitution if the disability of the President exceeds 30 days Congress may consider his leave of absence and decide on the appointment of a President ad interim.

2. Who should act as substitute or how should a Presidential vacancy be filled in case of temporary or permanent disability?

Latin American constitutions provide for three broad lines of procedure in designating a substitute President. In a number, the example of the United States is followed in naming the Vice President as the official who should take over if the President is disabled. Other constitutions authorize a line of succession beginning with some other official of the Government. Still others provide for the election of a substitute, either by the Congress or the people themselves. In addition, variations in the same constitution may exist as to succession depending upon whether the disability is permanent or temporary. In some cases a line of succession may be established for several substitutes and, in default of these, an election may be called for.

The Costa Rican Constitution authorizes the two Vice Presidents to replace the President in the event of a permanent absence, to succeed in the order of their nomination. If he is only temporarily absent the President may call upon either of the Vice Presidents to replace him. In Cuba, the Vice President substitutes for the President and following in the line of succession are the President of Congress and, temporarily, the oldest Justice of the Supreme Court.

When the Justice succeeds, a national election is called unless the vacancy occurs in the last year of the Presidential term, in which case he holds office until the end of the term. In El Salvador, the Vice President places the President upon the latter's temporary or permanent disability. If he cannot succeed, designates elected by the Congress substitute in the order of their selection. If all of these are unavailable the Assembly designates a person to assume office. In Honduras, the line of succession to the Presidency in the event of the temporary or permanent disability of the President lies with the Vice President, the President of the National Congress, and the President of the Supreme Court. However, if both the President and Vice President are permanently unavailable, the substitute President must call for an election. The Constitution of Panama likewise provides for the substitution by one of the Vice Presidents in the order in which they were elected, in case of a temporary or permanent absence of the President. Next in line of succession comes one of the Ministers of State.

Other constitutions provide various lines of succession. In Chile, when the President cannot exercise his office he is substituted by the ministers in turn, with the title of Vice President, whom the order of precedence as fixed by law may designate. Following these in the line come the President of the Senate, the President of the Chamber of Deputies and the President of the Supreme Court. When the Presidential absence from office cannot be ended before the completion of the time remaining of the constitutional period, elections are called by the Vice President. The Colombian Constitution empowers the Congress to elect a designate every 2 years to take the place of the President in default of the latter. In the absence of the designate the Executive Office would be filled by the Ministers in the order established by law and then the Governors. However, if the default of the President is permanent, the substitute President must call for elections within the three months following, the President so elected to serve for the rest of the period. In the Dominican Constitution the line of succession during a temporary or permanent absence of the President is as follows: Secretary of State for War and Navy; Secretary of State for the Interior and Police; Secretary of State for the Presidency. If these fail, the President of the Supreme Court assumes the role temporarily until the National Assembly names a permanent substitute. The Haitian Constitution departs from the norm by authorising the Council of Secretaries of State to assume executive power if the President finds it temporarily impossible to perform his duties but in case of vacancy of the office the void is temporarily filled by the President of the Court of Cassation, or the Vice President, or the senior Judge of the Court of Cassation who shall convvoke the Primary Assemblies for the election, within 4 months, of a President. The Nicaraguan Constitution empowers the President of the Republic to appoint a Designate who can substitute for him if he is unable to serve. If the Designate is also unable to serve the Presidency passes to a successor elected by the Congress from among its membership. In Venezuela, it is provided that temporary vacancies in the office of President of the Republic shall be filled by a Minister of the National Executive Office to be designated by him. Other procedures, noted below, are provided in case of inability to serve, presumably permanent.

Several constitutions place the responsibility directly on the Congress for filling a temporary or permanent vacancy in the Presidency. In Mexico, for example, if the President is permanently disabled during his last 4 years in office (the Presidential term is 6 years) the Congress acts as an electoral college and, subject to the attendance of at least two-thirds of its membership, elects a substitute President by majority vote (and secret ballot). If the permanent disability occurs within the first 2 years the Congress by the same procedure elects a President ad interim who acts until a new President is elected by popular vote to finish the term. In case of a temporary disability Congress, or the permanent committee, if Congress is not in session, designates an Acting President to serve. The permanent committee is composed of 20 deputies and senators acting during congressional recesses. After 30 days of a Presidential disability the Congress considers what further action shall be taken. The Paraguayan Constitution calls for the National Assembly to appoint the minister or functionary to exercise the Presidency until the end of the term if the inability occurs within the last 3 years of the term. If it occurs within the first 2 years, new Presidential elections are held. In case of temporary inability, the Assembly appoints one of the Ministers provisionally to exercise the Presidency. Under the Peruvian Constitution if the Presidency of the Republic becomes vacant, by reason of permanent physical or moral incapacity, the Congress is empowered to elect a President (by secret vote and absolute

majority) for the rest of the Presidential term. In Venezuela, in the event of the inability of the President the National Congress elects a President by an absolute majority vote, to serve until the end of the Presidential term. Temporary vacancies are filled in the manner noted above.

3. Should the timing of a permanent or temporary disability during the course of a presidential term affect the procedures to be followed?

In the majority of the Latin American constitutions, as in that of the United States, the same procedures are followed for filling a presidential vacancy caused by disability whether the vacancy occurs early or late during a presidential term. There are a few exceptions. Under the Colombian constitution, if there is an absolute default of the President during the first 2 years of his term, new elections are called to choose a President to serve for the rest of the term. If, however, the default occurs during the last 2 years, the line of succession established in the Constitution enter into effect. The same thing holds true in Paraguay. In Mexico, if a permanent disability occurs within the first 2 years of the 8-year term a new presidential election is called to be held at least 14 months and not more than 18 months after the call is made, an ad interim President acting in the meanwhile. If the permanent disability occurs during the last 4 years, the Congress elects a substitute President. In some instances, such as in Bolivia, Cuba, and Panama, if the Vice President is unable to substitute, new presidential elections are called if the presidential term has more than a year or two to run.

In some cases a new mandate from the people is provided for when a permanent disability occurs, whenever that may be during the presidential term, either by a new election for President by the people (as in Chile) or by the Congress (Haiti and Peru).

4. Should the fact that a person has acted as substitute President bar him from seeking the presidency?

Apart from the question of the number of terms a President himself may be allowed, a number of the Latin American constitutions pronounce against permitting a substitute President from subsequently seeking the presidency, at least immediately. For example, the Cuban Constitution states that the person occupying the presidency by reason of substitution "cannot be a candidate at the following election." The El Salvador Constitution goes a little bit farther and provides that anyone who has occupied the presidency "may not be President, Vice President, or designate during the following presidential term." The Mexican Constitution is the most emphatic of all, proclaiming that "No citizen who has acted as President, elected by popular vote, or appointed as substitute, or provisional President, or President ad interim can ever, in any event or for whatsoever reason, again occupy this post." It should be noted, however, that the majority of the constitutions are silent on this score.

V. CONCLUDING COMMENTS

Even this brief review may suffice to show that there are important continuencies relating to Presidential disability that have not been adequately met in many of the Latin American constitutions, just as there are in our own. Indeed, this is not surprising since these constitutions owe much of their inspiration to that of the United States. Although a line of succession of procedures for choosing a substitute are provided in all the constitutions, in only a few is it made clear who shall initiate the question of a President's inability or determine that a disability exists. The question of what organs or persons shall determine when a disability has ceased to exist is similarly clouded.

