

3-1964

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Recommended Citation

James C. Kirby, Jr., A Breakthrough on Presidential Inability: The ABA Conference Consensus, 17 *Vanderbilt Law Review* 463 (1964)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol17/iss2/4>

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A Breakthrough on Presidential Inability: The ABA Conference Consensus

James C. Kirby, Jr.*

On February 17, 1964, the House of Delegates of the American Bar Association recommended amendments to the United States Constitution to deal with the problem of presidential inability.¹ Of itself, this is not necessarily of unusual significance. The ABA takes many official positions. This was its third position in four years on this particular subject.²

This most recent action, however, may signal a permanent solution to a problem which has frustrated Congress and constitutional scholars for many years. The 1964 ABA position may be a great leap forward for two reasons: (1) the new recommendation takes a fresh approach to the problem, combining the principal features of the two competing proposals which have had widest acceptance and greatest acclaim in the past, and (2) the recommendation was evolved by a method which inherently carries promise of widespread acceptance of its product—a “consensus” of a special task force conference of consultants.

The House of Delegates adopted recommendations embodied in the consensus of a Special Conference on Presidential Inability and Succession which met in Washington on January 20 and 21, 1964.³

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1. 50 A.B.A.J. 237 (1964).

2. In 1960 the House of Delegates approved an amendment which would empower Congress to provide by law a mechanism for determining inability of a president. 46 A.B.A.J. 449 (1960). This is the “enabling” amendment, discussed at p. 473 *infra*, which was approved by the Senate Constitutional Amendments Subcommittee in 1963. In 1962 the House of Delegates approved a recommendation of the ABA Standing Committee on Jurisprudence and Law Reform which called for enactment of a statute but by a further resolution added that this proposal was not to be “construed to modify” the previous recommendation. 48 A.B.A.J. 364 (1962). The 1964 action of the House of Delegates included a resolution that the ABA “reaffirm in principle . . . the need for . . . statutory clarification . . . after the constitutional proposals have been submitted by Congress . . .” Report and Recommendations of the Standing Committee on Jurisprudence and Law Reform of the American Bar Association, as adopted by the House of Delegates, February 17, 1964.

3. The House of Delegates acted upon a subsequent report of the ABA Standing Committee on Jurisprudence and Law Reform which had concurred in the consensus recommendations.

The Conference members, appointed by ABA President Walter E. Craig, were practicing lawyers and law teachers who had been concerned with the problem in a variety of ways. The group included former officials of the Eisenhower administration, present and past officials and appropriate committee chairmen of the American Bar Association, teachers of constitutional law, a former counsel to the Senate Subcommittee on Constitutional Amendments, and several writers on the subject. They represented a variety of viewpoints and most were on record as favoring particular solutions, and opposing others, from the diverse and conflicting proposals which had been made in the past.⁴ Previous efforts in Congress to secure passage of a constitutional amendment had been stalemated by the widespread and seemingly hopeless disagreement among the experts. No significant new ideas had come forward and it was thought that all possibilities had been exhaustively examined and found wanting. Nonetheless, after two days of intensive deliberation and consultation with key members of Congress, and spurred on by public interest in the subject following the Kennedy assassination, the Conference came to a consensus of recommendations which is a new approach to the problem.

The Conference consensus is truly "new wine in a new bottle." Its merits will be better appreciated after a brief review of the need for constitutional amendment and the reasons why Congress has not yet dealt with a problem of such seriousness and long standing.

THE NEED

The problem stems from a rare oversight in draftsmanship by the framers of the Constitution. An excessive concern for conciseness and brevity led them to wrap up the entire matter of presidential succession in the following short clause:

In Case of the Removal of the President from Office, or of his Death,

4. The conferees were Herbert Brownell, former United States Attorney General and president of the Association of the Bar of the City of New York; Walter E. Craig, American Bar Association president; John D. Feerick, New York attorney and author of *The Problem of Presidential Inability—Will Congress Ever Solve It?* 32 *FORDHAM L. REV.* 73 (1963); Paul A. Freund, Harvard University professor of constitutional law; Jonathan C. Gibson, Chicago, chairman of the American Bar Association Committee on Jurisprudence and Law Reform; Richard H. Hansen, Lincoln, Nebraska, attorney and author of *THE YEAR WE HAD NO PRESIDENT* (1962); Ross L. Malone and Sylvester C. Smith, Jr., former ABA presidents; Charles B. Nutting, Washington, D.C., dean of the National Law Center; Lewis F. Powell, Jr., Richmond, Virginia, president-elect of ABA; Edward L. Wright, Little Rock, Arkansas, chairman of the ABA House of Delegates; Martin Taylor, chairman of the New York State Bar Association committee on the federal constitution, and this writer. *Caveat*: The consensus indicates that it is based upon "general agreement" and that all conferees do not necessarily subscribe to all portions.

