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# United States Senate

COMMITTEE ON THE JUDICIARY

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March 26, 1964

The Honorable Birch Bayh, Chairman  
Subcommittee on Constitutional Amendments  
United States Senate  
Washington, D.C.

Dear Birch:

You and I are in fundamental agreement that one or more constitutional amendments are urgently needed in the areas of Presidential succession and inability. We also agree that these problems are of such a high degree of urgency that arriving at a consensus and taking action on any reasonable and workable solution is more important than the exact terms of the solution itself.

13. We have had our differences on proposed answers to the twin aspects of succession and inability. On succession, as you know, I feel very strongly that two Vice Presidents is the best answer and that, although it may be unrealistic to expect its favorable consideration in the face of qualms over its seeming novelty more than anything else, nevertheless, in the long-run I believe it would finally gain acceptance. The underlying principle of the plan, let me emphasize, is that the country needs a full-time Vice President at all times, unburdened by the duties of another office, to be ready to step into the Presidency if the occasion arises. In my judgment, your proposal, embodied in S.J.Res. 139, to fill any vacancy in the Vice Presidency through Presidential nomination and Congressional confirmation would carry out this principle and, therefore, would be a solution I could wholeheartedly support.

C On disability, I remain convinced that a constitutional amendment should confer upon Congress plenary power to legislate in the area. Your idea is to spell out concrete disability procedures, with a certain amount of built-in flexibility, in the amendment itself. The nub of the difference between our separate ways of approach is primarily in our political hunches as to how State legislatures would react to each. I do not believe that this difference, which is concerned more with tactics than with substance, should contribute in the slightest to delaying Senate action on inability. If the divergence does in fact boil down to political judgment, it seems to me that the full Senate itself, composed as it is of practical politicians whose job it is to make political judgments day-in and day-out, ought to be afforded

March 26, 1964

a prompt opportunity to exercise that judgment and choose between the two ways of approach.

In my judgment, S.J.Res. 139 is an appropriate vehicle for resolving the remaining differences between us. As I shall indicate, all such differences need not be ironed out before the stage of full Senate consideration. I propose simply a number of amendments to improve and shorten S.J.Res. 139, in the hope that if these should prove acceptable to you, it would then be possible for us to join forces and present a united front to the Senate which would, in my judgment, immeasurably enhance prospects of securing the necessary two-thirds for approval. You have my assurances in any case, even if my suggestions should not commend themselves to you, that I will continue to bend every effort toward promptly taking action on any reasonable solution likely to receive approval.

I will proceed with a section-by-section commentary of S.J.Res. 139.

Section 1. First sentence: "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." Compare the first sentence of S.J.Res. 35: "In case of the removal of the President from office or of his death or resignation, the said office shall devolve on the Vice President."

Why not eliminate the words of S.J.Res. 139, "for the unexpired portion of the then current term"? No Vice President who has ever acceded to the Presidency under the Tyler precedent claimed he was entitled to occupy the office for a full four-year term after taking the oath. It clearly has been understood that succession means succession only for the unexpired portion of the original President's four-year term. The first section of the Twentieth Amendment indicates as much. Why bother spelling out in a constitutional amendment a practice which has always obtained and which no one presently concerned intends to change? Eliminating the language referred to would save nine words if you left it at "the Vice President shall become President" or six words if you left it at "the said office shall devolve upon the Vice President" (S.J.Res. 35). I have no preference between the two ways of phrasing it, but a minimum of six words can be saved, so why not do it?

*Do do good to me -  
Leave one to KK.*

*your thoughts please March 26, 1964  
I'm inclined to say score 2 for KK*

Second sentence: "Within a period of thirty days thereafter, the new President shall nominate a Vice President who shall take office upon confirmation by both Houses of Congress by a majority of those present and voting."

Why not save another six words simply by substituting the word "Thereupon" instead of "Within a period of thirty days thereafter"? "Thereupon" is precise enough to spell out that prompt action is desired, and I fail to perceive why a new President should want to start his occupancy of the office by violating a constitutional command. The danger of "within a period of thirty days thereafter" is this: Suppose the new President's Vice Presidential nomination is sent to the Congress within the required period but is not put to a vote until after the expiration of that period and then happens to be rejected. I would agree that that would be unlikely, but so are assassinations of the President, and we have had four cases of that in our history. Under your language, the negative implication of the words "Within a period of thirty days thereafter (meaning after the Vice President becomes President), the new President shall nominate, etc." is that beyond a period of thirty days thereafter, the President may not nominate, etc. In the circumstances I have posed, the country would not be able to secure a new Vice President. True, additional language in the amendment could cure this somewhat technical defect. But again, is it necessary? Would it achieve anything more than the word "Thereupon," which is virtuously vague enough to permit of successive nominations if the first should fail of approval? Why not use "thereupon" and save six words without changing the substance?

