COLGATE UNIVERSITY
HAMILTON, NEW YORK

Charles Evans Hughes Professor
of Government and Jurisprudence

28 January, 1964

Senator Hubert H. Humphrey
Senate Office Building
Washington, D.C.

Dear Senator Humphrey

Your letter of January 22 asked for suggestions regarding the problems of Presidential succession and Presidential disability. Here are a few random ideas.

1. The order of Presidential succession seems to be a problem of statecraft rather than of constitutional interpretation. If neither the President nor the Vice President is able to discharge the powers and duties of the Presidency, Congress is free to select any other officer to discharge them. (Art.II,Sec.1, Par. 5) The only restrictions on this power of Congress are those implied from the basic qualifications for the Presidency (Art. II, Sec. 2, Par. 4) and the prohibition of a religious test for any office. (Art. VI, Sec. 3)

The present order of succession is quite unsatisfactory. It could disrupt Congress in the middle of a session and could result in a sharp shift in executive policies in the middle of a term. It could result in the break-up of an administrative team soon after they had learned to work together. Since both the Speaker and the President Pro Temp. tend to be rather elderly men, there is no assurance they would have the physical vigor needed to give aggressive leadership to the country. Even with good health an elderly person rarely has the flexibility needed in a President.

The former order of succession through the heads of the executive departments has fewer disadvantages than the present arrangement but it also is far from ideal. The few cabinet officers who have been elected President since the middle of the last century (Hoover, Taft, and Buchanan) have not had distinguished records. The growing complexity of our political life and the increasing difficulty of our foreign relations demand a chief executive who has great political wisdom and skill. There is no assurance that a head of a department, even though able, would have either of these qualities.

We have need for a second Vice President. To provide an officer with that title would probably require an amendment of the Constitution since Amendment XII speaks of "the Vice President." But if he were given some other title, Congress could establish the office in the same way other federal offices have been established--by statute. Once the office was created, Congress could place the officer in the line of succession immediately

after the Vice President. If this officer were appointed by the President, by and with the consent of the Senate, the position would not need to be vacant longer than a few days at the most. Under our present political customs, the nominee for President's choice is in fact nominated for Vice President. An appointment of a second Vice President would thus be in line with our political practice. And being chosen well before an emergency has arisen, deliberate care could be exercised in his selection and the pull, tug, and pressure of personal politics could be reduced to a minimum.

A second Vice President could be well prepared to assume the responsibilities of the highest office. He would certainly be in accord with the major policies of the President. He could be invited to attend the Cabinet, National Security Council and other meetings at which the plans of the administration are discussed. Since he would not have the legislative duties of the Vice President, but would outrank the department heads, he could be given wide responsibilities by the President such as,for example, the duties of an administrative coordinator.

2. It seems quite clear that those who framed the Constitution expected the Vice President simply to discharge the powers and duties of the Presidency when the President was unable to do so. There was no thought that the Vice President should become the "President." It was perhaps fortunate, however, that the unbroken practice beginning with Tyler has been otherwise. The leader of our country needs all the prestige which rank can give him and a "Vice President", even with the powers and duties of the President, would not be as respected at home or abroad as would a "President."

The chief difficulty with the present practice is that it has tended to prevent the transfer of the Presidential powers to the Vice President in cases where the President has been ill but may recover. We have had three instances of this during the past half century and some provision should promptly be made to provide for the orderly transfer of the President's duties during his temporary disability. Arrangements like the Eisenhower-Nixon or the Kennedy Johnson understandings are useful but some formal provision of a desirable procedure is needed to prevent conflicts or difficulties in the future. This is a problem where nearly any solution is to be preferred to letting the matter drift.

The fact of Presidential inability might well be determined by a Presidential Commission consisting of the Chief Justice, the Speaker of the House, and the Surgeon General after the Commission had taken such advice as it felt appropriate. Once the fact of inability had been found, the Vice President should be empowered to exercise the powers and duties of the President until such time as the President, upon the advice of the Presidential Commission, should declare the inability no longer existed. Such arrangement would relieve the Vice President of the embarrassment of having to decide when he should assume the additional responsibilities. The high standing of the members of

the Commission would insure public confidence in their findings.

This solution would undoubtedly require a constitutional amendment since it interposes a new agency (the Presidential Commission) into the process provided by the Constitution. But any solution which could be accomplished by legislation would seem either to be wanting in some respect or to be of doubtful constitutionality. The determination of Presidential inability is an exceedingly difficult and delicate task and it is of prime importance that the public have confidence that it is performed accurately and fairly. The first consideration must be to insure the authority of the Vice President to act and then to provide legitimacy for his acts. Any constitutional doubts would weaken both the authority and the legitimacy.

This letter is longer than I should like to have written but I am sure you realize that your questions were not easy ones to answer. Indeed, I feel they deserve much more research and study than I have been able to give to them. However, there is no reason to keep the contents of this letter confidential. I have neither pride of authorship of these suggestions, for they are not very original, nor am I ashamed of them.

Very truly yours,

Rodney L. Mott

Rodney L. Mott

YALE UNIVERSITY
LAW SCHOOL
NEW HAVEN, CONNECTICUT

ALEXANDER M. BICKEL

January 27, 1964

My dear Senator Humphrey:

This is in reply to your letter of January 22 soliciting my views on the problems of Presidential succession and disability.

It has seemed to me that our present situation is alarmingly unsatisfactory. May I, therefore, begin by telling you what a great public service I think you are performing by provoking consideration of these problems. Their solution is a responsibility which, as Walter Lippmann has forcefully pointed out, Congress can no longer be permitted to shirk.

Two basic propositions seem to me to govern the problem of Presidential succession. One is that the succession must be provided for in advance, in order to ensure the stability of the Republic in the event of a sudden vacancy in the White House. The second is that no man can be expected to function adequately as President unless he feels he has -- and is felt to have -- a national mandate; the line must be made to run, as directly as may be possible without holding another election, from a successor-President to a national constituency. I would, therefore, favor a provision requiring Congress to elect a new Vice President within 30 days of a vacancy occurring in the office of Vice President, either by his elevation or death or disability. For the sake of party and policy continuity, I would limit the choice to a list of three names submitted by the President. (A possible alternative would be merely to give the President a veto, and in this fashion insert him into the process of selection.) Congress should act by the concurrent votes of both chambers, sitting separately. The Senate, whose members sit by state-wide election, albeit from unequal states, seems to me in many ways more accurately to reflect a true national constituency. In any event, the Senate reflects the Nation differently than does the House, so that only a concurrence of the two chambers can be trusted realistically to register the national will. I would not favor diluting the Senatorial votes in a joint session.

This proposal would ensure that we were never, for any appreciable time, without a Vice President, and it would give us one selected in the only way I know of to express the national will short of holding a national election -- namely, by the concerted action of the two Houses of Congress and the President, which is the way we pass laws and transact other business of moment.

There remains the contingency that some catastrophe may deprive us simultaneously of both President and Vice President. I don't think there is any really satisfactory way to guard against such a disaster. It seems to me inadvisable to have two Vice Presidents. It is difficult to invent a function for the second Vice President, and the office is extremely likely to become a throw-away. It took us much the better part of our national existence to learn to take the Vice Presidency seriously. I cannot bring myself to trust us to

take a second Vice Presidency as anything but a ghoulish joke, a sinecure for the undeserving, and a totally enervating burden for a man of any kind of distinction. I would suggest instead that in the unthinkable event of the simultaneous death or disability of both the President and the Vice President, the succession go on a temporary, acting basis to the Cabinet in line of seniority of the office (State, Defense, etc.). That will give us a reasonably qualified decision-maker for any interim emergency, which is after all likely to concern foreign affairs or defense. Within 30 days Congress, by the concurrent action of both Houses sitting separately, shall elect a President, being restricted in its selection to persons who at the last National Convention of the late President's party shall have received 200 or more votes; or if fewer than 3 names received 200 or more votes at that convention, then Congress shall elect from a list of ten names submitted by the National Committee of the late President's party, which shall convene for this purpose and act by majority vote within ten days of the vacancies occurring. The Acting President shall not have a power of veto in this process. Having filled the Presidency, Congress shall then, within 30 days, elect a Vice President in the manner described above. If two or more years remain of the late President's term, Congress shall call a Presidential election for a full four-year term, to take place no sooner than after 6 months, and later if necessary to ensure that the new term can conveniently commence on a January 20th, in accordance with the XXth Amendment.

It is difficult for me to understand why anyone should fear that arrangements such as I have described, or similar ones, cannot be made by legislation and require a constitutional amendment. The Constitution empowers Congress to say who shall "act as President" in the case of "Removal, Death, Resignation or Inability, both of the President and Vice President. . . ." When Congress provides for the succession in the absence of an elected Vice President, it is doing precisely what the Constitution tells it to do. It provides for the contingency of the removal, death, etc., of a President who created a vacancy in the office of Vice President by becoming President. That contingency is, if anything is, exactly the case of the removal, death, etc., "both of the President and Vice President." A more express grant of power to act in more explicitly described circumstances is hard to imagine. If Congress has power to designate an officer who shall assume the Presidency, there can surely be no constitutional difficulty about Congress choosing to call the officer it has designated by the name of Vice President. It could call him chairman of the board, or whatever it wished. It doesn't take much of an invocation of McCulloch v. Maryland to come up with this much of an implied power! As for the quibble that the Constitution empowers Congress to designate an "Officer" and not just anyone, and that Congress is therefore restricted to designating someone who is otherwise an officer of the United States -- that is just what I said, a quibble, and no more. Whoever is designated by Congress becomes an officer by virtue of that designation, and thus satisfies the literal language of the Constitution. There is no convincing historical evidence that the Framers had anything in particular in mind when they chose to use the word "Officer." As for calling an election, Congress, it seems to me, clearly has the option of doing so or not under the language that says that its designee "shall act accordingly, until the Disability be removed, or a President shall be elected."

It is arguable, as Senator Bayh has pointed out, that whether or not Congress is authorized to legislate, such structural arrangements are best made by constitutional amendment; their very inflexibility as constitutional provisions may be deemed an advantage. No doubt. But -- (1) we are faced with a present situation so unsatisfactory as to amount to an emergency, and we would be rash to wait; (2) what is more important, one doubts that any proposal quite embodies ultimate wisdom, and most proposals, definitely including the above, are tied to present estimates of the nature, capabilities and functioning of our political institutions, both the constitutional ones, such as the two Houses of Congress, and extra-constitutional ones, such as the two-party system and the cabinet. But the nature and capabilities of our institutions evolve and change in time; they have in the past and will again. What seems wise and fitting today may seem misplaced and even silly a half-century hence. Constitution-making is tricky and dangerous business, and if avoidable, is best avoided.

Coming to the problem of temporary Presidential disability, I think it plain, as has been widely remarked, that there is a gap in the Constitution. The second half of the 6th Clause of Section 1, Article II, would indicate that when there is a Vice President, he should take over as Acting President in the event of temporary Presidential disability. For it makes no sense for the Vice President not to do so, considering that an officer designated by Congress in the absence of a Vice President may; and the Framers plainly foresaw -- they said so -- that such an officer should. But does the Vice President then become President irrevocably rather than temporarily? The Constitution doesn't say so. It uses the word "devolve," but it simply doesn't address itself at all, in this half of the clause, to the question of what happens when the disability is removed. It seems, absent-mindedly, to assume a permanent disability. This is the gap. It is our general constitutional practice that gaps may be filled in by legislation, so long as such legislation does not clash with any prohibition or general principle of the Constitution, such as the principle of federalism. And so Congress ought by law to provide that in the event of temporary Presidential disability, either the Constitutional Vice President, or the Vice President designated as above proposed, shall assume the duties of the Presidency on an acting basis. Of course, the question is, when does the disability begin, and when does it end. I think Congress ought to establish by law a Medical Commission on Presidential Disability. Members should serve for staggered 6-year terms. They ought to be appointed by the President and confirmed by the Senate. When requested to do so either by the Cabinet acting by majority vote, or by a Joint Resolution of Congress, this Commission ought then to be required to report on the state of the President's health. The Commission's power should go no further. Only if, following the Commission's report, Congress declares by Joint Resolution that the President is disabled, shall the Vice President assume the powers of Acting President. The Medical Commission shall then reconvene and report on the President's health whenever the Acting President, the Cabinet, or Congress acting by Joint Resolution so requests. The President shall resume his office when, following a report of the Commission, Congress declares by Joint Resolution that the President's disability has been removed. The Medical Commission's reports shall in all instances be made public. I see no other solution which carries safeguards against usurpation as well as

assuring the indispensable, continuous sense of legitimacy and political responsibility in the office of Chief Executive and Head of State.

I appreciate the opportunity to state my views, and I hope you will forgive me for going on at such length. You may use this letter in any way you wish.

Faithfully yours,

Honorable Hubert H. Humphrey
United States Senate

THE UNIVERSITY OF WISCONSIN
NORTH HALL
MADISON 6, WISCONSIN

DEPARTMENT OF POLITICAL SCIENCE

29 January 1964

Senator Hubert H. Humphrey
Senate Office Building
Washington, D. C.

Dear Senator Humphrey:

I write in reply to your letter of 22 January. I do not have time, at the present, to do any research on the questions you raise regarding presidential succession and inability, but I am glad to state briefly my opinions on these matters. I once spelled out my views in greater detail in a long letter I wrote to Congressman Celler which was included in a document of the House Judiciary Committee.

1. I have always thought that the change in the line of succession after the Vice-President which was made by the 1947 statute was a mistake. I would vastly prefer to go back to the previous arrangement, under which the Secretary of State would be next in line after the Vice-President, and then the other members of the Cabinet in the order in which their offices were created. My main objection to the present statute is the danger that the Speaker of the House may belong to a different political party than the President and Vice-President. As you will recall, during six of the eight Eisenhower years the third man in line for the office was Speaker Rayburn, and while I had a tremendously high regard for him, he was a Democrat, and the President and Vice-President were Republicans. I would feel it tragedy twice compounded for an assassin to be able to shift the vast powers of the Presidency from one party to the other. When a Democrat succeeds a Democrat there is turbulence enough at the top, but the shift would be terribly demoralizing if a whole new group are brought in to the high offices of the country in mid-stream.

A secondary consideration is that the credentials of the Speaker are really not terribly impressive to me. He is, after all, the choice of a mere Congressional district, and a product of high seniority, and that normally means that he comes from a fairly safe district. Repeated re-election by a safe Congressional district is hardly a national endorsement. On the other hand, every President seems to want an outstanding public personality in the office of Secretary of State, and on the whole I am impressed by the quality of the men who have held this post. They include some first-rate men of outstanding ability and unblemished patriotism.

I do not believe that I favor a constitutional amendment which would empower Congress to elect a Vice-President when the sitting Vice-President succeeds to the Presidency. I have two objections. One is that this is inconsistent with the separation of powers principle, for a Vice-President so chosen would be beholden to the Congress, thus impairing his essential independence. The other is again the danger of a Vice-President, ultimately succeeding to the Presidency, who comes from a different party than that of the man who last won a national mandate in a national election. Thus, if Vice-President Nixon had succeeded to the Presidency in, let us say, 1958, I am sure that a Democratic Congress would have elected a Democrat to be the next Vice-President, in spite of President Eisenhower's tremendous victory at the polls in 1956. I think this would have been the wrong thing to do.

In sum, my own preference, in respect to the first cluster of questions in your letter, is simply to repeal the 1947 succession act and go back to the next previous system of making the Secretary of State the third man in line of succession.

2. I think it was the intention of the Founding Fathers that when a President is unable to carry out his duties, the Vice-President shall act as President, that is, as acting President, during the period of disability. I do not believe that it was intended that the Vice-President should become President. But as everyone knows, in every case where the Vice-President succeeded to the office, it was because the President had died. Under this circumstance there was no special reason for insisting on calling the Vice-President Acting President, and it seemed to be a rather churlish thing to do, since he had troubles enough with all the powers and duties of the office in his hands. But if the President is so sick as to be incapable of carrying on his duties, then the Vice-President, if he ever takes over, must be regarded as an Acting President, because we cannot have two Presidents at the same time. Furthermore, only if the Vice-President is denominated Acting President can the President hope to get his powers back when he recovers.

I think the ambiguity inherent in the constitutional provision on this subject can be best removed by legislation. I believe it is within the present constitutional powers of the Congress (1) to determine a procedure for arriving at a decision of presidential inability, and (2) to designate the Vice-President as Acting President for the duration of the disability.

On the first point, I believe that the best solution would be to set up a commission of some sort to decide both when a President is disabled, and when the disability has ceased. It must include members of great public repute in whose decisions the country will have confidence, and its decision must be made on the basis of medical advice. It should be small enough to meet promptly and it should be able to make decisions with something less than unanimity. My preference would be that this commission should be dominated by leading Congressional members of the President's own political party. I am not sure that Republicans should decide when a Democratic President is disabled, and vice versa. I think the Commission should include the leaders of the President's political party in the two houses of Congress, and a few others, including the Chief Justice, though I know there are sound grounds against involving the judiciary in this matter. The advantage is that the office of Chief Justice commands great public respect.

I not only believe that Congress has the necessary authority to create such a commission, but also the power to declare that when a President is found to be unable to discharge his duties, the Vice-President shall serve as Acting President, and when the commission makes a finding that the President is once more able to serve, the Vice-President shall step down. What is crucial, I believe, is to give the President some assurance that he can later be found to be able to discharge his duties, and then get his office back. Otherwise, and he and his entourage will always resist to the last breath any attempt to take the office from him.

I wish I had the time to discuss all these points at greater length, for I know that this hurried letter sounds more pat than I feel. I know this is a terribly difficult question, but I do want to say this, in conclusion, that the worst thing Congress can do is to do nothing. Fate has been pretty kind to us so far, but we can't count on it, and some day we shall deeply regret our failure to make the necessary decisions, in good time, which will avoid difficulties which under our system may well arise in the future.

Sincerely yours,

David Fellman

David Fellman

Law School of Harvard University

Cambridge 38, Mass.

January 24, 1964

Honorable Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator Humphrey:

Thank you for your letter of January 22, inviting my response to certain questions regarding presidential succession and inability.

At the outset I should say that I participated in the Conference on this subject held in Washington on January 20 and 21 under the auspices of the American Bar Association, and that I am in general agreement with the recommendations formulated by that group.

1. You have asked first for an opinion on the appropriate line of presidential succession. In my judgment that problem, which is of course within the control of Congress under the Constitution, can be largely obviated by centering attention on the problem of filling a vacancy in the office of Vice-President. It seems to me desirable from every point of view to keep that office filled, both for the sake of its growing usefulness and to provide a succession through an officer whose selection would envisage this possibility.

A constitutional amendment would of course be required to accomplish this purpose. Of the various proposals which have been advanced, I am inclined to favor the election of a Vice-President by the members of Congress with the approval of the President. Whether the President should initiate the process by nomination or should declare his approval after Congress acts is a formal matter; in any event there

would be advance discussion which would, in the critical and tragic event contemplated, minimize the risk of overt conflict. The Vice-President ought to be a member of the President's political party and one who enjoys the fullest confidence of the President. This element of solidarity argues against a special election to fill the office and against a purely Congressional selection. The proposal for the regular election of two vice-presidents has the merit of providing a popularly chosen officer, but the division of functions and diffusion of authority entailed by this proposal are serious objections.

If the question of presidential succession is to be reconsidered along lines other than a constitutional amendment to fill the office of Vice President, I would be disposed to favor a return to the line giving priority to members of the Cabinet. The choice here does not rest on any attempt to weigh the qualities of future holders of the respective offices. It rests rather on structural considerations. If, as not infrequently happens, the Speaker belongs to a party other than that of the President, something of a dilemma would be presented, which ought to be avoided if possible: either a transfer of powers and duties would be inhibited where such action would otherwise be indicated, or the executive power would suffer an awkward break in continuity of policy. Similar considerations arise from the fact that the Speaker would have resigned his seat and Congress would thereafter lose the benefit of his membership upon a resumption by the President of his own powers and duties.

2. You have also inquired about the status of the Vice-President when he acts during the inability of the President. The original understanding appears to have been that in the event of the President's death, removal, resignation or inability, only the powers and duties of the office, and not the office itself, would devolve on the Vice-President. Since the administration of President Tyler a uniform practice has developed whereby the office itself devolves in the event of the President's death. There is no disposition, nor should there be, to change this practice. But the question remains, which has fortunately not had to be squarely faced, whether a distinction

can be drawn under the constitutional language between such an irremediable vacancy and a mere temporary inability. It would be highly desirable to clarify this ambiguity by providing in a constitutional amendment that only the powers and duties would devolve in the latter case, in order that there may not be an inhibition against a transfer of powers and duties for an interim period where that appears to be imperative in the public interest.

For the determination of presidential inability the Constitution makes no specific provision. It can be argued persuasively that if the succession itself is provided by Congress, that is, in the case where both the President and the Vice-President are out of office or disabled, Congress itself, under the necessary and proper clause of the Constitution, may provide a method for determining disability. But where the transfer would be to the Vice-President himself, this argument for Congressional power is much less strong, since Congress does not fix this succession and the determination of disability would not be ancillary to a Congressional power. The doubt is sufficiently great to call for a Constitutional amendment. The amendment might prescribe a method for determining disability or might authorize Congress so to prescribe, or might do both in the alternative.

The recommendation of the American Bar Association group seems to me to strike a useful balance in this regard. It proposes an amendment which would in substance authorize the Vice-President, with the concurrence of the heads of departments, to determine inability (assuming, of course, that the President himself has not done so). In addition Congress would be authorized to provide by law for a different body to make a determination of inability. To describe such a body in detail would seem inappropriate for inclusion in a constitutional amendment itself. Congress would, however, be enabled to establish a Presidentally appointed commission, which seems to me to provide the most appropriate procedure to deal with a problem of such great delicacy and gravity.

The foregoing observations are necessarily quite sketchy. I hope that they may be of some use to you in formulating your own conclusions. You may feel

free to use these observations as you wish. I ought perhaps to add that because of my participation in the American Bar Association Conference I have been asked by Senator Bayh to make myself available either in person or through a written statement when hearings before his Subcommittee resume this spring.

With kindest regards and all good wishes,

Sincerely yours,

Paul A. Freund

PAF:AM

Memo to Files

From John Stewart

January 31, 1964

Re: Presidential Succession

Apparently Senator Monroney introduced a resolution on Wednesday, January 22, 1964, that the boss feels warrants close consideration. I dictate this note so that this resolution can be looked into.

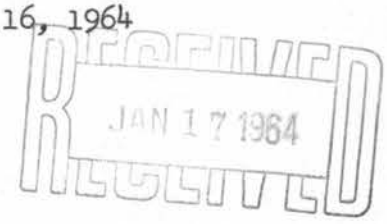
BIRCH BAYH
INDIANA

United States Senate

WASHINGTON, D.C.

January 16, 1964

HHH
V.P. Succession



Honorable Hubert H. Humphrey
Senate Office Building
Washington 25, D. C.

Dear Colleague:

Please be advised that the Senate Judiciary Subcommittee on Constitutional Amendments will hold hearings on January 22 and 23, 1964 at 10:00 a.m. in Room 2228 (NSOB) on S. J. Resolutions 13, 28, 35, 84, 138, 139, 140, 143 and other resolutions relating to Presidential succession and inability.

If you wish to present testimony on this matter, please notify Mr. Larry Conrad of my office at extension 5623.

Best wishes.

Sincerely,

Birch Bayh

Birch Bayh, Chairman
Constitutional Rights Subcommittee

AMHERST COLLEGE
Amherst, Massachusetts
DEPARTMENT OF POLITICAL SCIENCE

Pres. Succ.

February 22, 1964

Senator Hubert H. Humphrey
New Senate Office Building
United States Senate
Washington, D. C.

Dear Hubert :

The following is a statement about some aspects of the problem of the presidential succession, and you are at liberty to use it as you wish. The sum of it is that Congress, in my opinion, should either restore the succession as provided in the act of 1886, or write a new statute that permits a vice president upon his accession to the White House to designate his successor.

I think that the settlement of the procedures to govern the succession to the presidency should not be delayed out of deference to the personal feelings of any now temporarily favored by the existing system. The general welfare is too vulnerable already to the uncontrollable risks of the time to gamble it further on risks that it is within our power to diminish. The Succession Act of 1947 should be repealed and replaced and without delay. Although it is now three months since the death of John Kennedy, there has been no action to replace an unsatisfactory statute with a better one, and not even very much public interest in the problem of the presidential succession since the first week or so after the assassination. We may count ourselves lucky not to have experienced further misfortune but we are negligent if we do not act forthwith to reduce the element of luck. It is my feeling that Congress has the power to establish good procedure to regulate the succession. Before considering what I think is the best arrangement, a look at several other proposals for new rules on the presidential succession will be useful.

Election of Two Vice Presidents It is a fact of political experience that the selection of one vice president primarily because of his special fitness for the office of president would be unusual. The tendency is to "balance the ticket" after the presidential nominee has been chosen so as to make it as attractive to as many voters as possible. Often, as in the example of John Nance Garner in 1932, Earl Warren in 1948, Richard Nixon in 1952, and Lyndon Johnson in 1960, the vice presidential candidate is either the man who contributed the winning margin in the national convention to the successful presidential nominee, or he is the chief rival or contender who had to be overcome, and whose following is placated with the second spot on the ticket. In 1952 Warren and Taft held out too long to be eligible for gratitude, otherwise either of them might have been the vice presidential nominee in 1952.

In view of the intensely political nature of the process by which vice presidents have been chosen, the country has been remarkably well served on those occasions when the vice president has succeeded to the presidential office on the death of the incumbent president. Coolidge restored the reputation and the integrity of the Federal authority after the scandals in the term of his predecessor. Truman's achievements in the field of foreign policy will doubtless be memorable. But vice presidents have traditionally not been in close touch with the administrations of the presidents with whom they took office despite certain improvements in this respect under Eisenhower and Kennedy. Although Roosevelt used Wallace is various administrative capacities, and Nixon had an observer's seat at some events, vice presidents are virtually unemployed.

The creation of a second vice presidency would facilitate the balancing of the ticket by introducing a third weight—a light one—into the process, but after the election he would have less visibility and heft than the single vice president has now. Active men of competence and wise purpose—the kind needed in the presidency—would not be attracted by the premature retirement from public life that a second vice presidency would entail.

Election by the Electoral College The suggestion that the Electoral College be reconvened to choose a new vice president upon the accession of the incumbent to the presidency seems to me to be without merit. As custom has shaped the Electoral College, it is not an institution chosen for the quality of its judgment, nor for the distinction and competence of its members. The Succession Act of 1792 provided for the recall of the Electoral College under certain circumstances but this was in the eighteenth century and the institution has undergone substantial change. The electorate does not even know the names of the members of the Electoral College, although technically the voter is still choosing them directly, and the president of the United States only indirectly. The Electoral College has no function to serve except to ratify the choice of the majority of the voters in each state. Although political eccentrics in the Electoral College may cast an independent ballot, any widespread abuse of their responsibility to vote the majority desire would bring swift reaction.

The Electoral College is no longer perceived as an institution whose members exercise independence of judgment, nor is it capable of doing so. It has to be told for whom to vote. It does not meet as a national body, and there is neither precedent nor protocol for the conduct of deliberative proceedings. Indeed, there is no constitutional way at present to call it together after it has discharged its function of casting ballots for president and vice president after the general election once every four years. If it were worth the time and trouble to add an amendment to the Constitution to reconvene the Electoral College, it would be preferable to create some entirely new procedure to perform the function of choosing a successor to the president. The Electoral College is not worth maintaining in any form.

Selection by the Congress The suggestion that Congress play a role in filling the succession to the presidency has more merit than the two previous

proposals, but the role, I think, should be a narrow one. Nothing in American history supports the thought that the Congress—the very heart of a free constitutional system—is a very satisfactory institution to conduct an ad hoc election of the president. On the two occasions when the election of the president was thrown into the House of Representatives, the members of that body failed to distinguish themselves as custodians of a transcendental national interest, above petty party or regional advantage. The proceedings of the House following the elections of 1800 and 1824 were melees of factional excitement. The ad hoc Electoral Commission of 1877 performed so discreditably that it must be counted a stunning triumph for the American democracy that the people acquiesced in the result. And on the one occasion when the Congress attempted to remove a President of the United States from office, the proceeding was born of vindictiveness and carried forward by a fanatical campaign to convict.

The excesses of the Congressional contests over the presidency in after the elections of 1800, 1824, and 1876, and the partisan hostility pressed against Andrew Johnson might never recur but the risk is too great to entrust the selection of the next-in-line for the White House to the ad hoc action of Congress. Extra tension would be created if the Congress were organized by a different party from that represented by the departed president and the vice president who replaced him. An ad hoc election by Congress might fill the vacant vice presidency with a member of the party that had lost the previous presidential election. He would then constitute a center of rivalry to the new incumbent in the White House, preparing himself and his party for the next ensuing presidential election. Instead of providing quiet continuity in the presidential office, the Congress would only have succeeded in prolonging the next presidential contest by the number of years remaining in the original presidential term.

One further shortcoming of the ad hoc election by Congress is that it either leaves the Executive out of the process or, as in one version, limits him to the making of nominations from which the Congress will then choose. What if the Executive does make the nomination or nominations? Either the proceeding is purely ceremonial and the Congress ratifies the presidential choice, or the Congress has discretion to reject. If the Congress merely ratifies, the action of Congress adds nothing to the selection, which is then actually made by the new president, and the ratification is unnecessary procedure except insofar as it may have some slight symbolic value as an expression of unity.

If the Congress has discretion to reject, however, the exercise of this discretion might produce irreparable discord. It would at the least be an unedifying breach between the Congress and the Executive, and it could make impossible for a while what is now normally only difficult, namely, cooperation between the two branches in the enactment of public policy.

A basic objection to all of the suggestions for ad hoc action by the Congress , the Electoral College, or any other group of functionaries, is that the succession is not settled until the

crisis occurs. It is important to have the uncertainties of an ad hoc election dispelled, and the way to do this is to have the succession understood once and for all. The normal way to do this is for Congress to enact legislation--as it has already done--designating the person to serve in the event that the president and the vice president are unable to perform the duties of the president. The difficulty is that the present statute is open to serious objection.

The Succession Act of 1947 This act, which replaced another that had been on the books for some six decades, puts the speaker of the House and the president pro tempore of the Senate into the succession after the vice president, and it is defective in many respects. First, apart from technical arguments as to whether the Congress can designate a member of that body who is not and cannot be an officer of the United States, the act violates the principle of the separation of powers. Second, although there are exceptions, the men who become speaker and president pro tempore are eligible for these offices largely because of their longevity and residence in a safe district. Third, neither of these legislative officials normally has that closeness to the Administration that smooth transition in the presidential office would require.

It is said in support of the 1947 statute that it provides a somewhat more "democratic" procedure than the act of 1886 which it replaced. The argument is that the succession of an elected representative to the presidency puts the choice for that high office closer to the people than would, say, the selection of the secretary of state who, under the 1886 statute, was designated first after the vice president. But the argument lacks force when one considers the political reality. The speaker, however exalted, still represents only one Congressional district out of 435 and, until the recent case of Wesberry v. Sanders requiring the equalization of election districts, could come from a smaller one than most of his colleagues. Although the former speaker, Sam Rayburn, was justly admired for his great leadership in the House, he did in fact represent one of the smaller districts of the country. Under the 1947 statute, it is possible, therefore, for a man to become eligible for the presidency not because his election was "democratic" but because it fell short of the democratic norm. Moreover, any single district in the House, including that of the speaker, may be unrepresentative in still another sense--it may have few urban dwellers, or few rural dwellers, or it may be skewed for or against persons in different income, occupational, educational, or ethnic groups.

These considerations do not establish the superior "representativeness" of others than members of the House of Representatives , of course, but they mitigate the claim that mere election from a Congressional district creates a peculiar eligibility for the White House. The same considerations, it may be said, apply to the president pro tempore of the Senate. The principle of representation in the Senate is federal not popular, and the president pro tempore may come from a state that has more Senators than it has Congressmen because of the sparseness of the population. In fact the inequalities of representation in the Senate are grosser than

those of the House, for the ratios between the smallest Congressional district and the largest are smaller than those between the least populous and the most populous states, which all have equal representation.

It might also be said that if the Congress in 1947 had thought that experience in elective office was the "democratic" way to fill the succession to the presidency, it vitiated its own theory by designating members of the cabinet after the two Congressional officers. Consistency in the argument that elective office is a needed qualification would seem to require the elimination of the cabinet line entirely. If cabinet officers may succeed to the presidency at all without doing violence to democracy, there does not seem to be any "democratic" reason why they could not follow the vice president directly.

A New Succession Act The normal election of a president is an affair between the people of the United States and the candidates for presidential office. The role of the Congress is marginal, contingent, and supportive. It can choose the president when the Electoral College fails to produce the necessary majority but even here its choice is limited and it has no discretion to nominate its own. Upon the death, disability, resignation, or removal from office of the president, the Congress may designate that officer of the United States who will serve in the presidency.