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.⁵

The inherent inadequacy of this clause for instances of presidential inability has been exposed by an abundance of sound scholarship and need not be restated at length.⁶ Most difficulties result from the framers' lumping together all four contingencies for devolution of executive power and providing that the same consequences flow from inability as from death, resignation, and removal—despite a difference in kind. The latter are factual events whose occurrence can rarely be disputed, but inability is a condition whose existence might well be in doubt—especially to the party whose condition is in question. Also, death, resignation, and removal will result in a permanent succession to the powers and duties of the presidency, but inability might be temporary, leaving the possibility that a disabled President might resume the exercise of his office.

The clause is ambiguous as to whether the "office" itself or merely "the powers and duties" thereof devolve on the Vice President in each of the four contingencies. If the office of a disabled President devolves upon the Vice President and he becomes President, rather than merely acting as President, may the disabled President regain the office upon recovery? Eight Vice Presidents have become President upon death of the incumbent. This is obviously untenable for an inability situation and is a prime cause of the inoperativeness of the inability contingency. In two instances of presidential inability, those of Gar-

5. U.S. CONST. art II, § 1, cl. 6.

6. The burgeoning literature on the subject includes: CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 53-59 (1954); HANSEN, *THE YEAR WE HAD NO PRESIDENT* (1962); SILVA, *PRESIDENTIAL SUCCESSION* (1951); Brownell, *Presidential Disability: The Need for a Constitutional Amendment*, 68 *YALE L.J.* 189 (1958); Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. (1918), reprinted in HANSEN, *op. cit. supra*, at 136; Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73 (1963); Gasperini, *The Presidential Inability Riddle*, 31 *N.Y.S.B. BULL.* 258 (1959); Hansen, *One Strike and You're Out—The Constitution and Executive Disability*, 40 *NEB. L. REV.* 697 (1961); Heinlein, *The Problem of Presidential Inability*, 25 *U. CINC. L. REV.* 310 (1958); Hofstadter & Dinnes, *Presidential Inability: A Constitutional Amendment Is Needed Now*, 50 *A.B.A.J.* 59 (1964); Leavitt, *A Solution to the Presidential Inability Problem*, 8 *A.B.A.J.* 189 (1922); *The Problem of Presidential Inability*, 17 *RECORD OF N.Y.C.B.A.* 185 (1962); Silva, *Presidential Inability*, 35 *U. DET. L.J.* 139 (1957); *Symposium—Presidential Inability*, 133 *NO. AM. REV.* 417 (1881); Wickersham, *Presidential Inability: Procrastination, Apathy and the Constitution*, 7 *VILL. L. REV.* 202 (1961). The Silva treatise is a thorough and exhaustive treatment of the pre-Eisenhower history of the subject. Although no one has since attempted a comparable study, the Feerick article is the most complete recent contribution.

field in 1881 and Wilson in 1919-21, there was near paralysis in government because Vice Presidents failed to act as President. These failures were due in large part to uncertainty as to whether Wilson and Garfield could have resumed office upon recovery.

The most serious defect in the clause is the lack of any method for determining the existence, duration, and termination of inability. This is no problem if a disabled President is aware of the fact and is able to communicate it so that there is no possibility of disagreement or misunderstanding. But one can conceive of a President's insisting on exercising the office despite an inability, or, worse still, allowing the executive power either to go unexercised⁷ or to be exercised by unauthorized persons.⁸ The prospect of an elected President being involuntarily divested of the powers of office on grounds of inability is not pleasant, but the missile-age alternatives, if such an inability actually occurs, are much more somber.

There are no legal authorities, in the sense of controlling precedents, on any of these points. Fortunately, none has been tested by litigation. Nonetheless, what might be called "a weight of informed opinion" has emerged along the following lines:

1. *In the case of presidential inability only the powers and duties of the office, not the office itself, devolve on the Vice President.*⁹ It is generally agreed that this was the framers' intent for all successions by the Vice President and that President Tyler erred in 1841, by becoming President rather than a Vice President Acting As President.¹⁰ This precedent has been followed seven times and must be deemed established for succession by reason of death. It has served the nation well where there was no possibility of an incumbent President reasserting his right to the office and could well apply also to removal or resignation. But policy coincides with the intentions of the framers

7. The title of Hansen's *THE YEAR WE HAD NO PRESIDENT* is based on the sum total of seven periods when the Chief Executive was "too sick to be capable of exercising the powers vested in him" which includes the last 80 days of the Garfield administration, 280 days of Wilson's, and 143 days of Eisenhower's administrations. HANSEN, *op. cit. supra* note 6, at 1.

