Department of Justice

Statement

by

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on

H. J. Res. 1, and related proposals to amend 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 the
Committee on the Judiciary,
House of Representatives

February 9, 1965

I am privileged to appear before this Committee to give my support to H. J. Res. 1 and to discuss related proposals which are before you to amend the Constitution in order to remedy two critical deficiencies. The proposed amendments 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.

About ten years ago, the Chairman of this Committee initiated a scholarly study of the problem of presidential inability. A special subcommittee composed of ranking members of this Committee was appointed. To insure a broad and impartial approach to the problem, a questionnaire was sent to eminent jurists, political scientists, and public officials. In the succeeding years extended hearings were held and reports filed. I am not aware of any constitutional problem which has received more comprehensive and continuing attention by this Committee than that of presidential inability. Therefore, I see no value in any extensive review of the history of the presidential inability provision of Article II, section 1, clause 6 of the Constitution, or the interpretations which have been given to that provision over the years. These matters have been fully covered in the Attorney General's opinion to the President of August 2, 1961 (42 Ops. Atty. Gen. No. 5), and I respectfully request that the Committee make that opinion a part of the record of these hearings.

At the outset I wish to reaffirm the view I have expressed on several previous occasions that the only satisfactory method of settling the problem of presidential inability is by constitutional amendment, as H. J. Res. 1 proposes. The same of course is true of the problem of filling vacancies in the Office of Vice President. I know that some distinguished scholars take the view 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 statutory solution would therefore be adequate. There is, however, equally distinguished support, 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 H. 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 poses no 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 H. J. Res. 1 confirms this practice in the case of death and extends the same principal to 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 that section.

As for 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 on this matter, 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. Moreover, they make no provision for the situation that would exist if the President and Vice President should disagree on the question of inability. Accordingly, it is clear that what is needed is a lasting and complete solution to the key questions which would arise under the ambiguous language of Article II, section 1, clause 6 of the Constitution if a President were to become unable to discharge the powers and duties of his Office. The first of these questions is whether it is the "Office" of the President, or the "Powers and Duties" of the Office, that would devolve upon the Vice President in the event of presidential inability. The second is who is authorized to raise the question of "inability" and make a determination as to when it commences and when it terminates.

The great majority of constitutional scholars have expressed the opinion that in the event 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 also 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 the 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 demonstrate how quickly and unexpectedly disability can strike. If a President should become disabled while section 3 of H. J. Res. 1 is in effect, there could be no dispute as to the status of the Vice President as Acting President in discharging the powers and duties of the disabled President. There also would be a firm constitutional guarantee that the President could reassume his powers and duties as soon as his inability has ended. On this basis, we can assume that a President who is sick, or about to undergo an operation which will temporarily incapacitate him, would not hesitate to announce his inability, nor would a Vice President be unduly slow to act if an emergency situation of this kind should demand 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 H. 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 of 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. There upon 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 the necessary two-thirds vote in each House, the President would resume the powers and duties of his Office.

As the Committee well knows, the factual situations with which H. J. Res. 1 is designed to deal are numerous and complex. Inevitably, therefore, some aspects of the proposal will raise problems of ambiguity for some observers. In order to assist in resolving any such ambiguity, I propose to set forth the interpretations I would make in several difficult areas so that the Committee may 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 is 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 where the President has been declared disabled without his consent, in accordance with section 4; and that, where the President has voluntarily declared himself unable to act, pursuant to 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. However, I note in this regard that the Senate Committee on the Judiciary has recently approved an amended version of S. J. Res. 1, the counterpart of H. J. Res. 1, under which the President may resume his powers and duties in this situation only by following a procedure comparable to that established by section 5. I would much prefer a provision which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared.

Third, I assume that even where the President's inability was established originally pursuant to section 4, rather than declared voluntarily by him, 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.

The Senate Committee on the Judiciary has revised S.J. Res. 1 to provide that all declarations, including the declarations by the President under sections 3 and 5 and the declaration by the Vice President under section 4, shall be transmitted to the President of the Senate and Speaker of the House of Representatives. This change, the Committee states, would provide a basis on which Congressional leaders could convene Congress if it were not then in session. However, the Constitution expressly authorizes only the President to convene Congress in special session (Art. II, sec. 3, clause 2), and in view of that provision it might be argued that Congress cannot be convened in special session by its own officers. Accordingly, I would think it preferable to provide that the Acting President must convene a special session in order to raise an issue under section 5 as to the President's inability. Although section 5 as it now stands could be construed in that way, the Committee may wish to consider whether it would not be advisable to add express language which would make that intention unmistakable.

Fifth, 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, even though used also in Article I, section 3, clause 2 of the Constitution, that the Committee 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.

The Senate Judiciary Committee, in approving S.J. Res. 1, has changed the language "immediately decide the issue" to "immediately proceed to decide the issue." This change seems to have the effect of reversing the interpretation I have indicated, the result being that under S.J. Res. 1, as approved by the Senate Committee, the Acting President

would continue to exercise the powers and duties of the Presidency while Congress considered the matter and until one of the Houses of Congress brought the issue to a vote and failed to support the Acting President by a two-thirds vote.

I note that the Committee has before it several proposals (H. J. Res. 3, H. J. Res. 119, and H. J. Res. 248) which would provide that once the issue of inability was referred to Congress, the President would be automatically restored to the powers and duties of his Office if Congress failed to act within ten days. These proposals would add a measure of protection for the President against interminable consideration of the issue by Congress. However, it would still be possible under these proposals for the issue to be decided by delay rather than by a vote on the merits.

In view of the difficulty of establishing in advance exactly what period of consideration would be appropriate, the most effective course might be to initiate promptly the adoption of rules for the consideration of questions of inability that would insure a reasonably prompt vote on the merits. I do feel that, if the issue of national leadership is to be importantly affected by delay, then delay should favor the President. Particularly is this so if the President may not, under section 3, unilaterally declare an immediate end to periods of inability which he has voluntarily declared.

It is sometimes suggested, with respect to provisions like section 5, that the doctrine of separation of powers is violated by exercise of legislative authority in this field. I cannot accept this argument. Congress, it will be recalled, now has constitutional authority to enact a succession law when both the President and Vice President have suffered inability. Art. II, sec. 1, clause 6. Congress is also authorized by the Constitution to determine impeachment proceedings. Accordingly, vesting authority in the Congress by a two-thirds vote to determine the inability of the President in the event of an impasse between him and the Vice President would not seem to be a significant extension of its present authority. It should be noted in this connection that Congress would be authorized by section 5 only to confirm what the Vice President, acting with the concurrence of a majority of the Cabinet, has done. Congress could not initiate the procedure for determining the commencement or termination of presidential inability.

In my testimony on this subject in 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, over-whelming support for a measure such as H. 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 H. 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 H. 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 Vacancies in the Office of Vice President

Related to the problem of presidential inability is the equally critical problem of vacancies 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 the times 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, H. 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, 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 should help to insure that the person selected would be broadly acceptable to the people of the Nation.

All things considered, it is clear that H. J. Res. 1 represents as formidable a consensus of opinion on a proposed amendment to the Constitution as we are ever likely to find. It may not satisfy in all respects

the views of every student of the problems with which it deals. For that matter, I doubt that any proposal could ever fully satisfy everyone in this difficult area. But, it seems to me evident that this proposal, as President Johnson has said, "would responsibly meet the pressing need . . . . " That need has never been greater in all our history.

If Congress acts favorably on this proposed constitutional amendment this year, it is possible that it would be ratified by 1966. I therefore earnestly recommend such action.