Congress, of course, has exercised this power of designation. The act of 1792 vested the succession in the president pro tempore of the Senate and then the speaker of the House until the Electoral College could be convened to choose another president who would serve four years from the date of his election. This was a poor statute for several reasons, one of which was that it might have thrown the election of presidents into the odd numbered years thus putting it out of phase with the Congressional elections and forcing Federal elections three years out of every four. It was also based upon a conception of the Electoral College as an independent group which custom has changed. Despite is manifest shortcomings, however, the statute was clearly based upon the assumption that the election of the president and vice president was not an affair of the Congress, and that its role should be merely auxiliary to other procedures.

The act of 1886 placed the succession in the heads of cabinet departments beginning with the secretary of state, and it dropped the requirement that an election be held immediately to choose a new president. This statute was an improvement over the act of 1792 because of its greater simplicity, because it insured that the presidential office would always be filled during the term of the regularly elected chief executive, and because it did not disturb the periodicity of the Federal elections. Congress had fully discharged its duty to designate the officer of the United States who should serve after the president and the vice president when it listed the rank order of the then existing cabinet departments.

The principle of the act of 1886 was the correct principle to govern the succession and it should be restored. It can be restored in either of two ways. First, Congress can repeal the act of 1947 and re-enact the provisions of the statute of 1886. Second, Congress can adopt a new statute that would allow the vice president of the United States upon his accession to the office of president to designate his successor for the remainder of the original presidential term. The restoration of the act of 1886 needs no further comment, but the second proposal may have some elements of novelty which consideration will show to be unobjectionable.

The act of 1886 in effect allowed the president to determine the actual succession since Congress put the man he chose as secretary of state first in the line after the vice president. For some sixty years, then, it was possible for the president to choose his successor's successor under the statute. But he had also chosen his successor as well as his successor's successor because it is well known that the presidential nominee in the national party conventions usually selects the man who will run with him as vice presidential candidate. There is ample precedent then for permitting the occupant of the White House to choose his successor. The novelty of the suggestion consists only in the candid and direct recognition of what has been both practise and precedent.

It is probable that Congress has the authority to enact by statute the procedure by which a vice president, upon assuming the office of president, could designate his successor. A constitutional question may, however, be raised by the legal form of the designation. If the designee is to be regarded as the "vice president", a constitutional amendment is probably necessary since the office of vice president is a constitutional office, and any change in the way in which this constitutional officer is chosen would require an amendment to the Constitution. Under this procedure, the new "vice president" would preside over the deliberations of the Senate and in all other respects fill the duties of the constitutional office, such as voting in case of a tie. But the president pro tempore can preside and the contingent extra vote that the vice president has is only rarely called into service. The advantage in having a formal vice president may be too small to justify amending the Constitution if the principal objective—continuity in the presidential office—can be secured by the simpler procedure of a Congressional enactment.

Congress could avoid the need to amend the Constitution by creating the office of deputy general of the United States, much as it has created such offices as comptroller general and surgeon general. The office of deputy general would be filled by the vice president upon his assumption of the presidency. The qualifications for the office of deputy would have to be those required of presidents, since the holder of this office could not succeed to the presidency unless he were so qualified. He would have such duties as the president might wish to give him. Hopefully he would become a member of the White House staff, or a member of the White House staff could be appointed to the office. He would carry more prestige than the usual White House assistant. The office would be as substantial as the president wished to make it but the incumbent might conceivably relieve the chief

executive of some of his administrative and ceremonial obligations.

The preceding remarks are addressed mainly to the first of the two questions you put in your letter of January 22, and do not touch upon the second of the two questions, having to do with the problems raised by the disability of the president. Although there is ambiguity in the Constitution about many points connected with the procedure to be followed in case of inability of the president to discharge the powers and duties of the office, the intricacy of some of the questions is equal to the interest they arouse. If the incumbent president dies/or is removed from office, the vice president then becomes president and not acting president. Although Article II, Section 1 seems to contemplate his taking over as though to "act as President", I assume that the precedent established by President Tyler governs this case.

When the incumbent president suffers a disability that prevents him from discharging the powers and duties of his office, and the vice president assumes these duties and powers, he acts as president until the disability is removed or a president is elected. If the president is capable of declaring his own disability, he will do so and the vice president will act as president until the president declares/his disability is removed. If the president is incompetent to declare and avow his own disability, and clings to office when he cannot perform its functions, I think that the Congress can declare his incompetence and start the succession. The language is that "Congress may by law provide for the case of ... inability...declaring what officer shall act...until the disability be removed..." I assume that this language authorizes Congress to declare when the disability exists if, in an extreme case, it is forced to perform this melancholy task.

To some commentators, there is a constitutional problem in cases of disability only because it is assumed that the vice president becomes the president if he accedes to the latter office under any circumstance, and the Constitution makes no provision for two presidents. This difficulty is removed, however, if, as the Constitution makes clear, the disabled president is still the president. Perforce, the vice president is not the president but is only acting as president. The Tyler precedent is limited to those instances where there is no president at all. In these circumstances, the Tyler precedent applies and the vice president becomes the president upon his accession to that office.

I shall be glad to speak further on any of the points I have covered if there is need to do so.

All good wishes.

Yours,

Earl

Earl Latham
Joseph B. Eastman Professor
of Political Science

UNIVERSITY OF ILLINOIS
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URBANA

OFFICE OF THE DEAN

Rec. See

February 24, 1964

Senator Hubert H. Humphrey
Senate Office Building
Washington, D.C.

Dear Senator:

I take seriously requests from United States Senators, and most especially from you, but the press of my responsibilities and illness in my family have delayed my response to your letter of January 22. For this delay, I apologize.

In answer to your first series of questions, I much prefer the pre-1947 line of succession to the one we now have. In my judgment it was more likely to insure that the presidency would remain with a man of stature and one who was more likely to reflect the same basic values and to represent the same general constituency as the man who had been elected by the voters. True, under the pre-1947 law a Vice President on becoming President did have an opportunity to designate the next in line of succession, but his selection was subject to senatorial confirmation. And the designation of the next in line by the President is not unlike our present practice of giving presidential candidates the major voice in the selection of vice-presidential candidates.

Under the existing succession act, the presidency may fall to a man who has been selected as Speaker or President Pro Tempore of the Senate for a variety of reasons beside his ability to serve as President and to a man whose basic attitudes and values are not congruent with those of the presidential constituency. Moreover, the President Pro Tempore of the Senate is often a person of advanced age and little known to the public.

Even more desirable than the pre-1947 arrangements, I think, would be to amend the Constitution and empower Congress to elect a Vice President to fill the vacancy created by the regularly elected Vice President becoming President. I suspect that under such arrangements the new President would effectively pick the new Vice

President, a fact which does not disturb me. I recognize the danger inherent in such a proposed amendment: the possibility of a House-Senate deadlock, the fact that the Congress might be controlled by a party different from the one that won the last presidential election; the fact that a man might secure his selection through agreements with congressional leaders that might impair his independence if he becomes President; the fact that the President and the newly elected Vice President might not be compatible. Despite these difficulties, Congress is the national legislative body and I can think of no better alternative.

As to your second series of questions, I hope you will not think it inappropriate for me to rest on the views expressed in the enclosed letters: oneto Representative Celler (January 5, 1960) for the Special Subcommittee on Study of Presidential Inability of the House Committee on Judiciary, the other to Senator Estes Kefauver (March 4, 1958) for the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary.

Again I would emphasize that since every "expert" has his own favorite set of procedures and since there are doubts about Congress' authority to act, that what we urgently need is an amendment that will clearly give Congress complete and full authority to resolve all the ambiguities. Such a provision could be combined with the amendment suggested by your first question. Once adopted, Congress could then provide procedures for determining presidential inability and for resolving how the inability is removed, and to distinguish between situations where the Vice President should become President and where he should serve as Acting President.

Sincerely,

Jack

J. W. Peltason

JWP:jz

Enclosures

/COPY/

UNIVERSITY OF ILLINOIS
Urbana, Illinois

Department of Political Science

March 4, 1958

Honorable Estes Kefauver
Senate Office Building
Washington, D.C.

Dear Senator Kefauver:

I apologize for not answering your January letter, but I have been away from my office for the last 6 months on a research leave. I have little to add to my letter to Representative Celler (January 5, 1956) for the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary. However, the intervening public and congressional discussion further convinces me that a constitutional amendment is desirable.

As the Constitution stands a plausible argument can be made that the authority to determine the fact of Presidential inability is vested in (1) the Congress, (2) the President, (3) the Vice President, (4) the Courts. In my judgment the most pressing need is to determine beyond any doubt where the responsibility lies. Hence, I favor a simple amendment stating in effect: "The Congress may by law provide for the case of the inability of the President."

I believe that such an amendment is preferable to one that would itself stipulate the procedures to be used. It would allow Congress to change or modify the procedures according to future experiences.

Of course, implementing legislation would be needed. Since the existence of "inability," its duration, and the question of whether the Vice President should become President or merely Acting President are "political" (but not partisan) questions, I favor vesting this judgment in the Congress which is accountable to the electorate. I think past history indicates the unwisdom of placing the duty on the Vice President. But, in my judgment, the resolution of the doubts about who determines which procedures shall be used is more important than the question of which particular method should be adopted. I would, by amendment, leave up to the wisdom of Congress the decision as to how inability shall be established.

Sincerely yours,

Jack W. Peltason

PRO

by DR. JACK W. PELTASON
Professor, University of Illinois

From a memorandum of January 5, 1956, in reply to a questionnaire, on the subject of Presidential inability, from Rep. Emanuel Celler, Chairman of the House Committee on the Judiciary and its Special Subcommittee on Study of Presidential Inability.

"THE DICTIONARY distinguishes inability from disability by saying that the former 'suggests inherent lack of power to perform something' and the latter 'now commonly implies some loss of needed competency or qualifications.' But when the framers substituted inability for disability in later drafts of the Constitution, they did so for stylistic reasons and intended no substantive change. Disability is the word most frequently used in State constitutions to describe a condition when the gubernatorial office is to devolve upon some other person.

"The contradictory holdings of the few State decisions offer little guidance in determining the scope of the inability clause. Yet it is clear that a constitution should provide for all contingencies. It would, therefore, be sensible to define inability broadly to insure that the Presidency will always be occupied by a person able to discharge his duties. Death, resignation, removal by impeachment are provided for. So, too, does the 20th amendment provide for the failure of a President-elect to qualify. Since it is highly questionable if the issue of qualification should be, or could be, raised after an incumbent takes office, it would appear that lack of qualification can safely be excluded from the coverage of the inability clause. But all eventualities other than those elsewhere provided for should be included.

"Any attempt to define inability would be unwise. Inability is more than a condition, it is a judgment. It is a judgment that cannot be made in advance. It depends upon the particular demands at the particular time. Under some conditions, penumonia might render the President unable to discharge his duties. At other times, the demands might not be so pressing; a delay in Presidential action might not result in a failure to discharge his responsibilities.

"Inability is as precise as any word that might be chosen. What we need is agreement about who has the responsibility to determine whether a particular incumbent is in fact disabled.

"In the only three instances where there has been widespread concern about Presidential disability, the President's actions have been decisive. In the 1919-20 crisis the President's official family successfully resisted several serious attempts to raise the issue of disability, attempts supported by powerful Senators and the Secretary of State. On the other hand, if a President should declare that he is unable to discharge his duties, his decision probably would not be questioned.

"In the States too the chief executives have had a decisive voice in deciding their own inability, especially that which grows out of illness.

"Many have argued that the Vice President is the one to determine the existence of Presidential disability. However, modesty, embarrassment, and unwillingness to assume this responsibility have characterized the actions of Vice Presidents. Despite pressures, they have played a self-effacing role. The heirs-apparent of governors have not been so hesitant and State courts have recognized the lieutenant governors' right to raise the issue of disability.

"Federal judges have been more reluctant than State judges to assert jurisdiction and the Presidential Office has an immunity from judicial proceedings not granted to governors, but a case could be arranged to raise the facts of disability.

"Congress' right to establish disability stems from the necessary and proper clause which gives Congress the power to pass laws in order to enable the Vice President to execute his duties. Although it might be argued that this gives Congress the authority to provide procedures to determine disability rather than to decide a particular incumbent's disability, Congress could act in two steps. First, it could provide that the fact of disability is to be established by a joint or concurrent resolution of Congress, and then rule that the incumbent was disabled. Certainly such a determination would be given great weight.

"Thus unless the responsibility for determining disability is clearly given to a single agency there is danger of conflict. Even more likely, there is danger that no one will act, believing the others have the duty to do so.

"The procedures should be simple, swift, flexible, and acceptable. The decision as to disability is not only a technical judgment, but also a political decision involving consideration of many factors and one of highest moment. It should, therefore, be vested in an agency which has continuing public accountability.

"The two most obvious agencies to make this decision are Congress and the Supreme Court. The former is more immediately responsible to the electorate, but is also more unwieldy, not always in session, and its decisions, especially if made by a majority of a political party different from the President's, might not be so palatable. The Supreme Court lacks immediate accountability for its actions, but it has the advantage of being able to act swiftly and flexibly. Above all, the respect accorded to the Supreme Court and the general belief that its judges are above partisan politics, makes it especially suited to determine the highly political question of disability. (There is a risk that the Court's own

(Continued on page 30)

dignity might be jeopardized by the justices' involvement in this ticklish task, but it is a risk worth taking.)

"The Supreme Court could be authorized to investigate, appointing whatever assistance the justices consider necessary, and to make a determination upon petition of either chamber of Congress or during Congress' adjournment upon petition of any 2 or 3 of the following: Vice President, Speaker, President pro tempore of the Senate, congressional majority and minority party leaders. The Supreme Court could be authorized to stipulate whether the disability is of a permanent or temporary nature and on its own motion to restore the President to office when the disability has disappeared.

"The only three States which have established procedures to determine disability have given the job to their State supreme courts. All have done so by constitutional provision.

"State courts have assumed responsibility for establishing disability through mandamus or quo warranto proceedings, even in the absence of specific constitutional provisions. Nevertheless, a constitutional amendment would be necessary in order to empower the Supreme Court to act.

"Without an amendment an adversary proceeding—a case or controversy—would be required to raise the question of Presidential disability and it is doubtful if the issue could be first raised in the Supreme Court. Without an amendment the constitutionality of the procedures might be left unresolved until it became necessary to put them to use. Furthermore, even if the power to decide Presidential inability were vested in others beside the Supreme Court, there would be constitutional problems.

"Can Congress by law stipulate who is to determine disability? Does the necessary and proper clause vest this power in Congress? Is the precedent of the act of March 1, 1792, binding? By this act Congress provided that the only evidence of refusal to accept or resignation from the office of President or Vice President is to be an instrument in writing delivered to the Office of Secretary of State.

"These questions cannot conclusively be answered until a crisis is upon us, perhaps not until they arise in a legal controversy and are disposed of by the Supreme Court.

"The Vice President might refuse to assume the Presidency even if there were a ruling of disability. On the other hand, a Vice President has respectable authority to support his own right to determine disability even though there had been no action by anyone else.

"Hence, an act of Congress would still leave some basic constitutional questions unresolved, and would not decisively clarify responsibility. Only a constitutional amendment could do these things."

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DEPARTMENT OF POLITICAL SCIENCE
1126 EAST 59TH STREET

February 18, 1964

Senator Hubert H. Humphrey
United States Senate
Washington, D.C.

Dear Senator Humphrey:

In your letter of 22 January you request my views on the questions of Presidential succession and Presidential inability. I am sorry that circumstances prevented my replying earlier.

It is my opinion that the most appropriate successors to the President and the Vice President are the chief administrative officers of the government, beginning with the Secretary of State. While it is true that these officers lack a direct electoral link with the people, it is also true that any legislator lacks a direct electoral link with the <u>whole</u> people: both the Secretary of State and, say, the Speaker of the House of Representatives are deficient in this respect. The Speaker owes his particular elevation to the House of Representatives; the Secretary of State his to the President. If the Speaker's ties are nevertheless one degree closer than those of the Secretary of State to the electoral responsibility of the President, his <u>duties</u>--and therefore the character of the man likely to hold the office--seem to me to be several degrees further away. This latter consideration is to me decisive.

I am doubtful about the wisdom of a constitutional amendment to empower Congress to elect a Vice President when that office has become vacant. I am impressed by the probable incidental, unintended effects of such an amendment. Would it not be harmful, for example, to introduce the political controversy that must attend such an election during such a critical period in national life? Moreover, such an amendment seems to me less likely than a return to the line of succession to the Administration to meet what must be the major objectives: to ensure the continuity and stability and to secure a man capable of exercising well the high duties of the Presidency.

Finally, regarding the matter of Presidential inability, if there was a clearer or more particular intention of the Founders than is found in the Constitution itself, I have not run across it. I am very doubtful if any significant clarification of the constitutional ambiguity is possible. Not all contingencies can be provided for. Here I do not think that any elaboration of language can remove the ambiguity, for that ambiguity is inherent: the question of Presidential inability must be in the first place for the President to decide; but there may be cases where the President cannot decide or will not concede his inability. In this latter case someone else must decide, and that must be pre-eminently the Vice President, since he will assume the responsibility of the Presidential office. It is

true that a body of censors could be established in advance, to serve as a permanent examiner of the President's capacity; but apart from the disturbing implications of such an authority, the Vice President would still bear the major burden. No doubt any sensible Vice President, forced to act under such circumstances, will associate with himself a body of respectable political men, both in the declaration of incapacity and in the pursuit of Presidential performance of the Presidential responsibilities. I see no alternative to leaving this matter to the good sense of the people and the leaders at the time the question arises. I am well aware that this is not a perfect solution and that it is not without danger; but as far as I can see this imperfection, this danger, and this reliance on the people's and their leaders' good sense is inevitable and will not be removed by any form of amendment.

I hope that this is of some help to your deliberations.

Yours sincerely,

Herbert J. Storing

HJS:ap

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DEPARTMENT OF GOVERNMENT AND
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AREA CODE 212 SP 7-2000

Jill

February 18, 1964

The Honorable Hubert H. Humphrey
United States Senate
Washington 25, D. C.

Dear Senator Humphrey:

My deepest apologies for not answering sooner your letter of January 22. I hope that this reply does not come too late to be of use to you.

With regard to the question of the appropriate line of presidential succession, I feel very strongly that the previous congressional statute which provided for a succession starting with the Secretary of State and following through the department heads in the order of the creation of their departments, is a far sounder one than the present statute providing for succession by the leaders of Congress. It seems to me that the presidency should be occupied by a man younger in years than the Speaker of the House and the President pro tem of the Senate ordinarily are. I feel also that he should be a person who speaks for essentially the same constituency as the President, which is not ordinarily the same as that from which a Congressman, however much he may have the support of his colleagues, normally speaks. In addition, he should clearly be a person who is conversant with the international problems of the nation, which is not apt to be true of these congressional leaders.

I do not, however, feel that it is necessary to amend the Constitution to provide for the choice of a new Vice-President in the event that the Vice-President succeeds to the Presidency. In addition to the attributes which I just mentioned, the presidency calls for a high order of political savoir-faire - an ability to deal effectively with both the Congress and the people. It also calls for a person who has tremendous strength of character and firmness of purpose to carry out his policies in the face of all of the pressures which descend upon him. Such a person, if one can be found, should certainly be in the service of the United States government and should not be somebody who is sitting casually on the sidelines waiting for the call of duty. This person is more apt to be found in the position of Secretary of State than in any other single position. If he is not in the position of Secretary of State at the time that the Vice-President ascends to the office of President, the new President is in a position to put him there. So that in effect the Secretary of State is the Vice-President, in the sense that he is the President's obvious choice as successor in the event that something should happen to him.

The best argument for electing (at a special attention) a new Vice-President is to give the people some choice in the man who is to follow the President. Since they do not have any effective choice under the present system, I do not feel that that is necessarily an important

enough consideration to justify amending the Constitution. Besides, a person trying to campaign as an heir-apparent is in a very awkward position. A system which would enable Congress to elect a new Vice-President upon the nomination of the President lets the President choose his successor with the consent of a group which does not, under the present system, have any voice in the choice of a Vice-President: namely, the members of both political parties in Congress. I am not persuaded that this would be a desirable innovation.

Since, on the whole, the method of having the Secretary of State succeed the Vice-President provides nearly all of the advantages of the present system of selecting the Vice-President plus the advantage that you have a man who is currently in public life and whose abilities can be assessed, I feel that there is no need to amend the Constitution to provide for the election for a new Vice-President.

A much stickier problem, of course, is the question of the inability of the President to discharge the powers and duties of his office. It has always seemed fairly clear to me that the Founding Fathers didn't know exactly what they were doing when they wrote the present provisions in the Constitution. I think a respectful deference to their wisdom requires this conclusion. Clearly, if they had given the matter any serious thought, they would have come up with a system without quite so many ambiguities and loopholes in it.

I have not worked out any systematic scheme in this regard, but my impression is that the problem lies in two areas: first, the question of when the President becomes unable to perform the duties of his office; and secondly, when he becomes able to perform them again. I do feel that this is an area where the wording of the Constitution could usefully be improved. It seems to me it should be made clear that the successor to the President should become President only upon the death of the President in office; and that if the President in office is still alive, his successor would only serve as Acting President. If the President is alive and it appears to his successor that the President, for any reason, is unable to serve, then the Acting President would assume the duties of the office, unless the President should forbid it. This would take care of the situation in which you had a President physically or mentally unable to make even the decision as to whether or not his successor should take over. Presumably, if the President is in good mental and physical shape, he will indicate to the Vice-President when he should assume the presidential duties.

Under any circumstances, it seems to me, the President should be able to get back his position and authority simply by announcing that he is ready to assume the duties of his office again. This being the case, he should not be reluctant to relinquish them on a temporary basis, if the necessity arose. I appreciate that the contingency might arise where a President would ask to get back his duties (or deny them to his successor in the first place) when he was not in fact mentally or physically competent to discharge them. But it seems to me that this would be a very rare situation indeed, and one for which the processes of impeachment would be a sufficient safeguard. The closest thing we have had to this is the experience with President Wilson, and it is not unreasonable to suppose that, had there been some clear-cut method of delegating his powers on a temporary basis, he would have done so. In any event, I am strongly against

a change in the Constitution, which would permit any body of persons, however well-qualified, to take away the powers of the President if the President himself was unwilling to relinquish them. It seems to me that the dangers in such a provision far outweigh the advantages, considering how seldom the provision will be called into play.

If there is any further way in which I can be of service to you in this regard, please do not hesitate to let me know.

Sincerely yours,

Robert F. Cushman

Robert F. Cushman
Associate Professor of
Government

RFC:ll

NEW YORK STATE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS
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February 26, 1964

Hon. Hubert H. Humphrey
United States Senate
Washington, D.C.

Dear Senator Humphrey:

I believe that you already know from my previous correspondence what my answer to your letter of January 22 is. I support Senator Keating's plan for the election of two Vice-Presidents. It seems to me that this is the most appropriate way of taking care of the situation.

By constitutional practice, the Vice-President suceeds to the Presidency, but I would say that this is true only when he takes over the office upon the death of the President. We have had no actual experience with a Vice-President fulfilling the duties of the office of the President during the inability of the President. Should the contingency arise, I would think that the Vice-President would be only the Acting President. I see no need to amend the Constitution with respect to this matter as long as the President and the Vice-President can follow the procedure that has already been established by Presidents Eisenhower, Kennedy, and Johnson. It seems to me that that ought to be sufficient.

Kind regards.

Sincerely yours,

Milton R. Konvitz
Professor of Industrial
and Labor Relations
and
Professor of Law

MRK:ael

Succession file

HARVARD UNIVERSITY

C. J. Friedrich
Eaton Professor of the Science of Government

M-31 Littauer Center
Cambridge 38, Massachusetts

February 21, 1964

Senator Hubert H. Humphrey
United States Senate
Washington, D.C.

Dear Senator Humphrey:

I was very interested in finding on my return from Europe your letter of January 22. Needless to say I am very pleased to find a new concern with the problem of succession. You may recall my raising the issue a year ago when I was President of the American Political Science Association. My prime interest arises from the danger of a sneak nuclear attack. To meet this danger, I do not believe that it would help to empower Congress to elect a vice president. It may, however, be a worthwhile proposal for the kind of situation we are confronted with at present.

To meet the danger of nuclear attack, I believe it is necessary to face the problems created by a wholesale destruction of the national capitol. In this eventuality two things are needed. First, to provide for a president, and second to provide for a Congress. As far as the president is concerned, I lean towards an arrangement whereunder the surviving governor of the largest state would become president pro tem until presidential elections can be held. For the congress I favor an arrangement whereunder the state legislatures could elect a specified number of representatives, as well as two senators until elections can be held.

As to your second question, I do not pretend to know what the Founding Fathers intended. I should say that during a temporary inability the vice president would merely act as president; whereas if the inability is pronounced permanent by a competent medical authority the vice president would become president. The matter of procedure calls for careful exploration. I believe that a request from the President or Congress to our Association would undoubtedly be accepted as a significant challenge which after due consideration would produce adequate professional proposals.

With high regards,

Sincerely,

Carl J. Friedrich

Presidential Succession Work File
Ray W. has

sd

February 26, 1964

Mr. John Howe
Executive Offices
Encyclopaedia Britannica
342 Madison Avenue, Suite 702
New York 17, New York

Dear John:

One thing about that boss of yours, he always seems to have new and different ideas. Whether I want to come out for abolition of the Vice Presidency this year is, of course, a matter which deserves some thought. But, more seriously, I will include Bill's thinking in this compilationof ideas which have been coming in to me from a number of political sciences and lawyers.

Please give my best to everyone.

Sincerely yours,

Hubert H. Humphrey

ENCYCLOPAEDIA BRITANNICA
342 MADISON AVENUE
SUITE 702
NEW YORK 17, N.Y.

EXECUTIVE OFFICES

February 18, 1964

Dear Hubert:

Reading the New York Times piece on your survey of political scientists about the succession to the Presidency causes me to send you the two items by and about Bill Benton.

As you'll see, Bill proposes that the vice-presidency be abolished. He proposes that the Speaker of the House should always be next in line to the Presidency. But the key to his proposal is that a Presidential election should always be held within x months of the death or disability of the President. Bill contends that there is nothing sacred about the four-year rhthym.

Holmes Alexander, in his account here, says that "Mr. Benton further proposes that any successor to a vacant White House be required to face almost immediate confirmation at the polls. I don't believe Bill is talking about "confirmation" here. He would have the Speaker in the White House on an interim basis. The field would be wide open for candidates in the election.

Sincerely yours,

John Howe
Assistant to William Benton

Senator Hubert Humphrey
United States Senate
Washington, D. C.

att.
hk

Holmes Alexander

Abolish The Vice Presidency: Benton

WASHINGTON — William Benton (D., Conn.), who served us in the U.S. Senate and State Department, writes me in agreement with a column which upheld the speaker of the House as the logical and democratic successor to a vice president who has gone to the White House. But Mr. Benton, a serious and informed thinker— publisher of the Encyclopedia Britannica — goes further. He writes:

"I go so far as to think that the vice presidency ought to be abolished and that the speaker of the House should always be the successor to the president. I know too much about the way the vice presidential candidates have been selected. The process of selection is too accidental and too haphazard. The speaker of the House is always an experienced politician who has been tested in the crucible. Yes, let us abolish the vice presidency."

Well, a good many people back through history have agreed with Mr. Benton. John Adams, the first vice president, thought it the most useless office ever devised by the brain of man. Theodore Roosevelt considered himself mousetrapped in the post by Mark Hanna, who wanted to take T. R. out of circulation. If you have an idle evening to review the standard histories of the Democratic and Republican parties, written by Frank R. Kent and William Starr Myers, respectively, you can refresh your memory on the Throttlebottoms whom both parties have nominated as presidential stand-bys.

Yet only in one instance did a vice presidential successor bring disaster with him, and in no instance was a president-by-accident any sort of a personal disgrace. Andrew Johnson, a Southerner, did not have the genius to carry out Lincoln's program for the defeated Confederacy ("with malice toward none"); but

WILLIAM BENTON

he did no worse in an impossible fix than several duly elected presidents have done in times of depression and party splits. We only had one disgrace in the White House — Warren Harding — whose stand-in, Calvin Coolidge, proved the better man on the ticket.

It is hard to find much fault with the successors of this century — Roosevelt, Coolidge, Truman, Johnson. Or, back in the 19th century, with Tyler, who was a better man than President Harrison, or with Fillmore, who had it all over President Taylor. Even the most obscure successor, Chester Arthur, who followed Garfield, did a creditable relief job, though his only national experience had been as collector of the Port of New York, a political job he got under President Grant and lost under President Hayes. An yet, as Myers wrote, "Arthur really made a success as president." Another historian, James Ford Rhodes, said: "Arthur was fundamentally a gentleman and was simply his better self during his occupancy of the presidency."

No Insurance

Abolition of the vice presidency, appears to me, would not insure us against getting duds in the White House. We have had them there by election, as was sadly true in the case of William Howard Taft, to say nothing of Grant who, despite malodorous scandals in his two administrations, came close to getting a third-term nomination. The democratic process is not foolproof, or we would never have chosen Harding over Cox. The responsibility goes back to the party system which ought to offer us two tickets of four estimable men. John F. Kennedy's insistence upon Johnson seems the best, most responsible example that history has yet recorded.

Mr. Benton further proposes that any successor to a vacant White House be required to face almost immediate confirmation at the polls. He writes:

"There's nothing sacred about having presidential elections in the present rhythm of every four years . . . Most of the European countries have their elections at what seem to them the most appropriate time — rather than on any fixed rhythm."

But there is, I contend, something "sacred" and American about the four-year rhythm. It has served us well. Indeed, the mystique which attaches to the American presidency is demonstrably a better guaranty of excellence than many whoop-and-holler campaigns have been. The seven vice presidents who have succeeded by death are a long way from being the seven worst presidents we ever had.

We need a lot of thinking on the succession subject, and Mr. Benton's contributions are welcome and cogent. But when it comes to "sober second thoughts," the existing system stands. It has stood the test of time

December 26, 1963

Dear Mr. Alexander:

I am exposed to your columns when I am in Phoenix - about a month over Christmas and a month over Easter. May I congratulate you on the attached? Have you thought of this extra point? When the Speaker succeeds to the Presidency, if he does, why should the Presidential election be delayed until the regular normal four year rhythm? Suppose the Speaker succeeded only ninety days after the inauguration of the President, as did Harry Truman, why shouldn't both parties hold their convention during the summer, and why shouldn't the new Presidential election be held the following November? There's nothing sacred about having Presidential elections in the present rhythm of every four years. They could be held any time - six months or nine months after the death of a President. Most of the European countries have their elections at what seem to them the most appropriate time - rather than on any fixed rhythm. Certainly the death of a President opens up the appropriatness of a new election.

I go so far as to think that the Vice Presidency ought to be abolished and that the Speaker of the House should always be the successor to the President. I know too much about the way the Vice Presidential candidates have been selected. The process of selection is too accidental and too hazardous. The Speaker of the House is always an experienced politician who has been tested in the crucible. Yes, let us abolish the Vice Presidency. Let the Speaker of the House succeed. Let there be a Presidential election within X months (unless, let us say, the regular rhythm comes up within a year).

Sincerely,

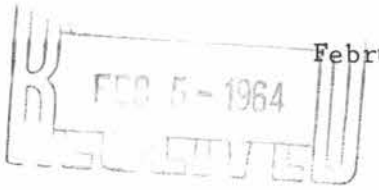
William Benton

Mr. Holmes Alexander
Mc Naught Syndicate
922 - 25th Street
Washington, D.C.

Dictated in Phoenix
Transcribed in New York
Attachment

THE JOHNS HOPKINS UNIVERSITY
BALTIMORE 18, MARYLAND

DEPARTMENT OF
POLITICAL SCIENCE



February 4, 1964

The Honorable Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator Humphrey:

Thank you for your letter of January 22 addressed to Professor Swisher. Unfortunately Professor Swisher is presently in the hospital undergoing extensive tests and observation and will be unable to reply at this time. If another two or three weeks will not make his reply too late, please let me know.

Sincerely,

(Mrs) Edna L. Fulton

Edna L. Fulton
Secretary

3 February 1964

Senator Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator:

I am flattered that you should ask for my opinion on the problems of Presidential succession and Presidential disability. I have long been interested in these problems and I have a few ideas which I would like to pass on to you for what they are worth. Perhaps, the best way to proceed is to answer your specific questions and make comments.

In regard to succession, I believe we should return to the scheme whereby the Cabinet officers follow the Vice President rather than the Speaker of the House. Although the idea of having an elected official rather than an appointed official "next in line" seems more in accord with democratic ideals, we should consider carefully what is actually involved.

The Speaker is not elected by a national constituency. Therefore, in terms of the office of the Presidency, no legitimacy can be claimed by virtue of the fact that the Speaker has been elected to Congress by the people of one district. If legitimacy is asserted on the grounds that the Speaker is elected Speaker by the whole House, the claim appears more valid. But, if this be the basis for designating that the Speaker be next in line, it means we find virtue in having the House make a selection. If that be so, let the House do the picking, but let it be done in a special proceeding in which the House meets specifically for the purpose of choosing a President or Vice President. More on this later.