There are, notwithstanding, Latin American procedures that could be examined with profit in general studies of the problems of Presidential inability: for example, the procedures provided in some of these countries for a substitute President to receive some kind of a mandate from the people at the time of the succession, at least when the Presidential disability occurs toward the beginning of a Presidential term.

ANNEX

PRESIDENTIAL DISABILITY: LATIN AMERICAN CONSTITUTIONS¹

PRINCIPAL PROVISIONS

1. Argentina: *Constitution of May 1, 1853*

Article 75.—In case of sickness, absence from the country, death, resignation, or removal of the President, the executive power shall be exercised by the Vice-President of the nation. In case of removal, death, resignation or inability of the President and Vice-President of the nation, Congress shall determine what official shall act as president until the disability is removed or a new president is elected.

2. Bolivia: *Constitution of November 23, 1945 (as amended)*

Article 91.—Should the President of the Republic be unable to fulfill his duties or remain temporarily absent, either before or after the proclamation, he shall be replaced in the interim by the Vice-President, and, if the latter is not available, by the president of the Senate or by the president of the Chamber of Deputies, if the latter cannot act.

The Vice-President shall occupy the Presidency of the Republic, should this remain vacant, either before or after the proclamation of the election of the President, and shall act as President until the end of the constitutional period. If there is no Vice-President, the president-elect of the Senate will act in his stead, or, if the latter cannot act, the president of the Chamber of Deputies shall act as President. In the latter case, and provided that not over three years of the presidential term have elapsed, a new election for President and Vice-President will be held, but only to complete said period.

3. Brazil: *Constitution of September 24, 1946*

Article 79.—The President shall be replaced, in case of impediment, and succeeded, in case of vacancy in office, by the Vice-President of the Republic.

1. In case of impediment or vacancy in office of the President and of the Vice-President of the Republic, the President of the Chamber of Deputies, the vice-president of the Federal Senate, and the president of the Federal Supreme Court shall be successively called to the exercise of the presidency.

4. Chile: *Constitution of September 18, 1925 (as amended)*

Article 66.—When the President of the Republic in person commands the armed forces, or when from illness, absence from the territory of the Republic, or from any other weighty reason, he cannot exercise his office, the minister, whom the order of precedence as fixed by law may designate, shall substitute for him, under the title of Vice President of the Republic. In default of such, the minister who follows in the order of precedence, and in default of all the ministers, the President of the Senate, the president of the Chamber of Deputies or the president of the Supreme Court successively.

In case of death, or declaration of there being cause for resignation, or other kind of absolute impossibility, which cannot be ended before the completion of the time remaining of the constitutional period, the Vice President in the first ten days of his incumbency shall issue the proper orders to proceed, within the period of sixty days, to a new election of President in the manner prescribed by the Constitution and by the electoral law.

5. Colombia: *Constitution of February 16, 1945 (with amendments)*

Article 123.—The Senate may grant to the President a temporary leave of absence.

The President may, on account of ill health, retire, for such time as may be necessary, from the exercise of the executive power; but notice thereof shall be given by him in due time to the Senate, or, in recess of the Senate, to the Supreme Court.

Article 124.—The Congress shall every two years elect a designate, who shall take the place of the President in default of the latter.

The term of the designate begins the seventh of August of the respective year.

Article 125.—When, for any reason, the Congress may have failed to elect a designate, the designate last elected shall continue to act in that capacity. In

¹ Peasee, Amos J. *Constitutions of Nations*, 2d edition. The Hague, Martinus Nijhoff, 1956. Guatemala is not included in this compilation, since it is not operating at present under a regular constitution.

the absence of the designate, the executive office shall be filled by the ministers, in the order established by law, and in default thereof by the governors, the latter being called according to the proximity of their respective residences to the capital of the Republic.

Article 126.—The person in charge of the executive office shall have the same privileges and exercise the same powers as the President whose position he fills.

Article 127.—In case of absolute default of the President of the Republic, the person charged with the presidency shall call elections for within the third month following. The President so elected shall serve for the rest of the period.

The person charged with the presidency shall continue exercising it when two years or less of the period remain without calling new elections.

6. Costa Rica: Constitution of November 8, 1949

Article 135.—There shall be two Vice Presidents of the Republic who shall replace the President during his complete absence, in the order of their nomination. During his temporary absence, the President may call upon either Vice President to replace him.

If neither Vice President can fill the temporary or permanent absence of the President, the position shall be held by the President of the Legislative Assembly.

7. Cuba: Constitution of July 5, 1940

Article 148.—The Vice President of the Republic shall substitute for the President in cases of absence, incapacity, or death. If the vacancy is definitive, the substitution shall continue until the end of the presidential term. In case of absence, incapacity, or death of both, the president of Congress shall substitute for them for the rest of the term.

Article 149.—In any case in which the presidential substitutes established by this Constitution are lacking, the presidency of the Republic shall be temporarily occupied by the oldest Justice of the Supreme Court, who shall call a national election to be held within a period of not more than ninety days.

When the vacancy occurs in the last year of the presidential term, the substitute Justice shall hold office until the term ends.

The person occupying the presidency by reason of any of the substitutions referred to in the preceding Articles cannot be a presidential candidate at the following election.

8. Dominican Republic: Constitution of January 10, 1947

Article 51.—In case the President of the Republic is temporarily absent the executive power shall be exercised during his absence by the secretary of state for war and the navy; in the absence of the latter, by the secretary of state for the Interior and police, and if both are absent, by the secretary of state for the Presidency. In case of permanent vacancy, the Presidency for the remainder of the term shall be occupied by the person invested with the office of secretary of state for war and navy; in default of him, by the person invested with the office of secretary of state for the Interior and police; and in default of both, by the person invested with the office of secretary of state for the presidency.

These secretaries of state must always figure in the law which establishes them, and to exercise their functions the same conditions shall be required as for President of the Republic.

Article 52.—By virtue of a decree of the President of the Republic, and while this is not revoked by another decree, a secretary of state designated by him and possessing the conditions required by the Constitution to become President of the Republic may also exercise the executive power temporarily.

Article 53.—In case of default of the substitutes provided for in Article 51, the president of the Supreme Court of Justice shall assume the executive power in the interim, and, within thirty days of the date on which he assumed these functions, shall convvoke the National Assembly to name a permanent substitute in a session that may not close or declare a recess until it shall have concluded the election. In case it is not convoked within those thirty days, the National Assembly shall convene in its own right to carry out the election in the manner provided for above.

9. Ecuador: Constitution of December 31, 1946

Article 87.—The functions of the President of the Republic are finally terminated: by the end of the term fixed in the Constitution; by death, dismissal and acceptance of renunciation; by abandonment of office or by permanent physical or mental incapacity, declared by the Congress.

If, when Congress is in recess, the council of state considers with reason that there has been an abandonment of office on the part of the President, or that he is physically or mentally incapacitated, the said council shall call to office provisionally the respective substitute and shall by the same act convoca a special session of the Congress to the end that it issue the proper resolution.

Physical or mental incapacity may not be considered by the council of state except by virtue of a written petition of the Supreme Court, which shall be accompanied by the documents establishing the facts complained of.

That which is said in this article with respect to the President of the Republic shall apply, in turn, to anyone occupying the presidency.

Article 88.—Whenever, either definitely or temporarily, there is no titular or elected President of the Republic in office, the office shall fall to the Vice-President of the Republic.

Article 89.—If there also be no Vice-President, either definitely or temporarily, the presidency of the Republic shall be exercised by one of the following officers in the following order:

- (1) The President of the House of Deputies;
- (2) The vice-president of the Senate;
- (3) The vice-president of the House of Deputies.

