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Bert Early

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ADDRESS BY MR. BERT EARLY, EXECUTIVE SECRETARY OF
THE AMERICAN BAR ASSOCIATION

When President Dwight Eisenhower was stricken with a heart attack a few years ago, this country faced, for the third time in its history, the temporary loss of any effective national leadership. When John Kennedy was struck down by the assassin's bullets last November, this country faced, for the seventh time in its history, the loss by death of the President of the United States and the succession to the highest office by a Vice President.

Neither such circumstance was intended by the framers of our Constitution. Strange as it may seem, this is a fact. It was not intended either (a) that we should have a hiatus in which the powers and duties of the President's office were not held by one capable of exercising their responsibilities, or (b) that Vice Presidents should ever assume the office of the Presidency.

Let us look at the history. When the Constitutional Convention was debating the matter of Presidential inability and succession it adopted the following language:

"In case of the President's removal, death, absence, resignation, or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed."

The key words in this sentence are "the Vice President shall exercise those powers and duties", and the words in the case of inability "until the inability of the President be removed."

This sentence, along with other Constitutional provisions, was referred to the Committee on Style of the Constitutional Convention without any authority in that Committee to change the substance of the provision. It is not clear just how it happened but when this sentence came from the Committee on Style, it read as follows:

"In case of the removal of the President from office or at his death or resignation or inability to discharge the powers and duties of said office, the same shall devolve on the Vice President * * *".

The key words here are "the same shall devolve on the Vice President.

It remained in this form when adopted by the Convention and ratified by the States. Thus it became a part of the Constitutional framework under which our Government functions.

It was not until 1841 that this clause of the Constitution was called in question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as acting President or whether he became the President of the

United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, notably that of Senator William Allen of Ohio, the Vice President was later recognized by both Houses of Congress as the President of the United States.

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Andrew Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all have become President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under this provision of the Constitution, namely that of death, the Vice President becomes the President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office or inability. In all four contingencies the Constitution states "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability or removal from office of the President. Historically, however, no Vice President has been willing to assume the powers and duties of the President during an inability of a President for fear, under the Tyler precedent, of ousting the President from office permanently and being labeled a usurper. This fact is best illustrated by the illness in 1919 of President Woodrow Wilson. This illness lasted for seventeen months and during a large portion of that time the President was completely isolated. 28 bills became law because the President failed to act; and still Vice President, Thomas Marshall, refused to assume the powers of the office for fear of ousting the President.

Vice President Chester Arthur refused to act as President, though urged to do so by his cabinet during the 80 dark days that President Garfield hovered between life and death after being shot in 1881. Following President Eisenhower's heart attack, a committee of the Cabinet and the White House staff kept the Executive Branch operating. Eventually, President Eisenhower and Vice President Nixon entered into a written agreement outlining procedures to be followed in the event of inability and similar agreements have been entered into by the following administrations. These measures, however, are only temporary and depend upon the cooperation of both parties. Some authorities question their constitutionality.

Furthermore, the Constitution makes no provision for determining what constitutes inability nor does it provide for replacing the Vice President when a vacancy occurs. These related problems have also remained unsolved throughout our history.

In the past these problems have been endlessly debated. The failure to reach satisfactory solutions is due, not to lack of interest, but rather to an

overabundance of proposals and a reluctance by their authors to admit the value of solutions other than their own. As a result of its continuing concern, the American Bar Association convened a group of eminent lawyers, scholars and members of Congress in January, 1964, to discuss the problems and recommend solutions. After two days of intense deliberation, the group reached a consensus agreement reflecting a workable solution with principles generally agreeable to all. The consensus agreement was unanimously adopted as the official position of the American Bar Association in February, 1964.

To focus national attention on the inadequacy of the constitutional provisions, the American Bar Association sponsored the National Forum on Presidential Inability and Vice Presidential Vacancy in Washington, D. C. on May 25, 1964. Representatives of major civic, business, labor, education, farm and professional organizations, as well as members of Congress and the news media attended. It is our belief that if the public is made generally aware of the inadequacy of the existing provisions of the law and the tremendous chaos that could result in time of emergency they will respond by demanding a practical solution.

The points of the consensus were incorporated into Senate Joint Resolution 139 introduced in the Senate by Senator Birch Bayh of Indiana. Subsequent to hearings in the Senate Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, S. J. Res. 139 was reported by the full committee and is now awaiting a calendar date assignment in and by the Senate. This resolution is sponsored by 39 Senators, including your own Milward Simpson. I am sure it is also receiving the attention and enthusiastic support of Senator McGee. There is no hope for action in the House this year but it is hoped that the proposed amendment will pass both Houses of Congress next year by the necessary two-thirds vote and will subsequently be ratified by three-quarters of the state legislatures.