The discussion so far leads me to make a couple of observations about the Vice Presidency. To those who, like President Truman, see such value in having an elected official succeed to the Presidency, I would point out that as a practical matter the Vice President is not an elected official. First of all, isn't he usually a man who attains the nomination because the nominee for President has picked him? Also, how does a voter vote for Vice President? Presumably, the men on top of the tickets are much more important to him. It's a safe bet that the overwhelming majority of the voters do not weigh very heavily their feelings about the Vice Presidential candidates when they cast their votes in Presidential elections. /But, of course, the pro's are right in trying to get nominees who might add a little strength here and there, for if 2% of the vote is affected, it may be the margin of victory./ So, although the choice of the Vice Presidential nominee may be crucial in an election, the fact remains that the overwhelming majority of the voters have made their choice for President without regard to Vice Presidential candidates and perhaps, even in spite of them.

In view of the foregoing, maybe, we should seriously reconsider the manner in which we "elect" the Vice President. As long as it is good strategy to have a balanced ticket, we are going to be faced with the anomaly of a Vice President who is less representative of the President's goals and aspirations than some of his principal officers in the Cabinet. Therefore, it would seem much more legitimate to have as a Vice President a man who is close to the President politically. Obviously, it would not be a good idea to have a separate election for Vice President. There would always be a likelihood of having a President and a Vice President of opposing parties. This would make for an exceedingly disruptive transition period when a President died or was disabled in office. What I would like to suggest is that there be some exploration of the idea of having a Constitutional Amendment which would enable a President with the advice and consent of the Senate to appoint a Vice President after the election. I realize that, at first blush, this may sound like a far-out idea. But look at it this way: What is the function of a Vice President? Certainly, history would indicate that his chief function is to take over the Presidency when the President dies in office. In addition, in recent years he has been employed most effectively as a personal representative of the President while the President is still alive. I ask you, is it better to have the President pick a man with these things in mind after the election or to have him designate a man who will balance the ticket before the election? To those who would worry about the lack of the safeguard that is provided in giving the people an opportunity to reject a Presidential candidate, if they are with his running mate, I would point out that the Senate would serve as a check against an extremely unfortunate choice, if the President were empowered to appoint after the election.

For reasons made apparent by the above, I would not prefer to see Congress elect a Vice President to fill the vacancy created by the regularly elected Vice President becoming President. However, if it is deemed unwise to have Cabinet officers in the line of succession, I believe it would be better to have Congress elect a Vice President rather than have the Speaker next in line. It is my frank opinion that if either House alone or the House and Senate together were to choose a man to succeed to the Presidency, more often than not, the Speaker would not be the man chosen. And for good reason. He is not chosen as Speaker primarily on the basis of his qualifications for the Presidency.

With respect to disability, I feel that the Founding Fathers fully intended that Congress should spell out the specifics within the framework of Article II, section 1. Apparently, they did not see all the difficulties involved with the problem of disability and assumed that Congress would be able to deal with the problem easily, if necessary. It is my personal belief that legislation with respect to disability is long overdue and I also feel that Congress is provided with the widest latitude in determining how to solve this problem. The Constitutional provision, it seems to me, gives Congress a blank check in these words, "...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." I think the arguments over whether or not the Vice President is President or Acting President until the disability is removed are really beside the point. If Congress were to spell out what was to happen, an overly-ambitious Vice President would not be able to "steal" the office of the President. The press, and the public, would react strongly against any such attempt and, if it ever came to a test in the Supreme Court, I am confident that the Court would support the statute against a usurper. Nonetheless, it would probably be wise in legislating to indicate clearly that the Vice President was only serving as Acting President during the period of the President's disability.

Now, for the toughest question of all. What machinery should be set up to determine a President's disability and to adjudge when the disability has ended? One thing seems clear. There is no really good solution to this problem. We are going to have to choose among choices none of which is very satisfactory. I would propose that whenever a President or Vice President feels that the President is unable to carry on his duties effectively, or in the case of a President who has been disabled but now believes he is fit to reassume

the duties of the office, that either officer should be able to set the machinery in motion to have a Commission inquire into the matter, make a determination and where appropriate relieve the President or the Acting President from the Presidency by certication. The membership of the Commission should be fixed in the law which should also provide that the Chairman will convene the Commission on written notice or complaint of the President, Vice President or Acting President. I would like to see such a Commission composed of the following: the Chief Justice of the Supreme Court as Chairman, the majority and minority leaders of both the House and the Senate, the Secretary of State and the Attorney General. Of course, there are all kinds of ways to determine the membership of such a Commission. The reason I designated the particular people that I did was to protect against possible abuses. There should be some representation from the party opposing the President, yet they should not be in the majority. Each branch of the government should be represented to prevent a palace guard from ousting a President. And there should also be several members who could be expected to have an unusually high degree of personal loyalty to the President to protect his interests. I am not prepared to make recommendations as to how the Commission should operate. But it seems to me that there would be need for enabling the Commission to work swiftly and to procure the aid of medical experts. Patently, a President could take umbrage with such a law and argue that the separation of powers principle would render it unconstitutional. In the face of the Constitutional provision which I have quoted above, I don't see that such an argument can hold water. Despite the separation of powers principle, a President can be impeached and he has the veto. The Constitution was not drawn up to enforce a rigid and absolute separation.

One last thought. I have been greatly disturbed by Congress' apparent willingness to allow the Eisenhower-Nixon, Kennedy-Johnson, and Johnson-McCormack agreements about disability to be made and stand unchallenged. The implication is that a President's disability is only a matter which concerns the President and Vice President and that the President's interests are the primary consideration. Well, we all have a stake in insuring that the man we have elected is able to carry on his duties effectively. Say a President shows signs of mental illness, isn't this a matter for concern to all of us and not just the President and Vice President?

In closing, I am very happy that you are pushing for some action on these problems and I am delighted to have the opportunity to throw in my two-cents worth. Please feel free to use my remarks in any way you see fit. I will be gratified if they prove helpful. Good luck to you in this endeavor.

Best regards.

Sincerely,

Harold W. Chase
Visiting Professor

The Rockefeller Foundation
111 WEST 50th STREET, NEW YORK 20

HUMANITIES AND SOCIAL SCIENCES

CABLE: ROCKFOUND, NEW YORK
TELEPHONE: COLUMBUS 5-8100

February 6, 1964

Dear Senator Humphrey:

Enclosed are my comments in response to your inquiry of January 22. Again let me say that I appreciate the opportunity to comment. Please feel free to use this contribution as you see fit. If you do publish all or part of it, I should like to have it noted that the ideas expressed here are my sole responsibility.

Sincerely yours,

Charles M. Hardin

Charles M. Hardin
Associate Director

The Hon. Hubert H. Humphrey
United States Senate
Washington, D. C.

CMH:ch

Enclosure

February 4, 1964

Memorandum to Senator Hubert H. Humphrey on the Question of Presidential Succession

Charles M. Hardin
The Rockefeller Foundation*

I

Let me refer to your first question, breaking it down as follows:

"(1) What do you consider the appropriate line of Presidential succession? Why?"

Under the present constitutional system and with reference to the clear-cut case of the death of the President and the elevation of the Vice President, I should return to the Act of 1886 making the Secretary of State once more the first in line after the Vice President. The reason is that, with the exception of civil rights, foreign policy raises the most lasting and severe challenge to our national survival and to the preservation of our constitutional democracy. Moreover, even the most urgent domestic questions can ordinarily be recessed on the death of the President, whereas foreign affairs cannot. I should prefer the Secretary of State who, on the basis of history, can be expected to have more knowledge of foreign relations and more experience in coping with them. It is most appropriate that the Secretary of State be of Presidential stature, and many of them have been -- more, I think, than Speakers of the House. Moreover, when a Vice President succeeds to the Presidency, he properly replaces the Secretary of State if the incumbent does not have his full confidence. It is obvious that the immediate successor to the Presidency should have the full confidence of the President so that the President will inform him on those matters on which the safety of the republic may depend.

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*The views are the sole responsibility of the author.

But the President and the Speaker may not share this confidence. Finally, the better the Speaker is as Speaker, the more vital is it for him to remain in that critical legislative office.

"What is your opinion on the proposals for Presidential succession which would require a constitutional amendment, e. g., to empower Congress to elect a Vice President to fill the vacancy created by the regularly elected Vice President becoming President?"

If Congress is to be authorized to fill a vacated Vice Presidency, a constitutional amendment seems necessary. But an emergency effort to this end in 1964 is inadvisable. It might be difficult to get approval by the necessary Congressional majorities (and an attempt might divert attention from pending legislation, particularly the civil rights bill); moreover, the required ratification by 38 states is in fact impracticable because only 18 state legislatures regularly meet in 1964, and 9 of these are confined to state budgetary and constitutional matters. At the same time, I think that in the longer run a constitutional amendment may well be needed, and I shall return to this.

Let me turn now to your second question.

"(2) What was the intention of the Founding Fathers in providing for periods where the President is unable to discharge the powers and duties of his office? Does the Vice President become the President or does he merely act as President until the inability is removed?"

In an admittedly cursory search I have not uncovered salient information on the intentions of the Framers in these important matters. They were profoundly concerned with the manner of selecting the President; with his tenure, re-eligibility; with his powers; and, perhaps above all, with his relationship to the legislature. They worried lest cabals form to manipulate the Presidential selection, lest undue dependency by the President on the legislature cause him to curry legislative favor, or lest the President be tempted to use his great powers to subvert the Constitution and perpetuate himself in the office. Beside such questions the issue of presidential

disability seemed to them of little moment, and for their time they were probably correct.

With the advent of the weekly crisis, we must try to provide for the contingency of Presidential disability, but first let us cite the rest of your question.

"What is the most appropriate way to clarify the existing ambiguity in the Constitution? What specific procedures would you recommend to be followed in such times of Presidential inability?"

This question poses a most serious constitutional problem especially if terms are defined to include political as well as physical disability. President Garfield's lingering death, President Wilson's long illness, and President Eisenhower's two heart attacks properly call attention to the fragility of the President's health; but we have thought all too little of the chance that he may lose his political acumen, insight or courage. The latter possibility is much clearer if we contemplate a country threatened by mortal danger at a time when its Chief Executive is physically sound but politically inadequate. The United States has been spared this kind of crisis that beset England in two World Wars. On the second occasion, English political institutions permitted the constitutional replacement of a Chamberlain by a Churchill; on the first, of an Asquith by a Lloyd George.

Let us then analyze the problem, taking physical disability first. We may propose one principle: so long as the President lives and has not resigned, the Vice President should be Acting President. The cost of this pejorative prefix will be considerable, for the Chief Executive needs all the authority-making symbols of his office. The cost will probably be supportable if the President lingers, as he might even for a year, in a coma. If the President recovers consciousness and lucidity without regaining the necessary stamina and energy, he may become convinced that he should resign.

But he may not choose to resign, and this would create one of three possible situations, all very dangerous. The second of these would arise if

the President recovers consciousness but has suffered serious impairment to his intellectual faculties and yet refuses to resign. The third is sharply different, namely, if the President though vigorous and in full possession of his faculties cannot grasp the threats to the country, find the means to oppose them, and act with vigor and dispatch. This last is what I should call political disability, and I repeat that if we think we are immune to it, we should remember that Britain has had to face it twice in this century.

All three of these situations have one thing in common: each requires a judgment and the courage and power to enforce it. At heart the problem is political and not legal. It cannot be taken care of in advance by detailed legislative provisions. I can imagine the leaders of a truly national political party soberly making and enforcing a judgment on the President's disability, but I can conceive of no other way of solving it. At best we might hope to take legal steps which will foster conditions for the evolution of political institutions and processes which can deal with the issues we have raised,

II.

What follows goes beyond an effort to answer the specific questions you put to me, but I am going to take advantage of your invitation for "general comments" to extend my remarks. I do indeed think that we might well give careful consideration to a constitutional amendment and shall suggest one for discussion rather than in the conviction that the specifics proposed are unalterably the best ones.

First, when the Vice President has assumed the Presidency, I should charge the House of Representatives forthwith to choose his successor by a majority vote. This would put the choice in the House where it is now for the Presidency if and when no candidate gets a majority in the electoral college; but now members would vote as individuals, and the comparable rule giving each state one vote would be rejected.

Second, I should do away with the present nomination and election of the Vice President in favor of election by the House of Representatives. When a new House convenes and organizes itself, this would be its first function.

Third, I should elect the House for four years, making its election and term the same as those of the President.

Let me comment. A prime reason for this move is to help create an institutional sense in the House of Representatives of its being a government-making body. Selection of the Vice President would be among the highest political functions. It is so important that it should be vested in one body which already has a corporate sense rather than a hybrid like some especially convened assembly of the House and Senate or an artificial congress of Presidential electors. The House rather than the Senate seems to be the natural seat of this function of we are to honor the constitutional practice that the most populous states have a proportionately greater voice in filling the nation's highest offices.

But to perform this function the House must be changed. It needs to be more national; it should have a longer lease on political life; it needs to fret less over special interests and to concern itself more with the national purpose and programs. Relief from the tyranny of biennial elections is recommended. This step which has many distinguished proponents should be included in the same amendment that changes the election of the Vice President, partly for its educational effect and partly to make the proposal more attractive, especially to Congressmen from the less populous states.

If the House selects the Vice President at the beginning of an incoming administration, I should expect the influence of the newly elected President to be -- properly -- very great. It is now accepted that successful

Presidential candidates select their running mates. When a new President takes office, with patronage unspent and with national sentiment typically running strongly in his favor, his voice would and should be the most powerful in the selection of the Vice President.[1]

But his would not be a simple fiat because he would, perforce, operate through his party; and now we come to what seems to me the nub of the question. Faced by the threats of these perilous centuries, the United States must re-examine its inherited institutions. We need a strong, continuous government which is accountable at home but also capable throughout the world of vigorous action in the national interest or to fulfill the national purpose. Such government must be selected and staffed by a group of men who are organized enough to concert their purposes and visible enough to be held responsible. Together, they constitute what we know as a political party, but the inherited fractionalization of American politics inhibits their formation and functioning as such.

What needs to be done, then, is to create the conditions around which a more organized and nationalized political party (or, rather, a system of two such parties) may form about certain functions. Of these, perhaps the most important is government-making.

By fixing the selection of the Vice President in a definite body of visible men that has a wide range of continuous political functions, we should hope that the practice of participating in government making would strengthen the House of Representatives in its sense of national mission.

Let us return to the question of presidential disability. The suggestions made above all point in the only direction that seems open to me to attack this most difficult problem. I have never been able to imagine a set of rules for men to follow in replacing a disabled President. The only hope

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1. What happens when as occurred only once since the Civil War, the House is organized by the political party opposite to the President? It might be wise to provide in the amendment for the President to nominate the Vice President to the House of Representatives, but I should prefer to see this develop by custom.

I see is to try to create the conditions of responsible party government in which leaders will recognize their natural obligation in such extreme circumstances and will find a way to discharge it. I should look, then, toward the creation of national parties of which the leaders follow their own high political sense and find a legitimate means to meet a crisis of Presidential disability. If the fear is raised that these provisions might open the door to endless intrigues against the President, this may be allayed by the retention of the national Presidential election. Political parties have inestimable stakes in successful Presidential candidates. They will not lightly sacrifice a leader who has demonstrated his popular appeal by winning a Presidential election. I should think, therefore, that this procedure would be as much in keeping with the spirit of the Constitution as an attempt, foredoomed, I am convinced, to spell out detailed legal requirements.

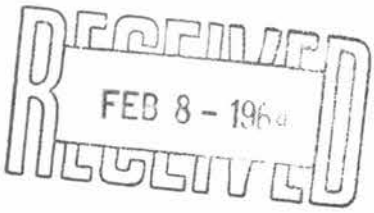
CORNELL UNIVERSITY

ITHACA, NEW YORK

DEPARTMENT OF GOVERNMENT

WEST SIBLEY

February 5, 1964



Senator Hubert H. Humphrey
Senate Office Building
Washington 25, D. C.

Dear Senator Humphrey:

I am pleased to respond to your letter of January 22 concerning Presidential succession and inability.

1. Presidential succession.

I believe we should return to the provisions of the 1886 law, according to which the line of succession descends through the various members of the Cabinet. My reasons are surely familiar to you. Succession should be automatic and unquestionable; the successor should not be required to do anything to qualify for the office -- especially something that raises legal or constitutional doubts. (For example, is the Speaker or President pro tempore an "Officer" in the sense of Art. II, 1, #5?) Secondly, a member of the Cabinet is much more likely to provide continuity in the executive branch, and I believe this is a desideratum; furthermore, he is more likely than a legislator to be well informed on current problems facing the executive. Thirdly, candor requires me to say that he is likely to be more qualified to deal with the major problems facing the country now and in the foreseeable future, namely, problems of foreign relations. Lastly, I am unpersuaded by the argument, advanced by President Truman, that a Speaker of the House or a President pro tempore would be a more democratic choice. A Cabinet officer holds his position by virtue of an appointment by the man who, more than any legislator, is chosen by the people of the United States, with the consent of the same body that chooses the President pro tempore.

I am opposed to the proposed constitutional amendment that would provide for the election of a new Vice President upon the succession of the Vice President to the Presidency. Suppose, after succeeding to the Presidency, the Vice President were to die before the Congress had elected his successor. Presumably, the next in line would succeed. Would he hold the office only until a Vice President were elected? Suppose the President and the Vice President died at the same time. Would the Speaker (or, assuming a return to the 1886 arrangement, the Secretary of State) succeed to the Presidency temporarily, until the Congress selected a new Vice President? And, in the event of the simultaneous death of both the President and Vice President, who would nominate the new Vice President? And, assuming the President were to be empowered to nominate a Vice President, who would then be confirmed by the Congress, there is always

the chance of disagreement leading to stalemate. No sir, succession as I said above, must be automatic and unquestionable, depending on no one to do anything. As to the proposal that a Vice President be chosen by electors chosen at the mid-term election: This would work only if a vacancy occurred, say, at least three months before the elections, for the parties would need time to nominate candidates, the candidates would need time to campaign, and the state election officers would need time to print the required ballots. And if the President were to die during the campaign, who would succeed and for how long? Will it be said in reply that these contingencies are not likely to occur? Very good; we are therefore not likely to have an appointed official -- a Cabinet officer -- as President; and I believe it would not be catastrophic if we did. Finally, it is my opinion that we are amending the Constitution too frequently nowadays. Poll taxes could have been prohibited by a statute based on the "Time, Places, and Manner" clause.

2. Presidential Inability.

There is nothing I can add to, and nothing I would subtract from, what is said on this problem by my colleague Clinton Rossiter in the second edition of his, The American Presidency, pp. 203-215 (Mentor ed.). As he says (p. 210) "...it would be either feckless or reckless to lay out an elaborate plan to solve a problem that in one sense is not much of a problem at all and in another is quite insoluble." Hence, I join him in calling for a concurrent resolution of Congress, as follows:

> "1) The President of the United States has the right to declare his own disability and to bestow his powers and duties upon the Vice-President or, in the event there is no Vice-President, upon the next officer in line of succession.
>
> "2) If the President is unable to declare his own disability, the Vice-President is to make this decision on his own initiative and responsibility.
>
> "3) In the event of disability, the Vice-President shall only act as President; his original oath as Vice-President shall be sufficient to give full legitimacy to his orders, proclamations, and other official actions.
>
> "4) The President may recover his powers and duties simply by informing the Vice-President that his disability no longer exists.
>
> "5) Disability, to repeat Professor Silva's words, means 'any de facto inability, whatever the cause or the duration, if it occurs at a time when the urgency of public business requires executive action.'"

In conclusion, I think it is imperative to enact a new succession law, and I believe that law should remove the Speaker and the President pro tempore from the line of succession.

Sincerely yours,

Walter F. Berns
Professor of Government

mg

Clinton Rossiter
Cornell University

The Problem of Succession to the Presidency

The problem of succession is in some ways stickier than the problem of disability. The Presidency is an office that can never, so to speak, be left empty for a moment; the authority of the man who wields its mighty powers must be recognized as constitutionally and morally legitimate by Congress, the courts, the people, and history. It is therefore imperative, especially under conditions of modern existence, that a line of succession be marked out clearly, that the line be extended downward through a number of persons, and that these persons be men of standing in the national community.

The Framers of the Constitution handled this problem in characteristic fashion. They designated the Vice-President, whom they expected to be a man of genuine standing, as heir apparent, and then invited Congress to guard against the calamitous event of a double vacancy (or a vacancy combined with a disability, or even a double disability) by enacting a law "declaring what officer shall then act as President." Congress has responded to this invitation on three occasions--1792, 1886 and 1947--each time with a law that has pleased just about no one who studies it with a lawyer's care or a historian's imagination. Fortunately, we have thus far been spared the necessity of doing anything more than study these three laws for imperfections. In the course of 175-odd years we have lost eight Presidents and eight Vice-Presidents during their terms of office, which comes to a total of sixteen occasions when the heir apparent to the authority if not to the office of the Presidency was marked out by law. But never yet have we lost both men whom we had elected to serve us for four years. This is no guarantee for the future.

There are two obvious pools of talent and prestige upon which the nation can be expected to draw for an acting President: the heads of

the executive departments and the leadership of Congress. Those notable pools that spawn generals, Justices, and state governors are all, for one sound reason or another, a little too muddy to be tapped with confidence, and Congress has refused to look beyond the Cabinet and its own leadership for men to entrust with the powers of the Presidency in the event of a double vacancy.

Congress came up with its first shaky solution to the problem of succession in 1792. The solution, be it noted by those who like to make bloodless gods of the Founding Fathers, was a product of political animosity rather than of creative statesmanship. Instead of designating the Secretary of State as first in line after the Vice-President (the sensible solution, except that the Secretary of State was Thomas Jefferson), the conservative leadership of Congress picked on the President pro tempore of the Senate and, after him, the Speaker of the House. Neither of these officers was to be President, but was only to act the part. Further, if the double vacancy were to occur during the first two years and seven months of any given presidential term, the Secretary of State was to proceed "forthwith" to call a special election.

Despite many doubts about both the constitutionality and practicality of this law, Congress did not make a real attempt to improve upon it until 1886. Then, for motives so mixed that I beg to be excused from deciphering them, the two houses turned abruptly to the other great pool of talent and prestige, the President's own Cabinet. Henceforth, in the event of a double vacancy, the succession was to run down the line from Secretary of State to Secretary of the Interior. Upon such a child of fortune only the "powers and duties" of the Presidency were to devolve, but he was to hold them all the way to the next regular election. The

provision for a special election in the law of 1792 was consigned to oblivion--and with it another clear but never clearly stated expectation of the Framers of the Constitution.

Just before leaving for Potsdam in 1945, Harry S. Truman asked Congress to reconsider the succession extablished in 1886. As an old legislative hand he had been strongly impressed by the argument that it would be more "democratic" to have an elected rather than an appointed official in line right after him. When this argument was first put forward for Truman's considerations, Edward R. Stettinius was Secretary of State and the chance to replace him as crown prince with Sam Rayburn, Speaker of the House, was enough to get the wheels of Congress in motion. After James F. Byrnes had taken over from Stettinius, however, the wheels ground to a halt. The victory of the Republicans in the congressional elections of 1946 provided Mr. Truman with a matchless opportunity to act the statesman; this he did by once again asking Congress to recast the succession in favor of the Speaker, who had now been transformed by the alchemy of politics from a man named Sam Rayburn to a man named Joseph W. Martin. Congress responded with the law of 1947, which we are likely to carry on the books for some time to come, praying all the while that we shall never have to use it.

The Presidential Succession Act of 1947 draws primarily on the legislative pool, keeping the Cabinet in reserve for the most contingent of contingencies. It is a complicated piece of legislation, and I will limit this exposition of it to those provisions designed to produce an acting President in the event both the Presidency and Vice-Presidency have fallen vacant. In such an unhappy event, "the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President." If there is no Speaker, or if "the Speaker

fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President." If there is no Speaker or no President pro tempore, or if neither is qualified (for example, neither is a natural-born citizen), the line of succession then runs down through the Cabinet to the first of its members "not under disability to discharge the powers and duties of the office of President," which is to say that he must be "eligible to the office of President under the Constitution," must hold his office "with the advice and consent of the Senate," and must not be under impeachment. Such a man would be an acting President twice over, for he would serve only until a Speaker or President pro tempore had qualified to take over. As in the law of 1886, no provision at all is made for a special election.

A number of substantial objections have been raised against this latest arrangement for the succession to the Presidency. For one thing, it is a quite unsettled question whether either the Speaker of the House or the President pro tempore of the Senate is an "officer" within the meaning of the Constitution. For another, the Succession Act of 1947 perversely requires the man upon whom the powers and duties of the Presidency devolve to resign the very office--the one he is already holding--to which these powers and duties are attached by law. Congress, that is to say, has power to attach the authority of the Presidency to an office, but not to decide what officer shall become President, which is exactly what it has done in the Act of 1947.

Even if these are technicalities that we could overcome with a show of common sense, would it not be more sensible to return to the Act of 1886 and designate the Secretary of State as statutory heir apparent

and to line up the other members of the Cabinet behind him? At least four reasons can be mustered in support of the contention that the Act of 1886 is superior to the Acts of 1792 and 1947: first, that we have several times been without a Speaker or President pro tempore; second, that the Secretary of State (or Treasury or Defense) would be more likely to provide continuity in the executive branch; third, that the Presidency would remain, for the unexpired portion of that term, in the keeping of the same party; and fourth, to be as realistic as possible, that more men of presidential stature have presided over the Department of State than over the House of Representatives.

The problem of succession could best be solved, except in the most ghastly and unforeseen of circumstances, by providing some dignified and conclusive means of filling the Vice-Presidency when, ever ~~even~~ it has been vacated. If we could be sure that there would always, or almost always, be a Vice-President, then we would not need to worry our heads too much over the really quite unanswerable question of whether the Secretary of State or Speaker of the House would make a better President.

The proposal of a second Vice-President, to be elected with the President and Vice-President on the same ticket, is not a happy one. Not many of our able men, I fear, would be candidates for a position of even less power and promise than the Vice-Presidency itself.

Several methods have been proposed to fill a vacant Vice-Presidency:

1) A vote of the electoral college, especially convened for this purpose.

2) Designation by the President.

3) Election by one or both Houses of Congress.

4) Nomination by the President and confirmation by a joint session of Congress.

The first of these methods would be inadmissible because the electors are rarely men of national standing, the second because no President should be permitted to act entirely on his own in choosing a successor, the third because no Congress should be permitted to shove a successor upon a President against his will and judgment--especially if the President's party is in the minority in Congress.

The fourth method, which would join the three great political branches of our government together in a solemn and responsible act, strikes me as much the most sensible and convenient way to handle this delicate and vital problem. The burden would rest upon the President to nominate a man of the highest stature and abilities, upon the Congress to withhold its approval unless just such a man were nominated. Because the President proposes we could expect the promise of continuity in the executive branch; because Congress disposes we could assume the fact of legitimacy.

An amendment to the Constitution would be necessary to fix this reform firmly in the American system of government, but I see no reason, political or constitutional, why Congress could not enact a temporary law creating the office of "acting Vice-President", providing for filling it in the manner described above in the event the Vice-Presidency itself is vacated, and designating its occupant as first in line of succession. This double step, a proposal of an amendment to the Constitution accompanied by a stop-gap law, is the surest way, in my opinion, to solve the enduring problem of which we have been so dramatically reminded by the tragic death of President Kennedy.

Columbia University in the City of New York | *New York 27, N.Y.*

DEPARTMENT OF PUBLIC LAW
AND GOVERNMENT

521 Fayerweather Hall

3 February 1964

Senator Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator:

I am flattered that you should ask for my opinion on the problems of Presidential succession and Presidential disability. I have long been interested in these problems and I have a few ideas which I would like to pass on to you for what they are worth. Perhaps, the best way to proceed is to answer your specific questions and make comments.

In regard to succession, I believe we should return to the scheme whereby the Cabinet officers follow the Vice President rather than the Speaker of the House. Although the idea of having an elected official rather than an appointed official "next in line" seems more in accord with democratic ideals, we should consider carefully what is actually involved.

The Speaker is not elected by a national constituency. Therefore, in terms of the office of the Presidency, no legitimacy can be claimed by virtue of the fact that the Speaker has been elected to Congress by the people of one district. If legitimacy is asserted on the grounds that the Speaker is elected Speaker by the whole House, the claim appears more valid. But, if this be the basis for designating that the Speaker be next in line, it means we find virtue in having the House make a selection. If that be so, let the House do the picking, but let it be done in a special proceeding in which the House meets specifically for the purpose of choosing a President or Vice President. More on this later.

The discussion so far leads me to make a couple of observations about the Vice Presidency. To those who, like President Truman, see such value in having an elected official succeed to the Presidency, I would point out that as a practical matter the Vice President is not an elected official. First of all, isn't he usually a man who attains the nomination because the nominee for President has picked him? Also, how does a voter vote for Vice President? Presumably, the men on top of the tickets are much more important to him. It's a safe bet that the overwhelming majority of the voters do not weigh very heavily their feelings about the Vice Presidential candidates when they cast their votes in Presidential elections. /But, of course, the pro's are right in trying to get nominees who might add a little strength here and there, for if 2% of the vote is affected, it may be the margin of victory./ So, although the choice of the Vice Presidential nominee may be crucial in an election, the fact remains that the overwhelming majority of the voters have made their choice for President without regard to Vice Presidential candidates and perhaps, even in spite of them.

In view of the foregoing, maybe, we should seriously reconsider the manner in which we "elect" the Vice President. As long as it is good strategy to have a balanced ticket, we are going to be faced with the anomaly of a Vice President who is less representative of the President's goals and aspirations than some of his principal officers in the Cabinet. Therefore, it would seem much more legitimate to have as a Vice President a man who is close to the President politically. Obviously, it would not be a good idea to have a separate election for Vice President. There would always be a likelihood of having a President and a Vice President of opposing parties. This would make for an exceedingly disruptive transition period when a President died or was disabled in office. What I would like to suggest is that there be some exploration of the idea of having a Constitutional Amendment which would enable a President with the advice and consent of the Senate to appoint a Vice President after the election. I realize that, at first blush, this may sound like a far-out idea. But look at it this way: What is the function of a Vice President? Certainly, history would indicate that his chief function is to take over the Presidency when the President dies in office. In addition, in recent years he has been employed most effectively as a personal representative of the President while the President is still alive. I ask you, is it better to have the President pick a man with these things in mind after the election or to have him designate a man who will balance the ticket before the election? To those who would worry about the lack of the safeguard that is provided in giving the people an opportunity to reject a Presidential candidate, if they are with his running mate, I would point out that the Senate would serve as a check against an extremely unfortunate choice, if the President were empowered to appoint after the election.

For reasons made apparent by the above, I would not prefer to see Congress elect a Vice President to fill the vacancy created by the regularly elected Vice President becoming President. However, if it is deemed unwise to have Cabinet officers in the line of succession, I believe it would be better to have Congress elect a Vice President rather than have the Speaker next in line. It is my frank opinion that if either House alone or the House and Senate together were to choose a man to succeed to the Presidency, more often than not, the Speaker would not be the man chosen. And for good reason. He is not chosen as Speaker primarily on the basis of his qualifications for the Presidency.

With respect to disability, I feel that the Founding Fathers fully intended that Congress should spell out the specifics within the framework of Article II, section 1. Apparently, they did not see all the difficulties involved with the problem of disability and assumed that Congress would be able to deal with the problem easily, if necessary. It is my personal belief that legislation with respect to disability is long overdue and I also feel that Congress is provided with the widest latitude in determining how to solve this problem. The Constitutional provision, it seems to me, gives Congress a blank check in these words, "...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." I think the arguments over whether or not the Vice President is President or Acting President until the disability is removed are really beside the point. If Congress were to spell out what was to happen, an overly-ambitious Vice President would not be able to "steal" the office of the President. The press, and the public, would react strongly against any such attempt and, if it ever came to a test in the Supreme Court, I am confident that the Court would support the statute against a usurper. Nonetheless, it would probably be wise in legislating to indicate clearly that the Vice President was only serving as Acting President during the period of the President's disability.

Now, for the toughest question of all. What machinery should be set up to determine a President's disability and to adjudge when the disability has ended? One thing seems clear. There is no really good solution to this problem. We are going to have to choose among choices none of which is very satisfactory. I would propose that whenever a President or Vice President feels that the President is unable to carry on his duties effectively, or in the case of a President who has been disabled but now believes he is fit to reassume

the duties of the office, that either officer should be able to set the machinery in motion to have a Commission inquire into the matter, make a determination and where appropriate relieve the President or the Acting President from the Presidency by certication. The membership of the Commission should be fixed in the law which should also provide that the Chairman will convene the Commission on written notice or complaint of the President, Vice President or Acting President. I would like to see such a Commission composed of the following: the Chief Justice of the Supreme Court as Chairman, the majority and minority leaders of both the House and the Senate, the Secretary of State and the Attorney General. Of course, there are all kinds of ways to determine the membership of such a Commission. The reason I designated the particular people that I did was to protect against possible abuses. There should be some representation from the party opposing the President, yet they should not be in the majority. Each branch of the government should be represented to prevent a palace guard from ousting a President. And there should also be several members who could be expected to have an unusually high degree of personal loyalty to the President to protect his interests. I am not prepared to make recommendations as to how the Commission should operate. But it seems to me that there would be need for enabling the Commission to work swiftly and to procure the aid of medical experts. Patently, a President could take umbrage with such a law and argue that the separation of powers principle would render it unconstitutional. In the face of the Constitutional provision which I have quoted above, I don't see that such an argument can hold water. Despite the separation of powers principle, a President can be impeached and he has the veto. The Constitution was not drawn up to enforce a rigid and absolute separation.

