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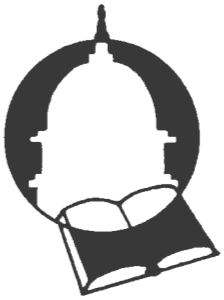
PRESIDENTIAL CONTINUITY AND
VICE PRESIDENTIAL VACANCY AMENDMENT



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PRESIDENTIAL CONTINUITY AND VICE PRESIDENTIAL VACANCY AMENDMENT

Introduction

At least three times in our history, during the administrations of Garfield, who lay in the twilight zone between life and death for eighty days before succumbing to an assassin's bullet, Wilson who, after suffering a stroke, spent the last eighteen months of his term in a state of at least semi-invalidism, and Eisenhower who had three separate and serious illnesses, the President of the United States, for varying periods, has been unable to carry out the duties of his office. Although the Constitution provides that when a President is disabled the Vice President shall take over, it does this in language so ambiguous that there is disagreement about whether the Vice President becomes President for the balance of the term or simply acts as President until the disability is ended. Moreover, no specific method is set forth for determining when presidential inability begins or ends. Nor is the responsibility for making such determination clearly spelled out.

Despite the virtual unanimity of informed contemporary opinion that existing law empowers the Vice President to make the determination that a President is disabled and thereafter to assume the powers and duties of the presidential office until the inability is ended, no Vice President has ever done so. Historical precedents as well as the weight of informed opinion are inclined toward the conclusion that no Vice President will act until the constitutional ambiguities have been removed. The cries for a solution to the problem have intensified as

Americans have apprehended the dread possibility of a nation immobilized in a moment of maximum peril because there might be neither a fit President nor someone unquestionably authorized to act in his stead.

Following his third illness, President Eisenhower attempted to fill in some of the constitutional gaps by entering into a working agreement with Vice President Nixon. The terms of the agreement provided that whenever the President informed the Vice President that he was unable to act the Vice President would assume the powers and duties of the presidential office until the inability had ended. If, however, the President were unable to communicate the existence of his inability, the Vice President would assume the duties of the office after such consultation as seemed to him appropriate under the circumstances. In either case the President, himself, would determine when the inability had ended and at that time resume the powers and duties of his office. Similar agreements were made between President Kennedy and Vice President Johnson and between President Johnson and Speaker McCormack who was next in line of succession until the inauguration of Vice President-elect Humphrey. A similar agreement also exists between President Johnson and Vice President Humphrey.

There has been general agreement that however valuable these working agreements might be nothing short of an amendment to the Constitution will give the person who assumes the duties of the presidential office the air of legitimacy so indispensable to their successful execution.

Furthermore, although three Attorneys General have expressed the view that these agreements are "consistent with the correct interpretation of . . . the Constitution" their legal standing continues to present a nagging question. 1/ Since the Supreme Court does not render advisory opinions it is extremely doubtful that the matter could ever be resolved in advance of the crisis. Not until the assassination of President Kennedy, however, had there been anything approaching a consensus on precisely what the amendment to the Constitution should provide. That consensus was embodied in the resolution proposed by the 89th Congress.

This report will outline the nature of the constitutional problem and examine the legislative history and analyze the amendment.

Statement of the Problem(s)

Article II, section 1, clause 6 of the Constitution now provides that--

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, 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.

Constitutional scholars have debated for many years the meaning of Article II, section 1, clause 6. The crux of the disability problem

arises from the first clause, i.e., "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 Same shall devolve on the Vice President, . . ." The second clause relating to the congressional power has been implemented from time to time through the enactment of statutes setting forth the succession to the office of President in the event of the removal, death, resignation, or inability of both the President and Vice President. Although the latter clause also raises several problems of constitutional interpretation, these more properly relate to presidential succession and are outside the scope of this paper. 2/

Turning to the first clause, it will be noted that it outlines four situations in which the Vice President may be called upon to act as President. Three of these, namely, removal, death, and resignation, obviously contemplate the permanent exclusion of the President for the balance of his term. The source of the uncertainty arises in connection with the fourth contingency, specifically, the "Inability to discharge the Powers and Duties of the said Office." Did the Framers intend such "inability" to permanently exclude the President, even in the event of recovery, from resuming the discharge of his powers and duties? Another question arises from the remaining language of the first clause which provides "the Same shall devolve on the Vice President." To what do the words "the Same" refer? In other words, what is it that

"devolves" on the Vice President? Is it the "Office" of the President or the presidential "Powers and Duties"? If the former interpretation prevails, the contingency of inability like the other three would operate to effect a permanent exclusion. However, if the latter interpretation prevails, the powers and duties would once again attach to the office upon the President's recovery.