8. The Wilson illness has been called the "Mrs. Wilson Regency." See HANSEN, *op. cit. supra* note 6, at 29-42. This thesis is further documented by SMITH, *WHEN THE CHEERING STOPPED* (1964), a new account of Wilson's last years. Allen Nevins' introduction of the Smith book concludes that "this book will confirm students in their belief that the country should be armed against the recurrence of such a lapse in executive authority as that here traced." *Id.* at x.

9. This is a basis of the Eisenhower-Nixon agreement, note 32 *infra*, which was adopted also by the Kennedy and Johnson administrations. It is thus accumulating some force as precedent, one of the values ascribed to it by the opinion of Attorney General Robert F. Kennedy. 42 OPS. ATT'Y GEN. No. 5, at 26 (1961).

10. See, e.g., CORWIN, *op. cit. supra* note 6, at 54; HANSEN, *op. cit. supra* note 6, at 13-20; SILVA, *op. cit. supra* note 6, at 4-13.

in inability situations. A disabled President should continue to hold that office and the Vice President merely carry out a constitutional duty of his own office—that of exercising the powers and duties of the presidency during any period of inability. Upon termination of a temporary inability the President should resume the exercise of his office. This construction for inability, different from that for the other succession contingencies, may appear to conflict with the apparent symmetry of the succession clause of the Constitution, but it can easily be rationalized. The devolution of executive power in each instance is commensurate with the contingency which induced it. A temporary inability logically should cause only a temporary devolution of power. This consequence is inherently impossible for death, resignation, or removal, which are all permanent in effect.¹¹

2. *The Constitution now vests in the Vice President the power to determine that an inability exists requiring him to exercise the powers and duties of the office.* This was the conclusion of Attorneys General Brownell¹² and Kennedy¹³ who advised Presidents Eisenhower and Kennedy accordingly. They relied on the principle that the grantee of a contingent power has the right and duty to determine when the contingency arises requiring him to exercise the power.¹⁴ This fits well with the first proposition and is another assumption underlying the Eisenhower-Nixon agreement.

3. *The Constitution authorizes the President to determine when his inability has terminated so that he may resume the exercise of the office.* This follows from propositions one and two and is also a premise of the Eisenhower-Nixon agreement.¹⁵ This makes the President the final authority as to his own ability and leaves impeachment as the only recourse if a President insists upon exercising the office despite an inability.

There is sufficient uncertainty on each of these propositions to require constitutional clarification, and the third should be modified to provide some effective means for resolving disagreements as to the existence of inability.

11. *But cf.* SILVA, *op. cit. supra* note 6, at 75-76.

12. Brownell, *supra* note 6, at 204.

13. 42 OPS. ATT'Y GEN. No. 5, at 20 (1961). See also SILVA, *op. cit. supra* note 6, at 101-02.

14. Hampton & Co. v. United States, 276 U.S. 394, 405-10 (1928); Field v. Clark, 143 U.S. 649, 682-94 (1891); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827); The Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813). A persuasive argument to the contrary is made by Martin Taylor who distinguishes these cases as involving express grants of power by Congress to the executive. *Hearing Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 25-36 (1957) [hereinafter cited as 1957 House Hearings].

15. See note 32 *infra*.

THE EISENHOWER PROPOSAL

President Eisenhower has been justifiably described as "the first President to take positive action on presidential disability."¹⁶ The absence of executive leadership on a subject so delicate and so intimately executive in nature had doomed to failure the weak previous efforts towards constitutional reform.

The Garfield crisis produced little more than some generalized urgings in President Arthur's annual messages to Congress,¹⁷ sporadic congressional discussion,¹⁸ and an inconclusive public symposium of constitutional authorities.¹⁹ During Wilson's illness legislation was introduced in Congress to give the Cabinet power to determine inability and hearings were held on the general subject but no committee action resulted.²⁰ Inability received passing reference on the few occasions when Congress considered the statutory line of succession but no committee of Congress came to grips with the problem.

