

SPECIAL REPORT

from the Washington Office, American Bar Association

PRESIDENTIAL INABILITY AND VICE PRESIDENTIAL VACANCY

The United States Constitution is dangerously ambiguous on the subject of Presidential inability. Because of the law's inadequacy, our nation could be thrown into chaos and confusion if the President became unable to discharge his responsibilities.

If the office of Vice President becomes vacant, there are no procedures for filling it. It should not be vacant again. The Vice President's role in national life is becoming increasingly important.

Congress is closer than ever in history to approving a Constitutional amendment relating to these subjects.

Few citizens realize that this country has been without a Chief Executive during several periods in our history when the President has been unable to perform his duties. And, as frightening as it may seem in this nuclear age, such a gap in Executive leadership could occur again unless steps are taken to clarify the Constitution.

Two recent events known to all adult Americans point vividly to the Constitutional problem. President Eisenhower suffered a heart attack in 1955, and could not see his staff for almost a week. He could not fully perform his duties for almost four weeks. On two other occasions President Eisenhower was disabled.

The tragic assassination of President Kennedy in 1963 again suggested the awesome possibility that a President might linger indefinitely in a condition that would prevent him from leading the country.

It is generally assumed that the Vice President would simply take over for the President until the Chief Executive could resume responsibility. However, this is not in fact what may happen.

No Legal Procedure for Presidential Inability

There is no legal procedure for deciding whether a President is disabled and when he becomes disabled. If he is disabled, and the Vice President steps in, does the Vice President become President for the balance of the term, or does he merely become Acting President for the term of the disability? And who decides when the disability ceases? Section I of Article II of the Constitution is vague on the subject of Presidential inability.

The Nation was not faced with having to answer these questions during President Eisenhower's illnesses. He recovered within a few weeks, and most fortunately, there was no international crisis at the time.

The Nation did not panic at President Kennedy's death. The transition of Presidential power was smoothly negotiated because acknowledged procedures exist in the case of death, and the new President's leadership commanded the respect of the people.

The Garfield and Wilson Disabilities

Earlier historical events bringing the subject of Presidential inability sharply into focus were during the administrations of Presidents Garfield and Wilson. These examples clearly project how the United States could suffer in this atomic age if the President were to become disabled and no machinery existed clearly defining procedures for a successor to assume the powers and duties of the Presidency.

President Garfield lingered between life and death for eighty days after he was shot by a disgruntled office seeker. During this period, he performed only one official act, the signing of one extradition paper. There was a crisis in foreign affairs, yet only routine business was transacted.

After sixty days, the Cabinet unanimously agreed that it would be desirable for Vice President Chester Arthur to act as President. But there was sharp disagreement over whether the Vice President would actually become the President if he exercised the Presidential power, or whether he would be only "Acting President."

It was considered possible that had Arthur taken over, Garfield could not have resumed the powers and duties of his office. Therefore, the Vice President did not act, and Garfield's death finally solved the problem at the time.

President Wilson's serious illness of a much longer duration presented the country with very severe problems. Following his stroke in 1919, some twenty-eight bills became law because of the Presi-

dent's failure to act on them.

Executive affairs were administered by Mrs. Wilson, Dr. Grayson and other members of the White House staff. The cabinet met unofficially from time to time at the call of Secretary of State Lansing. When Wilson learned of the meetings, he forced Lansing to resign, believing that Lansing was plotting to oust him.

Several insisted that Vice President Thomas R. Marshall should act as President. Marshall, as Arthur before him, declined, fearing such a move might permanently deprive Wilson of the Presidency should he recover.

Without clear authority of law, it cannot be expected that future Vice Presidents will act differently if a President is disabled. Since President Eisenhower's illnesses, a memorandum of understanding has been in effect between the President and Vice President, outlining the Vice President's role in the event of Presidential inability. This memorandum, however, does not have the force of law, and is subject to the goodwill of the President.

A Vice President Is Needed At All Times

Directly related to the problem of Presidential inability is that of a vacancy in the office of Vice President. That office has been vacant sixteen times in our Nation's history for a total period of thirty-eight years.

In past years, the office of Vice President was subject to more ridicule than respect. But such is not the case today. The Vice President is the possible successor to the Nation's highest office. He has many responsibilities. He is a member of the Cabinet and of the National Security Council. He is Chairman of the National Aeronautics and Space Council. He has become an important ambassador traveling thousands of miles on behalf of the President.