Historical investigation and the weight of constitutional authority tend to support the conclusion that under Article II, section 1, clause 6 of the Constitution the Vice President merely discharges the powers and duties of the Presidency during the President's inability. 3/ The sole dissenting voice in this otherwise harmonious picture springs from actual practice whereby Vice Presidents have become Presidents upon the latter's death. The precedent was established by John Tyler's succession upon the death of William Henry Harrison on April 4, 1841. In her authoritative volume, Presidential Succession, Ruth C. Silva describes these events, in part, as follows:

> . . . The presidential office was vacant for the first time. It was then decided that in conformity with the Constitution, Vice President Tyler was to be the President for the remaining three years and eleven months of Harrison's term. Exactly who made this decision is uncertain. Legend tells us that the precedent was established merely because Tyler claimed presidential status. The Cabinet had decided, so the story goes, that Mr. Tyler should be officially styled "Vice President of the United States, acting President." But Tyler is supposed to have promptly determined that he would enjoy all the dignities and honors which he assumed he had inherited. 4/

Although objections were raised in Congress and in the press, Tyler's assumption established the precedent that when the presidential office is vacant, the Vice President becomes the President for the remainder of the term. 5/ As a consequence, on each of the eight occasions that the Vice President has assumed office because of the death of the President, he has taken the presidential oath. Notwithstanding that succession in these instances arose from one of the contingencies that contemplates a permanent exclusion, namely, death, they threw a cloud on a disabled President's claim to office upon full recovery.

These precedents combined with the ambiguities of Article II, section 1, clause 6 served to throttle any action in the event of a presidential crisis. Arthur, Garfield's Vice President, emphatically declined to take any steps whatsoever to assume the powers of the President. Vice President Marshall flatly refused to assume any of the powers of the presidency because of the constitutional uncertainty as to whether Wilson could resume his office when he recovered.

Adding to this already highly uncertain situation was the recurrent and troubling problem of vice presidential vacancy. Between the years 1787 and 1965, eight Presidents died in office. 6/ Seven Vice Presidents also died in office and one resigned. 7/ As a result of these occurrences, the nation has been without a Vice President more than twenty percent of the time during its history.

It became apparent that in order to adequately correct the flaws in our constitutional system it was necessary to accomplish the following objectives:

(1) To establish once and for all that the Vice President assumes the presidential office upon removal from office, death, or resignation of the President;

(2) To provide that in the event of the fourth contingency, namely, inability, the Vice President shall exercise the powers and duties of the office of President;

(3) To establish the procedure for determining the existence of an inability and its termination; and

(4) To provide for filling a vacancy occurring in the Vice Presidency.

Legislative History

After more than eighty years of study by congressional committees, attorneys general, constitutional experts and bar association committees, the Congress, in the dying moments of 1963, began to act on a presidential continuity amendment. Sparked by the assassination of President Kennedy which alerted the American people as never before to the dangerous constitutional void, hearings were scheduled for early 1964. 8/ Even as the nation mourned the loss of the President many thoughts were troubled by the prospect of the political crisis which

might have followed had the fallen leader lingered on in hopeless and permanent incapacity. "As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land." 9/ Also, the record of Vice President Johnson's prior heart attack and advanced ages of the two immediate successors doubtless contributed to the general desire for a prompt solution.

A proposed constitutional amendment designed to solve the problem was introduced by Senator Birch Bayh, Chairman, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate. 10/ The resolution was favorably reported on August 13, 1964, 11/ and passed the Senate on September 29, 1964. 12/ Congress adjourned before the House of Representatives had taken any action on the measure.

Similar proposals were introduced in the opening days of the 89th Congress by Senator Bayh and Congressman Celler. 13/ On January 28, President Johnson lent his support and urged prompt passage of the resolution. In broad outline, these resolutions provided that upon the removal, death, or resignation of a President, the Vice President would become President. It would require a President to nominate a person who meets the constitutional qualifications to be a Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he had been confirmed by a majority vote of both Houses of the Congress.

The remainder of the resolution spelled out the procedure for determining the commencement and termination of presidential inability. It made clear that the President could declare his inability in writing and that upon such an occurrence the Vice President would become acting President. However, if a President did not declare the existence of his inability, the Vice President, if satisfied that the President was disabled would, with the written approval of a majority of the Cabinet, assume the discharge of the powers and duties of the office as acting President upon the transmission of such declaration to the Congress.

Finally, the resolution would permit the President to resume the powers and duties of the office upon his transmission to the Congress of his written declaration that no inability existed. However, if the Vice President and a majority of the Cabinet felt that the President was unable, they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress. At this point the proposal recommended that the Congress make the final determination on the existence of inability. If the Congress determined by a two-thirds vote of both Houses that the President was unable, then the Vice President would continue as acting President. However, if the Congress failed in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office,

then the President would resume the powers and duties of the office.

The Senate Judiciary Committee submitted a favorable report on an amended resolution on February 10, 1965. 14/ The Committee version contained a number of language changes in two of the three sections which embraced the procedures for determining the commencement and termination of presidential inability. Section 4, dealing with the factual determination of inability when the President does not make a declaration to that effect, was entirely rewritten. The purpose of these amendments was explained as follows:

> The text of Senate Joint Resolution 1, as introduced, requires, under certain contingencies, for a written declaration to be made by the President, under section 3, and by the Vice President and principal officers of the executive departments under section 4, and by the President, the Vice President and principal officers of the executive departments under section 5. It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.
>
> The committee is concerned about the possibility that such written declaration might be transmitted during a period in which Congress was not in session. In this event the committee feels that transmittal of such written declaration to the presiding officers of both Houses, the President of the Senate and the Speaker of the House of Representatives, would be sufficient transmittal under the terms of this amendment.
>
> It is the opinion of the committee that, under the language of section 5, Congress is empowered to reconvene in special session to consider any disability question arising under this section. Furthermore, under the language of this section, the President of the Senate and the Speaker of the House of Representatives would be required to call a

special session of the Congress to consider the question of presidential inability whenever the President's ability to perform the powers and duties of his office are questioned under the terms of section 5. However, nothing contained in this proposed amendment should be construed to limit the power of the President from exercising his existing constitutional authority to call for a special session of the Congress.