The American Bar Association believes that S. J. Res. 139 represents a workable practical solution to problems which have existed for over 175 years. I would like to outline the major provisions of the ABA consensus and S. J. Res. 139.

We begin with the premise that agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

These agreements, while desirable under the circumstances, do not have the force of law. They are subject to the whims and personal reactions of whoever may be Vice President or President. They can be disregarded at any time by either party.

An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person

next in line of succession for the duration of the inability of the President or until expiration of his term of office.

Scholars differ as to whether a Constitutional Amendment is necessary. Some believe that Congress now has the authority to act. Others believe that Congress has no power whatsoever to legislate on the subject of inability and emphasize that what actually must be resolved is the Constitutional question. It must be clarified that in the case of the President's inability, only the powers and duties of the office devolve on the Vice President or person next in line of succession.

A question of this magnitude should not be resolved on a balancing of opinions. Concerned here are the very fundamentals of our government, the office of President and the exercise and continuity of Executive power. These should be dealt with by a clearly stated amendment to the Constitution, and not merely by a legislative act which would be subject to Constitutional challenge at the very time we could least afford it.

The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.

Should the procedures for determining the President's inability and termination of that inability be written into the Constitution? The Constitutional amendment should provide for an immediate self-implementing procedure which does not depend upon further Congressional or Presidential action. However, a single method should not be frozen into the Constitution and the amendment should be flexible, giving Congress the legislative power to provide an appropriate body for inability determination if the need arises. The procedure for determining the inability leaves the responsibility, in the absence of further action by Congress, in the Executive Branch of the government. This is compatible with the separation of powers doctrine of the Constitution. It would enable prompt action by the person closest to the President, and presumably most familiar with his condition.

It would also tend to assure continuity and the least disruption of the functioning of the Executive Branch. When a 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 and the Vice President and members of the Cabinet, two-thirds of the Members of Congress should

be required to overrule the Presidential declaration that he is able to resume the powers and duties.

The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

This statement merely confirms the past practice established by John Tyler in 1841. It gives Constitutional status to the precedent that a Vice President succeeds to the office itself when a vacancy occurs upon any contingency other than inability.

It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The office of Vice President has become one of the most important positions in the United States. It is no longer a simple honorary position. For more than a decade the Vice President has borne specific and important responsibilities in the Executive Branch of government. 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 on short notice.

It is therefore necessary that the Vice Presidency be filled at all times. In the proposed amendment, the President would choose the Vice President subject to Congressional approval.

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. On the other hand, the proposed amendment recognizes the right of the people to have a choice in the Vice President's election through their elected representatives.

It has been suggested by some that the Electoral College be reconvened to fill the vacancy, but the Electoral College performs functions which are primarily ministerial. It is unlikely that a decision by the Electoral College would command the appropriate respect and support of the people. Nor by use of the College is the country assured of a prompt filling of the Vice Presidential vacancy.

The Congress is a numerical counterpart of the Electoral College in which each state has the same representation through its Congressional delegations as there are electoral votes. It is deliberate, easily assembled, and responsible to the people.

The vital need is for action which will solve these grave problems of Presidential inability and succession. Discussions of these problems have recurred down through the years, especially following events in history which dramatized the need for solutions. But even the interest aroused by the illness

of President Eisenhower was not sufficient to bring about action. There has been a resurgence of interest, and indeed deep concern, since the assassination of President Kennedy, and once more responsible voices throughout America are calling for appropriate action. There has been little disagreement as to the need. The difficulty has been in obtaining a consensus as to how best to meet the need. Many proposals have been made, and many of these have undoubted merit.

In testifying before Congress last spring, American Bar Association President, Lewis F. Powell, Jr. said, "Surely the time has come when reasonable men must agree on one workable method. It is not necessary, as the Washington conferees agreed, that we find a solution free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult."

It is the hope and strong recommendation of the American Bar Association, that past differences be reconciled and that a solution be found. We think that S. J. Res. 139, which is now supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field, contains provisions which are sound and reasonable and which are consistent with the basic framework of our Government.

Accordingly I urge each of you individually and collectively through your State Bar and your local Bar Associations to study the problem and to encourage your State and National legislators to act promptly in supporting this practical solution to the problem of Presidential inability and Vice Presidential vacancy.

I would further urge that this 49th meeting of the Wyoming State Bar go on record officially by adoption of an appropriate resolution endorsing and approving the principles set forth in the American Bar Association consensus and Senate Joint Resolution 139, and that it urge Congress to initiate an amendment to the Constitution to give effect to these principles.