Article 90.—Whenever a person who legally should substitute for the President is lacking or suffers some accidental impediment, his place shall be taken by the next person mentioned in the preceding article until the exercise of the executive function has been assumed by the person called to office in accordance with the provision of the said article.

Article 91.—He who, in conformity with the order and circumstances established in the three preceding articles, finally occupies the office of President of the Republic shall continue in office during the entire term for which the titular President was elected.

10. El Salvador: Constitution of September 8, 1950

Article 64.—If there is no President of the Republic, due to death, resignation, removal, or other cause, he shall be replaced by the Vice President; if the latter is unavailable, by one of the Designates in the order of their selection, and if all of these are unavailable for any legal reason, the Assembly shall designate the person who is to take office.

If the reason which incapacitates the President from exercising his position endures more than six months, the person replacing him, in accordance with the terms of the preceding paragraph, shall complete the presidential term.

If the incapacity of the President is temporary, his replacement shall hold office while such incapacity endures.

Article 65.—A citizen who occupied the Presidency of the Republic under any title may not be President, Vice President or Designate during the following presidential term.

11. Haiti: Constitution of November 26, 1950

Article 80.—If the President finds it temporarily impossible to perform his duties, the Council of Secretaries of State is charged with the executive authority for the duration of the impediment.

Article 81.—In case of vacancy in the office of President of the Republic through death, resignation or for any other reason, the President of the Court of Cassation, or in its default, the Vice President, or in default of the latter, the Senior Judge of the Court of Cassation, is temporarily invested with the Executive Power.

He shall immediately convoca the Primary Assemblies for the election of the President of the Republic, which must take place within four months after the date of convocation.

The Provisional Chief of the Executive Power may not be a candidate for the Presidency before the Primary Assemblies which he has convoked, nor be elected by them.

*12. Honduras: Constitution of March 28, 1957**

Article 114.—The executive power is exercised by a citizen who is called President of the Republic; in default thereof, by a Vice-President; and in default of the latter, by the citizen who occupies the presidency of the National

* Honduras adopted a new constitution in December 1957.

Congress or may have occupied this position in the last ordinary legislature; and in default of the last, by the citizen who is president of the Supreme Court of Justice.

* * * * *

Article 119.—In case of temporary disability of the President, he shall be substituted in his functions by the Vice-President; and in default of the latter, by the citizens mentioned in Article 114.

If the default of the President be absolute, the Vice-President shall exercise the executive power for the remaining time of the period; but if the Vice-President also defaults absolutely, the one legally in substitution shall one month afterwards call an election for a constitutional period that will begin the first of January following the convocation.

Article 120.—Until the one designated by law occupies the presidency, the executive power shall be exercised by the council of ministers; and if Congress be not in session, the council shall immediately call in the new official to give him possession.

13. Mexico: *Constitution of January 31, 1917*

Article 83.—The President shall enter upon his duties on the first day of December and remain in office six years. No citizen who has acted as president, elected by popular vote, or appointed as substitute, or provisional president, or president *ad interim*, can ever, in any event or for whatsoever reason, again occupy this post.

Article 84.—In the event of the permanent disability of the President of the Republic, if this shall occur within the first two years of the respective term, Congress, if in session shall forthwith act as an electoral college and with the attendance of at least two thirds of its total membership, shall choose a president *ad interim* by secret ballot and by a majority vote; and within the following ten days, the same Congress shall issue the call for elections for the president who shall finish the respective term. At least fourteen months and not more than eighteen months must elapse between the date of the call for the elections and the date on which they are held.

If Congress is in recess, the permanent committee shall forthwith designate a provisional president, and shall call Congress together in extraordinary session, at which a president *ad interim* shall be appointed, and the call for presidential elections issued in the manner set forth in the foregoing paragraph.

Should the disability of the President occur in the last four years of the respective term, Congress, if in session, shall choose a substitute president to hold office until the end of the presidential term; if Congress is not in session, the permanent committee shall choose a provisional president and convene extraordinary sessions in order that it may act as an electoral college and proceed to the election of a substitute president.

Article 85.— * * * In case of a temporary disability of the President Congress, or the permanent committee if Congress shall not be in session, shall designate an acting president during such disability.

In case the disability of the President exceeds thirty days and Congress is not sitting, the permanent committee shall convene extraordinary sessions of Congress to take a decision in regard to his leave-of-absence and, in the respective case, the appointment of the President *ad interim*.

If a temporary disability shall become permanent, the action prescribed in the preceding article shall be taken.

14. Nicaragua: *Constitution of November 1, 1950*

Article 188.—In the event the President of the Republic is unable to serve, his functions shall be exercised by the appointed Designate. If the President has not appointed a Designate, or the latter is also unable to serve, the Presidency of the Republic shall be assumed by the President of the Congress, who shall immediately convoke an extraordinary session of Congress for the purpose of electing a successor from among its membership.

If at the time of a vacancy in the Presidency of the Republic, Congress is meeting in regular or extraordinary session, the President of the Congress shall assume the Presidency of the Republic in order to turn over the office to the member whom Congress elects.

If the inability of the President to serve is permanent, the person called upon to replace him shall complete the presidential term.

Article 189.—In the event of a temporary or permanent inability to serve or an indefinite impediment of the President-elect, the new Congress shall elect among

its members the person who shall hold the office, temporarily or permanently as the case may be.

16. Panama: Constitution of March 1, 1946

Article 149.—In the temporary or permanent absence of the President of the Republic, his duties will be performed by one of the Vice-Presidents in the order in which they were elected.

* * * * *

Article 150.—When, for any reason, the absences of the President cannot be filled by the Vice-Presidents, one of the ministers of state, who fulfills the requisites necessary for being President of the Republic, and who has been elected thereto by majority vote, will fill the presidency.

Article 151.—When the permanent absence of the President and Vice-Presidents happens not less than two years before the expiration of the presidential period, the person charged with the duties of the presidency will call presidential and vice-presidential elections for a date not later than four months away, so that the citizen elected President may take possession within six months following the call. The respective decree will be issued at the latest eight days after the assumption of the post by the said person in charge. If it is less than two years until the end of the term, the person in charge will perform his duties until the end of the said term.

Neither the citizen who has discharged the duties of the presidency within the two years immediately preceding the elections mentioned, nor any of his relatives within the fourth degree of consanguinity or second of affinity, may be elected President or Vice-President in these elections.

Article 152.—The citizen who replaces the President of the Republic will have the same title and rank and will exercise the same attributes as the latter.

16. Paraguay: Constitution of July 10, 1940

Article 58.—In case of the resignation, inability, or death of the President of the Republic, the minister of the Interior will immediately convoke the Assembly to appoint the minister or functionary who should exercise the presidency until the end of the term, unless the resignation, inability, or death occurs within the first two years of the presidential period, in which the circumstance the provisional President will convoke the people to elections within a period of two months. If the inability is temporary, the National Assembly will appoint one of the ministers provisionally to exercise the presidency of the Republic.

17. Peru: Constitution of April 9, 1933 (as amended)

Article 144.—The presidency of the Republic is vacated, besides in the case of death:

- (1) By permanent physical or moral incapacity of the President, declared by Congress.
- (2) By the acceptance of his resignation.

* * * * *

Article 145.—The exercise of the presidency of the Republic is suspended:

* * * * *

(2) By the temporary physical incapacity of the President declared by Congress;

* * * * *

Article 147.—In the case of vacancy of the presidency of the Republic, Congress shall elect the President for the rest of the presidential period.