It is further understood by the committee that should the President of the Senate and the Speaker of the House of Representatives not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment.

It is the judgment of the committee that the language "principal officers of the executive departments" more adequately conveys the intended meaning of sections 4 and 5, that only those members of the President's official Cabinet were to participate in any decision of disability referred to under these sections. This language finds precedent under article II, section 2, clause 1, of the Constitution. The pertinent language there reads as follows:

> he may require the Opinion, in writing, of the principal Officer in each of the executive Departments,

In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise:

(1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented?

(2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?

Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.

However, the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination. The language, as amended, reads as follows:

> Thereupon Congress shall immediately proceed to decide the issue.

It was the opinion of the committee that the words "Thereupon", "shall", and "immediately" were sufficiently strong to indicate the necessity for prompt action.

Precedence for the use of the word "immediately" and the interpretation thereof may be found in the use of this same word, "immediately" in the 12th Amendment to the Constitution. In the 12th amendment, in the event no candidate for President receives a majority of electoral votes, the House of Representatives "shall choose immediately,". The committee was of the opinion that the same sense of urgency attendant to the use of the word "immediately" in the 12th amendment when Congress was in fact deciding who would be the President of the United States should be attendant in proceedings in which the Congress was deciding whether the President of the United States should be removed from his office because of his inability to perform the powers and duties thereof.

The committee is concerned that congressional action under the terms of section 5 should be taken under the greatest sense of urgency. However, because of the complexities involved in determining different types of disability, it is felt unwise to prescribe any specific time limitation to congressional deliberation thereupon. Indeed, the committee feels that Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.

The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section 5 would be pursued under the rules prescribed, or to be prescribed, by the Congress itself. 15/

On February 19 the Senate passed (72 - 0) and sent to the House a modified version of the resolution submitted by Senator Bayh. 16/

During debate on the measure the Senate adopted several amendments of a technical and corrective nature submitted by the Indiana Senator as well as the changes proposed by the Committee. 17/ Also adopted was an amendment proposed by Senator Hruska which would allow the Vice President seven days--rather than two--to communicate with the Congress in the event of a disagreement between him and the President concerning the termination of a disability. 18/ The Senator felt "that the two day period is insufficient for the Vice President and the members of the Cabinet to decide whether they want to raise the issue of the President's ability." 19/

On March 24 the House Committee on the Judiciary favorably reported an amended version of the resolution submitted by Congressman Celler. 20/ As noted above, the latter was identical to the proposal originally introduced by Senator Bayh. The changes made in Committee were explained at length in its report on the measure.

> The principal purpose of the amendment is to distinguish between inability voluntarily declared by the President himself and inability declared without his consent. In the former case, the President can resume his duties by making a simple declaration that the inability has ceased; in the latter, the measure provides procedures for promptly determining the presence or absence of inability when that issue is present.
>
> The amendment makes no changes in sections 1 and 2 of the constitutional amendment proposed by House Joint Resolution 1 as introduced; it does make changes in sections 3 and 4 and it eliminates section 5 by merging the substance of that section with that of section 4.

The changes made by the amendment in section 3 clarify the procedure and clarify the consequences when the President himself declares his inability to discharge the powers and duties of his office. There are two: First, the amendment indicates the officials to whom the President's written declaration of inability shall be transmitted, namely the President pro tempore of the Senate and the Speaker of the House of Representatives. The committee deemed it desirable to add this specification which was absent from the joint resolution as introduced. Second, the amendment makes clear that, in case of such voluntary self-disqualification by the President, the President's subsequent transmittal to the same officials of a written declaration to the contrary, i.e., a written declaration that no inability exists, terminates the Vice President's exercise of the Presidential powers and duties, and that the President shall thereupon resume them. In short, it is the intent of the committee that voluntary self-disqualification by the President shall be terminated by the President's own declaration that no inability exists, without further ado. To permit the Vice President and the Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Sections 4 and 5 of the amendment proposed by House Joint Resolution 1, as introduced, dealt respectively with the devolution upon the Vice President, as Acting President, of the President's powers and duties pursuant to a declaration of his inability made by the Vice President and other officials, and with the procedure upon subsequent declaration by the President that no inability exists.

The amendment places the substance of former section 5 into section 4, in order to emphasize the committee's intent that the procedure provided by former section 5 relates only to cases in which Presidential inability has been declared by others than the President. Two identical changes are made in former sections 4 and 5. First, the term "principal officers of the executive departments" is substituted for the term "heads of the executive departments" to make it clearer that only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. The substituted language follows more closely article II, section 2, of the Constitution, which provides that the President may require the

opinion in light "of the principal officers in each of the executive departments ***." The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.

The second change made in former sections 4 and 5 is to specify the President pro tempore of the Senate and the Speaker of the House of Representatives as the congressional officials to whom declaration concerning Presidential inability shall be transmitted, as is done in section 3.

The language of former section 5 of the House Joint Resolution 1 is further amended to make clear that if Congress is not in session at the time of receipt by the President pro tempore of the Senate and the Speaker of the House of Representatives of a written declaration by the Vice President and a majority of the principal officers of the executive departments contradicting a Presidential declaration that no inability exists, Congress shall immediately assemble for the purpose of deciding the issue. Finally, the language of former section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.