One last thought. I have been greatly disturbed by Congress' apparent willingness to allow the Eisenhower-Nixon, Kennedy-Johnson, and Johnson-McCormack agreements about disability to be made and stand unchallenged. The implication is that a President's disability is only a matter which concerns the President and Vice President and that the President's interests are the primary consideration. Well, we all have a stake in insuring that the man we have elected is able to carry on his duties effectively. Say a President shows signs of mental illness, isn't this a matter for concern to all of us and not just the President and Vice President?

In closing, I am very happy that you are pushing for some action on these problems and I am delighted to have the opportunity to throw in my two-cents worth. Please feel free to use my remarks in any way you see fit. I will be gratified if they prove helpful. Good luck to you in this endeavor.

Best regards.

Sincerely,

Hal

Harold W. Chase
Visiting Professor

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1126 EAST 59TH STREET

February 2, 1964

Senator Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator Humphrey:

I have your letter of January 22, requesting my opinion concerning the problems of presidential succession and presidential inability. I regret that I am at present unable to spell out my views on these very important problems in detail, but I will outline my position.

Presidential Succession. It does not seem necessary to rehearse all the reasons why the present succession law is inadequate and dangerous. The Act of 1947 should never have been passed, for it set up a plan of succession much more defective than the Act of 1886. However, the earlier statute was not satisfactory either.

In my opinion, the basic need, when the Vice President succeeds to the Presidency, is to fill the vacant position of Vice President. The desirability of having a Vice President in office at all times seems so clear as not to require argument. The only question, then, is how vacancies in the Vice Presidency are to be filled.

Congress is best suited to perform this function. It has been suggested that the Electoral College from the preceding presidential election might be utilized, but this would be ridiculous. The electors are faceless people, who are selected to perform as vote-registering automatons, and there is no reason to assume that they would have either the representative quality or the wisdom called for in using their discretion to select a Vice President.

While Congress must perform the electoral function of selecting the new Vice President, it is highly desirable that the President should also participate in this process. First, Congress should be under compulsion to select a Vice President from the same party as the President, the party which won the last presidential election. Second, the new Vice President should be acceptable to the President, because current practice has made the Vice President an active member of the administration.

Perhaps the best way to achieve presidential participation would be to authorize the President to nominate three men for the post of Vice President, with Congress limited to choosing one of these three. An alternative method would be for the President to nominate only one man for the post, whom Congress would be free to accept or reject. In case of rejection, the President would make another nomination.

Election of the Vice President would be by both houses of Congress meeting in joint session, the members voting as individuals, and a majority required to elect.

I would regard either of the two plans for nomination by the President as acceptable. The second plan with only one nominee would reduce the congressional role and would emphasize the President's responsibility, but it would require him to name a man who would be satisfactory to Congress. For the President could not run the risk to his prestige of proposing a nominee whom Congress would reject. Either of these plans would of course require a constitutional amendment for adoption.

Presidential Inability. The problem of presidential inability is more complicated, or at least it can be made so. If efforts are made to foresee and to meet every possible contingency that might arise, we may get so confused by competing proposals that no action at all is possible. I will therefore try to confine myself to what I regard as the essential issues.

First, it must be made clear that when the President suffers "inability," the Vice President can step in and "act" for him until the inability is terminated, without in any way clouding the President's title and right to resume his office. It has been argued by some that if a Vice President "acts" as President, the President is automatically ousted from his office, and cannot resume it. There is no language in the Constitution requiring this result and no support in common sense for such a conclusion. President Eisenhower's agreement with Vice President Nixon in 1958 and President Kennedy's agreement with Vice President Johnson in 1961 both assumed that the Vice President could "act" temporarily as President, but if any doubt remains on this point it should be cleared up by statute or constitutional amendment.

I feel that if this issue is clarified, the major part of the inability problem is solved. It was primarily the doubt as to whether the Vice President would oust the disabled President if he "acted" for him that prevented Vice Presidents from taking any such steps during previous periods of presidential inability.

There are of course other issues which might conceivably be the source of future trouble. One is, do we need some formal procedure for determining and declaring the inability of the President? It is conceivable that a disabled President might be unwilling to concede his disability, and that steps might have to be taken to declare him disabled so that the Vice President would be authorized to "act" as President.

A second issue could arise as to whether a disabled President's inability had been removed so that he could resume his office. Here again it is conceivable that a President who had declared himself or been declared disabled

might seek to resume his post before his inability had actually been terminated.

Many proposals have been made for setting up machinery for making these decisions or settling disputes as to inability. I do not regard the adoption of any of these proposals as essential. I feel that, in the unlikely event questions of this sort should arise, it will be possible to settle them by consultation of executive and legislative leaders, or if that should prove impossible, by emergency legislation. I would see no objection to legislation creating an ex officio standing committee of medical men to whom questions of presidential inability could be referred in case of dispute, but I would give only advisory power to such a body. No appointive body should have the power to oust the President. This should happen only by concurrence of responsible executive and legislative officers, or, in an extreme case, by legislative action alone.

Sincerely yours,

C. Herman Pritchett

C. Herman Pritchett
Chairman

The Vice-Presidency and the Problems of Presidential Succession and Inability

By

JOHN D. FEERICK

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THE VICE-PRESIDENCY AND THE PROBLEMS OF PRESIDENTIAL SUCCESSION AND INABILITY

*JOHN D. FEERICK**

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.[1]

THE orderly transfer of power to President Lyndon B. Johnson upon the tragic death of our late President, John F. Kennedy, clearly revealed one remarkable strength of our Government—its continuity. Succession by the Vice-President was swift and unquestioned. No gap occurred in our executive leadership since there was no doubt about who was to take over at the helm of the Government—the Vice-President. As was noted at the time: "[A] few lines in the Constitution . . . have made the Government of the United States a continuum that calamities like this . . . cannot interrupt or break."[2]

Despite (or perhaps because of) the smooth manner in which executive power changed hands on November 22, 1963, the entire mechanism of succession has again come under public and congressional scrutiny. Newspaper columnists in particular, public figures, and others have voiced strong criticism of various inadequacies in the present system.[3]

* Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

1. U.S. Const. art. II, § 1, cl. 6.

2. Krock, The Continuum: Kennedy's Death Points Up Orderly Progression in U.S. Government, N.Y. Times, Nov. 24, 1963, § 4 (The News of the Week in Review), p. 9E, cols. 1-2.

3. For a sampling of the criticisms of the present succession law, see Childs, Succession, N.Y. Post, Nov. 29, 1963, p. 50, cols. 1-2 ("This is the time to adopt a carefully thought-out plan of succession."); Eisenhower, When the Highest Office Changes Hands, Saturday Evening Post, Dec. 14, 1963, p. 15, col. 4; Lawrence, Presidential System Flaws Seen in Fixing of Tenure, N.Y. Herald Tribune, Dec. 11, 1963, p. 27, cols. 1-2 ("The weakness is the obligation written in the Constitution requiring that Presidential and Congressional elections be held at fixed times."); Lippmann, The Presidential Succession, Wash. Post, Dec. 12, 1963, p. A21, cols. 1-3 ("There are several very grave objections to the present law."); Morris, The Muddled Problem of the Succession, N.Y. Times, Dec. 15, 1963, § 6 (Magazine), p. 11; Nixon, We Need a Vice President Now, Saturday Evening Post, Jan. 18, 1964, p. 6; Reston, The Problem of Succession to the Presidency, N.Y. Times, Dec. 6, 1963, p. 34, col. 5 ("Congress has been remarkably casual about this succession problem from the start of the Republic."); Wilmerding, Jr., Wash. Post, Dec. 8, 1963, p. 1, cols. 2-3, p. A13, cols. 1-4 ("To cast doubt upon the constitutionality of the act of 1947 is to confuse a problem already difficult enough. But that the doubt exists can scarcely be denied."); Letter From Joseph L. Allen to N.Y. Times, Dec. 4, 1963, p. 46,

The Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, under the chairmanship of Senator Birch Bayh of Indiana, has just conducted extensive hearings at which members of the Congress and the public have presented their views and proposals as to how the inadequacies can be corrected.[4] There was general agreement that the time for Congress to eliminate these inadequacies is now, while there is widespread concern about them.

In the main, attention has been focused on three subjects—the Vice-Presidency, the present succession law, and the inability provision of the

col. 7 ("More reasonable provisions can be imagined."); N.Y. Times, Dec. 15, 1963, § 4 (The News of the Week in Review), p. 8E, cols. 1-2 ("The deficiencies inherent in the present law, the obscurity of some of its provisions and the unresolved doubts about its constitutionality urgently require reappraisal . . . ."); id. p. E9, cols. 3-5 (listing of views of other newspapers). See also Drummond, President's Party Is Seen Best Suited to Fill Vacancy, N.Y. Herald Tribune, Dec. 13, 1963, p. 21, cols. 1-2; Montgomery, Presidential Succession, N.Y. Journal-American, Dec. 10, 1963, p. 23, cols. 5-7; Letter From Martin Taylor to N.Y. Times, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, cols. 7-8.

For a sampling of the criticisms of the failure of Congress to solve the problem of presidential inability, see Drummond, A Gap At Top If President Should Fall Seriously Ill, N.Y. Herald Tribune, Dec. 6, 1963, p. 19, cols. 1-2 (It is "imperative" that "the gaping hole in the Constitution as to what happens when a President is temporarily unable . . ." be repaired.); Krock, Succession Problem; The Death of Kennedy Again Points Up the Need to Devise Solution, N.Y. Times, Dec. 8, 1963, § 4 (The News of the Week in Review), p. 9E, cols. 1-2 ("[T]he dreadful event at Dallas, Tex., on Nov. 22 has alerted Congress and the people to the problems as never before."); Krock, The Continuum: Kennedy's Death Points Up Orderly Progression in U.S. Government, N.Y. Times, Nov. 24, 1963, § 4 (The News of the Week in Review), p. 9E, cols. 1-2; Krock, The Cart Is Getting Ahead of the Horse, N.Y. Times, Dec. 12, 1963, p. 38, col. 6; Lewis, Presidential Disability Problem Stirs Concern, N.Y. Times, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 4E, cols. 1-6 ("The need for some agreed solution is conclusively demonstrated by history."); Lippmann, The Problem of a Disabled President, N.Y. Herald Tribune, Dec. 17, 1963, p. 24, cols. 4-5 ("[T]he problem of a disabled President . . . is insoluble without a workable solution of the problem of the succession."); Letter From Martin Taylor to N.Y. Times, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, cols. 7-8 ("What is much more important and receiving much less attention is the failure to deal with the constitutional uncertainty as to the inability of the President."); N.Y. Times, Dec. 7, 1963, p. 26, cols. 1-2 ("President Johnson's agreement with Speaker John W. McCormack . . . is no adequate solution for this difficult problem."); N.Y. Times, Dec. 1, 1963, § 4 (The News of the Week in Review), p. 10E, cols. 3-4 ("The time to clarify Presidential inability or disablement is now—when the subject of succession is in the forefront of the thoughts of a shocked nation."); N.Y. Times, Nov. 24, 1963, § 4 (The News of the Week in Review), p. 8E, cols. 3-4 ("The assassination of John F. Kennedy forces once again on the American people the necessity for correcting an important defect in the Constitution."). See also Letter From Cornelius W. Wickersham to N.Y. Herald Tribune, Dec. 26, 1963, p. 16, col. 7 ("Presidential Inability"); Letter From Author to N.Y. Times, Nov. 17, 1963, § 4 (The News of the Week in Review), p. 8E, col. 7 ("Fixing Presidential Succession").

4. Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964).

Constitution. The purpose of this article is to examine these interrelated subjects. First, a brief history of the Vice-Presidency is presented. Then, the various succession laws are examined and the present proposals to change the 1947 law are considered. Finally, the recent proposals for solving the problem of presidential inability are discussed. The author's article in the October issue of this volume contains the details of this problem and it will be referred to where appropriate.[5]

I. The Vice-Presidency

The succession of Lyndon B. Johnson to the Presidency has left a vacancy in the office of Vice-President for the sixteenth time in our history. The Nation is now in its thirty-seventh year without a Vice-President. Eight Vice-Presidents have succeeded to the Presidency,[6] seven have died in office,[7] and one has resigned from office.[8] A study of the Vice-Presidency is essential for a thorough understanding of the problems of succession and inability.[9]

5. Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73 (1963).

6. They are: John Tyler (April 4, 1841), Millard Fillmore (July 9, 1850), Andrew Johnson (April 15, 1865), Chester A. Arthur (September 19, 1881), Theodore Roosevelt (September 14, 1901), Calvin Coolidge (August 2, 1923), Harry S. Truman (April 12, 1945), and Lyndon B. Johnson (November 22, 1963). The dates are those on which the respective incumbents died. See note 50 infra on the question of when the Vice-President becomes President. Andrew Johnson, Roosevelt, Truman, and Lyndon B. Johnson took th presidential oath on the same day the incumbent died. Taylor, Arthur and Coolidge took it on the following day and Tyler, two days later. The oaths were administered by the following:

Tyler: Chief Judge William Cranch of the Circuit Court for the District of Columbia.
Fillmore: Judge Branch of the Federal District Court for the District of Columbia.
Johnson: Chief Justice Salmon P. Chase of the United States Supreme Court.
Arthur: Judge John R. Brady of the New York Supreme Court and Chief Judge Morrison R. Waite of the United States Supreme Court.
Roosevelt: Judge John R. Hazel of the Federal District Court for the District of Columbia.
Coolidge: His father, a state magistrate and notary public; and Judge A. A. Hoehling of the Supreme Court of the District of Columbia.
Truman: Chief Justice Stone of the United States Supreme Court.
Johnson: Texas Federal District Court Judge Sarah T. Hughes.

Excluding President Lyndon B. Johnson's service, succeeding Vice-Presidents have served almost 23 years of a possible twenty-eight.

7. They are: George Clinton (April 20, 1812), Elbridge Gerry (November 23, 1814), William R. King (April 18, 1853), Henry Wilson (November 22, 1875), Thomas A. Hendricks (November 25, 1885), Garrett A. Hobart (November 21, 1899), and James S. Sherman (October 30, 1912). The deaths of these men left the Vice-Presidency vacant for over 13 years of a possible 28.

8. He is John C. Calhoun (December 28, 1832). The resulting vacancy was for a little over two months.

9. For two excellent studies of the Vice-Presidency, see Waugh, Second Consul (1956);

A. *Creation and Early History*

Surprisingly, the Vice-Presidency seems to have been an afterthought of the framers of the Constitution. It was created in the closing days of the Constitutional Convention of 1787 when there was little time for the careful deliberation which had been given to other parts of the Constitution. Provision for a successor to the President, on the other hand, had existed from the early days of the Convention.[10] There is some doubt as to whether Pinckney's Plan of May 29 contained a presidential succession provision.[11] However, Hamilton's Plan of June 18 did include such a provision[12] as did the August 6 report of the Committee on Detail.[13] The proposed successor at that point was the President of the Senate who would be elected by the Senate from among its members. On August 27, Gouverneur Morris of Pennsylvania proposed that the Chief Justice should be the immediate successor to the President.[14] James Madison disagreed, suggesting that during a vacancy the executive powers should be administered by a council to the President.[15] On September 4 a Committee of Eleven, which had been appointed on August 31 to consider those parts of the Constitution which had been postponed or not acted upon, delivered a partial report to the Convention. It recommended an office of Vice-President as well as election of President and Vice-President by an electoral college.[16]

On September 7, the delegates addressed themselves to the office of Vice-President. Almost all of the discussion centered on the Vice-President's position as President of the Senate. Elbridge Gerry thought that the office, as proposed (*i.e.*, combining the functions of succeeding to

Williams, The Rise of the Vice Presidency (1956). Other studies are Field, The Vice-Presidency of the United States, 56 Am. L. Rev. 365 (1922); Hatch & Shoup, A History of the Vice Presidency of the United States (1934); Levin, Seven by Chance: The Accidental Presidents (1948); Williams, The American Vice Presidency: New Look (1954). See also Tompkins, The Office of Vice President (1957) (contains excellent bibliography).

10. For some history about the colonial office of deputy or lieutenant governor, see Feerick, supra note 5, at 77-81.

11. Id. at 82 & n.45.

12. 1 Records of the Federal Convention of 1787, at 292 (Farrand ed. 1911 & 1937) [hereinafter cited as Farrand].

13. 2 Farrand at 186.

14. Id. at 427.

15. Ibid. Madison thought that "the Senate might retard the appointment of a President in order to carry points whilst the revisionary power was in the President of their own body . . . ." Ibid.

16. Id. at 493-95. Nathaniel Gorham of Massachusetts registered an objection to the method of election of Vice-President: "[A] very obscure man with very few votes may arrive at that appointment." Id. at 499. Roger Sherman of Connecticut approved of the method, saying that it was designed to make the executive independent of the legislature. Ibid. For the remarks of other delegates, see id. at 500-02.

the Presidency and presiding over the Senate), violated the principle of separation of powers by permitting executive interference in the Legislature.[17] Gouverneur Morris dismissed this notion, arguing that the Vice-President could be expected to be independent of the President ("the vice-President then will be the first heir apparent that ever loved his father") and that it mattered little or not at all whether the successor was a Vice-President who was also President of the Senate or a Senate-elected President of the Senate.[18] Roger Sherman of Connecticut was concerned that, without a Vice-President, some Member of the Senate would be deprived of his vote (most of the time) by being made President of the Senate. He also felt that the Vice-President "would be without employment" if he were not President of the Senate.[19] Hugh Williamson of Delaware stated that "such an officer as Vice-President was not wanted."[20] At the conclusion of the discussion the Vice-Presidency was approved by a vote of eight to two.[21] Surprisingly, the delegates gave little attention "to the chief part which the Vice-President has, in fact, played in history, that is, to his succession in case of the death of the President."[22] Similarly, scant attention was paid to the office in the state ratifying conventions.[23]

On September 8, a committee was formed to "revise the style of and arrange the articles agreed to by the House."[24] On September 12, this committee returned a draft to the Convention which, except for a few changes, was to become the Constitution of the United States. The Vice-President was given only two duties by the Constitution: (1) to preside over the Senate, in which capacity he could vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors,[25] and (2) to discharge the powers and duties of

17. Id. at 536-37.

18. Id. at 537.

19. Ibid.

20. Ibid.

21. Id. at 538.

22. Warren, The Making of the Constitution 635 (1937 ed.).

23. For an excellent summary of post-Convention discussion on the Vice-Presidency, see Field, supra note 9, at 369-73.

24. 2 Farrand at 547, 553. As to how this Committee rendered the succession provision ambiguous, see Feerick, supra note 5, at 85-87.

25. U.S. Const. art. I, § 3; id., art. II, § 1. For a good analysis of the casting votes of Vice-Presidents, see Learned, Casting Votes of the Vice-Presidents, 1789-1915, 20 Am. Hist. Rev. 571 (1915), where the author says that such votes were cast 179 times. See also Hatch & Shoup, op. cit. supra note 9, at 101, where it is said that for the period 1789-1929, twenty-four of thirty Vice-Presidents cast tie breaking votes 191 times.

For some congressional discussion of this power, see 6 Cong. Rec. 737 (1877) (debate about whether it can be exercised where question involves membership in the Senate),

the President in case of his death, resignation, removal or inability.[26] His was a unique office, neither legislative nor executive but combining functions of both. What his role would be was clouded in such mystery that Alexander Hamilton was impelled to declare in *The Federalist* that:

> The appointment of an extraordinary person, as Vice-President, has been objected to as superfluous, if not mischievous. It has been alledged, that it would have been preferable to have authorised the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definitive resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is, that as the Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other.[27]

The Vice-President, like the President, was to hold office for four years.[28] He was to be elected at the same time and in the same manner as the President[29] and he was to be subject to impeachment but, while the Constitution provided that the Chief Justice would preside at a trial of the President, no presiding officer was mentioned for a trial of the Vice-President.[30] In contrast to its provision of an oath of office for the President, the Constitution prescribed no oath for the Vice-President.[31] Nor did it mention any qualifications for the Vice-Presidency.

and 47 Cong. Rec. 1950 (1911) (objections to the exercise of power in a matter involving a constitutional amendment).

The opening of the certificates of the presidential electors has been nothing more than a ministerial function of the Vice-President. He does not decide disputed questions about the certificates. Prior to the twelfth amendment, however, Vice-Presidents did exercise such a power. Williams, The American Vice-Presidency: New Look 5 (1954).

26. For the development of the succession clause at the Convention, see Feerick, supra note 5, at 81-87; Silva, Presidential Succession 1-13 (1951), the outstanding treatise on the subject.

27. The Federalist No. 68, at 443 (Wright ed. 1961) (Hamilton). See President Truman's interesting observations on the Vice-Presidency, 1 Truman, Memoirs 53-57 (1955).

28. U.S. Const. art. II, § 1, cl. 1.

29. Ibid.

30. Presumably, the President pro tempore of the Senate would preside at his trial.

31. By An Act of June 1, 1789, 1 Stat. 23, Congress established such an oath. For the oath taken by the Vice-President, see 15 Stat. 85 (1868), 5 U.S.C. § 16 (1958). For an interesting history of the Vice-President's oath, see Learned, The Vice President's Oath of Office, 104 Nation 248 (1917). The author says that prior to the Civil War it was customary for the President pro tempore to administer the oath to the Vice-President. Since then, it has been customary for the outgoing Vice-President to administer it, except, of course, where the Vice-President has either died or succeeded to the Presidency or the incumbent Vice-President has been given a second term. Learned points out seven exceptions to the above rules: In 1805, Chief Justice Marshall administered the oath to Vice-President Clinton and President Jefferson and, in 1833, to Vice-President Van Buren and President Jackson. In 1825, Andrew Jackson (then a Senator and the oldest present) administered the oath to Vice-President Calhoun. In 1809, Clinton took the oath at a place away from Washington, D. C., as did Gerry in 1813 (administered by a federal district court judge), Tompkins in 1821, and King in 1853 (administered in Cuba by a consul pursuant to a special act). See note 7 supra.

This was not due to oversight or lack of deliberation. The Vice-President would have the same qualifications as the President (*i.e.*, a natural-born citizen, at least thirty-five years of age, and fourteen years a resident within the United States)[32] since, under the original method of election, the presidential electors would vote for two persons for President and the person obtaining the second highest number of votes would become Vice-President.[33] This method was designed to place in the office of Vice-President a person equal in stature to the President.

Its purpose was early frustrated, however, because the electors began to distinguish the two votes in their own minds, casting the first for the candidate they considered suitable for the Presidency and the second for their vice-presidential choice. The inherent defect in the original method of election revealed itself in 1800 when most of the Republican electors voted for Aaron Burr and Thomas Jefferson, intending Burr for Vice-President and Jefferson for President. Burr received as many votes as Jefferson so that the election of President fell into the House of Representatives.[34] As a result, the mode of election was modified in 1804 by the adoption of the twelfth amendment, which provided that the electors would cast two distinct votes—one designated for President and one designated for Vice-President. The candidate who received a majority of the electoral votes for the respective office would be elected. If no candidate obtained a majority, the House of Representatives would choose a President from the candidates, not exceeding three, who had the highest number of votes for President, and the Senate would choose a Vice-President from the two candidates who had the highest number of votes for Vice-President. If it happened that the election of a President fell into the House of Representatives and the House failed to elect a President by the date set for his term to begin, the Vice-Presi-

32. U.S. Const. art. II, § 1, cl. 5.

33. See U.S. Const. art. II, § 1. The President was required to obtain a majority of the electoral votes. If he failed to do so, then the House, voting by States, would elect the President from the five highest. (If two candidates had a majority of the electoral votes and were tied, the House would choose between them.) To be elected in the House, a person had to obtain the votes of a majority of the States. The Vice-President would be that person receiving the next highest number of votes of the electors. If there were two or more candidates tied for next highest, then the Senate would choose the Vice-President by ballot. See note 35 infra.

34. For a good account of this election, see Waugh, op. cit. supra note 9, at 41-48.

dent-elect would act as President.[35] In order to insure that the Vice-President would have the same qualifications as the President, the words "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President . . ." were inserted in the amendment.[36]

Shortly after the passage of the Constitution, a number of matters concerning the Vice-Presidency came under discussion and the low opinion of the office became evident. In the debates of the First Congress over an annual salary for the Vice-President, some members of the House of Representatives felt that his work would be so sporadic that he should be paid only on a per diem basis.[37] Others, including James Madison, believed that not to give him an annual salary would be offensive to the dignity of the second officer of the Government. Said Madison:

> If he is to be considered as the apparent successor of the President, to qualify himself the better for that office, he must withdraw from his other avocations, and direct his attention to the obtaining [of] a perfect knowledge of his intended business . . . . [I]f we mean to carry the constitution into full effect, we ought to make provision for his support, adequate to the merits and nature of the office.[38]

An annual salary of $5,000 was finally decided upon.

The paradox which became evident in these debates was the tremendous gap between what the Vice-President was and what he could be. As Vice-President John Adams declared:

> I am possessed of two separate powers, the one *in esse* and the other *in posse*. I am vice-president. In this I am nothing, but I may be everything. But I am president also of the Senate.[39]

Although two of the first three Vice-Presidents became Presidents in their own right (Adams and Jefferson), the notion that the Vice-Presidency was a sure springboard to the Presidency ceased with the adoption of the twelfth amendment and the rise of political parties. As a result of the

35. Until February, 1933, when the twentieth amendment was adopted, the term began on March 4. Now, of course, it begins on January 20. It is to be noted that under the twelfth amendment the Vice-President must obtain a majority of the electoral votes. In 1836, Richard M. Johnson failed to receive a majority so that the Senate had to choose between him and another. (In such a case, a quorum of the Senate is two-thirds of the membership and a majority of the whole number is necessary to a choice.) Johnson emerged as the winner.

36. For an interesting discussion of the thesis that these words would prevent Eisenhower from running for the Vice-Presidency, see Krock, Loophole in Presidential Two-Term Limit, N.Y. Times, Oct. 8, 1963, p. 42, col. 6; Krock, 'Ike for V.P.' Idea Perished 160 Years Ago, N.Y. Times, Oct. 10, 1963, p. 40, col. 6.

37. 1 Annals of Cong. 672 (1789).

38. Id. at 674. See also id. at 673-82.

39. Maclay, The Journal of William Maclay 72 (1927). See Field, supra note 9, at 374-75.

twelfth amendment political considerations rather than ability became all-important in the selection of a Vice-President. Senator White was remarkably perceptive when he said, during the debates on the amendment, that:

> [C]haracter, talents, virtue, and merit, will not be sought after, in the candidate. The question will not be asked, is he capable? is he honest? But can he by his name, by his connexions, by his wealth, by his local situation, by his influence, or his intrigues, best promote the election of a President?[40]

B. *Nineteenth Century Decline*

As predicted, the Vice-Presidency became, in the ensuing years, a very inferior and often disparaged office:[41]

> The adoption of the Twelfth Amendment in 1804 marks a great turning point in the history of the Vice Presidency, and the turn was definitely for the worse . . . . Even without the Twelfth Amendment political party practice was pointing the Vice Presidency toward a decline. But by specifying that each elector would cast one ballot for President and a separate ballot for Vice President the amendment made the descent of the Vice Presidency clearer and more understandable.[42]

Thus, Vice-Presidents in the nineteenth century rarely were given any executive responsibilities, although good relationships existed between Monroe and Gerry, Jackson and Van Buren, Polk and Dallas, Lincoln and Hamlin, and McKinley and Hobart.[43] They did not take part in meetings of the President's Cabinet[44] and their role as President of the Senate became little more than a pastime.[45] Few nineteenth century Vice-Presidents left any legacy for future occupants. The decline in the office was plainly revealed in 1840, when the Democratic National Convention failed to select any Vice-Presidential candidate at all to run

40. 13 Annals of Cong. 143 (1803). Some delegates thought that rather than have the twelfth amendment, the Vice-Presidency should be abolished. Id. at 673-74. For an excellent analysis of the background and the effect of this amendment, see Wilmerding, Jr., The Vice Presidency, 68 Pol. Sci. Q. 17 (1953). The author concludes that the reasons for creating the office were frustrated by the amendment and that the office should, therefore, be abolished. Id. at 41.

41. Its first occupant was to note the following in a letter to his wife: "My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived." 1 Adams, The Works of John Adams 460 (1856 ed.). And its thirty-fourth was to say: "[W]hen I became Vice-President, I was familiar with incongruities and inadequacies of that office." 1 Truman, op. cit. supra note 27, at 53.

42. Waugh, op. cit. supra note 9, at 50.

43. See Rosenberg, The Vice Presidency of the United States 175-90 (1930) (unpublished thesis in University of California Library).

44. See note 54 infra.

45. Hatch & Shoup, op. cit. supra note 9, at 419.

with Van Buren.[46] In general, it can be said that the names of the nineteenth century Vice-Presidents—*e.g.*, Richard M. Johnson, George M. Dallas, William R. King, Hannibal Hamlin, Schuyler Colfax, Henry Wilson, William A. Wheeler, Thomas A. Hendricks, and Levi P. Morton[47] —are wholly unfamiliar to most Americans.

A major nineteenth century development in the Vice-Presidency occurred upon the death of William Henry Harrison on April 4, 1841.

> In upwards of half a century, this is the first instance of a Vice President's being called to act as President of the United States, and brings to the test that provision of the Constitution which places in the Executive chair a man never thought of for that office by anybody.[48]

Considerable discussion was generated about the status of the then Vice-President, John Tyler. Did he become President? Or, did he remain Vice-President with the added responsibility of discharging the powers and duties of the Presidency? Tyler acted decisively, declaring that by God, election and the Constitution he had become President, in every sense.[49] Although he seems to have been of the opinion that he automatically succeeded to the Presidency upon the death of Harrison, he took the presidential oath in order to eliminate all doubt on the question.[50] But doubt remained in the minds of some. Said John Quincy Adams in his diary:

> But it [Tyler's assumption of the title and office of the Presidency] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.[51]

Despite the objections, Tyler's assumption of the office established the precedent that when the President dies, the Vice-President becomes

46. Richard M. Johnson, the incumbent Vice-President at the time, was unable to obtain his party's renomination.

47. For a complete listing of our Vice-Presidents, see Information Please Almanac 568 (1964). In all, there have been thirty-seven Vice-Presidents. Seven have been elected for two terms—Adams, Clinton, Tompkins, Calhoun, Marshall, Garner, and Nixon—and six have become Presidents by election—Adams, Jefferson, Van Buren, T. Roosevelt, Coolidge, and Truman.

48. 10 Adams, Memoirs of John Quincy Adams 456-57 (1876).

49. See remarks of Representative Henry A. Wise of Virginia, Cong. Globe, 27th Cong., 1st Sess. 4 (1841). For the thesis that Tyler was wrong—that under the Constitution he remained Vice-President, acting as President—see Silva, op. cit. supra note 26.

50. Fraser, Democracy in the Making 158, 160 (1938) (The Jackson-Tyler Era). For an argument that he was not constitutionally required to take the presidential oath because succession was one of his constitutional duties for which he had already taken an oath, see Feerick, supra note 5, at 90 & n.84.

51. 10 Adams, op. cit. supra note 48, at 463-64.

President for the remainder of the term.[52] The taking of the presidential oath also became a constitutional custom.[53]

C. *Twentieth Century Growth*

Although Vice-Presidents Tyler, Fillmore, Johnson and Roosevelt had succeeded to the Presidency, the Vice-Presidency was not to undergo a "renaissance" until the twentieth century. In this century, the role of the Vice-President has steadily grown. He has become a regular member of the President's Cabinet,[54] a member of the National Security Council,[55] the head of some executive agencies,[56] a representative of

52. Despite this precedent, which has been given some recognition by the twentieth and twenty-second amendments, the death of an incumbent President usually evokes some discussion over the status of the then Vice-President. Hence the statement that "we probably have not had so many presidents as we have been accustomed to thinking." Field, supra note 9, at 385. See, e.g., Moley, Is Truman Really President?, Newsweek, July 14, 1947, p. 92. Shortly after the succession of President Lyndon B. Johnson, a southwestern attorney brought a lawsuit against him, seeking a determination that he is not President but rather Vice-President, acting as President.

