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"PRESIDENTIAL INABILITY"

ADDRESS

BY

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I should like to talk with you today about a matter of serious concern to the people of the nation. It is the problem of what happens under our Constitution and laws when a President is unable to discharge the powers and duties of his office in case of illness or other unexpected emergency.

The problem turns on Section 1 of Article II of the Constitution, which 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."

Thus, as you can see, this Section expressly declares that in case of the President's inability to discharge the powers and duties of the office of President, "the same shall devolve upon the Vice President . . . until the Disability be removed . . . ." From a study of the records of the Constitutional Convention it is clear that it is "the powers and duties", not "the said office", which "shall devolve" upon the Vice President, and for the temporary period of inability only. In other words, the Vice President does not become President, he merely exercises the powers and duties, he acts as President.

This is clear from the records of the Convention, but it is not so clear from the plain face of the Constitution itself. So the first time the clause was invoked, trouble arose with it.

When President William Henry Harrison died in 1841, there was objection to Vice President Tyler actually becoming President because it was thought that the precedent would complicate the situation when a President became disabled. It was urged, based upon a study of records of the Constitutional Convention, that a Vice President was not intended to become President under the succession clause previously quoted, but merely to exercise the powers and duties of the President until his inability was removed. Tyler thought otherwise and signed his name as President.

Regardless of the intent of the framers of the Constitution, seven Vice Presidents have, upon the death of the President, been recognized as succeeding to the office of the Presidency. From these precedents, it has been assumed that the Vice President becomes President and does not merely act as such when the President dies. This was Daniel Webster's view when President Harrison died, namely, that Vice President John Tyler actually became President.

It was these very precedents which were often relied on by those who argued that a Vice President supersedes the President permanently whenever the Vice President exercises presidential power. While the large majority of scholars disagrees with this theory, the fact remains that enough doubt has been engendered to discourage Vice Presidents from acting as President.

President Garfield, for example, lingered for eighty days after he was shot on July 2, 1881. During these eighty days, he performed only one official act--the signing of an extradition paper. In the early days of his illness his mind was clear, but thereafter he was unconscious and suffered from hallucinations. There was important business requiring the President's attention which was neglected. There was a serious crisis in our foreign affairs. Yet, only routine business was handled by department heads such as could be transacted without the President's supervision. There was criticism that Secretary of State Blaine was usurping the President's duties, and insistent demands that the Vice President act. The Cabinet was generally in agreement on the desirability of having Vice President Arthur act as President, but four of the seven Cabinet members, including the Attorney General, felt that if he did Garfield could never again return to office.

Considerable agitation was raised at the time for clarification of the law, but upon Garfield's death on Sepatember 20, the matter was dropped until President Wilson became ill in 1919.

At this time, once again, there was a repetition of what went on before. President Wilson was actually unable to perform most of his duties from September 1919 until the end of his term in March 1921. Not only did numerous domestic and international matters fail to receive his attention, but as you may recall his inability occurred during the crucial Senate debate on the Versailles Treaty.

The Vice President, the Cabinet and the public were all kept in the dark about Wilson's condition. History records that Mrs. Wilson and the President's physician played an important role in making and deciding matters of large public policy. The Cabinet tried its best to keep the affairs of the Government from becoming paralyzed. But when Wilson heard that Secretary of State Lansing had called Cabinet meetings, he accused Lansing of usurping presidential power, and fired him.

Attempts made to get Vice President Marshall to act as President failed. Marshall was unwilling to act because of his loyalty to the President and the faar that once he did act, Wilson would be ousted permanently from the Presidency.

In each of these two cases administration of the government practically came to a standstill because of the apprehension that once the Vice President was called on to act, he would supersede the disabled President for the remainder of the term. As a result of Wilson's prolonged illness, widespread discussion again ensued for clarification of the law, but when his term expired interest in the matter died down again.

Today offers the best opportunity in history to solve this problem and the administration has recommended to the Congress a constitutional amendment to govern in case of Presidential inability. The Administration Plan is embodied with minor revision in a bill introduced by Senators Kefauver and Dirksen with considerable bi-partisan support.

Section 1 restates existing law in case of death of the President.

Section 2 provides that, if a 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 section authorizes a President to announce his own inability knowing that his powers and duties will be restored to him when he recovers.

Section 3 of the Plan deals with cases in which the President is unable or unwilling to declare his own inability. In such cases, the Vice President with the approval of a majority of the heads of the executive departments in office--that is to say the President's Cabinet--would make the decision.

The majority of scholars are agreed that the Vice President presently has the authority under the Constitution to make the determination of Presidential inability. Section 3 is consistent with this view but goes further and selects the Cabinet as the proper body to participate along with the Vice President in declaring a President's inability.

Section 4 provides that whenever the President declares in writing that his inability is terminated, the President shall resume the exercise of the powers and duties of his office on the seventh day after making such announcement, or earlier than the seven days if he and the Vice President so determine. Thus Section 4 provides a disabled President

with a constitutional guarantee that he can regain the powers of his office if he is of the opinion that his inability has been removed. This of course would be an important factor in persuading a President to relinquish the powers of his office.