The committee deems it essential in the interest of stability of government to limit to the smallest possible period the time during which the vital issue of the executive power can remain in doubt. Under the bill, following a Presidential declaration that the disability previously declared by others no longer exists, a challenge to such declaration must be made within 2 days of its receipt by the heads of the Houses of Congress and must be finally determined within the following 10 days. Otherwise the President, having declared himself able, will resume his powers and duties. An unlimited power in Congress might afford an irresistible temptation to temporize with respect to restoring the President's powers. In this highly charged area there is no room for equivocation or delay. 21/

As reported by the House Committee, the resolution differed from the Senate-passed version in three major particulars. First, it spelled out more clearly that the Vice President would discharge the powers and duties of a President who voluntarily declared his own inability only until the President transmitted to Congress a written declaration stating that his inability had terminated. Second, it reinstated the two day limitation (rather than seven days) during which the Vice President and a majority of the Cabinet might challenge a President's contention that his inability had ended. Third, it provided that in the event of disagreement between the President and Vice President and a majority of the Cabinet over the termination of presidential inability, Congress, if not in session, would immediately assemble to decide the issue within ten days. The Senate-passed version provided only that Congress would "immediately proceed to decide" the issue.

On April 13, 1965, the House passed the amended version by a vote of 368 to 29. 22/ Following passage, the House substituted the text of its resolution for that passed by the Senate. 23/ The only amendment adopted on the floor was a proposal by Congressman Poff providing that Congress, if not in session, shall assemble "within 48 hours" to decide a dispute between the President and Vice President over termination of presidential inability. 24/

The tenor of the House debate was fairly well summarized by Congressman Celler who said:

This is by no means, ladies and gentlemen, a perfect bil[l]. No bill can be perfect. Even the sun has its spots. The world of actuality permits us to attain no perfection. Admirable as is our own Constitution, it had to be amended 24 times. But nonetheless, this bill has a minimum of drawbacks. It is well-rounded, sensible, and efficient approach toward a solution of a perplexing problem--a problem that has baffled us for over 100 years.

As to attaining perfection, let me call your attention to a very pertinent remarks (sic) made by Walter Lippman in the New York Herald Tribune of June 9, 1964, when he referred to this proposed amendment. He said:

> It is a great deal better than an endless search for the absolutely perfect solution, which will never be found and, indeed, is not necessary.

As was said by the distinguished former Attorney General of the United States, the honorable Herbert Brownell--I commend his words indeed to the gentleman from Ohio [Mr. Brown]--speaking for himself and speaking for the American Bar Association:

> Certainty and prompt action are *** built into this proposal--namely, House Joint Resolution 1. *** During the 10-year debate on presidential disability *** many plans have been advanced to have the existence of disability decided by different types of commissions or medical experts, by the Supreme Court, or by other complicated ad hoc procedures. But upon analysis *** they all have the same fatal flaw *** they would be time consuming and divisive.

We tried to avoid freighting down this amendment with too much detail. We leave that to supplementing, implementing legislation. We make the provisions as simple yet as comprehensive as possible.

This is certain: we have trifled with fate long enough on this question of presidential inability. We in the United States have been lucky, but luck does not last forever. The one sure thing about luck is that it is bound to change.

Sir Thomas Brown once said:

> Court not felicity too far and weary not the favorable hand of fortune.

> We can no longer delay. Delay is the art of keeping up with yesterday. We must keep abreast of tomorrow. Let us stop playing presidential inability roulette. Let us pass this measure. . . . 25/

The House on June 30, 1965, by voice vote and with little debate, adopted the conference report embodying the compromised version of the resolution. 26/

The Senate the same day debated the conference report but deferred action on it until July 6 to allow further debate after Senators Gore, Kennedy (N.Y.) and McCarthy raised a question concerning the provision allowing the Vice President "and a majority of either the principal officers of the executive departments or such other body as Congress may by law provide" to declare the President disabled. 27/ Senator Gore expressed concern that the words "either" and "or" might give rise to a situation in which the Vice President and a majority of the Cabinet, and a body which Congress might establish, would both claim the authority to exercise the function. Senator Bayh explained that this language was intended to mean "either one or the other." 28/

On July 6, the Senate, by a vote of 68 to 5, adopted the conference report on the resolution. 29/ During the debate Senator Gore renewed his objections to the proposal which he said would lead to the potentially disastrous spectacle of competing claims to the Presidency. Senator Bayh, supported by Senator Ervin, argued that the proposal was the very best obtainable in the Congress of the United States.