53. See note 6 supra.

54. The practice of the Vice-President's participating in Cabinet meetings dates back to President George Washington. His Vice-President, John Adams, is reported to have taken part in a meeting on April 11, 1791. 1 Writings of Thomas Jefferson 278 (Bergh ed. 1907). See also Learned, The President's Cabinet 121-25 (1912). During the administration of John Adams, his Vice-President, Thomas Jefferson, did not participate in Cabinet meetings. "I consider my office as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations, even were it proposed." 7 Writings of Jefferson 120 (Ford ed. 1896). Thus, it became customary for the Vice-President not to participate. Though there may have been times when Vice-Presidents did attend meetings of the Cabinet (see Paullin, The Vice-President and the Cabinet, 29 Am. Hist. Rev. 498 & nn.13 & 14 (1924)), no change in the custom was to occur until December 10, 1918, when Vice-President Thomas R. Marshall, at President Wilson's request, presided over a meeting of the Cabinet during the absence of Wilson and his Secretary of State from the country. Marshall presided over several meetings and when Wilson returned to the country, Marshall was invited to attend a meeting. Id. at 498-99. In the following administration, the then Vice-President, Calvin Coolidge, became a regular member of the Cabinet until President Harding's death. Id. at 500. Charles G. Dawes, President Coolidge's Vice-President, refused to attend Cabinet meetings, believing it politically and constitutionally "unwise." Hatch & Shoup, op. cit. supra note 9, at 45. Subsequent Vice-Presidents (Garner, Wallace, Truman, Barkley, Nixon and Johnson) have been regular members of the Cabinet. The most significant development happened during the administration of President Eisenhower, i.e., Vice-President Richard M. Nixon presided over the meetings of the Cabinet and National Security Council during the President's absence. See Donovan, Eisenhower: The Inside Story 378-85 (1956); Eisenhower, Mandate For Change 538, 540-41 (1963).

55. 61 Stat. 496 (1947), 50 U.S.C. 402 (1958). This development guards against the case of a Vice-President's being called to the Presidency in an emergency (e.g., Truman and the A-bomb) and not knowing vital facts about the Nation's security.

56. The precedent was established in 1941 by President Roosevelt who made his

the President on good will and diplomatic tours around the world,[57] and a sharer of some of the ceremonial and political functions of the President.[58] In short, he has become an informed, consulted and working member of the Government, adequately trained to assume the responsibilities of the Presidency, should the occasion require it.

D. *Proposed Changes*

The Vice-Presidency is still not above improvement. The practice of selecting vice-presidential candidates on the basis of political considerations rather than their qualifications for the Presidency persists.[59] Proposals to change this practice have been made from time to time but without any discernible effect.[60]

Vice-President, Henry A. Wallace, chairman of the Economic Defense Board. Lord, The Wallaces of Iowa 484-85 (1947). Vice-President Nixon was made chairman of the President's Committee on Government Contracts. Williams, The Rise of the Vice-Presidency 248 (1956).

57. Again, the classic precedents were established by President Roosevelt and Vice-President Henry A. Wallace. Lord, op. cit. supra note 56, at 501-03. This role was carried forward by Vice-President Nixon and even further by President Johnson. For a good account of part of Johnson's tenure as Vice-President, see Fuller, Year of Trial 18-33 (1962).

58. See Nixon, Six Crises (1962). James Reston gives an interesting picture of President Johnson as Vice-President: "When he was Vice President, he had to discipline his energies. He had a limited catalogue of duties, limited for a man of his expansive nature. He stayed within the bounds of his assignment, seldom talked up in Cabinet meetings or the National Security Council unless requested to do so, and, in keeping with his sense of political loyalty, never differed with President Kennedy in the presence of anybody else." Reston, Eisenhower to Johnson: Take It Easy, N.Y. Times Jan. 12, 1964, § 4 (The News of the Week in Review), p. 12E, col. 3.

59. How Vice-President Nixon was selected is described by Eisenhower, op. cit. supra note 54, at 46-47. He says that he "had made in longhand a short 'eligible list' of those I thought both qualified and available." Nixon was the first of five names and was approved by a committee of close advisers to the President. Johnson's selection is recounted in Fuller, op. cit. supra note 57, at 6-8 ("Kennedy picked his second choice for President in 1960."). Recent Vice-Presidents have, indeed, been men of presidential timber but the system does not insure that this will be so in the future.

60. Committees of Congress have given much attention to proposals for selection of presidential and vice-presidential candidates on the basis of nationwide primaries. See, e.g., Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (5 parts), 88th Cong., 1st Sess. (1963). Truman believes that nationwide primaries would be too expensive while former Vice-President Barkley believed that the candidates' own committees would probably bear the expense. Bendiner, The Changing Role of the Vice-President, Colliers, Feb. 17, 1956, p. 53. It has been suggested at times that the vice-presidential candidate be selected before the presidential candidate. This proposal would, it seems, discourage candidates of presidential timber from seeking the nomination as they probably would hold out for the presidential nomination. Another more serious objection is that it would permit the selection of a candidate whose views and personality would be incompatible with those of the presidential candidate. Former President Hoover has suggested a secret ballot instead of unit rule vote

Another area of possible reform is in the Vice-President's work load. While an enumeration of the President's powers and duties would literally fill reams of paper, those of the Vice-President can be briefly catalogued. In addition to being the presiding officer of the Senate,[61] the Vice-President is a member of the National Security Council,[62] chairman of the National Aeronautics Space Council,[63] chairman of the Committee on Equal Employment Opportunity,[64] and a member of the Board of Directors of the Smithsonian Institute (its presiding officer in the absence of the President).[65] He has the power to nominate a limited number of persons for appointment to the various military service academies,[66] and to administer oaths to executive officials.[67] His salary is $35,000 a year, plus an expense allowance of $10,000.[68]

The ascendancy of the Vice-Presidency to its present height argues well for the future, but there is no escaping the fact that the extent of any Vice-President's role in our government will depend on his relationship with the President. Proposals to make his role more specific,[69]

for Vice-President. Bendiner, supra. Other suggestions are that the presidential candidate either indicate several persons whom he would like to have on his ticket and then leave it to the Convention to decide among them, or express no preference at all and let the Convention decide (e.g., Kefauver and Kennedy in 1956). It has also been suggested that slates be presented to the Convention, or that the vice-presidential candidate be the one who has received the second highest number of votes for President. Ibid.

61. In his role as President of the Senate, history has shown that the Vice-President seldom presides over the Senate, that Presidents pro tempore seldom preside, and that the job of presiding is frequently given to junior Senators as they generally have more time. See U.S. News & World Rep., June 26, 1953, p. 71, where Nixon stated that he spent less than 10% of his time at this role.

62. 63 Stat. 579 (1949), as amended, 50 U.S.C. § 402(a) (1958).

63. 75 Stat. 46 (1961), 42 U.S.C. § 2471 (Supp. IV, 1963).

64. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

65. 9 Stat. 102, 103 (1846), 20 U.S.C. §§ 41, 45 (1958).

66. 10 U.S.C. §§ 4342, 6954, 9342 (1958).

67. 75 Stat. 743 (1961), 5 U.S.C. § 16a (Supp. IV, 1963).

68. 3 U.S.C. §§ 104, 111 (1958).

69. Some of the proposals which have been made over the years are as follows:

(1) The Vice-President should be given, in his role as President of the Senate, a vote on "ordinary occasions," a "voice in the debates" of the Senate, and the power to appoint committees of the Senate. T. Roosevelt, The Three Vice-Presidential Candidates and What They Represent, 14 Review of Reviews 289 (1896). Objection has been made to such proposals on the ground that they are contrary to the principle of equality of states and that the Vice-President might be from the minority party. Hatch & Shoup, op. cit. supra note 9, at 43.

(2) The Vice-President should be a liaison officer to Congress. F. Roosevelt, Can the Vice President Be Useful?, Saturday Evening Post, Oct. 16, 1920, p. 8. See Durham, The Vice-Presidency, 1 Western Political Q. 311, 314 (1948) (Vice-President as executive chairman of a legislative council which has "a leading role in the harmonization of legislative policy.").

their advantages aside, are not likely to be adopted. The recent proposal of Senator Kenneth B. Keating of New York that a constitutional amendment be enacted to provide for an executive Vice-President who would be first in the line of succession, as well as a legislative Vice-President, who would be second in line and President of the Senate, has met with some support but even greater opposition.[70] Former Vice-President Nixon summarily dismissed it, saying that by dividing "the already limited functions of the office, we would be downgrading the vice presidency at a time when it is imperative that we add to its prestige and importance."[71] To this can be added the objection that having two Vice-Presidents might well result in neither one being as adequately prepared as were Vice-Presidents Nixon and Johnson to assume the powers and duties of the Presidency in cases of emergency. A Vice-President devoted exclusively to administrative problems leaves much to be desired when one considers the present-day requirements for the Presidency. As our late President stated:

> [T]here is such a difference between those who advise or speak or legislate [or administer], and between the man who must select from the various alternatives proposed and say that this shall be the policy of the United States.[72]

(3) The Vice-President should be given more administrative responsibilities. Menez, Needed: A New Concept of the Vice-Presidency, 30 Social Science 143, 149 (1955) ("The Vice-President must become the Assistant President."); Rossiter, The Reform of the Vice-Presidency, 63 Pol. Sci. Q. 383, 394 (1948) ("[T]he President's chief assistant in the overall direction of the administrative branch"). See also Bush, Needed—A Business Manager, Colliers, March 13, 1920, p. 13; U.S. News & World Rep., July 9, 1948, pp. 19-20. During the 1956 Senate hearing on the proposal to create a position of administrative Vice-President, Clark Clifford, assistant to both Presidents Truman and Kennedy, suggested that the Vice-President could truly become the second officer in the Government if he were moved to the executive branch. This, he recognized, would require a constitutional amendment but only by becoming a "day-by-day working assistant to the President," he said, would he really be prepared for the Presidency. Hearings Before the Subcommittee on Reorganization of the Senate Committee on Government Operations, 84th Cong., 2d Sess. 57 (1956).

(4) Some have suggested the abolition of the office of Vice-President altogether. See note 40 supra. Wilmerding suggests that if the President were to die, be removed, or resign, the Secretary of State would act as President until the holding of a midterm election to fill the vacancy. In cases of inability, he would act until the inability was removed. Wilmerding, The Presidential Succession, Atlantic Monthly, May 1947, p. 91. See Hazlitt, The Vice Presidency, Newsweek, Dec. 2, 1963, p. 86.

See generally Field, The Vice Presidency of the United States, 56 Am. L. Rev. 365, 398-400 (1922); Rossiter, The Reform of the Vice-Presidency, 63 Pol. Sci. Q. 383, 387-89 (1948).

70. S.J. Res. 143, 88th Cong., 2d Sess. (1964). A similar proposal was introduced several years ago by Senator Monroney. For a good discussion of his proposal, see Rossiter, supra note 69, at 391-93.

71. Nixon, We Need a Vice President Now, Saturday Evening Post, Jan. 18, 1964, p. 6.

72. Public Papers of the Presidents of the United States, 1962, at 889 (U.S. Gov't Printing Office, 1963).

Prudence would seem to dictate that the twentieth century growth of the Vice-Presidency be in no way nullified.

II. Presidential Succession

The aftermath of President Kennedy's death has seen renewed discussion and much criticism of the present succession law.[73] Some of the discussion has, unfortunately, centered on the personalities who are now in line of succession rather than on what might be the best kind of law.[74] The criticisms of personalities aside, it is argued that the 1947 law is unconstitutional.[75] The Speaker of the House of Representatives and the President pro tempore of the Senate, it is said, are not "officers" within the meaning of the succession clause and, even if they are, Congress has no power to authorize them to act after they have resigned from their respective offices—which the present law requires them to do preparatory to acting as President. The 1947 law is said to be impractical since the Speaker and President pro tempore are not chosen on the basis of their qualifications for the Presidency and since it allows a political party different from that of the President and Vice-President to take over after them. Hence the demand for change. Former President Dwight D. Eisenhower has expressed a preference for the old Cabinet line of succession, observing that the present law does not fulfill "the requirements of our times."[76] Former Vice-President Richard M. Nixon has said he is in favor of filling a vacancy in the Vice-Presidency, noting that the "vice presidency . . . is the only office which provides complete on-the-job training for the duties of the presidency."[77]

Should the 1947 law be changed? If so, how? An examination of the constitutional background and history of the three succession laws provides some understanding of the strengths and weaknesses of the present law.

A. *The Constitutional Provision and the 1792 Law*

On August 27, 1787, Hugh Williamson of Delaware suggested to the Constitutional Convention that "the Legislature ought to have power to

73. See note 3 supra. For an extremely interesting panel discussion on the general subject, see CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964.

74. See Finney, Line Of Succession, N.Y. World-Tel. & Sun, Dec. 27, 1963, p. 21, cols. 3-7; Viorst, Next in Line for the Presidency, N.Y. Post, Dec. 8, 1963, § 2 (Magazine), p. 5; U.S. News & World Rep., Dec. 30, 1963, p. 26 ("Size-Up of New 'Vice President'"). See also Albright McCormack, Hayden Won't Quit, Wash. Post, Dec. 12, 1963, p. 1, cols. 4-7.

75. 3 U.S.C. § 19 (1958).

76. Eisenhower, When the Highest Office Changes Hands, Saturday Evening Post, Dec. 14, 1963, p. 15.

77. Nixon, supra note 71, at 10.

provide for occasional successors . . . ."[78] His suggestion was acted upon on September 7 when the following provision was agreed to:

> The Legislature may declare by law what officer of the U.S.—shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until such disability be removed, or a President shall be elected.[79]

This provision, with some changes, became embodied in article II, section 1, clause 6 of the Constitution.[80] Pursuant to this power, Congress made the first attempt to set up a line of succession beyond the Vice-President on December 20, 1790. A bill was presented to provide that an officer, the name of which was left blank, shall act as President when there are vacancies in the offices of President and Vice-President.[81] On January 10, 1791, motions were made to name the officer variously as the Secretary of State, the Chief Justice, the President pro tempore and the Speaker.[82] The discussion concluded on January 13 without any consensus having been reached and with some of the delegates remarking that there was no need for immediate action.[83]

In the Second Congress, on November 15, 1791, a Senate committee reported a bill dealing with the choice of presidential electors. On November 23, the bill was returned to the committee which was "instructed to report a clause, making provision for the administration of Government, in case of vacancies in the offices of President and Vice President."[84] The bill was reported on November 28 and was passed by

78. 2 Farrand 427.

79. The words "until such disability be removed, or a President shall be elected" were inserted on the motion of James Madison so as to permit a special election for filling a vacancy in the office of President. Significantly, at the Virginia Ratifying Convention, James Madison answered an objection of George Mason that the Constitution had no special election provision with these words: "When the President and Vice President die, the election of another President will immediately take place; and suppose it would not, all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and to continue only to such expiration." 3 Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 487-88 (1881 ed.).

80. As will be noted from a reading of this clause (see text accompanying note 1 supra), the expression "officer of the U.S." was shortened to "officer" and the semicolon was deleted.

81. 2 Annals of Cong. 1860 (1790).

82. Id. at 1902. James Madison objected to the Chief Justice on the ground that there would be a blending of the executive and judiciary. He objected to the President pro tempore on the ground that as a Senator, he would be subject to instruction by his state and would also be holding two offices. In his opinion, the best successor was the Secretary of State. Id. at 1904. See note 97 infra.

83. Id. at 1914-15.

84. 3 Annals of Cong. 31 (1791).

the Senate on November 30. Little is known as to what transpired in the Senate because its debates were not reported at the time. Section 9 of the bill named the President pro tempore and Speaker, respectively, as the successors. The bill was referred to the House on November 30, and it came under scrutiny by the Committee of the Whole on December 22.[85] On that day, a motion to eliminate section 9 entirely was made and defeated. Then a motion to remove the President pro tempore and Speaker from the line of succession was made. It was defeated on January 2, 1792.

In Committee, feeling was strong that neither the President pro tempore nor the Speaker was an officer in the sense contemplated by the Constitution.[86] Representative Giles declared that "if they had been considered as such, it is probable they would have been designated in the Constitution; the Constitution refers to some permanent officer to be created pursuant to the provisions therein contained."[87] Some felt that they were officers. "If the Speaker is not an officer," said Representative Gerry, "what is he?"[88] Gerry, however, objected to section 9 because it blended the executive and legislative branches of the Government. Representative Hillhouse registered a general objection to any provision by which the President could appoint his own successor since it would take "away the choice from the people . . . violating . . . the first principle of a free elective Government."[89]

On January 2, 1792, the Committee of the Whole reported the bill to the House. A motion to strike out the President pro tempore was narrowly defeated[90] while one to strike out the Speaker was carried.[91] As a result, the bill was laid on the table. On January 6,[92] it was returned to the Committee of the Whole. The Committee considered it on February 9, at which time the President pro tempore was removed

85. Id. at 278.

86. In the First Congress, Representative White had advanced this argument with which Representative Sherman had disagreed. 2 id. at 1902-03 (1790).

87. 3 id. at 281 (1791). In agreement were Representatives Giles, Sturges, White and Williamson. Said Williamson: "[T]his extensive construction of the meaning of the word officer, would render it proper to point out any person in the United States, whether connected with the Government or not, as a proper person to fill the vacancy contemplated." Ibid.

88. Ibid.

89. Ibid.

90. The vote was 27 nays and 24 yeas. Included among the yeas were four delegates to the Constitutional Convention—Baldwin, Fitzsimons, Madison and Williamson. The nays had only two—Gerry and Gilman. Id. at 303.

91. The vote was 26 to 25. In favor of it were the following delegates to the Constitutional Convention: Baldwin, Fitzsimons, Gerry, Madison and Williamson.

92. Id. at 315.

from the line of succession. On the next day, the Secretary of State was added.[93] The House concurred in the substitution and the bill was passed.[94]

In the Senate, the House amendment was rejected: the President pro tempore and Speaker were again inserted and the Secretary of State removed. The Senate's opposition to having the Secretary of State next in line after the Vice-President is said to have been due to Alexander Hamilton's dislike of the then Secretary of State, Thomas Jefferson.[95] Since Hamilton's influence in the Senate was great, he was able to have his own way. Thus, on February 21, the bill was returned to the House. The House withdrew its amendment[96] and the bill became law on March 1, 1792, with the signature of President George Washington.[97] For the next ninety-four years, the President pro tempore and Speaker were the only successors after the Vice-President. During that time, four Presidents and five Vice-Presidents died in office.[98] These vacancies occurred in singles so that the 1792 law was never employed.[99]

93. Id. at 401. A motion to add the senior Associate Justice was not passed.

94. Id. at 402. Baldwin, Fitzsimons, Gilman, Madison and Williamson voted for it, while Gerry voted against it.

95. See 3 Rives, History of the Life and Times of James Madison 223 (1868); 8 Works of Alexander Hamilton 261 (Lodge ed. 1886); 1 Works of Fisher Ames 114 (1854).

96. 3 Annals of Cong. 417 (1791). Three delegates to the Constitutional Convention—Dayton, Fitzsimons and Gerry—favored the withdrawal. Four did not—Baldwin, Gilman, Madison and Williamson.

97. 1 Stat. 239 (1792). It should be noted that section 10 of the act provided that whenever the offices of President and Vice-President became vacant, the Secretary of State was to notify the Governor of every state that electors were to be appointed within thirty-four days prior to the first Wednesday of the ensuing December. If less than two months remained before that date and if the term of the last President and Vice-President were not to end in the following March, the election would take place in December in the year next ensuing. If the term were to end in March, no election at all would take place.

Shortly after the law of 1792 was passed, Madison wrote Edmund Pendleton (Governor of Virginia) a letter in which he expressed his opposition to the act. He stated, in part, that either the Speaker or President pro tempore "will retain their Legislative stations, and then incompatible functions will be blended; or the incompatibility will supersede those stations, & then those being the substratum of the adventitious functions, these must fail also. The Constitution says Congress may declare what officers, &c., which seems to make it not an appointment or a translation, but an annexation of one office or trust to another office." 6 Writings of James Madison 95 n.1 (Hunt ed. 1906).

98. See notes 6 and 7 supra.

99. A double vacancy almost occurred on February 28, 1844. President Tyler and several members of his Cabinet were aboard a ship when an explosion occurred, killing the Secretaries of State and Navy. Tyler narrowly escaped with his life.

B. *The 1886 Law*

Dissatisfaction with the Act of 1792 reached a peak in the 1880's. On September 19, 1881, President James A. Garfield died from gunshot wounds inflicted eighty days earlier and Vice-President Chester A. Arthur succeeded to the Presidency. The country was again left without a Vice-President and, shockingly, for a time without any successor at all to Arthur. This was because Congress was out of session at the time of Garfield's death and the new Congress was not due to convene until December. Hence, there was no Speaker[100] and, since Arthur had presided at the last session of the Senate, there was no President pro tempore.[101] On November 25, 1885, Vice-President Hendricks died, again at a time when Congress was not in session. As in Arthur's case, for a time there was no successor to President Cleveland.[102]

These events generated a considerable amount of discussion in Congress during the years 1881-1886 regarding the problems of succession and inability.[103] Said Senator Jones during an early discussion:

[N]othing can be of greater importance to the American people or their representatives in Congress than those discussions of the fundamental law which may possibly

100. Prior to the adoption of the twentieth amendment, the terms of all Members of the House of Representatives expired on March 4 of the odd years. Thus, there would be a vacancy in the office of Speaker until the next Congress met (usually in the following December) and elected a Speaker. The twentieth amendment (ratified Feb. 6, 1933) provided that terms of Senators and Representatives would begin on January 3 instead of March 4, and that the regular sessions of Congress would begin at the same time. Thus, now there would normally be only a brief period during which a vacancy would exist in either the office of Speaker or President pro tempore—i.e., the time between January 3 and election of a Speaker or President pro tempore. See generally 93 Cong. Rec. 7711 (1947) (remarks of Senator Wherry).

101. See 12 Cong. Rec. 505 (1881). The Senate practice at the time was to elect a President pro tempore only when the Vice-President was absent. It was customary for the Vice-President to absent himself from the Senate in its closing sessions so that a President pro tempore could be elected to hold office until the next session. In this case, however, the Senate was closely divided and Vice-President Arthur's tie-breaking vote was required. Thus, he presided and no President pro tempore was chosen. 11 id. at 465-71 (1881). Since March 12, 1890, the Senate has elected its President pro tempore to hold office continuously (at the pleasure of the Senate) regardless of absences of the Vice-President. Thus, this situation would no longer be possible. 21 id. at 2153 (1890).

102. Hendricks had presided at a special session of the Senate in March to confirm presidential nominations so that no President pro tempore was elected. 17 id. at 1 (1885).

103. It should also be noted that another event which added to the criticism of the law of 1792 was the impeachment of President Johnson. Since he had succeeded to the Presidency upon the death of Lincoln, there was no Vice-President. Benjamin Wade of Ohio was President pro tempore of the Senate and next in line to succeed to the Presidency. When the Senate tried Johnson, Wade, who would succeed if Johnson were convicted, sat as a judge on the court of impeachment and voted "guilty." D. M. Dewitt,

have the effect of clearing away some of the doubts which surround this grave and important subject.[104]

In the discussions to follow, numerous objections to the law of 1792 were advanced.[105] As noted above, one was the possibility that there might be no President pro tempore or Speaker.[106] It was argued time and again, particularly by Senators Hoar,[107] Maxey,[108] Beck[109] and Garland,[110] that the President pro tempore and the Speaker were not officers under the succession provision but merely officers of their respective Houses or states.[111] James Madison was cited as an authority for this proposition,[112] as was the classic *Blount* decision,[113] which has been interpreted as holding that a Member of Congress is not a civil officer of the United States. Parts of the Constitution itself were cited in support of this position.[114] An officer under the succession provision, it

The Impeachment and Trial of Andrew Johnson 553 (1903). Johnson was acquitted by one vote. Senator Evarts said during the debates that the Constitution would never permit the House to impeach and the Senate to convict and then replace the President with one of their own members. 17 Cong. Rec. 250 (1885).

104. 13 id. at 141 (1881).

105. For a good historical review of the law of 1792 and some pertinent criticisms, see letter from D. F. Murphy, Official Reporter United States Senate, to Senator James B. Beck, dated July 14, 1881, in 13 Cong. Rec. 126 (1881) (remarks of Senator Beck). See also 93 id. at 7768-71 (1947) (remarks of Senator Hatch); 17 id. at 214-15 (1885) (remarks of Senator Maxey); 14 id. at 876-79 (1883) (remarks of Senators Hoar & Garland); Corwin, The President: Office and Powers 56-57 (1940).

106. See 13 Cong. Rec. 121 (1881) (remarks of Senator Beck); 14 id. at 876 (1883) (remarks of Senator Hoar); 17 id. at 216 (1885) (remarks of Senator Maxey); 17 id. at 686 (1886) (remarks of Senator Dibble).

107. See his remarks at 14 id. at 688-89, 876-77 (1882); id. at 965 (1883).

108. See his remarks at 13 id. at 129-33, 139 (1881); 14 id. at 913 (1883); 17 id. at 214-16 (1885).

109. See his remarks at 13 id. at 122 (1881); 14 id. at 954 (1883); 17 id. at 220-21 (1885).

110. See his remarks at 13 id. at 137-139 (1881); 14 id. at 878 (1883).

111. For similar remarks of other Senators, see 13 id. at 128 (1881) (Beck); 17 id. at 224 (Morgan), 250 (Evarts) (1885); 17 id. at 684 (Dibble), 687 (Baker), 688 (Ryan) (1886).

112. See note 97 supra. See remarks at 14 id. at 877 (Senator Hoar), 913 (Senator Maxey) (1883); 17 id. at 688 (1886) (Senator Ryan).

113. 8 Annals of Cong. 2245-415 (1798). Blount was impeached by the House. When he was tried in the Senate, Jared A. Ingersoll and A. J. Dallas, who represented him, pleaded lack of jurisdiction on the grounds that a Senator was not a civil officer and thus not subject to impeachment. The Senate dismissed the case, giving no reason for its decision.

U.S. Const. art. II, § 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction . . . ."

114. See U.S. Const. art. II, § 1, cl. 2, where a distinction is made between Senators and Representatives and Officers: "[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States . . ."; and U.S. Const. amend. XIV, § 3: "No person shall be a Senator or Representative in Congress . . . or hold any office, civil or military, under the United States . . . ."

It was also argued (14 Cong. Rec. 913 (1883) (remarks of Senator Maxey)) that the President pro tempore is not even an officer of the Senate by virtue of U.S. Const. art. I, § 3, cl. 5: "The Senate shall chuse their other Officers, and also a President pro tempore . . . ."

was said, was an officer of the United States, a permanent officer, one who receives his commission from the President. Even if the President pro tempore and Speaker were such officers, it was urged, the Constitution would still prevent them from acting as President because of the provision that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[115] The law of 1792 did not require the officer acting as President to resign[116] but, if it had, it would still have been objectionable because the function of acting as President must be added to an existing office.[117] If the President pro tempore or Speaker resigned, he would have no office to which the function of acting as President could be attached. On the other hand, it was said that if he did not resign, there would be a violation of the principle of separation of powers[118] as he would be the presiding officer of his House and thus entitled to vote and debate on measures.[119] In addition, his tenure as acting President would be subject to the will of his respective House[120] and it could come to an abrupt end if he lost his legislative seat at the polls.[121]

Most of the critics of the 1792 law favored a Cabinet line of succession,[122] believing that there would be no doubt about their status as

115. U.S. Const. art. I, § 6, cl. 2.

116. The law was apparently based on the premise that the Speaker and President pro tempore were not eligible to act as President unless they retained their offices while so acting.

117. See remarks at 14 Cong. Rec. 689 (1882) (Senator Hoar), 954 (1883) (Senator Dawes); 17 id. at 250 (1885) (Senator Evarts), 687 (1886) (Senator Baker), 688 (1886) (Senator Ryan). "[T]he Presidency is annexed by law to an office. It is not a person holding an office at the time succeeding to the Presidency, but it is an officer continuing in that office who is to perform as an annex or incident merely to another office the great duties of the Presidency itself." 14 id. at 689 (1882) (remarks of Senator Hoar).

118. See the remarks at 14 id. at 878 (Senator Garland), 954 (Senator Beck), 954 (Senator Dawes) (1883); 17 id. at 214 (Senator Maxey), 248-50 (Senator Evarts) (1885); 17 id. at 684 (Senator Dibble), 687 (Senator Baker), 688 (Senator Ryan) (1886).

119. See the remarks at 14 id. at 954 (Senator Beck), 955 (Senator Dawes) (1883); 17 id. at 684 (Senator Dibble), 688 (Senator Ryan) (1886).

120. See the remarks at 14 id. at 689 (1882) (Senator Hoar); 17 id. at 250 (1885) (Senator Evarts); 17 id. at 684 (Senator Dibble), 687 (Senator Baker), 689 (Senator Ryan) (1886).

121. See the remarks at 13 id. at 123 (Senator Beck), 138 (Senator Garland) (1881); 14 id. at 883-84 (Senator Morgan), 954 (Senator Beck) (1883).

122. See the remarks at 13 id. at 137 (1881) (Senator Garland); 17 id. at 216 (Senator Maxey), 248 (Senator Evarts) (1885); 17 id. at 684, 686 (Senator Dibble), 688 (Senator Baker) (1886).

officers,[123] that there would be continuity of administration and policy,[124] and that the Secretary of State would be far better qualified for the Presidency than either the President pro tempore or Speaker.[125] Opposition to setting up a Cabinet line of succession centered on the points that the original law was written by the Founding Fathers,[126] and that the President would be able to appoint his own successor, which would be contrary to the elective principle of our democracy.[127]

The arguments for a Cabinet line of succession and against the law of March 1, 1792 prevailed with the adoption of the Act of January 19, 1886.[128] The act removed the President pro tempore and the Speaker from the line of succession and added the heads of the executive departments, as follows: Secretary of State, Secretary of Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of Navy and Secretary of Interior.

Some of the advocates of the 1886 law criticized the special election provision of the Act of 1792 on the grounds that it was unwise[129] or even unconstitutional.[130] Yet, the words "until another President shall be elected" were nonetheless inserted in the 1886 Act, together with a proviso that the Cabinet successor would have to call Congress into session within twenty days after succeeding if it were not then in session. It would thus be left to Congress to decide whether or not to call a special election.[131]

123. See the remarks at 14 id. at 956 (1883) (Senator Sherman); 17 id. at 216 (1885) (Senator Maxey).

124. See the remarks at 14 id. at 688-89 (Senator Hoar), 954 (Senator Beck), 955 (Senator Dawes) (1882); 17 id. at 686 (1886) (Senator Dibble).

125. See the remarks at 14 id. at 689 (1882) (Senator Hoar), 878 (1883) (Senator Garland), 915 (1883) (Senator Maxey).

126. See the remarks at 17 id. at 670 (1886) (Senator Peters). For a good answer to this objection, see 17 id. at 216 (1885) (remarks of Senator Maxey).

127. See the remarks at 14 id. at 690 (1882) (Senator Edmunds), 956 (1882) (Senator Dawes), 960 (1883) (Senator Ingalls); 17 id. at 686 (1886) (Senator Osborne).

128. 24 Stat. 1 (1886).

129. See the remarks at 14 Cong. Rec. 689 (1882) (Senator Hoar), 954 (1883) (Senator Beck); 17 id. at 216 (1885) (Senator Maxey), 688 (1886) (Senator Baker).

130. See the remarks at 14 id. at 916 (1883) (Senator Maxey); 17 id. at 224 (1885) (Senator Morgan) (the words "shall be elected" in the Constitution mean every four years), 248 (1885) (Senator Evarts), 685 (1885) (Senator Dibble), 690 (1886) (Senator Ryan). For views that special elections were intended, see 14 id. at 690 (1882) (Senator Edmunds), 921 (1882), 955 (1883) (Senator Dawes). See also 14 id. at 957 (1883) (Senator Sherman); 17 id. at 224 (1885) (Senator Teller).

131. The feature which provides that the acting President serves "until another President shall be elected" is severely criticized in Hamlin, The Presidential Succession Act of 1886, 18 Harv. L. Rev. 182 (1905). The author takes the position that these words are both confusing and unwise in that the tenure of the successor is not defined (i.e., whether or not it is for the rest of the presidential term) and that they would allow Congress to harass the

From 1886 to 1945, three Presidents and two Vice-Presidents died in office.[132] The vacancies again occurred in singles so that the Act of 1886 was never resorted to.

C. *The 1947 Law*

After the death of President Franklin D. Roosevelt on April 12, 1945 and the succession of Vice-President Harry S. Truman to the Presidency, criticism of the the 1886 Act manifested itself. In a special message to Congress on June 19, 1945, President Truman declared:

> [B]y reason of the tragic death of the late President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act.
>
> I do not believe that in a democracy this power should rest with the Chief Executive.
>
> Insofar as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country.
>
> The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.[133]

In placing the Speaker ahead of the President pro tempore, President Truman stated that the Members of the House are closer to the people than those of the Senate since they are elected every two years and thus the Speaker would be closer than the President pro tempore. He recommended that whoever succeeds after the Vice-President should serve only until the next congressional election or a special election to elect a President and Vice-President.

On June 25, 1945, Representative W. Sumners of Texas introduced a bill[134] embodying the President's recommendations, adding the Speaker and President pro tempore, respectively, to the top of the cabinet line of succession. It was debated briefly in the House on June 29, in which debate Representatives Kefauver,[135] Robsion, Sumners, Reed, Mich-

acting executive, should it choose to do so. Cf. Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451, 472-75 (1949).

132. See notes 6 and 7 supra. It is to be noted that the Republican candidates for office in 1940, i.e., Wendell L. Willkie and Charles McNary, both had died before the term of Roosevelt and Wallace had ended.

133. 91 Cong. Rec. 6272 (1945).

