Department of Justice

Statement

by

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on

S.J. Res. 1, 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

Prepared for Delivery
Before a
Subcommittee on Constitutional Amendments
of the
Committee on the Judiciary
United States Senate

January 29, 1965

I am privileged to appear before this Subcommittee in support of S. J. Res. 1, a proposal which would amend the Constitution in order to remedy two critical deficiencies. The proposed amendment would, first, clarify the situation that would exist in the event that the President should become disabled, and second, provide a means for filling vacancies in the Office of Vice President.

The Subcommittee may recall that in 1963, I testified on several proposed amendments to the Constitution relating to cases where the President is unable to discharge the powers and duties of his Office. Last year the Subcommittee continued its efforts and approved a bill identical with S. J. Res. 1 which was passed by the Senate. Since the Subcommittee has already made a comprehensive study of this matter, I shall do no more today than to state fairly briefly what we understand S. J. Res. 1 proposes to do and what the Department's views are respecting it.

At the outset, before considering the specific provisions of S. J. Res. 1, I want to reaffirm my prior position that the only satisfactory method of settling the problem of presidential inability is by constitutional amendment, as S. J. Res. 1 proposes. The same of course is true of the problem of filling vacancies in the office of Vice President. I recognize that there are distinguished scholars who are of the opinion that Congress has power to act in the matter of presidential inability under the "necessary and proper" clause (Art. I, sec. 8, clause 18), and that a statute would therefore suffice as a solution. There is, however, equally distinguished opinion, including that of the last three Attorneys General, for the proposition that the problem can be adequately resolved only by constitutional amendment. And as a practical matter, if what we want is to assure continuity in Executive leadership -- and if what we want to avoid is uncertainty, confusion and dissension at the very time of crisis -- then in my judgment a statute would not provide a satisfactory solution. So I fully agree with the constitutional amendment route marked out by S. J. Res. 1.

I

The Problem of Presidential Inability

Article II, section 1, clause 6 of the Constitution provides as follows:

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

on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

It is generally agreed that this provision no longer poses any legal problem in the event of the death of a President. As a matter of historical practice, first established by John Tyler and followed by seven other Vice Presidents, the Vice President becomes President in such a contingency. Section 1 of S. J. Res. 1 confirms this practice in the case of death and extends the same principle to the case of removal of, or resignation by, the President. Under section 1, therefore, the Vice President would become President and be sworn in as President in the event of the latter's removal, death or resignation. I can see no objection whatever to section 1.

With respect to the problem of presidential inability, there is no similar settled practice because, of course, so far in our history no Vice President has ever exercised the powers and duties of the Presidency during a period of Presidential inability. It is true that the identical Eisenhower-Nixon, Kennedy-Johnson, Johnson-McCormack and Johnson-Humphrey understandings as to these matters, supported as they are by the views of the last three Attorneys General, have gone far toward establishing a settled practice. These informal understandings, however, leave much to be desired as a means of resolving such fundamental questions, and in any case they make no provision for the situation that would exist if the President and Vice President were to disagree on the question of inability. Accordingly, it is clear that what we need at this time is a lasting and complete solution to the key questions which are apt to arise under the ambiguous language of Article II, section 1, clause 6 of the Constitution when a President suffers inability. The first is whether it is the "Office" of the President, or the "Powers and Duties" of that Office, which devolve upon the Vice President in the event of presidential inability. The second is who shall raise the question of "Inability" and make the determination as to when it commences and when it terminates.

The great majority of constitutional scholars have expressed the opinion that upon a determination of presidential inability, the Vice President succeeds only temporarily to the powers and duties of the office and does not permanently become President. This has been the unanimous view of Attorneys General of both Republican and Democratic administrations for at least the last decade. Similarly, the majority of scholars are agreed that the Vice President has constitutional authority to make the initial determination of Presidential inability, and that the President has the authority to determine when his inability is at an end. My own judgment and that of many Attorneys General is that this is so. However, enough doubt has existed on these subjects in the past that several Vice Presidents have been deterred from acting as President when the President was temporarily disabled. As you will recall, this happened most dramatically during the prolonged illnesses of Presidents Garfield and Wilson, when the country was left without leadership and decisions were made, to the extent that they were made at all, in a questionable manner.

The events of the last decade show us all too clearly how quickly disability can strike. We cannot afford to assume that our good fortune in the past will continue in the future. If a similar tragedy should occur while section 3 of S.J. Res. 1 is in effect, it would not only fix beyond dispute the status of the Vice President as Acting President when he is discharging the powers and duties of a disabled President, it would also give the President a firm constitutional guarantee that he could reassume these powers and duties as soon as his inability has ended. On this basis, a President who is sick, or about to undergo an operation which will temporarily incapacitate him, will not hesitate to announce his inability, nor will a Vice President be unduly slow to act if an emergency situation of this kind demands it.