Members of Congress of the President's own party are understandably reluctant to raise the delicate issues here involved without positive encouragement from the White House incumbent. The opposing party risks charges of playing politics and attempting to alarm the country about presidential health. A President is understandably reluctant to suggest the possibility that he may become unable to carry out the duties of the office. He is equally reluctant to take the lead in establish machinery which conceivably could remove him from the powers of that office. Although Eisenhower made the first executive assault on the problem and was prepared to give the sort of leadership which seems essential to a solution, other considerations caused him to stop short of clear-cut, personalized, affirmative support.

In January 1956, on President Eisenhower's return to Washington after recovering from his September 1955 heart attack, he directed the Department of Justice to conduct a full-scale study of the inability problem. Election year considerations caused some delay but by early 1957 an administration proposal for a constitutional amendment had evolved. It provided that a Vice President would become President upon death, resignation, or removal but would only serve as acting President for the duration of an inability. The Vice President would be authorized to discharge the office either upon the President's written declaration of inability or upon approval by a majority of the Cabinet. The President would be authorized to resume the office

16. HANSEN, *op. cit. supra* note 6, at v.

17. See Feerick, *supra* note 6, at 94.

18. See Silva, *op. cit. supra* note 6, at 67-68, 73.

19. *Symposium—Presidential Inability*, 133 No. AM. REV. 417 (1881).

20. SILVA, *op. cit. supra* note 6, at 86-87, 108.

simply upon his written declaration that the inability had terminated. Eisenhower wanted to send this proposal to Congress with a special message urging its adoption. House Speaker Sam Rayburn discouraged this because of fear of alarming the public which might have mistakenly concluded that the President's health was again impaired. It was then decided that the administrations' plan would be announced in congressional testimony by Attorney General Brownell.²¹ Thus, the proposal became the "Brownell plan" and it was never clearly identified in the public or congressional eye as that of President Eisenhower personally. This undoubtedly contributed to the failure of Congress to accept it while Eisenhower was President.

As a result of Eisenhower's illness, Chairman Emmanuel Celler of the House Judiciary Committee had appointed its ranking members to a Special Subcommittee to Study Presidential Inability. Late in 1955 views of a select group of leading political scientists and constitutional law professors had been obtained in response to a questionnaire. Their replies were published in January 1956,²² preparatory to hearings in April 1956, at which no administration witness testified.²³ An analysis of the questionnaire replies and the testimony at the hearings by the Legislative Reference Service of the Library of Congress was published March 26, 1957.²⁴

Chairman Celler has since indicated to the author and others that it was the widespread variance in expert opinion disclosed by this analysis which caused the committee to throw up its hands in frustration and abandon hope of arriving at any generally acceptable solution. This is understandable. The sixty-eight page analysis was almost as long as the testimony and replies. On the question of how to determine cessation of inability there was found "such a wide variety of proposals that analysis does not yield particularly significant results."²⁵ The twenty-six persons who either testified or replied to the questionnaire proposed nine different methods for determining commencement of inability and eight methods for determining its cessation.²⁶

21. For the evolution of the Eisenhower proposal and this strategy, see Brownell, *supra* note 6, at 196.

22. STAFF OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS., PRESIDENTIAL INABILITY (Comm. Print 1956).

23. *Hearings Before Special Subcommittee to Study Presidential Inability of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 20 (1956) [hereinafter cited as 1956 *House Hearings*].

24. HOUSE COMMITTEE ON THE JUDICIARY, 85TH CONG., 1ST SESS., PRESIDENTIAL INABILITY: AN ANALYSIS OF REPLIES TO A QUESTIONNAIRE AND TESTIMONY AT A HEARING ON PRESIDENTIAL INABILITY 13 (Comm. Print 1957) [hereinafter cited as 1957 ANALYSIS].

25. *Id.* at 43.

26. *Id.* at 44.

Against this background, the subcommittee heard Brownell present the Eisenhower proposal at a special hearing on April 1, 1957. Brownell's testimony was received critically and he was questioned pointedly. At one point the Chairman questioned whether Brownell was actually presenting Eisenhower's views.²⁷

In any event, disclosure of the administration position did little to lift the uncertainty caused by the wide divergence of expert opinion. This testimony ended House Judiciary Committee activity on the subject. The special subcommittee made no recommendations and there has since been no significant activity in the House of Representatives.²⁸

Early in 1958 the stage shifted to the Senate where the permanent Judiciary Subcommittee on Constitutional Amendments, under Senator Estes Kefauver, held hearings on the subject.²⁹ The Eisenhower administration continued to press the matter and Attorney General William P. Rogers presented a modified Eisenhower proposal to that subcommittee on February 18, 1958.