There is ample evidence that the United States needs a Vice President at all times.

American Bar Association Consensus

The failure to reach an effective solution to these problems cannot be attributed to lack of interest, but primarily to a lack of ability to agree upon the best remedy. In January, 1964, the American Bar Association sponsored a conference of prominent lawyers, scholars, and members of Congress to discuss the problems of Presidential Inability and vacancy in the office of Vice President. The conferees, after intensive deliberation, reached a consensus of thought which has developed wide support as a workable and reasonable solution.

The consensus calls for a Constitutional Amendment. Specific procedures were recommended for dealing with Presidential inability and filling the of-

office of Vice President.

Action In 88th Congress

Senator Birch Bayh (Indiana), Chairman of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committees, introduced in the 88th Congress a Senate Joint Resolution which substantially incorporated the consensus recommendations.

The Senate, taking action on these subjects for the first time, passed the Resolution 65 to 0. The House of Representatives did not act during the 88th Congress.

Congress Expected to Act Soon

With more than seventy co-sponsors, Senator Bayh has introduced an identical resolution in the 89th Congress (S.J. Res. 1). Congressman Emanuel Celler (New York), Chairman of the House Judiciary Committee, has introduced H.J. Res. 1. Strong bipartisan support has been assured by the two ranking Republican members of the House Judiciary Committee, Congressmen William McCulloch (Ohio) and Richard Poff (Virginia). Both have introduced similar proposals. The basic provisions on inability in the Bayh-Celler proposal are:

- (1) In the event of the President's inability, the Vice President would become Acting President and would serve as such until the President's inability terminated;
- (2) The President may declare his own inability, if he is able to do so;
- (3) If the President does not declare his own inability, the Vice President, acting with the concurrence of the majority of the Cabinet, can determine the President to be disabled;
- (4) If a dispute should arise between the President and the Vice President and the Cabinet, Congress would decide the issue.

S.J. Res. 1 and H.J. Res. 1 also provide that in the event a vacancy occurs in the office of Vice President, the President shall nominate a Vice President who shall take office subject to ratification by Congress.

The outlook has never been brighter for adoption of a Constitutional Amendment on Presidential Inability and Vice Presidential Vacancy. A consensus of thought is materializing throughout the country. In the Senate, early action is expected.

In the House of Representatives, Congressman Celler has announced early hearings to be conducted by the full Judiciary Committee. It is expected that the House will act soon thereafter.

In his State of the Union address, President Johnson gave added impetus to the subject by calling for a means "to assure the necessary continuity of

leadership should the President become disabled.”

The organized bar and other groups must continue to work for adoption by Congress and ratification by the states. Proposed Constitutional Amendments originating in Congress must be ratified by three-fourths of the state legislatures.

If an amendment passes Congress early this year, it is possible that ratification could be accomplished early in 1966. Most state legislatures meet this year. State and local bar associations are urged to begin now to inform their state legislators of the need for a Constitutional amendment on Presidential Inability and Vice Presidential vacancies.

**Analysis of Senate Joint Resolution 1 (Sen. Bayh, D, Indiana and others)
and House Joint Resolution 1 (Congressman Celler, D, New York),
89th Congress**

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:

It is generally agreed that a Constitutional amendment is necessary to provide a means of filling a vacancy in the office of Vice President. Scholars differ, however, as to whether a Constitutional amendment is necessary to provide for cases of Presidential inability. Some believe Congress now has no power to legislate on inability and emphasize that what must be resolved is the Constitutional question.

Questions of this magnitude should not be resolved by weighing opinions. They should be resolved clearly by Constitutional amendment so as to preclude attack on Constitutional grounds during a time of crisis, the time we could least afford it.

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

John Tyler was the first Vice President to succeed to the Presidency upon the death of a President. His succession established the precedent that upon the death of the President the successor becomes President rather than “acting” President. Since the Constitutional language makes no distinction between procedures in case of death, removal, resignation or inability, it has been assumed that a successor, for any of the foregoing reasons, would also become President and not “acting” President. This provision confirms the Tyler precedent in case of death, removal or resignation of the President but excludes cases of inability, which are treated separately.