It, on the vacancy occurring, Congress is functioning, the election of the President shall be made within three days. If Congress is in recess, it must assemble in extraordinary sessions for the sole object of electing the President and receiving his oath. The election, in this case, shall be made within twenty days counting from that on which the vacancy occurred.

The convocation of Congress to assemble in extraordinary sessions to elect the President of the Republic is effected by the President of the Senate, or, in default of the latter, by the president of the Chamber of Deputies.

Article 148.—The election of the President of the Republic by Congress shall be made by secret vote, in permanent and continuous session. The person obtaining an absolute majority of the votes shall be proclaimed.

18. Uruguay: Constitution of October 26, 1951

Article 158.—The Presidency of the National Council of Government shall be rotation, by yearly periods, among the members elected by the party which obtained a majority and by order of their place on the respective list.

In the event of the absence, vacancy or temporary impediment or leave of the Counsellor serving as President, he shall be replaced by the member who followed him on the said list, who shall also occupy the Presidency for the year corresponding to him by virtue of the above provisions.

In the case provided for in the last paragraph of Article 151, the Presidency shall be occupied by the members from the majority list in order of their position thereon, beginning with the one who received the most votes.

19. Venezuela: Constitution of April 11, 1953

Article 106.—In the event of the inability of the President of the Republic to serve after he has taken the oath of office, the Ministers of the Cabinet, with a quorum of one more than half, shall select by absolute majority vote a Minister to take charge of the National Executive Power. The Minister designated shall immediately take the oath of office before the Cabinet and shall function as Acting in Charge of the National Executive Power. If the National Congress is in session it shall proceed, within ten days following the date of the vacancy, to elect a President of the Republic by an absolute majority vote, for the remainder of the constitutional period. If the National Congress is not in session, the Acting in Charge of the National Executive Power, within ten days after his designation, shall call an extraordinary session, for the purpose of filling the vacancy. The National Congress shall meet within ten days after the call, and, within ten days following its installation shall proceed to elect, by absolute majority vote, a President of the Republic for the remainder of the constitutional period.

The President elected in the manner indicated shall take office within ten days after his election, taking the oath of office before the National Congress, or the Federal Court if the former is not in session. If he does not do so the office of President of the Republic shall be considered vacant and the procedure shall be followed that is provided in the foregoing article.

Article 107.—Temporary vacancies in the office of President of the Republic shall be filled by a Minister of the National Executive Office designed by him. The designee shall act as Minister in Charge of the National Executive Power, after taking the oath of office before the President of the Republic or before the Federal Court, according to the decision of the President of the Republic upon making the designation.

PRESIDENTIAL DISABILITY: CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA

The Constitution of the Confederate States of America, March 11, 1861, closely resembled the Constitution of the United States. The presidential disability, or inability, clause was, in particular, practically identical, as may be seen from the following transcript from the Confederate Constitution:¹

"ARTICLE II, PARAGRAPH 8

"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 the removal, death, resignation, or inability both of the President and the Vice-President, declaring what officer shall then act as President, and such officer shall then act accordingly until the disability be removed or a President shall be elected."

Senator KEFAUVER. We will ask the staff of the subcommittee to have the hearings printed as quickly as possible. Any other statements that are received in the next few days will be included in the record.

¹ Commager, Henry Steele, editor: *Documents of American History*. New York, Appleton-Century-Crofts, Inc., 1948, p. 881.

With that our hearings will be terminated and the subcommittee will try to make a decision about this matter.

Mr. Rhyne, we again want to express our very deep appreciation to you for the public service you have rendered in giving us your thinking about this matter and coming here this morning.

Mr. RHYNE. Thank you, Senator. I again thank you for your courtesy and kindness in hearing me.

Senator KEFAUVER. We stand in recess.

(Whereupon at 11:25 a. m., the hearings were concluded.)

(Subsequently, the subcommittee received the following communications:)

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
DEPARTMENT OF PUBLIC LAW AND GOVERNMENT,
New York, N. Y., March 2, 1958.

Hon. ESTES KEFAUVER,
United States Senate,
Washington, D. C.

DEAR SENATOR KEFAUVER: In reply to your telegram asking my views on the problem of Presidential inability, I submit the following:

1. If Congress does nothing I shall not feel that the Republic is imperilled. I held this opinion before President Eisenhower's recent announcement to his press conference.

2. I think it might be worth while for Congress to consider passing a concurrent resolution along the following lines:

(a) The Congress welcomes the statement of President Eisenhower that Vice President Nixon "knows what he should do in the event of a Presidential disability" that is serious, and trusts that there will be similarly clear understandings between future Presidents and Vice Presidents.

(b) The Congress expects that in the event of serious Presidential inability the Cabinet, the majority and minority leaders of Congress, and the Vice President will take counsel with each other and will announce to the Congress the decisions that they reach. (I put the Vice President last in this enumeration because while he has the right to act as President in the event of Presidential inability, it is not for him alone to judge whether he should exercise the right. He should act as President only after advice taken from the Cabinet and with the approval of the Congress.)

(c) The Congress expects to be informed from time to time on the continuance or lessening of the President's inability and on the occasion of his re-assumption of his duties.

3. I view a constitutional amendment as (a) completely unnecessary and (b) possibly harmful.

(a) *Unnecessary.*—I have a feeling that those who desire an amendment are taking an "apprehensive" view of the Constitution. I borrow the word from my former colleague, the famous international lawyer, John Bassett Moore. He described the "apprehensive" method of interpretation as "fertile in doubts" and as treating "powers as subjects of abuse rather than as national necessities for sources of advantage." He was dealing with the treaty-making clauses, and apprehensions concerning them resulted in the proposal of the Bricker amendment. I think that Judge Moore's view is equally applicable to article II, section 1, paragraph 6: "In case of the removal of the President from office," and so forth. Moreover, we should not forget what Edmund Burke said in his famous speech on conciliation with the American Colonies: "In other countries the people more simple and of a less mercurial cast, judge an ill principle in government only by an actual grievance; here they anticipate the evil." The Americans, he went on to say, "augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze."

I do not think we need fear that any Vice President taking over Presidential "powers and duties until * * * the inability of the President be removed" would insist on retaining those powers when the President had made a recovery. Which Vice President that this country has had (or which unsuccessful vice-presidential candidate) could be suspected of being capable of harboring such a design? It is alleged that our national nominating conventions sometimes nominate candidates for the Vice Presidency with insufficient thought as to

whether they would make good Presidents. I do not fear that they might nominate candidates who would seek to be men on horseback.

(b) *Harmful*.—Even though a constitutional amendment were carefully drafted, some specific provisions might well be inappropriate in the event of a situation that the draftsmen had not contemplated. Then there would have to be an endeavor to follow the mandate of the amendment rather than to do the wise and sensible thing. The more detailed the amendment, the more embarrassing some provision might be. Take, for example, the proposal of a decision reached by a majority of the Cabinet. The 4 Cabinet members in the minority might command far more confidence from the country than the 6 who happened to be in the majority.

Whatever the merit or demerit of these views, I have held them without change for a good many years. In 1920, I wrote for the Review an article entitled, "Presidential Inability," of which I enclose a copy, and which you may wish to include in the hearings. It discusses some details of President Wilson's inability that I have not seen in print elsewhere; the dates on which bills became law without his signature, and the dates on which he was able to sign bills.

I concluded this article by saying that perhaps Congress would be wise to pass a bill along the lines suggested above. Since there has been discussion of a possible veto, I now suggest a concurrent resolution. To be sure, this would be hortatory rather than mandatory, but I think that the expression of congressional desires and expectations would be just as effective as the enactment of a statute.