As reported from conference and approved by both Houses the resolution contained a number of changes from the earlier passed versions. These changes were explained by Senator Bayh as follows:

> The conference report, which has now been approved by the House of Representatives, contains certain changes from the proposal which the Senate approved earlier this year by a vote of 72 to 0. I should like to describe those changes and then urge approval of the conference report by this body.
>
> In the Senate version of the measure we prescribed that all declarations concerning the inability of the President or of his ability to perform the powers and duties of that office, particularly a declaration concerning his readiness to resume the powers and duties of his office made by the President of the United States himself, be transmitted to the Speaker of the House and to the President of the Senate.
>
> The conference committee report proposes that those declarations go to the Speaker and to the President pro tempore of the Senate. The reason for the change is, of course, that the Vice President, who is also the President of the Senate, would be participating in making a declaration of presidential inability, and therefore would be unable to transmit his own declaration to himself. In addition, I believe that we would be on better legal ground not to send the declaration to a party in interest. The Vice President, who would be shortly assuming or seeking to assume the powers and duties of the office, would indeed be a party in interest.
>
> In the Senate version of the bill we did not specify that if the President were to surrender his powers and duties voluntarily--and I emphasize the word "voluntarily"--he could resume them immediately upon declaring that his inability no longer existed. We believe that our language clearly implied this. Certainly the intention was made clear in the debate on the question on the floor of the Senate and in the record of our committee hearings, but the Attorney General of the United States requested that we be more specific on this point so as to encourage a President to make a voluntary declaration to the effect that he was unable to perform the powers and duties of the office, if it was necessary for him to do so.

We made that point clear in the conference committee report.

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

That had been the intention of the Senate all along, as I recall the colloquy which took place on the floor of the Senate; and we had no objection to making that intention crystal clear in the wording of the proposed constitutional amendment itself.

In the Senate version we prescribed that the President, having been divested of his powers and duties by declaration of the Vice President and a majority of the Cabinet, or such other body as Congress by law may provide, could resume the powers and duties of the office of President upon his declaration that no inability existed, unless within 7 days the Vice President and a majority of the Cabinet, or such other body issued a declaration challenging the President's intention. The House version prescribed that the waiting period be 2 days. The conference compromised on 4 days, and I urge the Senate to accept that as a reasonable compromise between the time limits imposed by the two bodies.

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

I remember well the words of President Eisenhower, before the American Bar Association conference, when he said that it is a constitutional obligation of the Vice President to help make these decisions. We in the Senate felt that to be the case, and thus changed the language a bit to make it specifically clear.

That, I am sure, had been the intention of both the Senate and the House, but we felt that the language was not specific enough, so we clarified it on that point.

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

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

Finally, the Senate version imposed longtime limitations upon the Congress to settle a dispute as to whether the President or the Vice President could perform the powers and duties

of the office of President. Senators know the question would come to the Congress only if the Vice President, who would then be acting as President, were to challenge, in conjunction with a majority of the Cabinet, the President's declaration that no inability existed. The House version imposed a 10-day time limitation. The Senate conferees were willing to have a time limitation as a further safeguard to the President, but we were unanimous in agreeing that 10 days was too short a period in which to decide on that grave a question.

The conferees finally agreed to a 21-day time limitation after which, if the Vice President had failed to win the support of two-thirds of both the Houses of Congress, the President would automatically return to the powers and duties of his office. I urge the Senate to accept that change.

I should like to specify one thing further about this particular point since I feel it is the main point of contention between the House and the Senate, and one upon which I was happy to see we could find some agreements.

First, including a time limitation in the Constitution of the United States would impose upon those who come after us in this great body a limitation on their discussions and deliberation when surrounded by contingencies which we cannot foresee. The Senate conferees felt that a 10-day time limitation was too short a period.

Our feeling in the Senate, as represented by the views of the conferees, was that we should go slowly in imposing a maximum time limitation if we could not foresee the contingencies that might confront those who were forced to make their determination as to who would be the President of the United States. I believe 21 days is a reasonable time. I emphasize that it is our feeling that this is not necessarily an absolute period. The 21 days need not always be used. In my estimation, most decisions would be made in a shorter time. But if the Nation were involved in a war or other international crisis, and the President suffered an illness whose diagnosis might be difficult, a longer time might be needed, and the maximum of 21 days that was agreed upon might be required.

It should be made clear that if during the 21-day limit one House of Congress, either the Senate or the House of Representatives, voted on the issue as to whether the President was unable to perform his powers and duties, but failed to obtain the necessary two-thirds majority to sustain the position of the Vice President and the Cabinet, or whatever other body Congress in its wisdom might prescribe at some future date, the issue would be decided in favor of the President. In other

words, if one House voted but failed to get the necessary two-thirds majority, the other House would be precluded from using the 21 days and the President would immediately reassume the powers and duties of his office. 30/

25th Amendment Summarized

The amendment proposed to the States by the 89th Congress meets the four basic objectives noted earlier. It affirms the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. In order to assure that the second highest office will always be occupied, it requires the President to nominate a person to be Vice President whenever there is a vacancy in that office. The nominee is to take office as Vice President upon confirmation by a majority in both Houses of Congress.

The proposal permits the President to declare himself disabled and to declare the end of his disability. The declarations are to be reduced to writing and transmitted to the Speaker of the House of Representatives and the President pro tempore of the Senate. In the interim, the Vice President becomes Acting President. If a President does not declare the existence of his inability, the Vice President and a majority of the "principal officers of the executive departments" may declare the President disabled by transmitting their written declaration to this effect to the presiding legislative officers of

the House and Senate. In such an event the Vice President is to undertake the discharge of the presidential powers and duties as Acting President. If for any reason the Cabinet proves not to be a workable instrument in this matter, Congress is empowered to set up another body to work with the Vice President.