Apparently in response to some of the critical questioning at the 1957 House hearings,³⁰ the Eisenhower proposal now included a provision for resolving disputes over termination of a President's inability which made it possible to prevent a disabled President from resuming office merely by his own declaration. In essence the revision authorized the Vice President and a majority of the Cabinet to submit the issue to Congress where a two-thirds vote under the procedures used for impeachment could establish that the inability had not terminated. Brownell later stated the reasons for this revision:

Thus, in the presentation of President Eisenhower's original proposal for

27. 1957 *House Hearings* 27. Celler's question followed an observation that only former President Hoover had previously recommended involving the Cabinet in inability determinations. This should be no surprise in an executive branch proposal. Silva reports that the 1920 congressional hearings disclosed beliefs that the Cabinet is "the safest body" in which to vest the power to determine inability and the group in the best position to know the President's condition. SILVA, *op. cit. supra* note 6, at 108. Celler had indicated that "the solution should be wholly Executive." Celler, *The Problem of Presidential Inability—A Proposed Solution*, 19 F.R.D. 153, 156 (1956).

28. Reported opposition from Speaker Rayburn undoubtedly contributed to the lapse of interest in the House. See ADAMS, *FIRSTHAND REPORT* 201 (1961). Chairman Celler's personal position was that Congress could legislate on the subject without amending the Constitution. 1957 *House Hearings* 12. He recommended a procedure which he favors for inability determinations in his speech of August 2, 1956. Celler, *supra* note 27, at 153 (1958).

29. *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. (1958) [hereinafter cited as 1958 *Senate Hearings*].

30. Rep. Kenneth B. Keating (now a Senator) criticized this feature of the plan, and Rep. Francis E. Walter suggested "the advisability of having the President, when he feels he is able to act again, submit his case to the Cabinet." 1957 *House Hearings* 29.

a constitutional amendment in 1957, it was stated that any dispute between the President and the Vice President regarding termination of the President's disability could be resolved by Congress's taking impeachment proceedings against whichever official was wrongfully attempting to exercise the powers of the presidency. In subsequent public discussion of the proposal, however, it was pointed out that impeachment and trial are complicated and lengthy processes, that the Congress is not always in session, and that nothing in the Constitution now empowers the Vice President to call Congress into special session. Furthermore, conviction would remove the President permanently, and the odium attached to impeachment might very well cause many Congressmen to hesitate to take such action—especially against an ill man.³¹

Two weeks later the historic memorandum of agreement between President Eisenhower and Vice President Nixon was announced.³² The next day a bipartisan majority of the Senate Judiciary Committee introduced a proposed amendment containing the essentials of the revised Eisenhower proposal.³³ The Subcommittee on Constitutional Amendments quickly approved this resolution and reported it favorably to the Judiciary Committee on March 12. Despite its impressive support and sponsorship the proposal's momentum was lost in the Judiciary Committee, and when the 85th Congress adjourned in August the amendment was still pending without having been acted upon.

In the 86th Congress the Eisenhower proposal was reintroduced by Senator Kefauver.³⁴ The Subcommittee on Constitutional Amendments issued notice of public hearings on March 12, 1959, but no witnesses came forward. Chairman Kefauver then inquired of Attorney General Rogers whether he had supplemental testimony to that given in 1958. Rogers replied on April 6, 1959, that his support of the amendment continued to be enthusiastic but that he was con-

31. Brownell, *supra* note 6, at 201.

32. The complete text of this agreement, which has since been duplicated in the Kennedy and Johnson administrations is:

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

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

Section 3. If the President does not so declare, the Vice President, if satisfied 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 Acting President.

Section 4. Whenever the President declares in writing that his inability is terminated, the President shall forthwith discharge the powers and duties of his office.

According to Nixon, President Eisenhower personally composed the agreement and delivered it to him and Attorney General Rogers in early February, 1958. NIXON, *MY SIX CRISES* 178 (1961).

33. S.J. Res. 161, 85th Cong., 2d Sess. (1958).

34. S.J. Res. 40, 86th Cong., 2d Sess. (1959).

tent to stand on his prior testimony without a further personal appearance.³⁵ On May 11 the subcommittee again approved the amendment and reported it to the Senate Judiciary Committee. There it languished without action for almost sixteen months until the 86th Congress adjourned *sine die* on September 1, 1960. The Committee's Legislative and Executive calendar shows only that the proposed amendment was "discussed July 20, 1959." This bare entry is the high water mark of congressional consideration of presidential inability. It is the only record of either the House or Senate Judiciary Committee considering a favorable subcommittee report on a proposed constitutional amendment on the subject. It was an obscure climax to the gallant efforts of the Eisenhower administration.