With high regard, I am,
Yours faithfully,

LINDSAY ROGERS,
Burgess Professor of Public Law.

[From the Review, May 8, 1920]

PRESIDENTIAL INABILITY

(Mr. Wilson's improved health has removed from the problem of the disability of a President to perform the duties of his office any pressure of present urgency. But the experience of the half year during which his illness was serious serves as ample reason for discussing this important and delicate question on its merits.)

Several proposals have been made in Congress to decide how the fact of Presidential inability to act may be determined, and if the House Judiciary Committee can agree, it will doubtless make some recommendation. But the chances of early action are not great, since the questions of constitutional law and political policy are difficult and important and, judging from the attitude of Congress hitherto, a decision will be long delayed. Not until 1886 did Congress amend the Presidential succession law of 1792, which was, admittedly, inadequate and, perhaps, unconstitutional. But the question should be answered: If the President is unable to act, who is to determine how administrative decisions are to be made and other public business proceeded with, in order that the Government may not suffer a collapse similar to that of recent months which culminated in Secretary Lansing's resignation?

The framers of the Constitution attempted to guard against an interregnum by providing that "In the 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."

This provision, although in ambiguous terms, at least considers every possibility except the death of the President or Vice President subsequent to election but prior to inauguration. That contingency, fortunately, has never confronted the country, but Congress has not attempted to take measures to deal with it. In five cases, owing to death, the Vice President has become Chief Magistrate: Tyler, Filmore, Johnson, Arthur, and Roosevelt. Johnson was threatened with removal, but no President has ever suggested resignation, and the mention of this method of vacating the office is the only joke in the Federal Constitution.

The act of March 1, 1792, provided that the President of the Senate pro tempore and the Speaker of the House of Representatives should follow the Vice President in succession to the Presidency. There were, however, a number of objections to this arrangement. Its constitutionality was open to question, since it was not certain that the Speaker and President pro tempore were officers of the United States within the meaning of the term as used in the Constitution. In the second place—and Madison was among those who pointed this out—if one of these congressional officials went to the White House, there was no requirement that he give up his original duties, and his executive and legislative functions might conflict. Third, between Congresses there is no Speaker of the House, and until 1800 the President of the Senate pro tempore did not hold over; consequently, if the President and Vice President should die during this interim, difficulties would ensue.

There were a number of attempts to change the law. In 1820, the Senate Judiciary Committee was ordered to report whether any changes were necessary. It replied unanimously that at that time it was inexpedient to legislate. In 1850, the Committee on the Judiciary reported that the act was constitutional, but suggested that, if there should be a vacancy in the offices of Speaker and President of the Senate pro tempore, the Chief Justice of the United States (provided he had not presided at an impeachment) and then the Associate Justices of the Supreme Court of the United States should succeed according to seniority. No action was taken by the Senate on this report, and the matter was not pressed until 1881.

Before Congress met in December of that year and before either the Speaker of the House or the President pro tempore of the Senate had been chosen, Garfield died. The fact that for some time he was unable to perform the duties of his office caused the question of inability to be discussed, and when, in 1885, during Cleveland's administration, Vice President Hendricks died, some legislative action was felt to be necessary. In both cases, if the incumbents of the Presidential office— Presidents Arthur and Cleveland—had died during the congressional recesses, there would have been no one to take their places. More than that, it was possible for the office to go to a member of the political party which had been defeated in the election, for, during Cleveland's term, Senators Sherman and Ingalls were Presidents pro tempore of the Senate and were Republicans.

On January 10, 1886, therefore, Congress passed a law providing that, if the constitutional provision were invoked, succession to the Presidency should vest in the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney General, the Postmaster General, the Secretary of the Navy, and the Secretary of the Interior, in the order named. The act also declared "That, whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with the law within twenty days thereafter, it shall be the duty of the person upon whom such powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

This statute, however, does not attempt to settle two important points. In the first place, it seems to be agreed that Congress has the power to order a special election to fill a vacancy. The act of 1792 provided that an election should be held, but the question was left open in the act of 1886. Senator Hoar offered an amendment giving the person who succeeded to the Presidency the right to serve until the expiration of the regular term, but this was defeated, and Congress apparently reserves the right to order an election, if it deems wise. If a President were chosen under an intermediate election, his term would be 4 years, and that would destroy the present synchrony between the executive and legislative branches. It is possible, moreover, to imagine cases of conflict between the executive and legislative when Congress would use this method for getting rid of a President to whom it objected, and an Acting President could veto a measure providing for a special election. On the other hand, the Constitution unquestionably contemplated that only persons chosen by the electoral college should serve as Presidents. Fortunately, however, the succession has never gone further than the Vice President, and the difficulties which undeniably exist need not be solved until they confront us.

The second and more serious question is the meaning of "inability," and here the writers are in almost complete disagreement. Prof. W. W. Willoughby, the leading authority on American constitutional law, simply states the problem, and does not attempt to answer it:

"In the absence of a definition, who is to determine, and what conditions are to be held to create, an inability on the part of the President to perform his official duties? What is to be done in case the President is temporarily disabled by sickness, or accident, or insanity? Who is to decide, and by what criteria, when this disablement is so serious and so prolonged as to require the appointment of an Acting President?"

The most elaborate discussion of these questions is to be found in the *North American Review* for November 1881. Four distinguished constitutional authorities contributed to an interesting symposium on Presidential inability, apropos of the illness of President Garfield. The President's death rendered unnecessary any decision in his case, but the various possibilities were fully considered and widely differing opinions were expressed.

Senator Trumbull took the position that as no proof was required when the President died, "so in the case of inability the fact must be so notorious that there can be no reasonable doubt about it, nor that an urgency exists requiring immediate action on important matters, before the Vice President would be warranted in assuming the duties of the President. When such a case arises, the people will not only acquiesce in the discharge of the Presidential duties by the Vice President, but will demand that he exercise them."

Senator Trumbull questioned whether any law could be passed improving this situation. Ours is a people's government, he argued, and peaceful succession to the highest office must depend upon the support of public opinion. This support is both necessary and sufficient in cases of inability as well as in cases of election.

Judge Cooley, the eminent writer on constitutional law, urged that the question of inability was one for Congress to determine. "It is possible," he said, "for a case to arise so plain, so unmistakably determined in the public judgment, that public opinion, with unanimous concurrence, would summon the Vice President to act. But though this would make him Acting President *de facto*, he would become Acting President *de jure* only after solemn recognition in some form by Congress." Such recognition, it may be said, has always been given, even if only in the form of a communication telling the new incumbent of the Presidency that Congress has organized and is waiting for his message. And Judge Cooley argued that since Congress has the power to embarrass and tie the hands of the Vice President, Congress is competent to declare when the inability exists.

The third contributor to this symposium was Benjamin F. Butler, who thought that the question of inability was a judicial one on which Congress could not pass. He took it to be "axiomatic that when the Constitution imposes a duty on any officer, to be done by him, he must be the sole Judge when and how to do that duty, subject only to his responsibility to the people and to the risk of impeachment if he act improperly or corruptly," and if in certain cases the discharge of the duties of the President devolves upon the Vice President, "he alone must judge, under the grave responsibility of his position, when his duties begin, as he must determine how and in what manner he will exercise them."

Professor Dwight, on the other hand, took the view that public opinion would not be able to restrain an ambitious man eager to occupy the Presidential seat. He suggested that "some proper legal proceeding might be instituted by Congress, in which the evidence required by law might be presented under the general power to carry into execution all powers vested by the Constitution in any department or officer of the Government."