"Thereafter" the President may announce his own recovery and "resume the powers and duties of his office". However, if the Vice President and a majority of the Cabinet disagree with the President, they have four days to send a written declaration of the fact to the Speaker and the President pro tempore. At this point the Congress is responsible for a final decision. If Congress is not in session, it would have to assemble within forty-eight hours of receipt of the declaration. From the time of receipt Congress has twenty-one days in which to decide the issue. Pending the decision, the Vice President is to continue as Acting President. If Congress fails to arrive at a decision, or if more than one-third of the membership of either House sides with the President, the President is to resume his powers and duties. If two-thirds of the membership of each House support the Vice President and the Cabinet, the Vice President is to continue as Acting President.

Footnotes

1/ 42 Op. Atty. Gen. No. 5 (1961), as reproduced in Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. J. Res. 28, S. J. Res. 35 and S. J. Res. 84 (1963).

2/ The principal issue arising from the second clause concerns the legal propriety of placing legislative officers in the order of presidential succession. Despite the inclusion of such persons in two of the three succession laws passed by Congress--including that currently in effect--debate on the matter continues unabated. The specific points at issue are (1) whether the Speaker and the President pro tempore are "officers" in the sense of Article II, section 1, clause 6; (2) whether a legislative officer (named to act as President) who resigns his office thereafter is eligible to act as President; and (3) whether it violates the constitutional principal of separation of powers for a Member of Congress to act as President. See Celada, Presidential Succession: A Recurrent Problem, pp. 21-30 (1963) (L.R.S. Multilith Report).

3/ 42 Op. Atty. Gen., supra, note 1 at 89-96:

> 1. The records and history of the Constitutional Convention.
> Without dispute, Article II, section 1, clause 6 nowhere expressly provides that the Vice President shall under any circumstances become President. Had the framers of the Constitution intended the Vice President in certain contingencies to become President, they would not have been at a loss for words. Reference to the records of the Constitutional Convention discloses that the framers of the Constitution never intended the Vice President in event of Presidential inability to be anything but an acting President while the inability continued.
> Of the various written plans submitted for consideration at the Convention, only Charles Pinckney's draft offered May 29, 1787, specifically referred to Presidential disability. Article VIII of this draft provided in part that in case of the President's removal through impeachment, death, resignation or disability "the President of the Senate shall exercise the duties of his office until another President be chosen * * *." [1]
> The House resolved itself into a Committee of the Whole to consider various proposals, but having made little progress on

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[1] 3 Max Farrand, The Records of the Federal Convention of 1787 (1911 Ed.), 600.

the question of the President's inability, referred this proposal to the Committee of Detail which was then considering other matters. This Committee reported a draft on August 6, 1787, which contained Article X, section 2 relating to Presidential inability. It provided that in case of the President's removal as aforesaid through impeachment, death, resignation, or disability to discharge the powers and duties of his office, "the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed."[2] On August 27, Mr. Dickinson remarked about the vagueness of this clause. "What," he said,"is the extent of the term 'disability' & who is to be the judge of it?" Unfortunately, his suggestion produced no clarification. [3]

It will be noted that up to this point the official to act as President until the President's disability was ended was "the President of the Senate," not the Vice President. Article X of the draft was then referred to the Committee of Eleven which reported on September 4. In its report provision was included for the first time for a Vice President, as distinguished from the President of the Senate[4] who was to be ex officio, President of the Senate, except on two occasions: when the Senate sat in impeachment of the President, in which case the Chief Justice would preside, and "when he shall exercise the powers and duties of the President," in which case of his absence, the Senate would choose a President pro tempore. The Committee of Eleven also recommended that the latter part of section 2 of Article X be amended to provide that in case of the President's removal on impeachment, death, absence, resignation or inability to discharge the powers or duties of his office "the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed." [5] He was not to become the President in either event.

On September 7, the Convention adopted an amendment to cover the vacancy or disability of both the President and Vice President providing that the Legislature may declare by law what officer of the United States shall act as President in such event, and "such Officer shall act accordingly, until such disability be removed, or a President shall be elected." [6]

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[2] 2 id. 186.
[3] 2 id. 427.
[4] 2 id. 495.
[5] 2 id. 495, 499.
[6] 2 id. 532.

On September 8, the last clause of section 2, Article X was agreed to by the Convention, and a Committee of five was appointed "to revise the style and arrange the articles agreed to by the House" including those provisions dealing with inability.[7] Thus, as the proposed article came to the Committee on Style, it consisted of two clauses dealing with Presidential succession. The first related to the devolution of the powers and duties of the President's office on the Vice President in certain cases including the President's inability. The second authorized Congress to designate an officer to act as President in cases in which both the President and Vice President were disabled, had died, resigned, or been removed. A temporal clause modified each main clause limiting the tenure of an acting President to the duration of the inability or until "another President be chosen" (first clause) or until "a President shall be elected" (second clause). Nothing in either clause said that the Vice President was to become President.

On September 12 the Committee on Style, condensing and combining the provision for Presidential inability, together with the provision for joint inability of both the President and Vice President, reported the clause as follows: [8]

"(e) In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another arrive."

Madison crossed out the words "the period for chusing another president arrive" and inserted in their place "a President shall be elected." [9] In this form the clause was written into the final draft of the Constitution.

The Committee on Style had no authority to amend or alter the substance or meaning of the provisions, but merely to combine and integrate them as a matter of form. [10] In this setting, the effect of what was done by it may be better understood by placing

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[7] Davis, Inability of the President, Sen. Doc. No. 308, 65th Cong., 3d sess. 10 (1918).