134. H.R. 3587, 79th Cong., 1st Sess. (1945).

135. "I shall not elaborate upon the arguments which we are all familiar with; that he is closer to the people; that he has much governmental experience; that he has been honored by his colleagues who are the direct representatives of the people. I think we should also bear in mind that the Speaker of the House of Representatives is an official who, if he

ener[136] and Monroney[137] expressed support for the bill. The passage of the first succession law and the long acquiesence therein, the Supreme Court's decision in *Lamar v. United States*,[138] and parts of the Constitution itself were referred to in support of the contention that a law placing the Speaker and the President pro tempore in the line of succession would be constitutional.[139] Representatives Gwynne, Hancock and Springer argued that the Speaker and President pro tempore were not officers under the succession clause.[140] The special election feature of the Sumners bill was attacked by Representative Robsion.[141] He stated that it would require conforming changes in the state election laws and even in some state constitutions. Joined by Representatives

should become Acting President, would know how to get along with the Congress. He is bound to have experience in government which would qualify him for that position." 91 Cong. Rec. 7016 (1945).

136. "[A] Speaker . . . is always a man who has on numerous occasions been selected by the people, a man with legislative as well as executive experience, a man in a position to cooperate with the Congress, a very essential factor in the picture of Government at all times. . . . As between being governed by a bureaucrat or an 'heir apparent to the throne' selected by any Executive, I much prefer as our President a man elected by the people themselves. This is representative democracy and should be adhered to in this particular case, unless there is constitutional prohibition, and I do not believe there is." 91 Cong. Rec. 7011 (1945).

137. "I believe he was very wise in recommending that the Speaker of the House is the nearest possible officer to express the maximum representative choice of the people at the most recently held national election that it is possible to find in our Government." 91 Cong. Rec. 7012 (1945).

138. 241 U.S. 103 (1916). In that case, the Court held that a Member of the House of Representatives was an officer of the Government within the meaning of a penal statute making it a crime for one to impersonate an officer of the Government. The Court was careful to note that the issue presented was not a constitutional one. In the course of its opinion, the Court stated: "[W]hen the relations of members of the House of Representatives to the Government of the United States are borne in mind and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute." Id. at 112.

The Lamar decision has been construed by several state courts as holding that a Member of Congress is a United States officer and not a state officer. See, e.g., State ex rel. Pickrell v. Senner, 92 Ariz. 243, 375 P.2d 728 (1962); Harless v. Lockwood, 85 Ariz. 97, 332 P.2d 887 (1958); State ex rel. Carroll v. Becker, 329 Mo. 501, 45 S.W.2d 533 (1932); Ekwall v. Stadelman, 146 Ore. 439, 30 P.2d 1037 (1934). For Attorney General opinions that Members of Congress are officers of the United States, see 93 Cong. Rec. 8621-22 (1947) (Acting Attorney General McGregor); 17 Ops. Att'y Gen. 419 (1882) (Attorney General Brewster).

139. Representative Kefauver argued that U.S. Const. art. I, § 2, cl. 5, which provides: "The House of Representatives shall chuse their Speaker and other Officers . . . ," shows that the Speaker is an officer. See generally 91 Cong. Rec. 7008-28 (1945).

140. Id. at 7015, 7017-18, 7022.

141. Id. at 7010. As reported, the bill provided for a special election to fill vacancies in the offices of President and Vice-President if such should occur ninety days or more before the mid-term congressional elections.

Kefauver,[142] Monroney[143] and Reed,[144] Robsion was successful in eliminating the provision altogether.[145] As amended, the Sumners bill passed the House and was forwarded to the Senate, where it became pigeonholed in committee.

The 1946 congressional elections brought a different party from that of the President into the majority in Congress.[146] President Truman, however, still asked Congress for action on his succession recommendations, despite the fact that their enactment would place a Republican Speaker in the line of succession.[147] Finally, in June 1946, the Senate gave serious thought to a bill (similar to that of Sumners) which had been introduced several months before by Senator Wherry.[148] Unlike the Sumners bill, it contained no special election provision and it expressly required the Speaker and President pro tempore to resign from Congress before they could act as President.[149] In the Senate debates, Senator Hatch argued at length that the Speaker and President pro tempore were not officers, that if an officer resigns his office he can not act as President, that it would violate the principle of separation of powers for a Member of Congress to act as President, and that a

142. He stated: "[I]t probably would upset things too much within a period of 4 years to have four people fill the office of President—the President, the Vice President, the Speaker of the House—and then have an election to get the fourth person." Id. at 7017.

143. "I feel that the Speaker should continue to fill that unexpired term of the Presidency in order to avoid creating disunity and division which always occurs in a national election at a time when we would need the greatest unity in our country." Id. at 7013. He went on to point out that a special election law passed at a time when one was acting as President could be vetoed by that person.

144. Such a provision, he said, was "impractical . . . cumbersome . . . expensive and of doubtful constitutionality." Id. at 7020.

145. Id. at 7024-25. The provision was believed by some to be unconstitutional (see, e.g., id. at 7022 (remarks of Representative Springer)). See notes 129-30 supra.

146. In 1945, the Speaker was Sam Rayburn, one of the country's ablest public servants. In a sense, a vote for the Sumners bill was considered a vote for Rayburn. In 1946, Joseph W. Martin, Jr., of Massachusetts became Speaker. This further background should be noted: When Truman became President, Edward R. Stettinius, Jr., was Secretary of State. It was felt by many Members of Congress that "he had not had sufficient governmental experience to exercise the duties of President." 25 Cong. Dig. 67 (1946). On June 27, Stettinius resigned his position, and on July 3, former Senator James E. Byrnes was appointed as his successor. Interest in adopting a new law waned. See S. Con. Res. 50, 79th Cong., 2d Sess. (1946), which looked to setting up a committee of Members of both Houses to study the problems involved. It was never adopted by the House.

147. See Letter from President Truman to President pro tempore Vandenberg and Speaker Martin, Feb. 5, 1947, in 93 Cong. Rec. 7693 (1947).

148. S. 564, 80th Cong., 1st Sess. (1947).

149. The Sumners bill was not clear on this point. During the House debates on the Sumners bill, Representative Judd argued that the Speaker and President pro tempore did not have to resign because they would not be holding any office but merely acting as President. 91 Cong. Rec. 7027 (1945).

Speaker or President pro tempore is not elected on the basis of his qualifications for the Presidency.[150] Some felt that the Wherry bill represented piecemeal legislation and that it should be given further consideration in committee.[151] An amendment which would place the President pro tempore ahead of the Speaker was proposed by Senator Russell.[152] It was narrowly defeated, largely because of Senator Vandenberg, the then President pro tempore, who argued that the Speaker was "the officer reflecting the largest measure of popular and representative expression at the instant moment of his succession."[153] A proposed amendment by Senator McMahon regarding a provision for a special election was defeated,[154] as was an amendment by Senator Wiley to add the highest ranking military or naval officers to the line of succession after the Cabinet heads.[155] The bill was finally put to a vote and it passed by a vote of 50 to 35.[156] It passed the House on July 10 by a vote of 365 to 11[157] and became law on July 18, with President Truman's signature.

The 1947 law provides that "if, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President then the Speaker . . . shall, upon his resignation as Speaker and as Representative in Congress, act as President."[158] If there is no Speaker at the time, then the President pro tempore shall act as President, upon his resignation as President pro tempore and as Senator.[159] If either the Speaker or President pro tempore acts, he

150. See 93 Cong. Rec. 7767-70 (1947) for an excellent presentation of these arguments by the Senator.

151. Id. at 7776-77. That the Speaker and President pro tempore would have to resign their offices and membership in Congress before they could act in a case of inability, even if it were to be for a day, was objected to. Id. at 7774.

152. Id. at 7780.

153. Id. at 7781. The vote was 55 to 31.

154. Id. at 7783-84. McMahon's proposal provided for the election, by the last electoral college, of a new President and Vice-President, where vacancies in these offices occurred 120 days or more before the end of the term. Senator Wherry objected to the amendment on the grounds that Congress had no special election authority, that the Constitution provided only for four-year terms, and that such a power would interfere with the right of the states to say how their electors are to be chosen.

155. Id. at 7785.

156. Id. at 7786. Only Democrats opposed it while 47 Republicans and 3 Democrats favored it.

157. Id. at 8634-35. Ten Democrats and one Republican opposed the bill.

158. 62 Stat. 677 (1948), 3 U.S.C. § 19(a)(1) (1958).

159. 62 Stat. 677 (1948), 3 U.S.C. § 19(b) (1958). The act is not entirely clear on whether a new Speaker, elected after a Speaker has resigned to act as President, is next in line. The legislative history of the act argues for the new Speaker. See 93 Cong. Rec. 8626 (remarks of Representative Robsion), 8622 (remarks of Representative Michener), 7696 (remarks of Senator Wherry) (1947); 91 id. at 7009 (remarks of Representative Allen) (1945). See also 62 Stat. 677 (1948), 3 U.S.C. § 19(a)(2) (1958), providing that: "The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection." Furthermore, the act is not explicit that the Speaker and President pro tempore would have to take the presidential oath, though such was intended. Their resigning from the Congress and the taking of the oath would probably be simultaneous so that, in a sense, at the time that they act as President, they would still be "officers."

does so until the end of the presidential term except in cases of failure to qualify or inability, in which cases he acts until a President or Vice-President qualifies or recovers from an inability. (If the President pro tempore acts, he cannot be replaced by a new Speaker.)

If there should be no Speaker or President pro tempore at the time of an emergency, then the line of succession runs to the highest on the following list who is not under a disability to discharge the powers and duties of the President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor.[160] A Cabinet officer automatically resigns his departmental position upon taking the presidential oath of office. He acts as President for the rest of the term or until a President, Vice-President, Speaker or President pro tempore is available.[161] The 1947 law makes it clear that no one may act as President who does not have the constitutional requirements for the Presidency.[162]

D. *Present Proposals*

The 1947 Act, like the Acts of 1792 and 1886, has never been applied.[163] Since President Kennedy's death—the only death in office of

160. Subsection (e) of the act provides that only such officers appointed by and with the advice and consent of the Senate prior to the happening of the particular contingency and not under impeachment at the time by the House of Representatives are eligible. 62 Stat. 677 (1948), 3 U.S.C. § 19(e) (1958). It will be noted that the Secretary of Health, Education and Welfare has never been added to the line of succession.

161. Thus, a Secretary of Treasury who acts can not be superseded by a Secretary of State.

162. See text accompanying notes 34-36 supra. Subsection (f) provides that an individual who acts as President is paid at the rate then applicable to the President. 62 Stat. 677 (1948), 3 U.S.C. § 19(f) (1958).

163. Is it unconstitutional? Some outstanding authorities think it is. See Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451 (1949). Professor Silva states that the interpretation that "the Constitution does not contemplate the presiding legislative officers as officers of the United States," is "supported by all the commentators." Id. at 463-64. She says that the 1947 law provides for succession by the Speaker and President pro tempore on the basis of their status as presiding officers and not as Members of Congress. (The Constitution does not require that they be Members of Congress, though

a President since the enactment of the 1947 Act—the lines for and against the law have been clearly drawn. Former President Eisenhower stands first in the group which opposes the law:

> [I]f you have a line of succession which, right after the Vice-President, brings in two of the legislative group, you can have a very, very bad situation arise . . . in a period of crisis. For six years of my administration, of course, I had a Congress that was controlled by the Democrats, so right behind Mr. Nixon in the line of succession stood, under the present law, Mr. Rayburn, the Speaker of the House . . . . [M]y immediate predecessor . . . had . . . the same experience I did in reverse. He had Mr. Martin . . . . [W]hen there was no Vice-President, you would have had different parties taking over suddenly . . . the Executive department . . . . You can't change it over night and get it working effectively. I believe that if the electorate says that such-and-such a party should have the White House for four years, it ought to have the White House for four years.[164]

In contrast, President Truman favors the present law, for the following reasons:

> The Speaker of the House has usually been a member of the House for a good, long time before he's ever elected Speaker, he comes more nearly being elected by the country at large than any other public servant in the federal government and of course, that's the reason I placed him next to the Vice-President in the succession . . . .[165]

they have always been and, without a doubt, will always be.) For other articles in point, see Kallenbach, The New Presidential Succession Act, 41 Am. Pol. Sci. Rev. 931, 939-41 (1947); Wilmerding, Jr., Wash. Post, Dec. 8, 1963, p. 1, cols. 2-3. See also Rankin, Presidential Succession in the United States, 8 J. of Politics 44, 51-55 (1946).

Space limitations will not permit a detailed examination of the question. Suffice it to say that it seems unlikely that the Supreme Court would ever declare the law unconstitutional. The Court would, most likely, be faced with the question at the time one of the presiding officers had taken over. It is suggested that under such circumstances the Court would avoid the question by saying it involved a political question—or if it did decide it, would hold that the Speaker and President pro tempore are United States officers, based on the long acquiescence in the 1792 law and the Court's decision in Lamar v. United States, 241 U.S. 103 (1916). See notes 138 supra & 166 infra.

It is to be noted that no constitutional problems are created when the Speaker or President pro tempore acts in a case where neither a President-elect nor a Vice-President-elect has qualified. The twentieth amendment provides that Congress may declare what "person" shall act in such a case.

164. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 35-36. Eisenhower further stated that: "If the Presidency went to a member of the Cabinet, then if that man had more than one year to serve his Presidency, I think they [sic] might be called a special election and . . . let the people decide this thing." Id. at 38. See Lippmann, The Presidential Succession, N.Y. Herald Tribune, Dec. 12, 1963, p. 24, cols. 4-6 (Cabinet, with a special election proviso); Wilmerding, Jr., Wash. Post, Dec. 8, 1963, p. 1, cols. 2-3 (Cabinet, plus midterm election for President); Wash. Post, Jan. 10, 1964, p. A12, cols. 2-4.

Interestingly, CBS Reports interviewed 59 Senators, of whom most said "something can and must be done about the line of succession. Only one or two think nothing need be done about [it]. . . ." CBS Reports, supra, at 47. See N.Y. Times, Feb. 23, 1964, § 4 (The News of the Week in Review), p. 8E, cols. 1-2 (advocates re-establishing the Cabinet line of succession).

Whether the Speaker and President pro tempore should be removed from the line of succession in favor of immediate succession after the Vice-President by the heads of the executive departments (in order to insure continuity of policy and administration) and whether the present law is more democratic than the law of 1886 are issues more of the nature of policy than not.[166] History shows that reasonable men have

165. CBS Reports, supra note 164, at 36. Truman's first preference, however, which he expressed several years ago, is to have the last electoral college meet to elect a new Vice-President whenever a vacancy occurs in that office. Id. at 40-41. Senator Kenneth B. Keating of New York has stated that: "I don't like the succession to the regular members of the Cabinet because . . . . One, they are not elected officials. Second, they are very apt to be specialists in their field." Id. at 37. Speaker John McCormack also supports the present law ("I supported the 1947 Act recommended by former President Harry S. Truman and I still support it.") and notes that the Members of Congress "are pretty much wedded" to it. Id. at 43-44; see N.Y. Times, Dec. 9, 1963, p. 1, cols. 2-3. See also Lawrence, People's Right to Elect and the Succession Law, N.Y. Herald Tribune, Dec. 9, 1963, p. 24, cols. 1-2 (author says that law must be made clear on the point that a new Speaker succeeds if the former one is acting as President).

President Johnson, who voted for the present law when he was a Representative, has properly sought to give it some meaning by asking Speaker McCormack to sit in on sessions of the National Security Council and "other key decision-making meetings" not "inconsistent with his legislative responsibilities," N.Y. Times, Dec. 4, 1963, p. 1, cols. 6-7, and by establishing a verbal agreement to cover cases of presidential inability, id., Dec. 6, 1963, p. 1, col. 8. The Speaker's legislative role will prevent him from taking part in Cabinet meetings. It is reported that under President Kennedy, Cabinet meetings were seldom held and, when they were, they were seldom used for formulating over-all domestic and foreign policies. Sidey, John F. Kennedy, President 68 (1963).

166. To be noted are the following facts about the state succession laws:

(1) Of the thirty-eight states having lieutenant governors as the immediate successor after the Governor:

(a) The President pro tempore and the Speaker, respectively, are the next successors in eighteen. Ala. Const. art. V, § 127; Ark. Const. amend. VI, § 4; Cal. Const. art. V, § 16; Colo. Const. art. IV, §§ 13-15; Idaho Const. art. IV, §§ 12-14; Ill. Const. art. V, §§ 17, 19; Iowa Const. art. IV, §§ 17, 19; Kan. Const. art. I, §§ 11, 13; Minn. Const. art. V, § 6; Miss. Const. art. V, § 131; Mo. Const. art. IV, § 11; Mont. Const. art. VII, §§ 14-16; Nev. Const. art. V, §§ 17-18; N.Y. Const. art. IV, § 5; N.C. Const. art. III, § 12; Ohio Const. art. III, §§ 15, 17; Okla. Const. art. VI, §§ 15-16; Pa. Const. art. IV, §§ 13-14.

(b) The Speaker and President pro tempore, respectively, are the next successors in two. S.D. Const. art. IV, §§ 6-7; Vt. Const. ch. II, § 24.

(c) The President pro tempore is the next successor in seven. (The Speaker is not in the line of succession.) Conn. Const. art. IV, §§ 17-19; Ind. Const. art. 5, § 10; Ky. Const. §§ 84-85; La. Const. art. V, § 6; R.I. Const. art. VII, §§ 9-10; S.C. Const. art. IV, § 9; Tex. Const. art. IV, §§ 16-17.

(d) The Speaker is the next successor in two. (The President pro tempore is not in the line of succession.) Ga. Const. art. V, § 2-3007; Neb. Const. art. IV, §§ 16, 18.

(e) The secretary of state is next in line in seven. Del. Const. art. III, § 20; Mass. Const. pt. II, ch. II, § 2, art. III; Mich. Const. art. V, § 26; N.M. Const. art. V, § 7; N.D. Const.

differed over the answers to these questions. Yet, the death of President Kennedy has focused attention on a more lasting and acceptable solution to the problem, one which has not received any real consideration until now: the filling of a vacany in the Vice-Presidency. It is generally agreed that the Vice-President is the official in the best position to succeed to the Presidency and insure the continuum which was so magnificently revealed during the weeks following the tragic and unexpected death of President Kennedy.[167]

art. III, §§ 72, 77; Wash. Const. art. III, § 10; Wis. Const. art. V, § 7. In four of these states, the President pro tempore and Speaker are somewhere in the line of succession—Delaware, New Mexico, North Dakota and Wisconsin.

(f) The attorney general is next in line in one. Va. Const. art. V, § 78. In that state, he is followed by the Speaker and President pro tempore.

(g) One state has only a lieutenant governor in the line of succession. Hawaii Const. art. IV, § 4.

(2) Of the twelve states having no lieutenant governor:

(a) The President of the Senate and the Speaker, respectively, are the immediate successors to the Governor in eight. Fla. Const. art. IV, § 19; Me. Const. art. V, pt. 1, § 14; Md. Const. art. II, § 7; N.H. Const. pt. II, art. 49; N.J. Const. art. V, § 1, ¶¶ 6-7; Ore. Const. art. V, § 8; Tenn. Const. art. III, § 12; W. Va. Const. art. VII, § 16.

(b) The secretary of state is first in line in four states. Alaska Const. art. III, §§ 10-13; Ariz. Const. art. V, § 6; Utah Const. art. VII, § 11; Wyo. Const. art. IV, § 6. In Utah, he is followed by the President of the Senate; in Wyoming, by the President of the Senate and Speaker.

In recent years, a number of states have passed so-called "Disaster Acts," increasing the number of persons in the line of succession. See, e.g., Ark. Stat. Ann. § 12-117 (Supp. 1963); Cal. Gov't Code § 12061; Fla. Stat. Ann. § 22.04 (1961); Idaho Code § 59-1404 (Supp. 1963); Ill. Ann. Stat. ch. 102, § 104 (Smith-Hurd 1963); Iowa Code Ann. § 38A:5 (Supp. 1962); Kan. Gen. Stat. Ann. § 48-1204 (Supp. 1961); Me. Laws 1961, ch. 171, § 21-D; Minn. Stat. Ann. § 4.06 (Supp. 1963); Mont. Rev. Codes Ann. § 82-1309 (Supp. 1963); Neb. Laws 1961, ch. 451, § 1(7); N.H. Rev. Stat. Ann. § 108-A:12 (Supp. 1963); N.J. Stat. Ann. § 52:14A-4 (Supp. 1963); N.M. Stat. Ann. § 4-18-4 (Supp. 1963); N.Y. Unconsol. Laws § 9105 (McKinney 1961); N.C. Gen. Stat. § 147-11.1 (Supp. 1963); N.D. Cent. Code Ann. § 54-47-03 (Supp. 1963); Ohio Rev. Code Ann. § 161.03 (Page 1963); Okla. Stat. Ann. tit. 63, § 685.4 (Supp. 1963); Ore. Laws 1961, ch. 287, § 3(1); Pa. Stat. Ann. tit. 71, § 779.4 (1962); S.C. Code § 1-1003 (Supp. 1963); Vt. Stat. Ann. tit. 20, § 183 (Supp. 1963); Va. Code Ann. 24-150 (1950); W. Va. Code Ann. § 354(14)4 (1961); Wis. Stat. Ann. § 22.08(3) (Supp. 1963); Wyo. Laws 1961, ch. 199, § 1.

An overwhelming majority of the states have a line of succession with both legislative and executive officials (who are mainly elective). Several states, such as Alaska, Arizona, Massachusetts, Michigan and Washington, have basically a line of executive officers (who are mainly elective), while several others, such as Colorado, Connecticut, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Pennsylvania, Rhode Island, Tennessee and Texas, have basically a line of legislative officers. For additional information about the state succession laws, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 102-05.

167. "It is significant that every measure placed before this Committee since President Kennedy's assassination agrees on one vital point—that we shall have a Vice President." Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee

The proposals to fill a vacancy differ in certain features. Former President Truman and former Vice-President Nixon suggest the filling of the vacancy by the last electoral college.[168] Senator Birch Bayh of Indiana proposes that when an elected Vice-President succeeds to the Presidency, he shall, within thirty days, nominate a person who would, upon confirmation by the House and Senate, become Vice-President.[169] Representative Ayres would have the President submit a list of not less than three nor more than five names to either the House[170] or the Senate[171] from which a Vice-President would be selected. Senator Jacob K. Javits of New York, on the other hand, would provide for the Congress to elect a Vice-President subject to the President's confirmation.[172]

on the Judiciary, 88th Cong., 2d Sess. — (1964) (statement of Senator Birch Bayh) [hereinafter cited as 1964 Senate Hearings]. Interestingly, France adopted a presidential system in 1962, without an office of Vice-President. Many Frenchmen are concerned about the possibility of a chaotic situation arising if President Charles de Gaulle should die in office. (The Constitutional successor is the President of the Senate.) Hence, there is demand that an office of Vice-President be created. See Le Monde, Nov. 26, 1963, pp. 1, 9; Geniger, France's No. 2 Man, N.Y. Times, Jan. 5, 1964, § 6 (Magazine), p. 24.

168. See Nixon, We Need a Vice President Now, Saturday Evening Post, Jan. 18, 1964, p. 6; note 165 supra; Allen, Help Wanted: A U.S. Vice President, Reader's Digest 73 (March 1964).

169. S.J. Res. 139, 88th Cong., 1st Sess. (1963) (joined in by Senators Pell, Randolph, Bible, Moss and Burdick). The bill is not clear on whether the two Houses of Congress would meet in joint session or separately and whether the House of Representatives would vote by states or not. If the House would not vote by states, its say would be 435 as against the Senate's 100.

To cover the case of a double vacancy, provision is made in the bill for a Cabinet line of succession. Whoever succeeds does so for the rest of the term and he would be required to nominate a person for Vice-President. The so-called Bayh bill also includes some provisions on presidential inability. See note 201 infra.

170. H.R. 9305, 88th Cong., 1st Sess. (1963). A quorum of the House would consist of a member or members from two thirds of the states and a majority of all the states would be necessary to a choice. (The House would vote by states.)

The bill is clearly objectionable because it does not set any time by which the President would have to submit the names and it could well result in no one obtaining a majority of the states' votes. Moreover, it suffers from a more serious objection of constitutionality. The only authority Congress has to fill a vacancy in the Vice-Presidency is when there are vacancies in both the offices of President and Vice-President. See note 79 supra. Furthermore, this bill is inconsistent with article II, section 1, clause 1 of the Constitution, which states that the Vice-President shall "be elected, as follows." There is also an argument that the new Vice-President would be required to serve a four-year term, since this is the only term provided for in the Constitution. See note 130 supra. A constitutional amendment is clearly essential.

171. H.J. Res. 818, 88th Cong., 1st Sess. (1963). This proposal calls for a constitutional amendment under which a majority of the Senate would select the Vice-President. See note 170 supra.

172. S.J. Res. 138, 88th Cong., 1st Sess. (1963). Congress would meet in joint session and if a quorum of each House were present, the Congress would elect by majority vote

Senator Kenneth B. Keating favors the election of two Vice-Presidents every four years.[173]

Participation by the electoral college is objectionable as its functions are purely ministerial in nature[174] and, as Senator Bayh noted:

> The Electoral College is not chosen, as is Congress, to exercise any considered judgment or reasoning. Its members are chosen merely to carry out the will of the voters in their respective states. . . . The Electoral College is not equipped, nor should it be equipped, to conduct hearings on the qualifications of the nominee submitted by the President. It would be a cumbersome body to try to assemble quickly and to get to act quickly in emergencies. Much of the general public has no earthly idea who their state's electors are and would be understandably hesitant to allow any such unknown quantity to make an important decision like confirmation of a Vice President of the United States.[175]

(each member having one vote) a Vice-President from the heads of the executive departments or Members of Congress. As originally proposed, Congress was given exclusive authority to select the Vice-President. This was later modified with the addition of the words "by and with the advice and consent of the President." The reason for the change was to assure that in electing a Vice-President, Congress would give "considerable weight to the views of the President." N.Y. Times, Jan. 24, 1964, p. 15, col. 3.

Senator Ervin's S.J. Res. 147, 88th Cong., 2d Sess. (1964), would provide that within ten days after a vacancy, Congress would meet in joint session to select a new Vice-President. A majority vote would be necessary for a selection, each Member of Congress having one vote. (If a double vacancy occurred, Congress would fill both offices within ten days, the statutory successor acting in the interim.) Senator Gary's proposal is similar except that it does not make clear how the House would vote. H.J. Res. 858, 88th Cong., 1st Sess. (1963).

173. S.J. Res. 143, 88th Cong., 2d Sess. (1964); see notes 70-71 supra. A similar proposal has been made by Representative Auchincloss. H.J. Res. 868, 88th Cong., 1st Sess. (1963). His Vice-Presidents would be First Vice-President and Second, instead of Executive and Legislative. Senator Keating argues that his two Vice-Presidents would be selected from the most competent people in the party, that most Senators, Representatives and Governors would be interested in either position, that the legislative Vice-President would be no less busy than the Vice-President is now, that there is much room for the President to delegate important tasks to both, and that both Vice-Presidents would be of the President's party and elected by the people. 1964 Senate Hearings—(statement of Senator Keating).

For Constitutions having two or more Vice-Presidents (or Designates), see Costa Rica Const. art. 135 (two Vice-Presidents elected by people); Guat. Const. art. 166 (two Designates elected by Congress from three proposed by President); Hond. Const. art. 201 (three Designates elected by people); Pan. Const. arts. 138, 149 (two Vice-Presidents elected by people). For Constitutions having only one Vice-President (or Designate), see Argen. Const. art. 75; Bol. Const. art. 91; Braz. Const. art. 79; Dahomey Const. art. 9; Ecuador Const. art. 100; El Sal. Const. art. 64; India Const. art. 48; Liberia Const. art. 3, § 2; Phil. Const. art. 7, § 2. Ecuador, India and Liberia provide for special elections in case of vacancies in the Vice-Presidency. Argentina, Bolivia, Brazil and India provide for a special election in case of a double vacancy. For general information about the succession laws of foreign countries having a President for Chief Executive, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 105-10.

174. In fact, over the last few years, much attention has been given to proposals calling for the abolition of the electoral college. See, e.g., Hearings Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on Nomination and Election of President and Vice President, 88th Cong., 1st Sess. (1961) (Parts 1-5); see generally Margolin, Proposals to Reform Our Electoral System (Lib. Cong. Legis. Ref. Serv., 1960). See S.J. Res., 88th Cong., 2d Sess. (1964) (Senator Smathers).

Congress is a far better body to participate in the selection of a new Vice-President, primarily because it is representative of the people and its Members are in a position to exercise a considered judgment.[176] Since Congress is a political body, it would be preferable to give the succeeding President the dominant role in the selection.[177] Otherwise, if a different party were in control of Congress, a person of that party might be elected, which could frustrate the purpose for obtaining a new Vice-President, *i.e.*, to give him the "on the job training" for assuming the responsibilities of the Presidency, should he ever have to do so.

The new Vice-President should be of the same party as the President, of compatible temperament, and of presidential ability. There is much merit in the proposal that the President nominate a person subject to congressional approval. The presidential candidate now selects his running mate so that such a nomination would be consistent with present practice. As the people must give their stamp of approval to the presidential and vice-presidential candidates in order for them to be elected, so, too, here their representatives in Congress would have to give their approval to the nominee before he could become Vice-President. The submission of a list of names by the new President to Congress would not assure the election of the person with whom the President could most effectively work.

Whatever proposal is adopted should contain a time limit within which the President would have to make his choice. It probably would be unwise to require action by Congress within a specified period of time, though the inclusion of the word "forthwith" might serve a useful purpose. In any event, it is very likely that Congress would act quickly, putting partisan activities aside, to approve the President's choice.

Everything considered, it seems clear that the best way to solve the problem of the succession is to fill the vacancy in the Vice-Presidency. Secretaries of State and Speakers are not chosen on the basis of their

175. 1964 Senate Hearings ——.

176. Of course, the most democratic way to fill the vacancy would be by direct election. Such an election, however, would necessitate changes in the election laws of the various states and would come at a time of distress (if the Vice-President had succeeded to the Presidency), when conditions would be least conducive to the holding of a "political" election.

177. It is suggested that no special election should be held to fill vacancies in the offices of President and Vice-President, should they be vacant at the same time. The acting President would be in no position to act effectively as a President if he knew an election was in the offing. Also, the people would be in no mood for such an election and the political campaigns it would entail. See note 176 supra.

qualifications for the Presidency. A person selected to fill a vacancy in the Vice-Presidency would, very likely, be chosen because of his qualifications to substitute for the President. The chances of his being ready and able to assume the responsibilities of the Presidency are far greater than those of any other official.

III. Presidential Inability

President Kennedy's death has also revived the critical problem of presidential inability. As former Vice-President Nixon noted: "It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process."[178] Had our late President lived, hovering unconscious between life and death, discontinuity and disorder might well have invaded the American Government. If a vital decision had had to be made, would there have been anyone to make it? Former President Eisenhower underscored the shocking deficiency in our system in his recent book, when, in speaking of the period surrounding his heart attack, he stated:

> I was not required to make any immediate operational decisions involving the use of the armed forces of the United States. Certainly, had there been an emergency such as the detection of incoming enemy bombers, on which I would have had to make a rapid decision regarding the use of United States retaliatory might, there could have been no question, *after* the first forty-eight hours of my heart attack, of my capacity to act according to my own judgment. *However*, had a situation arisen such as occurred in 1958 in which I eventually sent troops ashore in Lebanon, the concentration, the weighing of the pros and cons, and the final determination would have represented a burden, during the first week of my illness, which the doctors would likely have found unacceptable for a new cardiac patient to bear.[179]

What would have happened if a "rapid decision" had been required during the first forty-eight hours or a Lebanon situation had arisen during the first week is anybody's guess.

A. *The Problem*

The problem of presidential inability has been with us for over one hundred and seventy-five years.[180] It has been frequently discussed but never solved. The problem exists because the Constitution of the United States does not clearly provide that the Vice-President may temporarily act as President during a period of inability,[181] and because

178. Nixon, supra note 168, at 10.

179. Eisenhower, Mandate for Change 545 (1963). (Emphasis added.)

180. For studies of the problem, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73; Hansen, The Year We Had No President (1962); Silva, Presidential Succession (1962). For a listing of recent articles, see note 3 supra.

181. See text accompanying note 1 supra.

it does not define inability, nor indicate who may initiate and decide the questions of whether inability has occurred or ended. No more complete statement of this manifold problem can be found than that of Chester A. Arthur in his special message to Congress on December 6, 1881—over eighty-two years ago. In that message, he asked Congress to solve a problem with which he had been confronted for eighty days while President Garfield lay dying. Said Arthur:

> Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import?
>
> What must be its extent and duration?
>
> How must its existence be established?
>
> Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability, and how and by what tribunal or authority it should be ascertained?
>
> If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office?
>
> Does he continue as President for the remainder of the four years' term?
>
> Or would the elected President, if his inability should cease in the interval, be empowered to resume his office?
>
> And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?[182]

Mainly because of the precedent established by John Tyler in 1841[183] and because of the vagueness of the Constitution in regard to inability, on three different occasions in our history (1881, 1919-1920, and 1955-1956) the country was for a time without an able President. On two of these occasions, the federal administration simply drifted[184] while, on

182. 8 Richardson, Messages and Papers of the Presidents, 1789-1797, at 65 (1898).