THE KENNEDY ADMINISTRATION POSITION

The constitutional challenge of presidential inability was of low priority on the New Frontier. The Kennedy administration took a somewhat passive attitude towards the entire problem. In its early days the White House press staff was severely criticized for withholding the news that the President had aggravated a back injury during a tree-planting ceremony in Ottawa, Canada.³⁶ The President's widely known war injuries and protracted illnesses while a member of Congress made presidential health a delicate subject.

Although it has been reported that a "tentative informal agreement" similar to the Eisenhower-Nixon pact was made between Kennedy and Johnson in December, 1960,³⁷ before their taking office in January, 1961, it was August 10, 1961, before it was officially announced that such an agreement had been formalized. The opinion of Attorney General Robert F. Kennedy which was released at the time concluded that the agreement was constitutional in that it was based upon valid interpretations of the succession clause and that it came "as close to spelling out a practical solution to the problem as is possible."³⁸ The only reference in the opinion to a possible need for constitutional amendment was a statement that the agreement "may prove to be a persuasive precedent of what the Constitution means until it is amended or other action is taken."³⁹

In the meantime, Senator Kefauver had reintroduced the Eisenhower proposal in the 87th Congress⁴⁰ and had begun attempts to secure a

35. Senate Judiciary Subcommittee on Constitutional Amendments, *Constitutional Amendments*, S. REP. No. 1200, 86th Cong., 2d Sess. 7 (1960).

36. HANSEN, *op. cit. supra* note 6, at 69.

37. *Id.* at 78.

38. 42 OPS. ATT'Y GEN. No. 5, at 26 (1961).

39. *Id.* at 27.

40. S.J. Res. 19, 87th Cong., 1st Sess. (1961).

statement of position from the Kennedy administration. On March 9, 1961, the Senate Judiciary Committee requested a routine report from the Department of Justice on the proposal; it reported almost a year later that no response was ever received.⁴¹ Nothing further occurred in the 87th Congress.

The Administration first took a position on the constitutional amendment question on June 18, 1963, when Deputy Attorney General Nicholas de B. Katzenbach testified at hearings of the Constitutional Amendments Subcommittee.⁴² Mr. Katzenbach opposed the Eisenhower proposal on the grounds that it would be unwise to "freeze" into the Constitution a fixed procedure for inability determinations. However, he gave a guarded acquiescence to the simpler "enabling amendment"⁴³ which was endorsed at that time by the American Bar Association.

This proposal, which Katzenbach considered "the best of the three" pending before the subcommittee, authorizes Congress to provide by law a method for determining commencement and termination of inability. It also clarifies the status and tenure of a Vice President who acts as President during presidential inability.

The enabling amendment has both respectable bar support and an impressive recent history. It originated in 1957 in a special subcommittee of the New York State Bar Association composed of Arthur Dean, Elihu Root, and Martin Taylor.⁴⁴ It was endorsed by that association in 1957, by the American Bar Association in 1960,⁴⁵ and by the Bar Association of the City of New York in 1962.⁴⁶ It was co-sponsored in 1963 by Senators Kefauver and Keating, who had previously sponsored competing proposals which specified procedures for determining inability.⁴⁷ (Each reserved the right to support his previous plan for the implementing legislation if the enabling amendment were adopted.)

Although this approach merely postpones an ultimate congressional decision on method, it has the obvious advantage of flexibility for the

41. Senate Judiciary Subcommittee on Constitutional Amendments, *Constitutional Amendments*, S. REP. No. 1305, 87th Cong., 2d Sess. 26 (March 15, 1962).

42. *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 32 (1963).

43. S.J. Res. 35, 88th Cong., 1st Sess. (1963).

44. Statements of Cornelius W. Wickersham and Martin Taylor, 1957 *House Hearings* 32, 35.

45. See note 2 *supra*.

46. 17 RECORD OF N.Y.C.B.A. 185, 202 (1962).