The extraordinary situations -- where the President cannot or does not declare his own inability, or where a dispute exists between the President and Vice President as to whether inability exists -- are covered by sections 4 and 5 of S.J. Res. 1.

Section 4 provides that if the President does not declare his inability, the Vice President with the written concurrence of a majority of the heads of the Executive departments (i.e., the members of the Cabinet) or such other body as Congress might by law provide, may transmit to Congress his written declaration that the President is disabled, and immediately assume the powers and duties of the office as Acting President. Section 5 provides that the President can resume the powers and duties of his office by transmitting to the Congress his written declaration that his inability has ended. If, however, the Vice President does not agree that the President's inability has ended, section 5 further provides that the Vice President can, with the written concurrence of a majority of the heads of the Executive departments or such other body as Congress might by law provide, within two days so advise Congress. Thereupon Congress would be required immediately to decide the issue. A two-thirds vote of both Houses would be necessary to keep the President out and permit the Vice President to continue to act as Acting President. If the Vice President could not muster a two-thirds vote in each House in favor of a determination of continuing presidential inability, the President would resume the powers and duties of his office.

As the Subcommittee knows all too well, the factual situations with which S.J. Res. 1 is designed to deal are numerous and complex. Inevitably, therefore, some aspects of S.J. Res. 1 will raise problems of ambiguity for some observers. In order to assist in minimizing any such ambiguity, I would like to set forth the interpretations I would make of the proposed amendment in several difficult areas so that the Subcommittee may have an opportunity to consider whether clarification is needed.

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with long-standing precedent (see, e.g., Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his Office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable

to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his Office by declaring in writing that his inability has ended. The Subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the two-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the Subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail. There is, however, overwhelming support for S.J. Res. 1, and widespread sentiment that these procedures should be written into the Constitution. The debate has already gone on much too long. Above all, we should be concerned with substance, not form. It is to the credit of S.J. Res. 1 that it provides for immediate, self-implementing procedures that are not dependent on further Congressional or Presidential action. In addition, it has the advantage that the States, when called upon to ratify the proposed

amendment to the Constitution, will know precisely what is intended. In view of these reasons supporting the method adopted by S. J. Res. 1, I see no reason to insist upon the preference I expressed in 1963 and assert no objection on that ground.

II

Filling the Vacancy in the Office of Vice President.

Related to the problem of presidential inability is the equally critical problem of a vacancy in the Office of Vice President. Too often it is overlooked that the country has been without a Vice President sixteen times -- in almost half of the 36 Administrations in the history of the Nation. In an age marked by crisis, we can no longer afford such a gap in the high command of the Executive Branch of the Government. Today more than ever, the working relationship between the President and Vice President has become increasingly close; the burdens of the Presidency and the exigencies of our time leave no other alternative. The need is therefore manifest for a constitutional amendment to assure that the Office of Vice President will never again remain vacant.

In my opinion, S. J. Res. 1 embodies a highly satisfactory solution to this problem. Section 2 would amend the Constitution to provide that whenever there is a vacancy in the Office of Vice President the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Permitting the President to choose the Vice President, subject to congressional approval, in the event of a vacancy in that Office, will tend to insure the selection of an associate in whom the President has confidence, and with whom he can work in harmony. Participation by Congress in the procedure should help to insure that the person selected would be broadly acceptable to the people of the Nation.

At this time, I wish to pay my respects to the Members of this Subcommittee, whose combined effort and scholarship have resulted in this important measure. Also, I wish to commend the Special Committee on Presidential Inability of the American Bar Association, and similar committees of State and city Bar Associations, who have in recent years helped to focus attention and to rally public support for resolving these problems promptly.

It seems clear that S. J. Res. 1 represents as formidable a consensus of considered opinion on any proposed amendment to the Constitution as one is likely to find. It may not satisfy in every respect the views of all scholars and statesmen who have studied the problem. For that matter, I doubt that any proposal could ever fully satisfy everyone in this troublesome area. But, it seems to me evident that, as President Johnson said yesterday, S. J. Res. 1 "would responsibly meet the pressing need . . . ."

I understand that 47 State legislatures will be in session this year. Given the opportunity, I believe that many of these State legislatures will be able to ratify the necessary constitutional amendment if Congress acts without delay. I earnestly recommend such action.