183. See text accompanying notes 48-53 supra.

184. The first case is that of President Garfield, who was shot on July 2, 1881 and died on September 19, 1881. During the disability his only governmental act was that of signing an extradition paper. Not once did Vice-President Arthur see Garfield during the eighty days. Arthur refused to act as President, although a majority of the Cabinet felt that he should. However, a majority of the Cabinet and many authorities of the day believed that, were he to act, he would become President for the remainder of the term.

The second case is that of President Wilson, who became ill on September 25, 1919, and had a stroke on October 2, 1919. In the first six weeks of the inability, twenty-eight bills became law by default of any action by the President. No official Cabinet meeting was held until April 13, 1920. The President was shielded from all by his wife, doctor and close friends so that the extent of his inability was never fully known. Vice-President Marshall declined to act and Secretary of State Lansing was discharged for his efforts to give some direction to the Government. See generally Smith, When the Cheering Stopped (1964), for an excellent account of the plight of the Government during Wilson's inability.

For a detailed account of these inabilities, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 93-98.

the third, it was directed by a small group of men.[185] However,

> [The committee system] worked during the period of President Eisenhower's heart attack mainly because . . . there were no serious international crises at that time. But had there been a serious international crisis requiring Presidential decisions, then . . . the committee system might not have worked.[186]

It has been estimated that the "sum total of the periods—hours, days, weeks, even months—when the man in the White House was too sick to be capable of exercising the powers vested in him by the Constitution" is one year.[187]

B. *Attempts at Solution*

The first act of any real significance in meeting the problem occurred in the early part of 1958. Former President Eisenhower, in a letter addressed to former Vice-President Nixon, formulated the following agreement:

> (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.
>
> (2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.
>
> (3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.[188]

185. During the recuperative period after President Eisenhower's heart attack of September 24, 1955, Presidential Assistant Sherman Adams, Vice-President Nixon, Secretary of State John Foster Dulles, Attorney General Herbert Brownell, Secretary of Treasury George M. Humphrey, and White House Assistant Wilton Persons took charge of affairs. For an excellent account of this period, see Eisenhower, op. cit. supra note 179, at 535-46; Nixon, Six Crises 131-81 (1962).

186. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 24-25 (former Vice-President Nixon).

187. Hansen, op. cit. supra note 180, at 1.

188. White House Press Release, March 3, 1958; see Public Papers of the Presidents of the United States, 1958, at 188-89 (U.S. Gov't Printing Office, 1959). See also Nixon, Six Crises 178-80 (1962). Says former President Eisenhower about the agreement: "We decided and this was the thing that frightened me; suppose something happens to you in the turn of a stroke that might incapacitate you mentally and you wouldn't know it and the people around you, wanting to protect you, would probably keep this away from the public, so I decided that what we must do is make the Vice-President decide when the President can no longer carry on, and then he should take over the duties and when the President became convinced that he could take back his duties, he would be the one to decide." CBS Reports, supra note 186, at 23-24. Former Vice-President Nixon recently noted that the agreement is merely informal and that the problem of inability can only be solved by a constitutional amendment. Nixon, op. cit. supra note 185, at 180. He states: "We just can't have this great government of the United States run in that way, by the whims and the personal reactions of whoever may be Vice President, or President, or the wife of the President at a critical time." Id. at 27. See Nixon, supra note 168, at 10.

This agreement was followed, in turn, by President Kennedy and Vice-President Johnson in August, 1961,[189] and, more recently, by President Johnson and Speaker McCormack.[190] The Johnson-McCormack agreement is now in writing.[191]

The above agreement serves a useful purpose but by no means is it a satisfactory permanent solution to the problem. First, it does not have the force of law, and has no binding effect if one or both of the parties should decide to break it. Second, it does not deal with the situation where the person next in line after the President becomes disabled before the President does. Finally, it does not solve the constitutional problem created by the Tyler precedent: Should the Vice-President permanently replace the President in cases of inability?

C. *A Practical Solution*

One of the best proposals to solve the problem on a permanent basis was recently advanced by a special panel of lawyers called together by the American Bar Association.[192] Included among its members were such well-known personages as: former Attorney General Herbert Brownell; Walter E. Craig, President of the American Bar Association; Professor Paul A. Freund of the Harvard Law School; former Deputy Attorney General Ross L. Malone; Dean Charles B. Nutting of the National Law Center; Lewis F. Powell, Jr., President-elect of the American Bar Association; and Sylvester C. Smith, Jr., former President of the American Bar Association.[193] The panel reached a consensus which recommended that the Constitution be amended to provide:

> (1) 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

189. White House Press Release, August 10, 1961; see Public Papers of the Presidents of the United States, 1961, at 561-62 U.S. Gov't Printing Office, 1962. See also 42 Ops. Att'y Gen. No. 5 (1961).

190. N.Y. Times, Dec. 6, 1963, p. 1, col. 8.

191. Id. p. 19, col. 1.

192. See N.Y. Times, Jan. 22, 1964, p. 38L, cols. 7 & 8; Wash. Post, Jan. 22, 1964, p. A2, col. 5.

193. Other members were Jonathan C. Gibson of Chicago; Richard Hansen of Nebraska, author of "The Year We Had No President" (1962); Professor James C. Kirby, Jr. of Vanderbilt University, former chief counsel of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee; Martin Taylor, chairman of the Committee on Federal Constitution of the New York State Bar Association; Edward Wright, chairman of the House of Delegates of the American Bar Association; and the author.

for the duration of the inability of the President or until expiration of his term of office;

(2) 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;

(3) 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 disability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress;

(4) 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; and

(5) When a vacancy occurs in the office of the 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.

Point (1) was inserted to eliminate the ambiguous wording of the succession clause which prevented Vice-Presidents Chester A. Arthur and Thomas R. Marshall from acting as President for fear that, by virtue of the Tyler precedent, the Constitution would make them President for the remainder of the term without regard to the cessation of inability.[194] This clause makes it indisputably clear that the Vice-President merely acts as President when the President is unable.[195]

Point (2) would allow the President to declare his own inability since there is no good reason why he should not be able to do so. If he used this as a pretense for shirking his duties, impeachment would lie. The panel felt that the giving of this power to the President might have the effect of encouraging cooperation among him, the Vice-President, and the Cabinet in inability situations—obviously, a thing to be desired. The possibility of a disabled President's refusing to declare his inability or actually being unable to make any determination at all required a provision that someone or some body have the power to make the determination in such cases. The panel believed that the Vice-President

194. See notes 48-53 supra. Since the Constitution clearly provides in article II, section 1, clause 6 (see text accompanying note 1 supra) that "the Same" devolves in all cases (i.e., death, resignation, removal and inability), Tyler's assumption of the office of President upon President Harrison's death proved to be a formidable barrier.

195. The expression "inability" was left general so that it would cover an almost unlimited number of cases—e.g., physical or mental illness, kidnaping, wartime capture, etc. It would not cover incompetence, lack of judgment, laziness, misconduct, or other possible grounds for impeachment. See 1964 Senate Hearings —— (statement of Senator Keating).

(or person next in line) should not have the sole power as he would be an interested party and, therefore, might be too reluctant to make a determination. The Vice-President was included in the determination process, however, because it is his duty to act and, therefore, it is only proper that he have some voice in determining when that duty is to be performed. The Cabinet (or the heads of the executive departments) was thought to be the best possible body.[196] The facts that Cabinet members are close to the President, that they would, very likely, be aware of an inability and would know if the circumstances were such that the Vice-President should act, that they are part of the Executive Department, and that the public would have confidence in the rightness of their decision were the primary considerations for the selection of this body. That such a Cabinet method would involve no violation of the principle of separation of powers was underscored. Since the method would be embodied in the Constitution, itself, it was thought desirable to include a clause allowing Congress to change, by legislation, the body which would function with the Vice-President. It was doubted that this power would ever be resorted to but, if it were, any legislation passed under it would be subject to presidential veto. The justification for such a provision was that a constitutional amendment, with specifics, could only be changed by amendment and that it therefore would be wise to leave the door open for change by legislation.

Point (3) was designed to permit the President to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice-President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.[197] In order to weigh the provision as heavily in favor of the President as possible, review by Congress would be required in such a case (the Vice-President would continue to act as

196. Although a Cabinet was not included in the Constitution as a mechanism for assisting the President (see 1 Farrand 1, 70, 97, 110; 2 id. at 285, 328, 335-37, 367, 537-42), a provision was nonetheless inserted into the Constitution providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . . ." U.S. Const. art. II, § 2, cl. 1. Since the composition of the Cabinet is at the complete discretion of the President, the so-called Cabinet proposals refer to the "Heads of the Executive Departments." (The use of the word "Cabinet" herein is meant in this context.) Thus, there can be no doubt about who would be responsible for the decision.

197. The opinion was expressed that the only check on the President should be that of impeachment. Against the use of impeachment were such arguments as that it takes too long, has the effect of permanently removing the President from office, and may not even be applicable to inability situations. See generally Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 127-28.

President in the interim). It would take a two-thirds vote of the whole Congress to prevent the President from resuming his powers and duties.

Point (4) would give constitutional status to the Tyler precedent in cases of complete vacancy.[198]

Point (5) would meet the problem of a vacancy in the Vice-Presidency.[199]

What is significant about the consensus of the panel is that the method of determining inability and recovery would be embodied in the Constitution.[200] It was agreed that this would be desirable for several reasons. First, it was felt that an amendment which would merely give Congress a broad power to establish (by legislation) a method for determining the beginning and ending of an inability would be no solution at all, since Congress would still have to agree on a method. Second, since such a constitutional amendment would place the question of inability in the "political arena" where the question of succession has always been, it was believed advisable to include a method in the Constitution itself. Third, as the Constitution is very specific as to how a President is to be elected and removed, it should be similarly specific with regard to divesting the President of his powers, even temporarily, as in the case of inability. Fourth, the method might otherwise violate the principle of separation of powers.

The panel proposal, which has been endorsed by the American Bar Association, has received very favorable comment in and out of Congress.[201] Although other proposals have been advanced,[202] this proposal

198. See text accompanying note 52 supra.

199. See text accompanying notes 168-72 supra.

200. For a discussion of the advisability of including the method in the Constitution itself, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 120-21. Id. at 115-16, where the various proposals not to include the method are discussed.

201. See Krock, Basic Principles Emerging From the Fog, N.Y. Times, Jan. 24, 1964, p. 26, col. 6; N.Y. Times, Jan. 22, 1964, p. 38L, cols. 7-8; Wash. Post, Jan. 26, 1964, p. E6, cols. 1-2; Wash. Post, Jan. 23, 1964, p. A1, cols. 2-3; Wash. Post, Jan. 22, 1964, p. A2, col. 5. See also T. Lewis, Capitol Stuff, Daily News, Jan. 23, 1964, p. 4, cols. 5-6; 1964 Senate Hearings—(statements of Senator Birch Bayh and Professor James C. Kirby, Jr.).

The proposal of the ABA panel is essentially in agreement with that of Senator Birch Bayh's resolution, S.J. Res. 139, 88th Cong., 1st Sess. (1963), with these exceptions: The Bayh proposal would not give Congress any power at all to change the method embodied in the amendment and it would require the Vice-President (provided he is supported by a majority of the Cabinet), in a case where he disagrees with the President's declaration of recovery, to bring the matter before Congress within seven days. For similar proposals, see S.J. Res. 28, 88th Cong., 1st Sess. (1963) (former Senator Estes Kefauver); same, S.J. Res. 19, 87th Cong., 1st Sess. (1961); H.R.J. Res. 272, 88th Cong., 1st Sess. (1963) (Representative John V. Lindsay); same, H.R.J. Res. 529, 87th Cong., 1st Sess. (1961).

202. Some of the recent proposals are:

(1) That a blue-ribbon presidential commission be established to study all the problems involved. Burns, Let's Stop Gambling With the Presidency, Saturday Evening Post, Jan. 25, 1964, p. 12, at 16; Morris, The Muddled Problem of the Succession, N.Y. Times, Dec. 15, 1963, § 6 (Magazine), p. 11, at 63; Nixon, supra note 168, at 10; see also N.Y. Times, Jan. 23, 1964, p. 18C, col. 6 (views of Senator Mike Monroney);

(2) Justice Samuel H. Hofstadter of the New York Supreme Court and Jacob M. Dinnes of New York suggest a self-executing constitutional amendment along these lines: Within ten days after his inauguration, the President would appoint nine members to a "Commission on Inability," to hold office at his pleasure. Three members would come from the Cabinet, two from the Supreme Court, and two each from the House and Senate. The commission, by six votes (two from the Cabinet and at least one from every other group) could declare the President disabled. The cessation of the inability would take only a majority vote. Provision is also made for the President to declare his own inability and, in such a case, the cessation thereof. Hofstadter & Dinnes, Presidential Inability: A Constitutional Amendment Is Needed Now, 50 A.B.A.J. 59 (1964). For other proposals of inability commissions, see CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, pp. 29 (Senator Kenneth B. Keating of New York), 30-31 (former President Truman); Burns, supra, at 12; H.R. 1164, 88th Cong., 1st Sess. (1963) (Representative Louis C. Wyman of New Hampshire). See also Morris, Political Scientists Criticize the Law on Line of Presidential Succession, N.Y. Times, Feb. 16, 1964, p. 48, col. 1 (summarizes replies received by Senator Hubert H. Humphrey to a questionnaire).

(3) Senator Kenneth B. Keating and others suggest a constitutional amendment as follows: "The commencement and termination of any inability shall be determined by such method as Congress shall by law provide." S.J. Res. 143, 88th Cong., 2d Sess. —— (1964); see Letter From Martin Taylor to New York Times, Dec. 22, 1963, § 4 (The News of the Week in Review), p. 6E, col. 7. This amendment was approved by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee prior to President Kennedy's death. N.Y. Times, Dec. 7, 1963, p. 26, col. 1.

(4) For a discussion of the proposals advanced prior to the President's death, see Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 110-20; and see id. at 123-28, for the author's personal views.

203. A constitutional amendment is necessary because there is considerable doubt about Congress' power to legislate in this area. The Constitution indicates that Congress has the power to legislate on the succession, without more. If the Vice-President now has the power to make the determination of inability, as many think, a statute could not, constitutionally take it away. Prudence plainly dictates that the problem be solved by constitutional amendment. See Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, supra this volume, at 73, 123-25.

presently offers the best hope of solving the problem. Without further legislation, it is complete, practical, consistent with the principle of separation of powers, gives the decisive role to those in whom the people would most likely have confidence, involves only persons who have been elected by the people or approved by their representatives, and embodies checks on all concerned—the President, Vice-President and Cabinet. And, since it is embodied in a constitutional amendment, there would be no question about its constitutionality.[203]

It is essential that this problem be solved now, while the tragedy of November 22 is still fresh in our memory. As former Vice-President Nixon noted:

Fifty years ago the country could afford to "muddle along" until the disabled President got well or died. But today when only the President can make the decision to use atomic weapons in the defense of the nation, there could be a critical period when "no finger is on the trigger" because of the illness of the Chief Executive.[204]

IV. Conclusion

The problems of the succession and inability are now before Congress for action. Ideally, both should be solved, together if possible. However, if anything is going to be solved, the problem of inability should be. It has first claim for action. It has been left unsolved for almost two centuries. Thus, as Senator Bayh, the chairman of the Senate Subcommittee on Constitutional Amendments which is studying the problems, noted: "Our obligation to deal with the question of presidential inability is crystal clear. Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our nation from the possibility of floundering in the sea of public confusion and uncertainty."[205] If this and the problem of the succession are not solved now, there is good reason to believe, as former Vice-President Nixon well put it, that "once the elections of '64 are held—[and] we have a new President and Vice President—this is going to be put away until we have another great international crisis. . . . [I]t would be a great tragedy if the American people, at this particular time, missed this opportunity."[206]

204. Nixon, supra note 168, at 10.

205. 1964 Senate Hearings ——.

206. CBS Reports, Transcript of "The Crisis of Presidential Succession," Jan. 8, 1964, p. 46.

Leg: GG: Presidential Succession

COPY

April 21, 1964

Professor Fred Kort
Department of Political Science
The University of Connecticut
Storrs, Connecticut

Dear Professor Kort:

This is just a note to thank you and your associates for your very helpful statements on Presidential succession. These views were extremely useful to me in seeing this urgent question in broader perspective.

I am now preparing a general statement which summarizes the variety of proposals which were raised in this exchange as soon as it is prepared. I also intend to make these statements available to the Subcommittee on Constitutional Amendments of the Committee on the Judiciary which is currently investigating this question.

Again, my deep thanks for your excellent contributions to this debate.

Sincerely yours,

Hubert H. Humphrey

THE UNIVERSITY OF CONNECTICUT
STORRS, CONNECTICUT

Department of Political Science

April 9, 1964

The Honorable Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator Humphrey:

I would like to apologize for the considerable delay in replying to your letter of January 22, 1964. The questions regarding presidential succession and disability you raised are of such immense importance that an attempt to answer them should rely on the most informed sources. For this reason, I did not want to limit the reply to your letter to my own view, but asked those of my colleagues whose fields of specialty qualify them particularly well in the area of presidential succession and disability to express their opinions. The statements of their views and my own comments are enclosed. We hope that they will be helpful to you in pursuing a task which has such vital and monumental importance.

Sincerely yours,

Fred Kort

Fred Kort
Associate Professor
of Political Science

FK/fls
Enc.

COMMENTS
by
Karl A. Bosworth
Professor of Political Science
University of Connecticut

1. The present arrangement has mainly the advantage of assuring continuity in politically experienced hands, which is of course no mean value in these matters. If one assumes that maintaining continuity for the parties or party which won the last presidential election would be desirable, changes would be required. The prior, or St. Wapmiacl, system seemed to serve the principle generally, but the selection of individuals of non-presidential sorts for secretary of state and of members of the opposite party for some posts showed its limitations. I would approve adoption of the principle of party continuity for the term and confer the selection of the successor (or new vice-president), upon the death of either the president or vice-president, on the national committee of the principal supporting party of the last winning candidate. The national committeemen and women from each state would cast votes equal to the number of members of the House of Representatives from their state.

2. In the presidential system, illness of the president leaves a hazardous vacuum. The present system (save for the understandings in the last two administrations, as far as they went) seems incomplete to take care of these contingencies. If relations between the offices stand in mutual confidence, perhaps the recent understandings should be formalized by legislation. If I understand these statements, the vice-president may assume the powers if he thinks the President is unable, while the President resumes the powers at his decision that he is able. This would not be inconsistent with the provision of alternative methods for initiating a medical fact finding by, for instance, a joint resolution, or a resolution of either house, or, in case Congress is not in session, a petition of some stated length by members of Congress. As the judiciary may have to decide "quo warranto" for the exercise of power by a substitute, it would seem to have some merit that if the issue is raised by some such procedures as above, the court may be directed, if it so may be, to appoint a commission or body of commissioners of the court to make a finding of fact. If a finding of inability were made, the substitute would act until a different finding were made.

COMMENTS
by
I. Ridgway Davis
Assistant Professor of Political Science
University of Connecticut

Succession

In my opinion it would be preferable to rescind the present Succession Act of 1947 and return to the former basis of succession, which followed the line of cabinet officers after the vice-president. This provided for an orderly continuation of policies and political party control in the presidential office, since officials of cabinet rank are versed in a president's policies. The current practice of including the Speaker of the House of Representatives and the President pro tempore of the Senate in the line of succession is fraught with problems. These individuals are primarily legislators, who lack experience with the affairs of the presidential office and its operations. These persons are elected by the voters of their constituencies with little or no thought that they will become the President of the United States. Furthermore, under the present law there is a chance of a shift in party control.

Vice Presidential Office

In respect to current proposals for constitutional amendments, Senate Joint Resolutions 138, 139, 140, 143 and 147, I would like to make the following observations. I think it is not necessary to have two vice-presidents as proposed in Senate Joint Resolutions 140 and 143, although I certainly approve of the idea of having the electorate directly involved in a choice. One problem would be the duties of the so-called "executive vice-president". If such an idea were accepted, then the duties of the "executive vice-president" should be sketched out by legislation, in order that one would be assured of his use by a chief executive. Knowledge and experience of the presidency are crucial to the next in line of succession.

Senate Joint Resolutions 138, 139 and 147 all provide for the election of the vice-president in some manner by a vote of Congress. By placing such authority in Congress, the question of a conflict with the presidency might be raised. The three-fold or triple action, as suggested by Senate Joint Resolution 148, is, in my opinion, not appropriate. Under this proposal presidential initiative is required to nominate, Senate action to confirm, and a final vote is taken by the House of Representatives among a group of five candidates. Under such a cumbersome procedure the backing which the final person really has is questionable. If such lengthy methods are to be considered, why not place the ultimate decision in the hands of the electorate? At least then it could not be argued that the candidate had not met the test at the polls.

Generally, I would not support the idea of immediately filling a vacancy in the office of vice-president unless the electorate can become involved. For this reason I tend to go along with cabinet officers as the next line of succession.

Presidential Inability

"Presidential inability" is an old problem which was thrashed out in 1956 and 1957 by the House Committee on the Judiciary and various "experts" in the field. I believe that it is the vice-president who must decide the question of "inability", no matter how touchy it may be. It is also my contention that he then becomes only the "acting president" until such time as the disability is removed. An agreement between the president and the vice-president or the next in line of succession provides the necessary flexibility in this matter.

Legislation could provide for the establishment of a small commission composed of presiding officers and legislative leaders, two cabinet officers and two justices of the Supreme Court to assist the next in the line of succession in making his decision. Such a commission should have the authority to consult with medical experts, if necessary. In such cases of takeover by the next in line, legislation should cite that it is in the capacity of "acting president", until such time as disability is removed. A principal problem in legislating on the question of presidential inability is to keep the procedure from being too cumbersome, and thus avoid delay in the event of the necessity for the next in line to become "acting president".

COMMENTS

by
G. Lowell Field
Professor of Political Science
University of Connecticut

1. There are two overriding desiderata for the presidential succession. (1) The succession should occur as nearly instantaneously as possible on the basis of absolute certainty as to who the proper successor is. (2) There should be nothing avoidable about the succession arrangements likely to suggest in concrete terms that a succession would involve a discontinuity in policy. The present arrangement is objectionable in both these respects. A prominent member of Congress might decline the succession. If it came too late in the term to assure his nomination to succeed himself, he would be very likely to decline it. This problem could delay the succession for hours, if not days. Clearly the speaker or the president pro tempore is likely to be known to hold somewhat different opinions from the president. Even a suspicion that a serious political interest (domestic or foreign) might be served by the assassination of a president should be made as unlikely as possible. On these grounds I believe that Congress should restore the old rule of succession exclusively in the line of cabinet officers. One can count upon a vice-president or a cabinet officer accepting the succession no matter how short the remaining term. These persons, moreover, are not very likely to have recently expressed opinions at variance with administration policy.

2. The power of the vice-president to act as president in case of the president is a power "vested by this Constitution" in an "officer" of the "government of the United States". It would, therefore, seem to me that the eighteenth clause of section 8 of Article I allows Congress to establish a reasonable procedure for its exercise. I should think that the president, if able to do so, should have power to delegate his powers to the vice-president (or other next person in the line of succession) and to resume them. Where the president cannot act or where his condition might raise serious questions as to his competence to act I think that a small ex-officio body should be empowered to authorize the vice-president or other officer next in line to act. This could well consist of the chief justice, the speaker, the president pro tempore, and the three cabinet officers next in line after the officer who would succeed. (The even number and one-half representing the administration are intended. Any other arrangement suggests the possibility of a politically motivated removal.) Such a decision would ordinarily be effective until a positive act of the president resuming his powers. If, however, the ground for the decision were the president's illness, the commission should be empowered to make its decision final for a period of (say) one month, subject to renewal.

COMMENT
by
Norman Kogan
Professor of Political Science
University of Connecticut

My personal preference is for succession to return to the cabinet in the order that prevailed up to 1947. The grounds are policy and party continuity. I concur with the arguments of G. Lowell Field (supra) and E. E. Schattschneider (infra), which indicate an automatic succession. The president is also the head of the state, and the state must have a head at all times.

COMMENT
by
Fred Kort
Associate Professor of Political Science
University of Connecticut

I favor the proposal of Karl A. Bosworth (supra) for the following reasons:

1. It would be desirable to have a flexible arrangement and not to designate by statute the holder of any particular office as presidential successor beyond the constitutionally elected vice-president. Obviously it would be impossible to anticipate what the qualifications or lack of qualifications of such a person at the time of succession would be.

2. Party continuity during a presidential term seems to be desirable. Under the two-party system, responsibility during a presidential term should be attached to a principal party, regardless of how cohesive that party is.

3. As I understand Bosworth's proposal, the selection of the presidential successor by the national committee would take place not at the time at which the vacancy in the presidential office occurs, but at the time at which a vacancy in the office of the successor is encountered. It is in this respect that I would suggest an additional feature for the proposal:

The person elected by the national committee as presidential successor shall assume in any case the title and the functions of "vice-president". He shall resign from any other office he is holding at the time of his election as vice-president.

The purpose of this additional provision would be to give the new vice-president full opportunity to acquaint himself with the responsibilities that would devolve on him in the case of actual succession.

4. A possible modification of Bosworth's proposal would be the selection of the new vice-president by the Senate and House party conferences (or conference and caucus) of the party of the deceased president rather than by the national committee.

COMMENT

by

Kent R. Newmyer
Assistant Professor of History
University of Connecticut

I would subscribe to the position and reasoning of G. Lowell Field (supra) on the issues of presidential succession and disability.

COMMENTS

by

E. E. Schattschneider
University Professor of Political Science
University of Connecticut

Almost any arrangement would be better than the present one. Why not simply repeal the Truman Act and go back to the old system? This has the advantage of simplicity and it is relatively easy to do.

If we are going to amend the Constitution, it seems to me that Richard Nixon's suggestion that the Electoral College be reactivated to elect a new vice-president has something to be said for it. (It would spoil a lot of bad jokes about the uselessness of the Electoral College!)

As for disability, would it be possible to revive an older concept about presidential succession? Prior to Tyler's succession to the presidency, it was assumed that the vice-president became "acting" president in the case of the president's death. Such an arrangement for the case of disability could be made by Congressional legislation. There is a substantial body of precedents in state experience according to which lieutenant governors became acting governors on a variety of occasions.

Leg: GG: Presidential Succession

COPY

April 21, 1964

Professor David J. Danelski
Department of Political Science
University of Washington
Seattle 5, Washington

Dear Professor Danelski:

This is just a note to thank you for your very helpful statement on Presidential succession. Your views were extremely useful to me in seeing this urgent question in broader perspective.

I am now preparing a general statement which summarizes the variety of proposals which were raised in this exchange of correspondence. You will receive a copy of this statement as soon as it is prepared. I also intend to make your statement available to the Subcommittee on Constitutional Amendments of the Committee on the Judiciary which is currently investigating this question.

Again, my deep thanks for your excellent contributions to this debate.

Sincerely yours,

Hubert H. Humphrey

UNIVERSITY OF WASHINGTON
DEPARTMENT OF POLITICAL SCIENCE
SEATTLE 5

April 7, 1964

Your reply + send to Ray

Senator Hubert H. Humphrey
United States Senate
Washington, D. C.

Dear Senator Humphrey:

In response to your request for comments on the problems of presidential succession and inability, I am sending the enclosed memorandum. Someone once said that what is needed in this area is a plan that is "swift, small, and uncomplicated." The memorandum is an attempt at formulating such a plan. Most important, of course, in the formulation of any plan dealing with these matters is acceptability by Congress and the American people. I think the proposal in the memorandum has a chance of acquiring the necessary acceptance.

I should like to acknowledge the research assistance of George F. Cole in preparing the memorandum.

Sincerely,

David J. Danelski

David J. Danelski
Assistant Professor

DJD:po
Enclosure
(1) memorandum

PRESIDENTIAL SUCCESSION AND INABILITY: A PROPOSAL

In 1951, Professor Ruth C. Silva began her monograph on presidential succession with these words: "The constitutional and statutory provisions for presidential succession are fraught with ambiguities and abound in omissions. As our succession law now stands, a combination of circumstances may arise under which we would have no President." Thirteen years have passed during which one President was disabled for 143 days and another was assassinated; yet the same succession law still stands. A clear, comprehensive plan that deals with the whole range of problems involved, especially the problem of presidential inability, is urgently needed. Such a plan should be capable of operating with simplicity and dispatch so that, as a practical matter, the Nation will always have capable leaders whose legitimacy is unquestioned.

Any plan to reform the succession law in the United States--if it is to be accepted by the people and Congress--must be in keeping with our basic political traditions. While seeking to come to grips with the problems of our time, it must reflect the spirit of the Constitution and not depart unnecessarily from the Document's provisions.

I. Succession

A. Vice President

Recommendation 1: There should be no change in the constitutional provisions or practices concerning the Vice President's succession to the powers and duties of the Presidency.

Comment: In recent years few officers in government were more qualified to assume the powers and duties of the Presidency than the Vice President; today the Vice Presidency attracts men of presidential calibre and gives them valuable experience for the Presidency. In part, this is probably due to the passage of the Twenty-Second Amendment, which, in limiting the term of the President, focuses attention on the Vice President as a leading contender for the highest office; in part, this is also probably due to the larger role given the Vice President in the conduct of executive affairs. Whatever the reason, selection of a candidate for the Vice Presidency today is not apt to be based solely on considerations of party harmony and a balanced ticket. When a presidential candidate considers a running mate, he must also take into account that the man chosen may well succeed him, if not by death or inability during his term of office, by election thereafter. Hence, in addition to asking how much will the name of the vice-presidential candidate on the ballot aid in securing victory at the polls, questions such as these are apt to be asked: Is the potential vice-presidential candidate presidential calibre? Is he sufficiently sympathetic with the future administration's program to carry it out if he became President? Does he possess both loyalty to the presidential candidate and self-sufficient judgment to act in the public

interest in a situation involving presidential inability? Such considerations lead to the selection of a qualified presidential successor.

The usages of the Vice President becoming President upon the death of his predecessor and serving the balance of the presidential term are deeply rooted in our traditions and have created no difficulties. On the contrary, it can be argued that in time of great national grief--such as when President Kennedy was assassinated--there is public benefit in calling the fallen Executive's successor President. But the limits of these usages should be noted: They do not extend to any other successor to the Presidency than the Vice President; and the Vice President becomes President only upon the death of the President. The latter usage does not apply in the case of presidential inability.

B. Cabinet

Recommendation 2: After the Vice President, succession to the powers and duties of the Presidency should be in the Cabinet, beginning with the Secretary of State.

Comments: The criticisms of the Succession Act of 1947 by Professor Silva and other constitutional scholars sufficiently demonstrate that there are more preferable alternatives. Succession in the Cabinet, which has a long history in our succession law, is one of them. Cabinet officers should succeed to the powers and duties of the Presidency after the Vice President because of their experience in the affairs of the administration. In a sense, they are a part of the Presidency from the time they take office. In an era when issues of foreign affairs are dominant, designating the Secretary of State to succeed to the powers and duties of the Presidency after the Vice President seems especially appropriate. Whether the line of succession after the Secretary of State as provided in the 1886 Act should be followed is an open question. One could argue as easily for the Secretary of Defense as the Secretary of the Treasury to follow the Secretary of State in the line of succession. Presumably one of the considerations that a President would take into account in appointing a Cabinet officer, and the Senate in confirming his nomination, would be whether the nominee is presidential calibre, which, as in the selection of a vice-presidential candidate, would lead to the appointment of a qualified presidential successor.

Recommendation 3: When a Cabinet officer succeeds to the powers and duties of the Presidency, he should be designated "Acting President."

Comment: The succeeding Cabinet officer, not being elected to office, is on different constitutional footing than the Vice President. The usage of the Vice President becoming President upon the latter's death does not apply to a Cabinet officer.

Recommendation 4: When a Cabinet officer assumes the powers and duties of the Presidency, his term of office should extend only until the President elected at the next biennial election takes office. The new President should be elected for a regular four-year term.

Comment: The usage that the Vice President succeeds to the Presidency for the balance of a four-year term is not applicable to a Cabinet officer. Since he was not elected to office, it seems appropriate for the electorate to elect a President at the earliest convenient time. In the interest of orderly transition of leadership and the synchronism of presidential and congressional elections, the next biennial election appears to be the earliest convenient time.

C. Acting Vice President

Recommendation 5: The Cabinet officer who is next in line to succeed to the powers and duties of the Presidency should be designated "Acting Vice President."

Comment: The purposes of this recommendation are to insure the Cabinet officer's familiarity of all aspects of national policy in the same way that the Vice President is familiar with these matters and to prepare the public for the eventuality of the Cabinet officer's assuming the Presidency. The Acting Vice President would retain his Cabinet office.

II. Inability

A. Definition of "Inability"

Recommendation 6: "Inability" in Article II of the Constitution should be defined to include physical and mental incapacity, capture, the status of missing, and any other situation in which the President is incapable of performing the duties of his office.

Comment: In past there have been instances of presidential inability where Vice Presidents have failed to assume the powers and duties of the Presidency partly because the ambiguity of the term "Inability". Hence, it should be clearly defined with the intention of covering all inability situations so that the Nation is never without a capable President or Acting President.