It is evident that these views do not disclose any agreement as to what constitutes and who determines Presidential inability. Certain opinions expressed by these writers, however, may be accepted. The support of public opinion is necessary if anyone is to succeed to the Presidential office; the responsibility of the Vice President is heavy; Congress must approve, or a dangerous instance of disunion between the executive and legislative branches might occur. The Constitution unquestionably contemplated temporary inability, and it can be provided for without submitting an amendment to the States. The Vice President and the Cabinet, with the support of Congress, are competent to determine the matter.

President Wilson ought to be rather reluctant to criticize any efforts which were made during his illness to prevent complete governmental inaction. Certainly the disposition of everyone—Congress, the Vice President, the Cabinet, and the public—was against raising the question of how the inability should be met. That it existed was sure. To mention only 1 evidence, 28 bills became law during the special session of Congress owing to the failure of the Execu-

tive to act within 10 days (exclusive of Sundays) after their receipt at the White House; and when full disclosures are made as to the nature and times of the President's complete inability to act, it will be interesting to check them up with the dates on which bills were signed. For example, the President was able to veto the Prohibition Enforcement Act on October 27, but he did not approve 2 statutes which became law on October 22 and 25, and he failed to sign Public Laws Nos. 67 to 82, inclusive (October 28 to November 18), with the exception of No. 73, the first general deficiency law for 1920, which was signed on November 4. After November 18 practically all of the bills became law with the signature of the President.

The Vice President, supported by Congress, could, under these circumstances, I think, have asserted the right to act for the period of the emergency. But the Vice President is an anomalous officer of the United States, who presides over the Senate while he waits for the President to die. Although by the Constitution he succeeds to the Presidency, he is, in most cases, totally unfamiliar with the problems of the administration. In spite of the fact that, for long periods, Mr. Wilson's Cabinet was ignored, this body was the best qualified to deal with the problems that needed consideration. A wise President might have asked Secretary Lansing to call his colleagues together, and I cannot see that the informal Cabinet meetings constituted a dangerous precedent. The President, perhaps, does not know that they were the only evidence to the public that there was any Government in Washington, and they may have saved Mr. Wilson the embarrassment of having the question of inability brought to a settlement by Congress or by the Vice President, in response to public opinion.

What seems to be required in the future is a simple statute saying that if the President is temporarily unable to act he shall notify the Vice President and request him to consult with the Cabinet—as was done during Mr. Wilson's absence abroad; and that if the fact of the President's inability is notorious, and yet this action is not taken by him, the Vice President shall meet with the Cabinet, informing Congress of the situation, or calling it into special session, if this is necessary. The Supreme Court of the United States could not be compelled to pass on the question without a constitutional amendment enlarging its jurisdiction, and in any event it would be a political matter similar to those which the Court has hitherto wisely avoided taking any part in.

It is true that such a statute as the one suggested might encourage an ambitious Vice President to attempt to interpret a temporary indisposition as constitutional inability, but the fear of Congress and of public opinion would, I think, be an effective bar. And, after all, it would simply be one more of those political arrangements which for their success depend on that "natural sentiment" which the historian Grote called "constitutional morality": "a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the Constitution will be no less sacred in the eyes of his opponents than in his own."

LINDSAY ROGERS.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., March 3, 1958.

Hon. ESTES KEPAUVER,

*Chairman of Subcommittee on Constitutional Amendments,
United States Senate, Washington, D. C.*

DEAR SENATOR KEPAUVER: In response to your telegram of February 27, I have nothing to add to the views on the subject of Presidential disability, which I expressed to the special subcommittee of the House on that subject, headed by Hon. Emanuel Celler, of New York, about 2 years ago. (See hearings before Special Subcommittee to Study Presidential Disability of the Committee on the Judiciary, House of Representatives, 84th Cong., 2d sess., April 11 and 12, 1956, serial No. 20, pp. 105-119.)

However, at the request of one of the newspapers here, I boiled down my views on the most important aspect of this subject, last year, for publication in their columns. I enclose a copy of the result, which is shorter and probably for that reason clearer than what I had to say before the House committee. I hope it may be of some use to you.

Sincerely yours,

WILLIAM W. CROSSKEY.

[From the Chicago Daily News, April 10, 1957]

PROFESSOR CROSSKEY: PRESIDENTIAL DISABILITY A JUDICIAL ISSUE

I cannot agree that Congress has all along had power, under the Presidential-disability provisions of the Constitution, to deal fully—had it only desired to do so—with the three cases of Presidential disability that have thus far arisen.

The provisions in question actually give Congress no power at all in cases merely of Presidential disability, death, resignation, or removal from office.

The power given is limited expressly to "the case of removal, death, resignation, or inability, both of the President and Vice President"; and in such a case, Congress can do no more than "provide," or "declare," "by law," "what officer shall then act as President." It cannot determine alternatively that a case of such dual disability has arisen.

It is also not true, as some have supposed, that Congress can deal fully with Presidential-disability cases, by virtue of the power it has under the "necessary and proper" clause.

This clause empowers the Congress only to "make laws."

Presidential-disability cases do not call for the making of laws; they call, whenever there is any doubt or difference about the matter, for the finding of a fact—the fact of Presidential disability—and they call, further, for the application of preexisting law to that fact—law already provided in the Constitution.

Upon any accurate view, what is called for is adjudication; not legislation, or the making of laws.

The widespread belief that the Constitution does not provide for determining such cases is a consequence, I think, of reading the Presidential-disability provisions out of context.

In addition, there were certain transactions of the Federal Convention, on and after August 27, 1787, which are mistakenly taken to confirm this widespread view.

On that date, the Presidential-disability provisions in the draft constitution of August 6 came before the Convention. Various members objected to these.

John Dickinson of Delaware complained because no "judge" of Presidential disability was designated. On this ground and others, the provisions were postponed.

Four days later, they were handed to a committee for revision. John Dickinson was a member of this committee. Yet, when the committee reported, it recommended Presidential-disability provisions containing no indication as to who was to be "the judge" in such cases.

So, if the usual view is correct, the Convention not only made no provisions upon this subject; it must also have intended to make none.

This is, for me, a hard conclusion to reach; and it is easy to show that it is not correct.

When John Dickinson made his complaint on August 27, there was, indeed, no provision in the Constitution upon the subject about which he complained; the judiciary provisions of the document were then very narrow.

Later, on the same day, the judiciary provisions were, however, much extended, and one of the extensions met Dickinson's complaint completely.

This was the provision whereby the judicial power was extended to "all cases in law and equity arising under the Constitution."

Cases "arise under the Constitution" whenever they present a question as to the meaning or application of any of its provisions. Presidential-disability cases would fall within this category.

A case is, furthermore, a case in law or equity, within the meaning of the above provision whenever it is a case of a kind customarily litigated in courts either of law or equity at the time when the Constitution was drawn.

Among the cases then long customarily litigated in courts of law were cases of "quo warranto." In such cases the right of an individual might be adjudicated to exercise the powers and duties (but not necessarily to enjoy the salary and perquisites) of a public office.

Presidential-disability cases would be such cases. So would cases arising under the same constitutional provision that presented any question of the removal of a Presidential disability.

Both therefore would be within the constitutional authority of the national courts to decide: A conclusion in perfect accord with the general scheme of tripartite division of governmental power under the document. For the cases in question are cases calling for adjudication, and the Constitution puts them where such cases are generally put.

