AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers/Impeaching and Censuring the President

**Hearings on Presidential Inability** (1965)[[1]](#footnote-1)

*The Constitution of 1787 anticipated the problem of presidential succession. It provided that “in case of 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.” The vice president had been called upon to fill the office of the president on multiple occasions due to the death of the elected president, No vice president had attempted to assume the powers of the president due to the president’s “inability to discharge the powers and duties” of his office, but not necessarily because there had been no occasion to do so. President James Garfield lingered for eleven weeks after being shot in 1881. President Woodrow Wilson continued in office for nearly two years after a debilitating stroke. Although President John Kennedy’s death came quickly when he was shot in 1963, the shocking assassination put the problem of presidential disability on the front burner.*

*Congress moved quickly to propose the Twenty-Fifth Amendment in order to try to provide a clearer constitutional framework for a vice president to step in when the president remained alive but unable to perform his duties. The new constitutional amendment created a clearer process by which the vice president might displace the president, and thus hopefully might embolden the vice president to act when the situation demanded it. But the text of the Twenty-Fifth Amendment did little to clarify the circumstances in which the president should be relieved of his duties, simply authorizing the vice president and a majority of the Cabinet to act when they conclude that “the President is unable to discharge the powers and duties of his office” and empowering two-thirds of Congress to decide the issue if the president and his Cabinet disagree about whether an “inability exists.” The drafters of the amendment struggled with how to balance the need for a safeguard for presidential inability with the need to deter the temptation of vice presidential usurpation and how to account for the possibility of partisan politics, obstructionism, ambition, intrigue, and litigiousness when the powers of the presidency were at stake.*

*The Twenty-Fifth Amendment was ratified in 1967, but Section 4’s provision for involuntary declarations of presidential inability has never been invoked.*

ATTORNEY GENERAL NICHOLAS KATZENBACH. . . . With respect to the problem of presidential inability, there is no . . . 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 [and] Kennedy-Johnson . . . 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 in commences and when it terminates.

. . . . [E]nough doubt has existed on the 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 President 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. . . .

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PRESIDENT LYNDON B. JOHNSON. . . . Our Constitution clearly prescribes the order of procedure for assuming continuity I the office of the Presidency in the event of the death of the incumbent. These provisions have met their tragic tests successfully. Our system, unlike many others, has never experienced the catastrophe of disputed succession or the chaos of uncertain command.

Our stability is, nonetheless, more superficial than sure. While we are prepared for the possibility of a President’s death, we are all but defenseless against the probability of a President’s incapacity by injury, illness, senility, or other affliction. A nation bearing the responsibilities we are privileged to bear for our own security, and the security of the free world, cannot justify the appalling gamble of entrusting its security to the immobilized hands or uncomprehending mind of a Commander in Chief unable to command.

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KATZENBACH. . . . [I]t seems to me that those who feel that Congress should act on this [when there is a disagreement between the president and vice president on the president’s inability] are adopting a philosophy that says that the elected representatives of the people would better give the sense of the people, at least in confirming that executive decision. And it would prevent at least the possibility, although we have never faced it in our history at all, the possibility of a coup d’état which certainly other countries have experienced from time to time; the possibility of deposing a President when the Vice President can, through one way or another, wean away a majority of the Cabinet from supporting the President.

So I think you accentuate the problem that the chairman raised at the outset of simply an unpopular President and a Vice President who seeks to assume the office and can edge the support of the majority of the Cabinet.

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SENATOR ROMAN HRUSKA (Republican, Nebraska). . . . In the case of a disability, the situation is different. There the policy has been determined already. The policy was determined that Mr. X was elected President. That is the decisive action taken by the electorate of this country. The question is only as to fact: Is he capable of carrying on his duties?

Now, that is not a policy question. It is a factual question. I submit that the contingency to which we refer . . . is a violation of the separation of powers.

Now, in the situation where there would be a coup d’état by manipulation of the Cabinet, that is a detail that can be taken care of by legislation . . . because we have a provision that the Congress may legislate to see that this decision is made within the executive branch. If it is desirable to say the Vice President may not fire or discharge the members of the President’s Cabinet, that he must work with them or such of them as are still alive and capable of proceeding, Congress may do that.