*what  
7*

Section 2. Same objection, and the same substitution would save six more words.

*of above's objection I'm inclined to say score 3 for KK*

Sections 3, 4, and 5 deal with inability. I would not dissent from ordering any proposed amendment with these sections in it reported to the full Senate, assuming you are satisfied with the language as it now stands. The only hesitation I would have is one I share with former Attorney General Biddle, whose testimony the Subcommittee received, on the procedure to follow when a disabled President and a Vice President acting as President disagree whether the President's inability has terminated. I, too, hesitate to bring all "the heads of the executive

*I'm concerned about trying to "draw a line" -  
come in - some out -  
your thoughts - I'm inclined  
to say yes -  
Score 1 for BB*

March 26, 1964

departments in office at the time of such announcement (of the President as to the termination of his inability)" into the process of approving or rejecting the Vice President's move to put the issue before Congress. A smaller group would be easier to consult with, could take action faster, and might have lesser potential for divisiveness. Consideration might well be given to letting the issue go to Congress if the Vice President receives the written approval of three from among only the Secretaries of State, Defense, and Treasury, and the Attorney General. This would give two ranking Cabinet members the power to veto an attempted power-grab by the Vice President, but a concurring judgment of three in the Vice President's declaration would lend weight to the propriety of letting Congress decide.

*Let's check the wording again*

At all events, let me repeat, I would not dissent from reporting sections 3, 4, and 5 to the Senate. However, it would be my intention to offer on the Senate floor, as a substitute for all three of these sections, an amendment consisting of the last two of the three sentences of S.J.Res. 35, empowering Congress to legislate generally on inability procedures, as an alternative to spelling out particular procedures in the Constitution. The fate of the amendment, which, as I have said involves tactics more than substance, would then depend on the exercise of political judgment by the Senate, and a simple majority could decide. I would only hope that if the amendment I intend to offer (assuming all along we reach that stage) were to be approved, you would see fit to support the adoption of the package resolution, including the amendment, and work for the two-thirds vote necessary on final passage. *I don't see how we can beat this type of arrangement. You thought*

Section 6. This section deals with succession. It would write into the Constitution a provision for a Cabinet line of succession and thus nullify the statutory succession of the Speaker of the House under the 1947 Act (3 U.S.C. 19). To be as frank as possible, and apart from my own opinion that the Succession Act of 1947 is superior to the Cabinet line established in 1888, I do not believe section 6 stands a ghost of a chance of passing in either the Senate or House so long as the present incumbent of the House Speakership, whom we and all of our colleagues so deeply revere, continues to hold that office. I believe the deletion of section 6 from S.J.Res. 139, on the other hand, would go far to ensure its approval.

*With great reluctance, a moan, a sigh (and a quid pro quo)*

*Score 4 for KK*

The Honorable Birch Bayh

-5-

March 26, 1964

*What do you say to this? I'm inclined to say this might divide our staff. Although it might be good law and desired protection. In addition I*

Moreover, if action is taken on a Constitutional amendment to authorize the filling of a vacancy in the Vice Presidency, the less important will it become to reconsider the line of succession after the Vice President. If you were to agree to the deletion of section 6 from S.J.Res. 139, I, for one, would be perfectly willing to join with you in the introduction of a simple statute creating the office of Acting Vice President to be filled by Presidential nomination and Senate confirmation under existing Constitutional authority. This would serve as an interim means of strengthening the line of succession until a modified S.J.Res. 139 along the lines I have suggested may be approved in Congress and ratified in the State legislatures.

*70 D.  
Secret for  
BB 7*

If the revisions in S.J.Res. 139 which I have suggested are generally accepted, even without deletion of section 6, the proposed amendment would be considerably shorter than it now is. With the deletion of section 6, a concise, readily understandable amendment would emerge. And finally, if the broad language on disability of S.J.Res. 35 were substituted on the floor for sections 3, 4, and 5 of S.J.Res. 139, I believe we will have come up with the shortest possible proposal capable of satisfying the fundamental objectives we both have in common.

I would be pleased to meet with you at any time that is mutually convenient to discuss the matter further.

With kindest personal regards,

Very sincerely yours,

Kenneth B. Keating

K:alx

*In love this letter is a shocker.  
Let's hold our breath + let Ken  
win this battle 4-2. I think  
we can afford the sacrifice.  
your thoughts please*