The Supreme Court has held that, in the absence of contrary legislation by Congress, the right of initiating proceedings *in quo warranto*, as to offices under the United States, belongs exclusively to the Attorney General. Congress, however, can mold this remedy in practically any way it sees fit.

Thus, it could, and probably should, give an initiatory right in all Presidential disability cases to the Vice President; and to the President, in removal-of-disability cases.

It could, also, if it saw fit, confer initiatory rights, in both these cases, upon any citizen; or it could, I think, provide for such rights in Congress itself, as a group of interested citizens; or, in order to assure the right of initiation to both political parties, it could give such rights to a congressional minority, preferably one not too large.

And, finally, if Congress saw fit to do so, it could put such rights into a special standing commission of distinguished citizens. The right to counsel, other than the Attorney General, could also be provided.

WILLIAM W. CROSSKEY,
Professor of Law, University of Chicago.

UNIVERSITY OF ILLINOIS,
DEPARTMENT OF POLITICAL SCIENCE,
Urbana, Ill., March 4, 1958.

HON. ESTES KEFAUVER,
Senate Office Building, Washington, D. C.

DEAR SENATOR KEFAUVER: I apologize for not answering your January letter, but I have been away from my office for the last 6 months on a research leave. I have little to add to my letter to Representative Celler (January 5, 1950) for the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary. However, the intervening public and congressional discussion further convinces me that a constitutional amendment is desirable.

As the Constitution stands a plausible argument can be made that the authority to determine the fact of Presidential inability is vested in (1) the Congress, (2) the President, (3) the Vice President, (4) the courts. In my judgment the most pressing need is to determine beyond any doubt where the responsibility lies. Hence, I favor a simple amendment stating in effect: "The Congress may by law provide for the case of the inability of the President."

I believe that such an amendment is preferable to one that would itself stipulate the procedures to be used. It would allow Congress to change or modify the procedures according to future experiences.

Of course, implementing legislation would be needed. Since the existence of "inability," its duration, and the question of whether the Vice President should become President or merely Acting President are "political" (but not partisan) questions, I favor vesting this judgment in the Congress which is accountable to the electorate. I think past history indicates the unwisdom of placing the duty on the Vice President. But, in my judgment, the resolution of the doubts about who determines which procedures shall be used is more important than the question of which particular method should be adopted. I would, by amendment, leave up to the wisdom of Congress the decision as to how inability shall be established.

Sincerely yours,

JACK W. PELTASON.

COLONNADE CLUB,
UNIVERSITY OF VIRGINIA,
Charlottesville, Va., March 5, 1958.

Senator ESTES KEFAUVER,

*Chairman, Standing Subcommittee on Constitutional Amendments,
Committee on the Judiciary, United States Senate,*

Washington, D. C.

DEAR SENATOR KEFAUVER: I received your letter of January 10 last and your telegram of a few days ago, and I tender my apologies for replying so tardily. If this letter is not too late, it may be included in the record.

I answered the questionnaire of Representative Celler for the subcommittee of the House Committee on the Judiciary and later testified before that subcommittee. I shall not repeat here what I then submitted, for it was published at the time.

My present inclination is to submit to you some conclusions as of today.

The subject is highly important, but any solution which has been made, including my own, has serious objections. This is probably why it has been so hard to agree.

One is tempted, after all the discussion, to say, "Let us not fix any solution in advance, but leave any actual situation which may arise to be handled when it arises."

But doing nothing in advance has the serious danger that, in an emergency, delay may be caused by uncertainty, with disastrous results.

I view with alarm freezing a solution into a constitutional amendment, because the solution chosen may not work well and yet could be changed only by another amendment.

I see only one argument which is worthy of being taken seriously against Congress having the power to act in this matter under the "necessary and proper" clause. That objection is that this delicate subject touches the independence of the Presidency, a matter close to the hearts of the bulk of the framers and of the utmost importance in our system as it has developed.

Despite this argument, a strong case can be made for the power of Congress to implement the constitutional provision under the "necessary and proper" clause.

Our first neutrality act, approved June 5, 1794, changed the enacting clause in all pertinent sections to "Be it enacted and declared, etc." I take this to mean that Congress did not want to be pinned down to the assertion that what it provided was a new enactment or was merely declaratory of the law of nations and in part of the command power of the President. Perhaps Congress might now follow the resourcefulness of the men of that day and "enact and declare" that, in case of a Presidential inability, the Vice President is to become Acting President, and that he is to cease to be such when the disability is removed. It might then "enact" how and by whom both these things should be determined.

Aye; there's the rub. For, here, men differ on legal points and on policy.

There are those who think the determination of inability belongs to the Vice President, and, certainly, if he is faced with a situation when the decision must be made, he would have the responsibility of stepping in.

In this connection, I approve the Eisenhower-Nixon agreement, and consider it a valid and useful step. Its only weakness is in not providing for the possible case where the President thinks and determines that the disability has been removed but is still not in shape to carry on his office.

I see no merit whatever in the criticisms of Speaker Rayburn and ex-President Truman. I see no reason why an Acting President could not take the oath that he will faithfully exercise the office of President. Indeed, the Constitution says 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, which he can do in an acting capacity. The President and Vice President have not created the office of Acting President, but have merely given a name to what they interpret the Constitution as providing for in the event of inability.

There is the objection of policy to the Vice President's having the decision, however, that he is the party in interest, and, hence, would not decide without criticism or embarrassment. It would be bad for him to push himself into the office. It would also be bad for him to hesitate to act when action was needed because he was leaning over backward to avoid the charge of usurpation.

To the Celler subcommittee I first proposed that Congress provide that the Supreme Court appoint as inferior officers private citizens of distinction to be prepared to serve when an occasion arose as commissioners to make both determinations.

I later modified this to make them private citizens in active life, to get around the criticism that, between the time the men were appointed and the time a case arose, they might become feble-minded and yet still be commissioners.

My purpose was to get men whose judgment and honesty the public would respect, men who would make their decision in a quasi-judicial spirit. I assumed that Supreme Court members should not sit as commissioners themselves, but that they might be given, by law, the power to appoint as technically inferior officers, as per the constitutional provision, men of high standing from active public life, and that these men would serve as commissioners so long as they were engaged in active life and were not removed by the Supreme Court for cause.

The Cabinet is composed of administrative subordinates of the President whose respect for and dependence for their offices upon him might make them reluctant to act.

Congress is a political body, and I look with disfavor upon the suggestion that it be empowered to decide a matter so closely related to the tenure of the President. Impeachment by the House and removal after conviction by the Senate was almost abused in reconstruction in a manner which might have permanently weakened the Presidency. Fortunately, the impeachment process has not since been a serious threat to Presidential independence. But so vital do I regard such independence to our system that I object to having this power given to Congress by law or by constitutional amendment.

I said at the beginning that every solution has its drawbacks, including my own. Yet I make one more plea for serious consideration of some form of my proposal to the Celler committee. The objection that I want to set up w. o. c.'s I regard as misleading.

I am not inclined to have the President notify the Vice President where that is possible, as per the Eisenhower-Nixon agreement. But, where that is not possible, why not have distinguished citizens chosen by the Supreme Court standing by as commissioners for the purpose of deciding, with the proviso that they retire as commissioners when they retire from active private life, as suitably defined? And, since the resumption of activity by the President is an even more delicate matter, why not have these men decide that in all cases?

I am honored to be asked to comment upon this important subject. If you should wish me to amplify or clarify my summary statements, please let me know.

Respectfully yours,

JAMES HART.

AMERICAN COLLEGE OF CHEST PHYSICIANS,
Chicago, Ill., March 6, 1958.