[8] 2 Ferrand, op. cit. supra note 1, 598-599.

[9] 2 id. 626. See also 2 id. 599.

[10] Davis, op. cit. supra note 7, 11.

the provisions originally agreed to by the Convention side by side with the clauses as they were adopted by the Convention.

"Articles Originally Agreed to by the Convention	As Later Reported by Committee on Style and Finally Adopted
Article X, section 2: * * * and in case of removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.	Article 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;
Article X, section 1: The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President;	and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President;
and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.	and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

Comparison of these provisions makes clear the intention of the framers of the Constitution. When the provisions were placed into the hands of the Committee on Style and Arrangement, they explicitly provided that in case of inability of the President, the Vice President was not to become President, but merely to "exercise those powers and duties * * * until the inability of the President be removed." When, therefore, the Committee on Style condensed the language and reported the provision to read in case of the President's "inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President," the exact meaning intended by the Convention was carried over to the revised language.

It has been argued by one school of thought that "the Same" as used in the succession clause refers to "Office," and therefore the office devolves on the Vice President who thereby

becomes President. The other school asserts that "the Same" has reference to "Powers and Duties," and that the Vice President may merely discharge those powers and duties, but does not become President. Since a definitive answer is not to be found in any fixed rules of English usage, Professor Ruth C. Silva has concluded that the antecedent of "the Same" should be ascertained on the basis of the intention of those who framed and ratified the Convention. [11] This is sound construction.

This interpretation is reinforced by other language initially agreed to by the Convention. If it were intended that the Vice President should act permanently as President, it seems unlikely that the language adopted by the Convention and sent to the Committee on Style would expressly prescribe a temporary period during which the Vice President shall exercise "those powers and duties," viz: "until another President be chosen, or until the inability of the President be removed."

When we refer to the provisions before and after the Committee on Style had combined them, it appears that the Committee did several things: consolidated the two provisions into one and introduced the words "the same shall devolve on the Vice President"; omitted reference to "absence" as an occasion for operation of the succession rule; used the adverbial clause "until the disability be removed," only once instead of using it to modify each of the preceding clauses separately; substituted "inability" for "disability" in the clause referring to succession beyond the Vice President, possibly as being more comprehensive and covering both absence and temporary physical disability; and changed the semicolon after "Vice President" to a comma so that the limiting clause beginning "and such Officer" would refer both to the Vice President and the officer designated by Congress. Thus the evolution of this clause makes clear that merely the powers and duties devolve on the Vice President, not the office itself.

2. The debates in the Convention and in the ratifying conventions.

The debates in the Convention are not too illuminating on the question whether a Vice President was merely to act as President until the latter's disability was over or to become President. In support of the view that the debates demonstrate recognition that the Vice President's role was to be a temporary one while the inability existed, statements relied on are not squarely in point, but the inferences drawn are entitled to weight.

Thus, Professor Silva states: [12] "* * * This assumption [that the Vice President is an acting President] is implicit in James

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[11] Silva, Presidential Succession 32 (1951).

[12] Id. 10.

Wilson's objections to the election of the President by Congress. The gentleman from Pennsylvania said that the Senate might prevent the filling of a vacancy by dilatory action, so that their own presiding officer could continue to exercise the executive function. Gouverneur Morris and James Madison likewise objected to this mode of election for a similar reason--the Senate might retard appointment of a President in order that its own presiding officer might continue to possess veto power. Such objections are without merit if the President's successor was intended to become President for the remainder of the term."

There is other evidence from which the intention of the delegates may be determined. Charles Warren reports that during the debates little enthusiasm was expressed for an officer such as the Vice President, that the discussion centered on his status as a legislative officer, and there was no discussion as to his succession even in case of the President's death. [13] However, Warren is of the opinion "the delegates probably contemplated that * * * the Vice President would only perform the duties of President until a new election for President should be held; and that he would not ipso facto become President." [14] It seems fairly clear that if the delegates did not contemplate thatthe Vice President shall become President on the death of the President, but only perform the duties of the office, that they certainly did not intend any different result upon the President's inability.

Discussion of the succession clause at the ratifying conventions was also singularly unenlightening.

Professor Silva, who has made a careful study of the matter, reports there is no record of discussion of the succession clause at the ratifying conventions except briefly at the Virginia Convention. George Mason objected to the clause because it lacked provision for the prompt election of another President in event of vacancy in both the Presidential and Vice-Presidential offices. Madison's attempt to answer this objection indicated that he did not think that the designated officer in event of succession beyond the Vice President "would have that tenure which the Constitution guarantees to a de jure President," but it does not appear that Madison had in mind the status of a Vice President who might be acting as President. [15] What is of greater significance is that the delegates in the ratifying conventions always

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[13] Charles Warren, The Making of the Constitution, 634-635 (1928).
[14] Id. at 635.
[15] Silva, op. cit. supra note 11, 11.

carefully distinguished between "the President" and "the acting President." Reference was made to "the Vice President, when acting as President," not "the Vice President when he becomes President." [16] Silva says that "nowhere in the debates of the ratifying conventions did a single one of the delgates use the latter expression." [17]

The Federalist, in which Hamilton defended the proposed Constitution and explained in detail its provisions, is surprisingly silent as a whole on what was intended when a President suffers inability. However, at one point Hamilton defended the role of a Vice President over the objection that his position would be "superfluous, if not mischievous." He urged that two considerations justified the Vice President's position: one to cast the deciding vote in the Senate when they were equally divided; the other, that "the vice-president may occasionally become a substitute for the president * * *, and exercise the authorities and discharge the duties of the president." [18]

While these debates in the Convention and ratifying conventions appear to be inconclusive, generally they tend to support the argument that a Vice President or designated officer was never, in the view of the framers of the Constitution, intended to become President. If there was Presidential inability, the Vice President was to act only until the inability was terminated. [19]

4/ Ann Arbor, University of Michigan Press, 1951, at 14.