It does seem to me that there still is a violation of that separation of powers doctrine when we get into this particular thing. It puts one of the branches of Government in a dominant position over the other. That, of course, is the essence of the violation of that doctrine.

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. . . . [T]o judge a man guilty of acts which would be determined as treasonous or against public policy to the extent that he shall no longer serve as President, that is a policy question. It is semi- or quasi-judicial, to be sure, but that is a political and policy question.

The fact of insufficient mental or physical powers to continue in office is not a policy question; that is a factual question. Those that are policy in nature should be decided by the Congress. That is where they belong. And, of course, the Constitution expressly provides for impeachment. But where it is not a policy question, then it should remain within the branch of Government that is involved. . . .

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KATZENBACH. I would think that a question of this importance, Senator, could scarcely be regarded as a purely factual question. There are all kinds of gravest considerations of policy involved in the determination that Congress would make – the whole question of the confidence of the country, the confidence of the world.

SENATOR BIRCH BAYH (Democrat, Indiana). Are we talking about disability?

KATZENBACH. Disability in that kind of a case, I would think that was a policy question, admitting the factual basis of it, but I would think that was a policy question of the highest order. I would think it would be extremely important to know, in the event that a Vice President was taking over the offices, that he had the support in that determination of two-thirds of each House of Congress. I do not see how, just from the point of view of the confidence of the people of the United States, form the point of view of the confidence of foreign governments in our constitutional processes, I find it difficult to see how you could really do away with the political necessity. I mean that in the highest term, meaning, political, of that kind of confirmation of the President’s inability to act

HRUSKA. Mr. Attorney General, if this matter came to a vote in Congress, it would take a vote of 67 Senators and then two-thirds in the House, to determine that the President in unable to discharge the powers and duties of his office. If there were only 63 Senators who would say he is unable to serve, what becomes of your consensus and backing up of the decision made in the Cabinet and by the Vice President in the eyes of the Nation and the world?

KATZENBACH. I think it would be a most unfortunate thing if that were to occur, Senator. But I think that is inherent in the problem, not in the procedure here.

I would be very surprised at any Vice President with the political experience of Vice Presidents that I think has been true in all of our history who would even propose to do this unless he were absolutely assured that he was going to have the overwhelming support in the House and Senate. And I cannot imagine responsible Cabinet officials ever putting the country in that position. If there was that kind of doubt in the situation that you could not muster a two-thirds vote, then I do not think that the issue would ever be put. . . .

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. . . . I do believe that in that kind of a crisis, which, thank God, we have never had in this country and I hope never will, it would be so important to join ranks on both sides of the aisle and to create that kind of confidence among the public of the United States by their elected representatives joining in this very unpleasant and terribly important determination so that as we have in the past, this country could indicate that in such a crisis, it can and will unite.

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. . . . [W]hether they voted on it or whether they did not vote on it. You would have exactly the same kind of grave constitutional crisis. It almost comes when you talk two-thirds, and it is a customary figure. On this, it would be my hope that if the situation ever evolved, you would have 100 Senators who would agree. Because it simply becomes an impossible situation, and if it is a close question and a difficult one, it is in that situation where I think the Vice President would not act, the Cabinet would not support him. . . .

FORMER ATTORNEY GENERAL HERBERT BROWNELL. . . . I know . . . both in the executive branch and the congressional branch, in time of crisis will act not as rogues and rascals, but as patriotic Americans, as they always do and have done in time of crisis, that this will be an orderly procedure. . . .

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Now the President, under those circumstances, would not be likely to try to resume the duties of the office unless he was pretty sure that he had public support, that he had congressional support, that he had the support of the majority or practically all the members of his Cabinet. It would be such a reckless thing for him otherwise. It would only be in a situation of this type where he was mentally unbalanced, or something of that sort, which would be very obvious to everyone when you consider the white heat of publicity that beats upon the White House. In that kind of a situation, it follows almost automatically that there would be a strong insistence on the part of the public and the leaders in the Congress to see that he did not come back. Therefore, I do not visualize long hassles involved in this, even if this, unusual situation did arise.

I think that there would be overwhelming opinion one way or the other that would demand immediate action.

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1. Excerpt taken from Senate Judiciary Committee*, Hearings on Presidential Inability and Vacancies in the Office of the Vice President*, 89th Cong., 1st Sess. (January, 29, 1965). [↑](#footnote-ref-1)