Hon. ESTES KEFAUVER,
Senate Office Building, Washington, D. C.

DEAR SIR: An important issue of current concern to the Congress is the need for legislation regarding procedure to protect the interests of the country in the event the President should be unable to carry on the duties of his office. A proposed bill now before Congress suggests the establishment of a 7-man Commission on Presidential Disability. These 7 men, under the proposed bill, would be the Secretary of State, the Speaker of the House, the President pro tempore of the Senate, and the 4 party leaders of the 2 Houses.

Insofar as this can go, it appears to be a reasonable and effective proposal; however, the one, and perhaps most important issue it does not seem to consider, is just what qualified person or persons will determine the President's state of health.

It appears to me that this is a medical rather than a legislative problem and that the most difficult decision facing the Congress would be to determine when the Chief Executive is physically or mentally incapable of carrying out his duties as President.

If this premise is accepted as a basis for legislation, we would accordingly propose that the Congress establish a medical commission comprised of 3 physicians: 1 to be selected by the Democratic leaders, a second by the Republican leaders, and the third to be designated by these 2 parties. Recognized medical societies can be requested to submit a suggested panel of prominent physicians from which the Congress could make its selection.

We further recommend that this medical commission be comprised of a cardiologist, a specialist in pulmonary disease, and a neurologist, since it would appear that disability, were it to occur, would fall within these 3 specialties. The duty of this medical commission would be to consult with the President's personal physician and periodically check the President's health. If, in the opinion of these specialists, the President's health is such that he should not carry the heavy burden of the office of President, they could so advise the President and make proper recommendations. Should the President be incapacitated and unable to make a decision on his own, the duty of the medical commission would then be to report their findings to the 7-man Commission on Presidential Disability. The Congress would then be obliged to take the necessary steps to declare the President incapable of carrying on the official duties and to elect the Vice President to succeed him.

Since President Eisenhower has requested that the Congress enact legislation in operation for such eventualities, I trust that the foregoing plan will merit consideration by your committee.

Respectfully yours,

MURRAY KORNFIELD, *Executive Director,*

WASHINGTON UNIVERSITY,
DEPARTMENT OF POLITICAL SCIENCE,
St. Louis, Mo., March 6, 1958.

Senator ESTES KEFAUVER,
United States Senate.

DEAR SENATOR KEFAUVER: Based on your splendid record in the Senate, your association with the disability amendment was what your followers might have expected. But, I, nevertheless, congratulate you on this new basic service to the public.

For many years a student of our constitutional system and constitutional law, I am certain that only by amending the Constitution can an adequate and stable clarification of the provision concerning the disability of the President be achieved. There are obvious objections to a mere compact between the President and the Vice President. And a statute based upon article II, section 1, paragraph 6, and the necessary and proper clause of the Constitution would always be an easy target for challenges of its constitutionality.

Your draft of an amendment seems to me the best that has been offered thus far. But some additional provisions seem to me desirable, if not imperative.

Yours truly,

ARNOLD J. LIEN.

1. I am one among the many who would like to have as a first section a declaration to the effect that in the case of a vacancy in the office of President, the Vice President shall become President and serve as such for the remainder of the unexpired term.

2. Because 8 times in our history the office of Vice President has had a vacancy (7 times because the Vice President became President and once because the Vice President resigned), an additional section would seem to be absolutely essential, with the following suggested content: "In case of a vacancy in the office of Vice President, the functions, powers, and duties vested by this article in the Vice President shall be performed by the officer designated by the Congress by law as next in line to act as President under the conditions specified in this Constitution. And the Congress shall by law adapt the procedure herein prescribed for use in the case of the disability of the President to the case of the simultaneous disability of both the President and the Vice President."

In this age serious consideration has to be given not only to the high death rate among the incumbents of the office of President with its terrible strains and pressures, but also to the hazards of travel by air and to the ever-present threat of atomic warfare.

NEW YORK, N. Y., March 13, 1958.

Hon. ESTES KEFAUVER,
United States Senate, Washington, D. C.

DEAR SENATOR KEFAUVER: You have been good enough to suggest that I send to you, as chairman of the Standing Subcommittee on Constitutional Amendments of the Committee on the Judiciary of the Senate, my views on the question of presidential succession.

1. The principal purpose of many of the current proposals on presidential disability is to make clear that the Vice President succeeds only to the powers and duties and not to the office in the event of a presidential disability.

It is desirable that this point be clear. If necessary we should have a constitutional amendment to make it clear. But I suggest that the history of article 2, section 1, clause 6, in fact makes it clear that it is only to the powers and duties to which the Vice President would succeed in the event of the disability of the President.

The draft Constitution, before it went to the Committee on Style, provided that, during periods of inability or vacancy in the Presidency, "the Vice President shall exercise those powers and duties until another President be chosen, or

until the inability of the President be removed." The Committee on Style substituted "the same" for "powers and duties," and "devolve" for "exercise." The Committee on Style had no authority to make any substantive changes and it follows that it could not have been the intention of the Committee to change the basic provision as drafted by the Convention, namely, that it was only to the powers and duties to which the Vice President would succeed.

If we were dealing with an act of Congress and not a constitutional provision I would agree that it would be well to clarify the matter once and for all. But I do believe that we should be wary with constitutional amendments and should propose them only when there is the clearest kind of need. I suggest that this clear need does not exist in this case.

The views of President Eisenhower, Vice President Nixon, and the Attorney General apparently are in accordance with what I have just said. There are others who disagree. So it might be well to have a concurrent resolution of the Congress which would express the interpretation of the Congress on the subject. I would think the chances high that after the debate which would take place on the floor of the House, the result would be to have a concurrent resolution expressing the opinion of the Congress along the lines I have just suggested; and if this were so I should think that would establish an effective interpretation of the Constitution. If this is wrong and the opinion of the House of Representatives and Senate were to the contrary, or even indeed if there were a large minority view to the contrary, then the matter of the constitutional amendment might be taken up.

2. If the foregoing view were accepted, it would seem to follow that no constitutional amendment would be necessary to provide for the recapture by the President of the powers and duties in the event of his recovery from the disability. This point is covered by the present provisions of article 2, section 1, clause 6.

3. Then there is the question as to the consultations which the Vice President should make in the case of a disabled President who will not or cannot declare his inability. I do not think it necessary or desirable to elaborate the kind of consultation or authority which the Vice President should have in order to make this determination. Obviously he should consult with many people in and out of Government, and I doubt the wisdom of specifying in detail whom he should consult. If it is specified that he must consult with the Cabinet this would seem to exclude his responsibility to consult with others, as for example leaders in both parties and even medical authorities. I think we must have confidence that officials in such high positions will act with responsibility in a matter of such great national importance.

Respectfully yours,

THOMAS K. FINLETTER.

[S. J. Res. 8, 84th Cong., 1st sess.]

JOINT RESOLUTION To amend the Constitution to authorize governors to fill temporary vacancies in the House of Representatives.

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

"ARTICLE —

"On any date that the total number of vacancies in the House of Representatives exceeds half of the authorized membership thereof, and for a period of sixty days thereafter, the executive authority of each State shall have power to make temporary appointments to fill any vacancies, including those happening during such period, in the representation from his State in the House of Representatives. Any person temporarily appointed to fill any such vacancy shall serve until the people fill the vacancy by election as provided for by article I, section 2, of the Constitution."

Passed the Senate May 19 (legislative day, May 2), 1955.

Attest:

FELTON M. JOHNSTON,
Secretary.

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