5/ Id., at 15-24.

6/ The eight Vice Presidents who succeeded to the Presidency were John Tyler (Harrison), Millard Fillmore (Taylor), Andrew Johnson (Lincoln), Chester A. Arthur (Garfield), Theodore Roosevelt (McKinley), Calvin Coolidge (Harding), Harry S. Truman (Roosevelt), and Lyndon B. Johnson (Kennedy).

7/ The seven Vice Presidents who died in office were George Clinton, Elbridge Gerry, William R. King, Henry Wilson, Thomas A. Hendricks, Garrett A. Hobart, and James Sherman. The only Vice President to have ever resigned was John C. Calhoun.

8/ Presidential Inability and Vacancies in the Office of Five President. Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary. United States Senate, 88th Cong., 2d Sess., (1964).

9/ Id., at 22 (Senator Keating).

10/ S. J. Res. 139, 88th Cong., 1st Sess.

11/ S. Rept. No. 1382, 88th Cong., 2d Sess. (1964).

12/ 110 Cong. Rec. 23061 (1964).

13/ S. J. Res. 1, H. J. Res. 1, 89th Cong., 1st Sess.

14/ S. Rept. No. 66, 89th Cong., 1st Sess. (1965).

15/ Id., at 2-3.

16/ 111 Cong. Rec. 3203 (daily ed.).

17/ Id., at 3167-3168.

18/ Id., at 3194.

19/ Id., at 3192.

20/ H. Rept. No. 203, 89th Cong., 1st Sess. (1965).

21/ Id., at 2-3.

22/ 111 Cong. Rec. 7699 (daily ed. April 13, 1965).

23/ Id., at 7700.

24/ Id., at 7698.

25/ Id., at 7667-7668.

26/ 111 Cong. Rec. 14668 (daily ed. June 30, 1965). H. Rept. No. 564, 89th Cong., 1st Sess. (1965).

27/ 111 Cong. Rec. 14829-14832, 14833-14839 (daily ed. June 30, 1965).

28/ Id., at 14835.

29/ 111 Cong. Rec. 15031-15032 (daily ed. July 6, 1965).

30/ 111 Cong. Rec. 14830-14831 (daily ed. June 30, 1965).

Appendix

Text of the 25th Amendment

JOINT RESOLUTION

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

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

"Article--

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

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

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

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

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority

of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office."

LRS-34

ADDENDUM TO THE REPORT OF DECEMBER 3, 1965, PRESIDENTIAL CONTINUITY AND VICE PRESIDENTIAL VACANCY AMENDMENT

The proposal to assure continuity of Presidential power in the case of disability was formally proclaimed the 25th Amendment at a White House ceremony on Thursday, February 23, 1967. Mr. Lawson Knott, Administrator, General Services Administration, signed the document certifying that the Amendment had been ratified in accordance with procedures set forth in Article V of the Constitution. President Johnson signed as a witness.

The Amendment, the subject of intensive study for almost a century, went into effect when Nevada became the 38th State to ratify. Although the joint congressional resolution containing the terms of the Amendment allowed seven years for completion of the ratification process, a scant 20 months had elapsed since its formal presentation to the States.

Briefly, the Amendment specifies the procedures to be followed when a President is disabled and authorizes a President to fill the office of Vice President if it becomes vacant.

President Johnson emphasized the importance of the 25th Amendment during the ceremonies of February 23. He said:

> Twice in our history we have had serious and prolonged disabilities in the Presidency. Sixteen times in the history of the Republic the office of Vice President . . . has been vacant. [In this] crisis-ridden era there is no margin for delay, no possible justification for a vacuum in national leadership.

The Amendment was ratified by the following states: *

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, August 9, 1965; Pennsylvania, August 18, 1965; Kentucky, September 15, 1965; Arizona, September 22, 1965; Michigan, October 5, 1965; Indiana, October 20, 1965; California, October 21, 1965; Arkansas, November 4, 1965; New Jersey, November 29, 1965; Delaware, December 7, 1965; Utah, January 17, 1966; West Virginia, January 20, 1966; Maine, January 24, 1966; Rhode Island, January 28, 1966; New Mexico, February 3, 1966; Colorado, February 3, 1966; Kansas, February 8, 1966; Vermont, February 10, 1966; Alaska, February 18, 1966; Idaho, February 25, 1966; Hawaii, March 3, 1966; Virginia, March 8, 1966; Mississippi, March 10, 1966; New York, March 14, 1966; Maryland, March 23, 1966; Missouri, March 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, January 12, 1967; Wyoming, January 25, 1967; Iowa, January 26, 1967; Washington, January 26, 1967; Oregon, February 2, 1967; Minnesota, February 10, 1967; Nevada, February 10, 1967.

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* According to the official papers on file February 15, 1967, with the National Archives.