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.

It is highly desirable that the office of Vice President be filled at all times. The office of Vice President today has become one of the most important positions in the United States. It is essential in this age that there always be a Presidential successor fully conversant with domestic and world affairs and prepared to step into the higher office at any time.

It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence, and that the President be granted the generally accepted prerogative of choosing his co-worker. This conforms, in fact, to modern political convention practice. On the other hand, the proposed amendment recognizes the right of the people to have a choice in the Vice President’s election through confirmation by their elected representatives.

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

This procedure establishes a means by which the President may declare his own inability. By doing so, this provision will make it easier for a disabled President to relinquish the powers and duties of his office. Public confidence in the Vice President will also be strengthened if a declaration of inability is made by the President.

This section further treats cases of inability in a different manner than death, resignation or removal. It removes the confusion and doubt produced by the Tyler precedent by assuring that the Vice President acts temporarily as “Acting” President in case of inability. The President can resume his office once his disability is removed. By assuring that the Vice President will only act temporarily, a President will have less reluctance to

call on the Vice President when necessary.

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

When a President is disabled but unable to communicate his inability, as in the case of a stroke or coma, or in the event of mental disability, or if a President should refuse to acknowledge his inability, the Vice President and the Cabinet, or other body as Congress may provide, may declare to Congress that the President is disabled. The Vice President will then assume the duties of the office. By placing the decision in the Executive Branch of the Government, the proposal maintains the separation of powers and enables prompt action by the persons closest to the President and presumably most familiar with his condition. This procedure for determining inability in self-implementing, and requires no further action by Congress. It remains flexible, however, by permitting Congress to provide a body, other than the Cabinet, to determine inability if the need arises. This provision makes clear that in cases of inability declared by the Vice President and the Cabinet, the Vice President becomes "Acting" President and performs his duties until the President is able to resume his responsibilities.

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

When the President's inability ceases to exist, he should be able to regain easily the powers and duties of his office. Thus, if there is disagreement between the President on one hand and the Vice President and members of the Cabinet on the other, two-thirds of the members of Congress are required to over-rule the Presidential declaration that he is able to perform the powers and duties of his office. This places a presumption of ability with the President and places the ultimate responsibility with the elected representatives of the people in Congress.

Uncompleted Terms of Presidents and Vice Presidents

Presidents who died in office and Vice Presidents who then became Presidents:

President	Length of Service	Succeeded by
William Henry Harrison	Mar. 4, 1841 - Apr. 4, 1841	John Tyler
Zachary Taylor	Mar. 5, 1849 - July 9, 1850	Millard Fillmore
*Abraham Lincoln	Mar. 4, 1865 - Apr. 15, 1865 (2nd term)	Andrew Johnson
*James A. Garfield	Mar. 4, 1881 - Sept. 19, 1881	Chester A. Arthur
*William McKinley	Mar. 4, 1901 - Sept. 14, 1901 (2nd term)	Theodore Roosevelt
Warren G. Harding	Mar. 4, 1921 - Aug. 2, 1923	Calvin Coolidge
Franklin D. Roosevelt	Jan. 20, 1945 - Apr. 12, 1945 (4th term)	Harry S. Truman
*John F. Kennedy	Jan. 20, 1961 - Nov. 22, 1963	Lyndon B. Johnson

**Assassinated*

Vice Presidents who died in office and Presidents with whom they were serving:

Vice President	Length of Service	President
George Clinton	Mar. 4, 1809 - Apr. 20, 1812 (2nd term)	James Madison
Elbridge Gerry	Mar. 4, 1813 - Nov. 23, 1814	James Madison
William R. King	Mar. 4, 1853 - Apr. 18, 1853	Franklin Pierce
Henry Wilson	Mar. 4, 1873 - Nov. 22, 1875	Ulysses S. Grant
Thomas A. Hendricks	Mar. 4, 1885 - Nov. 25, 1885	Grover Cleveland
Garret A. Hobart	Mar. 4, 1897 - Nov. 21, 1899	William McKinley
James S. Sherman	Mar. 4, 1909 - Oct. 30, 1912	William H. Taft

John C. Calhoun was elected Vice President in 1828 and served from March 4, 1829, to December 28, 1832, when he resigned to become a United States Senator. Andrew Jackson was President at the time.