Then too, the Vice President would certainly not attempt to assume the duties of the Presidency unless it were clear beyond challenge in any quarter that the President was in fact actually disabled from exercising the powers and duties of his office. On the other hand, a constitutional provision which makes it clear that the Vice President is merely acting as President for a temporary period, negates any motive of usurpation. Thus no Vice President should refuse--as did Vice Presidents Arthur and Marshall--to perform his constitutional duty of serving as the alternate executive for a temporary period if the circumstances required such action. The President's immediate family and friends would be stripped of any motive to oppose the Vice President, as in Wilson's case, for on regaining his health the President could simply assert his ability and regain the powers and duties of the office.

This leaves open one extreme contingency, a difference in opinion between the President and the Vice President as to whether the inability has ended.

Section 4 would allow the President to resume the functions of his office in event of such a dispute, but provide for the immediate action of Congress, whether then in session or not, to resolve the question of

Presidential inability if raised in writing by the Vice President supported by a majority of the Cabinet. A two-thirds vote of the members present in both Houses would determine the existence of a President's inability; a majority vote of both Houses could restore the powers of the office to him at a later date if he ever recovered.

This procedure is much more desirable and appropriate than impeachment proceedings. First, while members of Congress might be reluctant to impeach the President because of the odium that attaches to this proceeding, they would act more freely in removing a President physically unable to perform the duties of his office. Second, impeachment would remove the President permanently; a determination of inability by Congress would enable the President to reassume the powers of his office upon recovery.

So long as the determination of inability is left within the Executive branch, either by the President or the Vice President as is now true under the Constitution, or by the Vice President and Cabinet under the circumstances proposed by the Resolution, there can be neither harassment of the President nor impairment of his prestige in the eyes of the people.

But if we transfer the power of initial determination of inability out of the Executive branch, as for example to a medical commission, or in some fashion share it with others outside the Executive branch, then the way is opened for harrassing the President for political and personal motives. Our solution must contemplate the testing of it -- if need be -- in

circumstances similar to the time of President Johnson and the Reconstruction Congress, when violent personal differences and party controversy might invite the Congress to use any power it had to determine presidential inability as a weapon of harassment -- if such a weapon were easily at hand. This possibility could severely weaken the Presidency at the very time when assertion of its full power was most needed.

We must avoid any purported solution of the problem which may tend to dilute the prestige of the Presidency, diminish its stature or endanger its tenure. We must be alert to any purported solution which leaves the situation as uncertain and confused as it is now. This, I think, is the fatal weakness in those plans which would deal with the matter by statute rather than a constitutional amendment; it would be most illogical to deal with the problem by statute, and leave it in the same unconstitutional uncertainty as it is now.

Pending action by Congress, President Eisenhower has taken the wise precaution of agreeing with Vice President Nixon on the course of action in event of any future crisis. Under this agreement, the President would declare his own inability. If he could not declare it, the Vice President would decide the matter. In either case, the Vice President would serve only as Acting President until the inability had ended. In either case, the President could determine when the inability was over. These procedures are strictly in accord with the Constitution as originally drafted in convention and interpreted by most responsible authorities today.

Summarizing then, the problem has never been one of an over-ambitious Vice President, but rather of a reluctant Vice President who hesitated to exercise the powers of the presidency because he might oust the President from office. The key provision in solving the problem is to make absolutely certain that the Vice President steps in only temporarily. This key provision is the foundation of the Administration proposal submitted last year, re-urged this year, and of the proposed Dirksen-Kefauver amendment. It follows, I believe, the accepted interpretation of the Constitution as it now stands and is the basis of the expressed understanding between the President and Vice President; but any interpretation is clouded by previous divergent views and the existing understanding cannot bind a future Administration.

The Executive branch has done everything it can to solve the problem. The Eisenhower-Nixon understanding eliminates it entirely until 1961. For the future, the Administration has recommended a Constitutional amendment. In the Senate a bi-partisan effort of nine of the fifteen Senators of the Judiciary Committee, led by Senators Dirksen and Kefauver, has introduced an amendment which embodies the best thoughts of all who have seriously considered this problem. It has been reported by the subcommittee, and is now awaiting consideration by the full Judiciary Committee. The House Judiciary Committee has made no progress. No amendment of any kind has been agreed on even by a subcommittee of the Judiciary Committee. Representative Keating has

introduced the Dirksen-Kefauver amendment in the House. But no hearings have been scheduled on it by Chairman Celler of the subcommittee and no action of any kind has as yet been taken. A hard-driving effort by an informed and responsible public opinion is now needed to secure action.

This Congress has, -- this year -- the golden opportunity to enact this vitally needed constitutional clarification. At this moment in history it can be done by a bi-partisan effort without any consideration of which personality or which party will occupy the White House by the time the amendment is effective. We do not know which man or which party will occupy the White House in 1961, but under the Constitution it cannot be President Eisenhower. At this particular time the proposed measure can be considered entirely on its merits without the consideration of persons or party.

This Administration, aided by a bi-partisan effort of thoughtful and responsible Senators, has done everything possible to solve the problem of Presidential inability. It is now up to Congress, particularly the leadership in the House and Senate, to act on this most important problem this year.