47. Kefauver had supported the Eisenhower proposal. Keating had proposed an amendment which would establish a Presidential Inability Commission composed of the Speaker of the House, the House minority leader, the Senate majority and minority leaders, the Secretaries of State and the Treasury, and the Attorney General, with the Vice President as nonvoting Chairman. S.J. Res. 125, 87th Cong., 1st Sess. (1961).

future. Katzenbach suggested no particular procedure for future legislation, but he did not disapprove the Cabinet-Vice President method of the Eisenhower proposal and left the way open for it to be selected by a future Congress as the statutory method if the enabling amendment were adopted. The principal objection to the enabling amendment has been that in violation of the separation-of-powers principle it would permit Congress to vest in itself the power to make inability determinations and thus would jeopardize the independence of the executive. Katzenbach viewed the power of the President to veto such legislation, subject to being overridden by a two-thirds vote, as sufficient protection against inability legislation unacceptable to the executive.

This slight boost from the administration was enough. The enabling amendment sponsored by the ABA was quickly approved by the Subcommittee on Constitutional Amendments and reported to the full Judiciary Committee on June 25, 1963. Further favorable action was considered likely until the untimely death of Senator Kefauver in August removed the responsible subcommittee chairman and the most active Senate proponent of the measure. No action was taken in the Judiciary Committee. The matter was at a virtual standstill when the first session of the 88th Congress adjourned in the fall.

AFTERMATH OF THE ASSASSINATION

The circumstances of the Kennedy assassination and the Johnson succession to the Presidency produced unparalleled public interest in the problems of presidential succession and inability. But the Eisenhower years had proved that temporarily aroused public interest alone is not sufficient. The fact that a Senate subcommittee had approved an inability proposal had failed twice in the recent past to herald further action. Although the Kennedy administration had indicated passive approval of a proposed amendment, much more aggressive executive support in the past had failed to break through congressional resistance. Also, the Eisenhower and Kennedy administrations had approved different proposals and there was little affirmative indication of any substantial lessening of the general disagreement which stultified the House Judiciary efforts in 1957.

These are some of the considerations which led President Walter Craig of the American Bar Association to convene the special two day Conference on Presidential Inability and Succession in Washington, D.C. on January 20, 1964. Like President Johnson's admonition, "Come let us reason together," it was an attempt to find a consensus of informed and interested lawyers through a deliberative process of give-

and-take discussion. No comparable effort had ever been made in this area. It offered a fresh opportunity to cut through the conflict and divergence which had caused many to abandon the cause.

A consensus emerged which, upon analysis, essentially weds the Eisenhower and Kennedy positions. The specific inability procedure of the Eisenhower proposal is combined with a grant to Congress of a residual power to alter it. This combines the flexibility of the enabling amendment with the substantive inability procedure which was so carefully evolved by the Eisenhower administration.

THE ABA CONFERENCE CONSENSUS ON PRESIDENTIAL INABILITY⁴⁸

1. *Agreements between the President and Vice President or person next in line of succession provide a partial solution but not an acceptable permanent solution to the problem.*

The agreement has never been claimed to be a solution to the underlying constitutional problems. It is primarily valuable as an advance indication of the understandings of the parties of their relative positions in the limited situations which it contemplates. In the Garfield crisis such an agreement would probably have led Vice President Arthur to act as President. In the Wilson crisis it is doubtful that it would have caused any change.

It provides no check against a President who is determined to exercise his office although he is in fact disabled. In all events, it depends upon the good faith of the parties and has no force of law.

2. *An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of inability of the President to discharge the powers and duties of his office.*

Although there is a respectable body of opinion that Congress presently has power to legislate to provide an inability procedure, the majority view is negative⁴⁹ and it is generally conceded that all uncertainties should be settled by a comprehensive constitutional amendment. The argument in favor of legislative authority is based upon the "necessary and proper" clause which authorizes Congress "to make

48. A point of the consensus outside the scope of this paper concerns filling vacancies in the Vice Presidency. It provides:

"It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall become Vice President for the unexpired term."

49. See HANSEN, *op. cit. supra* note 6, at 101; 1957 ANALYSIS 58; Silva, *op. cit. supra* note 6, at 91.

all laws which may 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 office thereof."⁵⁰ The assumed power of the Vice President to undertake the exercise of the office in the event of a presidential inability is viewed as a power vested in an officer of the United States for which Congress may legislate a means of execution. The same argument would permit statutory regulation of the resumption of office by the President when he recovered from an inability.

The persuasive answer to this argument is the structure of the succession clause itself, which by specifically granting to Congress the power to legislate concerning the inability of both the President and the Vice President implies that such power is withheld when only one of the two executive incumbents is disabled. This distinction takes added weight from the fact that when the succession clause was drafted the Vice President was to be the person who received the second number of votes for President in the electoral college.⁵¹ The clause thus indicates an intention to insulate these two, both of whom were in office as the result of receiving votes for the Presidency, from legislative inference.

3. The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

The first of the substantive recommendations, this would embody the Tyler precedent in the Constitution for all cases of succession to the Presidency for reasons other than inability.

4. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

This is a corollary to the third point. As an interpretation of the Constitution it now is an underlying assumption of the Eisenhower-Nixon agreement. Placing it in the Constitution would insure that the basis of the Tyler precedent would never be extended to inability situations to preclude a disabled President from resuming office upon recovery. This would remove the uncertainty which has contributed so heavily to the failure of Vice Presidents to act in serious cases of presidential inability.

50. U.S. CONST. art. I, § 8, cl. 18.

51. U.S. CONST. art. II, § 1, cl. 3; superseded by the Twelfth Amendment in 1804.

Points 3 and 4 are largely non-controversial and are included in virtually all proposed amendments.

5. *The amendment should provide that the inability of the President may be established by a declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of the majority of the Cabinet,⁵² or by action of such other body as the Congress may, by law, provide.*

Upon ratification, such an amendment would provide an immediate self-implementing procedure whereby the Vice President and a majority of the Cabinet could determine the existence of an operative inability requiring the Vice President to act. In this respect, it follows the initial Eisenhower proposal and reflects a widely held opinion that this decision should be within the executive branch, respecting the separation of powers and insuring that the decision is made by persons in close proximity to the President and presumably loyal to him.

The provision also incorporates the principle of the enabling amendment previously supported by the ABA and by the Kennedy administration. It authorizes Congress, by law, to substitute some other inability-determining body for the Vice President and a majority of the Cabinet acting concurrently. This provides the flexibility for future circumstances which Deputy Attorney General Katzenbach thought to be imperative. If Congress attempts by law to prescribe an unacceptable procedure or to reserve the determination to itself the veto power should protect the Executive.

6. *The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and the majority of the Cabinet or such other body as Congress may, by law, provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by a vote of two-thirds of the elected members of each house of Congress.*

This point deals with the most difficult problem, the disabled President who nonetheless attempts to resume the exercise of his office. There is understandable reluctance on the part of many to deal with this contingency by constitutional provision. It ultimately could be

52. Since the "Cabinet" is not a constitutional term, the amendment itself should refer to "heads of the departments of the Executive branch of the Government." As a statement of substantive principles, the consensus deliberately left draftsmanship problems to future implementation.

the means of preventing an elected President from exercising the office against his will. It is included for much the same reasons the Eisenhower proposal was revised in 1958 to include a similar provision. The power is so closely guarded that it surely would be used only in a compelling case. The Vice President, a majority of the Cabinet and two-thirds of Congress must concur to prevent a President from resuming office. The congressional participation is consistent with the concept underlying veto and impeachment: the President is subordinate only to a two-thirds vote of each house of Congress.

Unlike the previous ABA-proposed and Kennedy-approved enabling amendment, points 5 and 6 have the Eisenhower proposal's advantage of being self-executing. They could not fail because of congressional stalemate or inaction. The power of decision is lodged in a body which is reasonably certain to be in existence. The chief effect upon the procedures of the memorandum agreement would be the cautious check upon a disabled President's returning to office.

Like most new and prospective enactments, this one undoubtedly contains some difficulties and pitfalls not now foreseeable. If so, the power of Congress to establish a different procedure should be sufficient protection.

CONCLUSION

As a marriage of the two proposals which have the greatest past acceptance, the consensus recommendation should receive widespread acceptance. It meets the objections which the Kennedy administration had to the Eisenhower proposal and the objections of supporters of the Eisenhower plan to the enabling amendment. It does not appear to be subject to any legitimate criticism which executive branch spokesmen have levelled in the past at proposed amendments. The method by which it evolved should indicate widespread acceptance in academic and professional circles.

Executive support continues to be the key. Experience has shown that no proposal so intimately concerned with the internal affairs of the executive can secure congressional approval without affirmative presidential encouragement. Time may also be of the essence. If public interest subsides and general apathy and indifference return to the subject of presidential succession, the Eisenhower experience shows that executive voices can go unheard in Congress. Only another crisis could then arouse the necessary public concern. We cannot be sure that our present incomplete and makeshift methods will let us escape the next executive crisis without serious damage to the Republic.