B. Who Determines Inability

Recommendation 7: The officer designated by law to succeed to the powers and duties of the Presidency should be charged with the responsibility of determining whether the person having the powers of that office is unable to perform his duties.

Comment: The Vice President and Cabinet officers are among the few persons in government who have sufficient and reliable information upon which to base a judgment of inability. The responsibility for determining inability is great but not too great for a man who is qualified to assume the powers and duties of the Presidency.

C. Procedure For Determining Inability

Recommendation 8: If the officer designated by law to succeed to the Presidency is satisfied, after investigation and consultation with appropriate persons, that presidential inability exists, he should inform the Cabinet that he is going to assume the powers and duties of the Presidency and become Acting President during the duration of the President's inability. As soon as possible thereafter he should make the same report to Congress.

Comment: This recommendation allows for dispatch where dispatch is required. The President himself might indicate he is no longer capable of performing the duties of his office; others might raise the question of inability. In any case, the person designated by law to succeed to the powers and duties of the Presidency must decide. The kind of investigation he will conduct and persons he will consult will depend upon the nature of the suspected inability. In the case of physical and mental incapacity, medical opinion obviously is important. In a situation where the President is believed to be missing or captured, other persons will have to be consulted.

Once the decision is made, the officer making it cannot be vetoed in the Cabinet, though he must report his decision to that body. But usurpation of presidential power is unlikely, for the Acting President must report his action as soon as possible to Congress, which, if it decides his conduct is wrongful, may forthwith impeach him.

D. Acting President During Inability

Recommendation 9: The officer assuming the powers and duties of the Presidency during inability of the incumbent should be designated Acting President.

Comment: Since no usage covers this point, the Vice President as well as a Cabinet officer would become Acting President in case of presidential inability. The clear recognition of "acting" status of the officer assuming the powers and duties of the Presidency would probably tend to make him less hesitant to act in a situation involving presidential inability than if he believed he would become President, thereby excluding his predecessor from resuming the Presidency upon the cessation of the inability.

E. Termination of Inability

Recommendation 10: Upon the termination of presidential inability, the President should so inform the Acting President, the Cabinet, and Congress. Upon the completion of such notification, the President resumes his powers and duties.

Comment: The procedure, as in Recommendation 8, is simple and can be accomplished with dispatch. In the event that the President were still incapacitated, either mentally or physically, when he announced his inability had terminated, Congress would be in position to act before he resumed his powers and duties.

III. How to Effect the Plan

Recommendation 11: If there is any question as to the constitutionality of any part of the above plan, a constitutional amendment should be enacted giving Congress power to enact that part of the plan.

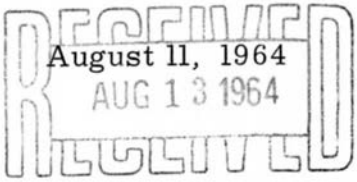
Comment: The plan presented here is in keeping with our basic political traditions and consistent with the spirit of our Constitution. There are some scholars and others, however, who may doubt the constitutionality of Congress passing a law enacting the entire plan. The matter is so important that any doubts as to constitutionality should be removed by constitutional amendment now when there is time to discuss and debate the various ways in which the problem can be handled. In view of the fact that the plan, for the most part, simply clarifies what is in the Constitution, it is likely that Congress and the American people would accept a constitutional amendment authorizing its enactment.

Respectfully submitted:

David J. Danelski

David J. Danelski
Assistant Professor of Political Science
University of Washington

American Bar Association
WASHINGTON OFFICE
1120 CONNECTICUT AVENUE, N.W.
337-8266



August 11, 1964

Dear Senator Humphrey:

This is for your information in considering S. J. Res. 139.

Donald E. Channell

Presidential Inability: The Problem and a Solution

It is urgent that the problem of Presidential inability be solved now, Mr. Feerick declares. After outlining the problem and noting Presidential inabilities in the past, he endorses the consensus proposal for a constitutional amendment worked out by the panel of experts convened by the American Bar Association in January and later adopted by the House of Delegates as the proposal of the Association.

by John D. Feerick • ***of the New York Bar (New York)***

THE SHOCKING DEATH of President Kennedy stunned the American people and revived a problem which is as old as the nation itself. The contrast between what actually happened on November 22, 1963, and what could have happened has jolted us into the realization that the problem of Presidential inability must be solved once and for all.

Senator Kenneth B. Keating of New York has stated:

> As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land.[1]

Because President Kennedy died, there was a swift and orderly transfer of power. Had he lived seriously injured, however, chaos and confusion might well have invaded the United States Government. No one would have been clearly authorized by the Constitution either to determine the inability of the President or to make a major decision had one been necessary.

The Problem Arises from the Constitution

The Constitution is singularly vague on the subject of Presidential inability. It neither defines inability nor provides a method of determining the commencement or termination of inability. It merely provides that:

> 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.[2]

The wording of this clause poses a fundamental problem: What devolves on the Vice President? Is it the office of President or the powers and duties of the office? If it is the office which devolves, the Vice President would presumably become President, and thus in a case of inability the displaced President could not recover the office upon cessation of the inability. If it is the powers and duties which devolve, the Vice President would merely act as President for the duration of the inability. It is clear, though, that whatever devolves does so in all cases—removal, death, resignation and inability.

It is evident from the records of the proceedings of the Constitutional Convention that the Founding Fathers thought they had handled the problem adequately by providing for a temporary substitute for the President in all cases. In no event did they intend the Vice President to become President.[3] The debates at the convention are not at all revealing, however, as to what inability is or who determines it. It is very probable that the word "inability" was intended to cover any occurrence which would cause a President to be unable to discharge the powers and duties of his office.

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1. *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (1964) (hereafter cited as *1964 Senate Hearings*).
2. U.S. CONST. art. II, §1, cl. 6.
3. See SILVA, PRESIDENTIAL SUCCESSION (1951) and the author's recent article, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

Reprinted from American Bar Association Journal, April, 1964

A persuasive argument was made by Henry E. Davis in 1881 that the reason for the Constitution's silence on these questions is that "the convention thought the provision as adopted self-explanatory, self-operative and sufficient".[4] He believed, as do most authorities, that the Constitution implicitly gives the Vice President the power to make the determination of inability when the President is unable to do so.

Tyler's Succession Set a Precedent

The first application of the succession provision occurred on the death of President William Henry Harrison on April 4, 1841—the first death of a President in office. The then Vice President, John Tyler, asserted his right to the office and title of President and became President for the remainder of Harrison's term. Former President John Quincy Adams expressed the objection of many at the time when he stated:

> [I]t [Tyler's assumption of the title and office of the Presidency] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice President, on the decease of the President, not the office but the powers and duties of the said office.

The so-called Tyler precedent has been followed in turn by Vice Presidents Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman and Lyndon B. Johnson. Because of this interpretation that the office devolves on the Vice President when a President dies, confusion has resulted on each occurrence of Presidential inability in our history. This has been due mainly to the fear that were a Vice President to take over, he would become President for the remainder of the term, since whatever devolves does so in all cases. Doubt as to whether the Vice President has the constitutional authority to declare the President disabled has added to the confusion.[6]

On July 2, 1881, President Garfield was shot by Charles T. Guiteau and for the next eighty days he lingered between life and death, clearly unable to discharge the powers and duties of the Presidency. Several weeks after the shooting, the Cabinet met and unanimously agreed that Vice President Arthur should assume the responsibilities of the Presidency. A majority of the Cabinet believed, however, that if he did so, he would become President for the remainder of the term. Arthur refused to act as President for fear that he would be labeled a usurper. The crisis ended on September 19, when Garfield died and Arthur succeeded to the Presidency. During his term of office, he expressed deep concern over the question of Presidential inability and repeatedly asked Congress to solve the problem. But nothing was done.

On September 25, 1919, an illness, which was followed by a stroke on October 2, rendered President Woodrow Wilson incapable of discharging the powers and duties of the Presidency and another inability crisis presented itself.[7] While Wilson lay ill, many insisted that Vice President Thomas R. Marshall act as President. For fear that he would oust the President if he did so, Marshall, like Arthur before him, declined.

Some twenty-eight bills became law by default of any action by the President. Few public matters reached Wilson and he was seldom seen during the remainder of the term. Mrs. Wilson, Dr. Grayson and other members of the White House staff administered executive affairs. Wilson did not call a Cabinet meeting until April 13, 1920. In the interim, the Cabinet met unofficially, largely under the direction of Secretary of State Robert Lansing. When Wilson learned of these meetings, he forced Lansing to resign, believing Lansing was plotting to oust him. This series of events provoked renewed discussion of the problem, but again Congress failed to take any action.

On September 24, 1955, President Eisenhower was stricken with a heart attack and the gap in the Executive forcibly presented itself once again. The problems confronting the country at that time were such that, as the President himself said, he "could not have selected a better time, so to speak, to have a heart attack . . .".[8]

The government was administered by a small group of officials pursuant to policy directives previously formulated by the President. Former Vice President Nixon has remarked:

> The committee system worked during the period of President Eisenhower's heart attack mainly because . . . there were no serious international crises at that time. But had there been a serious international crisis requiring Presidential decisions, then . . . the committee system might not have worked.[9]

Mr. Eisenhower's ileitis attack on June 8, 1956, and the stroke causing a speech impairment on November 25, 1957, again served to point up the constitutional inadequacies in relation to Presidential inability.

Congressional hearings were held by both the House and Senate Judiciary Committees and every aspect of the subject was thoroughly examined. There was general agreement that something should be done, but widespread disagreement as to the best method for determining a President's inability was manifest. Numerous proposals were offered. None, however, commanded enough support to be adopted.

Informal Agreements

Mr. Eisenhower's illnesses prompted him to make a historic agreement with his Vice President, Richard M. Nixon, in 1958.[10] This was the first act of any real significance in meeting the inability problem. The agreement provided that in case of his inability the President would inform the Vice President, who would then act as President until the inability ceased. If the President should be unable to communicate with the Vice President, the Vice President, after such consultation as seemed appropriate, would make the decision to act as President. In either event, the President would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of his office. This precedent was followed by President Kennedy and Vice President Johnson in 1961, and more recently by President Johnson and Speaker McCormack.

A penetrating objection to this type of solution was made by Mr. Nixon when he said:

> [I]t would not be effective in the event you happened to have a President and Vice President who didn't get along. . . . The President might not want to write a letter. If he had written one, he might tear it up. Let's suppose, for example, that the President became disabled and that the Vice President decided that he should step in and assume the duties of the Presidency, but . . . a member of the President's family held a Cabinet position or some other high post and didn't believe that the President was so disabled. . . . You'd have a constitutional crisis there of great magnitude. . . . *We just can't have this great government of the United States run in that way, by the whims and the personal reactions of whoever may be Vice President, or President, or the wife of the President at a critical time.*[11]

Perhaps the main reason for the continuing failure to solve this problem on a permanent basis has been the difficulty in finding a solution that would be practical and widely accepted. Experience indicates that there is, in fact, no perfect solution. But this is not to say that there is no workable solution. As Senator Keating noted: "The best we can hope to achieve is the best practical solution which will meet the needs of crises we can readily envision."[12]

Conference Produces a Workable Solution

The most workable solution yet proposed, in my opinion, was advanced in January, 1964, by a special panel of lawyers called together by the American Bar Association. The group included a former Attorney General of the United States, a former Deputy Attorney General, past, present and future Presidents of the American Bar Association, professors of law and practicing lawyers.[13] The members of the group represented a variety of points of view regarding the question of how to solve the problem.[14] The group spent two days in closed session examining the various proposals.

At the close of its session, it issued a consensus which has since been endorsed by the American Bar Association and other groups.[15] The consensus is necessarily a compromise, but it represents points on which a group of persons who had studied the problem could agree. They are:

1. A constitutional amendment is necessary.

2. The amendment should state that in a case of inability, the powers and duties of the Presidency devolve on the Vice President for the duration of the inability, while in the case of death, resignation or removal, the office of President devolves for the rest of the term.[16]

3. The amendment should also specifically state that (a) the President may declare his own inability in writing; (b) if a President is unable or unwilling to make such a declaration, the Vice President, with majority approval of the Cabinet[17] (or such other body as Congress may by law determine) may make the determination; and (c) the President may resume his powers and duties upon his own declaration in writing, except that if the Vice President and a majority of the Cabinet do not agree that the President is able to resume them, the Vice President shall continue to act and Congress shall review the dis-

A graduate of Fordham College (B.S. 1958) and of Fordham Law School (LL.B. 1961), John D. Feerick practices in New York City. A student of the Presidential inability problem, he testified recently before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee.

agreement. A two-thirds vote of both houses of Congress shall be required to keep the President from resuming his powers and duties.

4. An amendment should provide that whenever a vacancy occurs in the Vice Presidency, the President shall nominate a person who will, upon confirmation by Congress, become Vice President.

There were several reasons why an amendment was considered necessary. Some members of the panel were of the opinion that Congress has no power at all to legislate on this subject—that it merely has the power to legislate on the line of succession beyond the Vice Presidency. Most believed that the Vice President now has the constitutional power to determine inability and, therefore, this power

4. Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. (1918).

5. 10 ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 463 (1876).

6. ". . . [T]he history of 170 years shows no real difficulty attends the determination of when or whether a President is unable to perform the duties of his office. The crux of the constitutional problem has been and will be to ensure that the Vice President can take over with unquestioned authority for a temporary period when the President's disability is not disputed, and that the President can resume his office once he has recovered." *1964 Senate Hearings* (remarks of former Attorney General Herbert Brownell).

7. See generally, HANSEN, THE YEAR WE HAD NO PRESIDENT 29-42 (1962) and the recent book, SMITH, WHEN THE CHEERING STOPPED (1964).

8. EISENHOWER, MANDATE FOR CHANGE 545 (1963).

9. Transcript of television broadcast, *CBS Reports: The Crisis of Presidential Succession* 17 (January 8, 1964) (remarks of former Vice President Nixon).

10. White House press release, March 3, 1958.

11. *CBS Reports*, *op. cit. supra* note 9, at 18 (emphasis added).

12. *1964 Senate Hearings.*

13. They were: Herbert Brownell, Walter E. Craig, Paul A. Freund, Jonathan C. Gibson, Richard H. Hansen, James C. Kirby, Jr., Ross L. Malone, Charles B. Nutting, Lewis F. Powell, Jr., Sylvester C. Smith, Jr., Martin Taylor, Edward L. Wright and the author.

14. The conferees "differed widely in their views just as individual Senators probably do. But they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences." *1964 Senate Hearings* (remarks of Herbert Brownell).

15. "Although there was not absolute agreement by each conferee on all points of the final consensus, there was general agreement on the statement." *1964 Senate Hearings* (remarks of Walter E. Craig). For the text of the explanatory statement and consensus of the conference, see 50 A.B.A.J. 237 (1964) The House of Delegates of the American Bar Association adopted the principles of the consensus at its Midyear Meeting in February, 1964. See 50 A.B.A.J. 393 (1964).

16. The panel's recommendations concerning the Vice President were made equally applicable to whoever would be first in the line of succession.

17. The term "Cabinet" means the "heads of the executive departments".

could not be diverted from him, constitutionally, by legislation. It was stressed that if a merely legislative solution to the problem were enacted, it would be subject to constitutional challenge, which would come, very likely, during a time of inability—when we could least afford it.

The second point would eliminate the fear that a Vice President would oust the President if he acted as President in a case of inability, and it would give constitutional status to the Tyler precedent.

The panel believed that the Vice President should be involved in the decision, since it is his duty to act as President and he should, therefore, have a voice in determining when so to act. On the other hand, it was felt that he should not have the sole power, as he would be an interested party and, therefore, reluctant to make a determination. The Cabinet was thought to be the best possible body to assist him in making the determination. Among the reasons for the selection of the Cabinet were that its members are close to the President, that they would likely be aware of an inability, that they would know whether the circumstances were such that the Vice President should act, that they are part of the Executive branch, and that the public would have confidence in their decision. A primary consideration in favor of a so-called Vice President-Cabinet approach was that it would involve no violation of the principle of separation of powers, which is fundamental to our system of government.

An insertion of a specific method in the Constitution itself was decided on for several reasons. The amendment would be self-executing and would require no further legislation by Congress. Since the Constitution is quite specific as to the election of the President and as to how he may be deprived of his powers and duties by impeachment, the method of determining inability, which would also deprive him of his prerogatives, at least temporarily, should be no less specific and should be written into the Constitution.

Giving Congress a broad power to establish a method for determining inability is in itself no solution, for a method would still have to be agreed upon by Congress—and that could take years. The inclusion of a provision that Congress could change the Cabinet as the body to function with the Vice President was recommended. Although some members felt that Congress should have no power at all to change the method, it was the consensus that such a provision would have the advantage of flexibility, so that if it should become necessary to do so, Congress could by legislation (which would be subject to Presidential veto) change the procedure relatively quickly without having to resort to a new constitutional amendment.[18]

The possibility of a President's declaring that he was able when he was not led to the inclusion of the provision that the Vice President and a majority of the Cabinet could prevent him from doing so. The Vice President would continue to act in order that the office would not be filled by one whose capacity was seriously challenged. A two-thirds vote of Congress would be required to prevent the President from resuming his powers and duties, in order to weigh the provision heavily in favor of the President. This also conforms to the two-thirds vote required by the Constitution to remove a President from office. It was stressed that since the President is elected by all the people, he should not be deprived of his powers and duties except under extraordinary circumstances.

The panel was unanimous that the best way to solve the succession problem is by filling the Vice Presidency, since the Vice President, having been chosen and trained for that purpose, is the official in the best position to succeed to the Presidency.[19] The manner of filling the vacancy would give the President a dominant role. However, as Congress would provide a check, it would be in conformity with current practice and would insure that the Vice President would be of the same party as the President and compatible with him.

Now Is the Time for Congress To Act

The consensus offers a very practical solution to the problem of Presidential inability. Without further legislation, it is complete, practical and consistent with the principle of separation of powers. It gives the decisive role to those in whom the people most likely would have confidence. It involves only persons who have been elected by the people or approved by their representatives, and it embodies checks on all concerned—the President, the Vice President and the Cabinet. Finally, since it would be embodied in a constitutional amendment, there would be no question about its constitutionality.

It is urgent that the problem of Presidential inability be solved now, while the tragedy of November 22, 1963, is still fresh in our memory.[20] To miss this opportunity and again to leave unsolved this most serious problem would be to trifle with the security of this great nation. As Senator Keating, who has been deeply concerned over the problem for many years, said: "Let us not lose the opportunity to take action on inability by losing inability proposals in the scramble for changing the succession law."[21]

In the words of Senator Birch Bayh of Indiana, Chairman of the Senate Subcommittee on Constitutional Amendments: "Our obligation to deal with the question of Presidential inability is crystal clear."[22]

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18. Thus, the consensus in effect combines provisions of S. J. Res. 139, 88th Cong., 1st Sess. (Senator Bayh and others) and S. J. Res. 35, 88th Cong., 1st Sess. (Senator Keating).

19. The rationale for this recommendation was well stated by the American Bar Association Committee on Jurisprudence and Law Reform: ". . . [It is] essential in this atomic age that there always be available a Presidential successor who would be fully conversant with domestic and world affairs and who would be prepared to step into the higher office on short notice and to assume its full responsibilities with a minimum of interruption of the conduct of affairs of state." See the author's article, *The Vice Presidency and the Problems of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457 (1964).

20. "Presidential inability is, to be sure, a delicate and distasteful subject to contemplate but in all prudence it must be faced." *1964 Senate Hearings*—(remarks of Professor Paul Freund). ". . . [S]urely the time has come when reasonable men must agree on one workable method." *Id.* (remarks of Lewis F. Powell, Jr.)

21. *Id.*

22. *Id.*

Leg: GG:Presidential Succession

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August 7, 1964

The Honorable Birch Bayh
Chairman
Subcommittee on Constitutional Amendments
Senate Judiciary Committee
United States Senate

Dear Birch:

Many thanks for your letter. I was pleased to receive the hearings and analysis of your Subcommittee relating to Presidential inability and the filling of vacancies in the office of Vice President.

I could not be more in agreement with you that this is a matter which should receive the immediate attention of the Congress, and I am hopeful we can act on it this session.

My congratulations to youand your staff on this excellent report.

Sincerely yours,

Hubert H. Humphrey

BIRCH BAYH
INDIANA

COMMITTEES
JUDICIARY
PUBLIC WORKS

CHAIRMAN
SUBCOMMITTEE
ON CONSTITUTIONAL
AMENDMENTS

United States Senate

WASHINGTON, D.C.

August 6, 1964

The Honorable Hubert Humphrey
United States Senate
Washington 25, D. C.

Dear Hubert:

Today I am having delivered to you a copy of the Hearings held earlier this year by the Subcommittee regarding Presidential inability and the filling of vacancies in the office of Vice President.

I am also including with the Hearings an "Analysis of Study" which the Subcommittee staff has prepared. This "Analysis," as you will note, contains resumes of the testimony given by the distinguished roster of witnesses who appeared before us.

The national urgency of agreeing upon a solution to this existing constitutional gap has prompted me to make these materials available to you. I know you will agree with me that there must never be a moment of vacant, uncertain, or disputed authority in the Presidential office at this or any other crucial time of our history. For this reason, I am hopeful that it will be possible for the Senate to give this matter its attention yet this session of Congress.

Sincerely,

Birch

Birch Bayh, Chairman
Subcommittee on Constitutional
Amendments

BIRCH BAYH
INDIANA

COMMITTEES
JUDICIARY
PUBLIC WORKS

CHAIRMAN
SUBCOMMITTEE
ON CONSTITUTIONAL
AMENDMENTS

United States Senate

WASHINGTON, D.C.

August 13, 1964

The Honorable Hubert Humphrey
United States Senate
Washington 25, D. C.

Dear Hubert:

I am enclosing for your perusal a list of "Editorials, Columns and Newspaper Items on the Subject of Presidential Inability and Vice Presidential Succession." This list, which includes items published in papers throughout the nation up to July 1, 1964, indicates the extensive concern about the subject developed across the country.

Hopefully, you will find this information helpful in your consideration of Senate Joint Resolution 139.

Sincerely,

Birch

Birch Bayh, Chairman
Subcommittee on
Constitutional Amendments

EDITORIALS, COLUMNS AND NEWSPAPER ITEMS

ON THE SUBJECT OF

PRESIDENTIAL INABILITY AND VICE PRESIDENTIAL SUCCESSION

July 1, 1964

AKRON BEACON JOURNAL, Adron, Ohio
May 24 - Favor Letting Presidents Fill VP Vacancy
May 28 - High Stakes Gamble
TRIBUNE, Albuquerque, N. M.
May 27 - Ike Gives His Views on Vice Presidency
AMERICAN METAL MARKET, New York, N. Y.
Jun 2 - How to Succeed
THE ARIZONA REPUBLIC, Phoenix, Arizona
May 24 - GOP, Democrat Senators Agree on Presidential Successor Plan
May 31 - Ike Came of Age in Talk to Bar
THE ATLANTA JOURNAL and THE ATLANTA CONSTITUTION, Atlanta, Ga.
Jun 7 - Presidential Succession

BIRMINGHAM POST-HERALD, Birmingham, Alabama
May 26 - Ike Would Give VP Discretionary Power
THE BLADE, Toledo, Ohio
May 24 - Vice President Vacancy Plan Gets Approval
THE BOSTON GLOBE, Boston Mass.
May 26 - Ike Spurs Presidential Inability, Succession Law
May 26 - If a President is Disabled
Jun 7 - A Crucial Gap in the Constitution
THE BOSTON HERALD, Boston, Mass.
May 26 - Ike Favors Disability Plan
May 27 - Securing the Succession
THE BRIDGEPORT TELEGRAM, Bridgeport, Conn.
Mar 27 - ABA Plans Campaign on Disability Law

CHICAGO DAILY NEWS, Chicago, Illinois
May 26 - Eisenhower Cites Need to Name a Vice President
CHICAGO SUN-TIMES, Chicago, Illinois
May 26 - Ike Puts Disability Ruling up to the Vice President
May 24 - Agree on Presidential Disability Plan
CHICAGO TRIBUNE, Chicago, Illinois
May 24 - Would let President pick Vice President
May 26 - Ike Urges Vice President Act if Chief's Ill
THE CHRISTIAN SCIENCE MONITOR, Boston, Mass.
Feb 25 - U. S. Presidency - Succession Plans Offered
Mar 27 - Presidential Succession
May 27 - US Action Urged on Succession
Jun 6 - Exit Mr. Throttlebottom
THE CINCINNATI ENQUIRER, Cincinnati, Ohio
May 24 - Plan of Succession for Disabled President Charted
THE CLARION-LEDGER, Jackson Daily News for Mississippians
May 24 - Would Okay Naming of No. 2 Man
THE CLEVELAND PRESS, Cleveland, Ohio
May 26 - Ike Says Vice President Should Rule on Disability
May 27 - Congress Action is Urged on Presidential Succession
COLUMBUS CITIZEN-JOURNAL, Columbus, Ohio
Jun 1 - First Small Step to Safety
COLUMBUS EVENING DISPATCH, Columbus, Ohio
May 26 - Vice President Vital, Eisenhower Advises
COLUMBUS SUNDAY DISPATCH, Columbus, Ohio
May 24 - Favors President Filling Veep Vacancy
THE COMMERCIAL APPEAL, Memphis, Tenn.
May 24 - Leaders Approve Succession Plan
May 26 - Decision to Take Command is Vice President's, Says Ike
COURIER EXPRESS, Buffalo, N. Y.
May 26 - VP Should Make Decision, Ike Says
THE COURIER JOURNAL
Jan 25 - The American Bar Raises A Flag for Us All

THE DAILY OKLAHOMAN, Oklahoma City, Okla.
May 31 - Presidential Succession Tricky Issue
THE DALLAS MORNING NEWS, Dallas, Texas
May 28 - Ike Asks Authority for Vice-President
Jun 13 - 'Shadow Over White House' - Feature for 'ABC Reports'
DALLAS TIMES HERALD, Dallas Texas
May 24 - President's Choice - Appoint Veep, Panel Suggests
May 26 - President Disability Views Given by Ike
DAYTON DAILY NEWS, Dayton, Ohio
May 24 - Panel Would let President Appoint VP
May 26 - Ike Proposes Changes in Succession
DEMOCRAT AND CHRONICLE, Rochester, N. Y.
May 26 - Ike on Presidential Succession....'Up to Vice President'
THE DENVER POST, Denver, Colorado
May 26 - Presidency in Retrospect - Successions Proposed by Ike
DESERT NEWS, SALT LAKE TELEGRAM, Salt Lake City, Utah
May 26 - Vice President Must Decide, Ike Declares
THE DES MOINES REGISTER, Des Moines, Iowa
May 28 - Choosing a Vice President
THE DETROIT FREE PRESS, Detroit, Michigan
May 26 - Ike Would Let Veep Take Ailing President's Place
THE DETROIT NEWS, Detroit, Michigan
May 24 - Plan Seeks to Let President Pick VP in Case of Vacancy
May 30 - Congress Moves on Nasty Problem - an Incapacitated President
Jun 15 - White House Shadow
DROVERS JOURNAL, Chicago, Illinois
May 30 - Ike Says VP Should Determine Inability of any President

ECONOMIST
Dec 14 - Without a Vice President
EVANSVILLE PRESS, Evansville, Ind.
May 29 - US Safety at Sake - Action on Presidential Succession Needed Now
THE EVENING BULLETIN, Philadelphia, Pa.
May 26 - Eisenhower Suggests Plan on Presidential Succession
THE EVENING GAZETTE, Worcester, Mass.
May 27 - To Correct a Flaw
THE EVENING STAR, Washington, D. C.
Dec 20 - Again, Accent is on Personalities
Jan 22 - Disability Amendment Needed, Lawyers Say
May 25 - Eisenhower Suggests Succession Procedure
EXPRESS AND NEWS, San Antonio, Texas
May 24 - Presidential Succession, Disability Changes Favored

FORT WORTH STAR-TELEGRAM, Fort Worth, Texas
May 24 - Plan to Fill No. 2 Post Approved
FORT WORTH PRESS, Fort Worth, Texas
May 27 - When President is Out of Action
THE FRESNO BEE, Fresno, Calif.
Mar 22 - Problem Will not Just go Away

THE GARY POST-TRIBUNE, Gary, Ind.
May 26 - VEEP Should Judge if Chief Too Ill-Ike

THE HARTFORD COURANT, Hartford, Conn.
May 26 - VP Should Have Power to Take Over if President is Disabled, Says I
May 29 - Mr. Eisenhower Speaks on Presidential Succession
HERALD EXAMINER, Los Angeles, Calif.
May 28 - The GOP's Best Bet: Candidate Named Ike
THE HONOLULU ADVERTISER, Hawaii
May 26 - Ike Says VP Should Rule on President's Disability
HOUSTON CHRONICLE, Houston, Texas
May 24 - Solons Would Let President Appoint VP
THE HOUSTON POST, Houston, Texas
May 27 - Presidential Succession Plan

INDIANA TIMES, Indiana
Bayh and Disability
INDIANAPOLIS NEWS, Indianapolis, Ind.
Feb 18 - Bar Backs Bayh Presidential Succession Plan
THE INDIANAPOLIS STAR, Indianapolis, Ind.
Feb 25 - Presidential Disability Protection is "Urgent"
Why Tinker?
THE INDIANAPOLIS TIMES, Indianapolis, Ind.
Mar 1 - Bayh Plan on Presidential Succession Gains Support
May 26 - Ike Backs Bayh's Succession Plan
May 26 - When the President is Sick
May 29 - First Small Step to Safety

JACKSON DAILY NEWS, Jackson, Miss.
May 29 - Ike - Statesman and Hangman

THE KANSAS CITY KANSAN, Kansas City, Kans.
Apr 26 - Succession Legislation Given Push
May 20 - State Bar Assn. Favors Succession Amendment
THE KANSAS CITY TIMES, Kansas City, Mo.
May 26 - Ike View on Succession

THE LIGHT, San Antonio, Texas
May 24 - Succession Report
LONG ISLAND PRESS, Jamaica, N. Y.
May 19 - The Presidential Succession
LOOK, N. Y., N. Y.
Apr 7 - Our Greatest National Danger - (Sen. Birch Bayh)
LOS ANGELES TIMES, Los Angeles, Calif.
May 26 - Eisenhower Favors Change in Succession
May 28 - A Presidential Succession Proposal
LOUISVILLE COURIER JOURNAL, Louisville, Kentucky
Jun 1 - Progress on a Plan of Succession
LOUISVILLE TIMES KENTUCKY, Louisville, Kentucky
May 25 - Welcome Teamwork on Succession

MASON CITY GLOBE-GAZETTE, Mason City, Iowa
Jun 3 - Presidential Succession Still Argued
MILWAUKEE JOURNAL, Milwaukee, Wisconsin
May 26 - News in Brief
MORNING ADVOCATE, Baton Rouge, La.
May 24 - Presidential Succession Plan Offered
May 26 - Ike Presents Views on Succession Plan
THE MORNING CALL, Patterson, N. J.
May 23 - Lawyers to Hear Ike at Washington Parley
THE MORNING NEWS, Patterson, N. J.
May 23 - Bar Forum on VP Vacancy in Capital Monday

NEWARK EVENING NEWS, Newark, N. J.
May 26 - Chain of Command
NEWARD SUNDAY NEWS, Neward, N. J.
May 24 - Senate Unit Offers Succession Plans
NEW HAVEN JOURNAL - COURIER, New Haven, Conn.
May 26 - Eisenhower Tells About 3 Illnesses
THE NEW HAVEN REGISTER, New Haven, Conn.
May 26 - Ike Suggests Presidential Succession
NEW ORLEANS STATES-ITEM, New Orleans, Louisiana
May 23 - V-P Plank Seen in 2 Platforms
Jun 5 - Succession Question Unresolved
THE NEW REPUBLIC, Washington, D. C.
Jan 4 - Succession Law
Jan 25 - Naming a Successor
NEW YORK DAILY NEWS, New York, N. Y.
May 26 - Ike Admits He Couldn't Handle President's Job on 3 Occasions
May 27 - Presidents and Veeps

NEW YORK HERALD TRIBUNE, New York, N. Y.
Mar 6 - At Capitol, He Talks of Succession
May 26 - On the Vice Presidency
NEW YORK JOURNAL AMERICAN, New York, N. Y.
May 19 - Good Case for the Lawyers
NEW YORK POST, New York, N. Y.
Mar 22 - If a President is Disabled
NEW YORK TIMES, New York, N. Y.
Dec 13 - Eyes on Succession
Jan 10 - Bar Summons Conference on Presidential Disability
Jan 24 - In the Nation
Feb 25 - U.S. Bar Presses Succession Plan
Feb 26 - Warren Urged to Head Panel on Setting Presidential Disability
Mar 6 - Nixon Asks Speed on Vice President
May 26 - Eisenhower Favors Disability Change
May 28 - Presidential Disability Amendment is Voted by Senate Panel
May 24 - Senators Would Let President Fill Vice-Presidential Vacancy
Jun 1 - The Presidential Succession
NEW YORK WORLD-TELEGRAM, New York, N. Y.
May 26 - Ike Believes Vice President Must Rule on Chief's Disability
May 26 - When the President is Sick
May 29 - First Small Step to Safety
THE NEWS AMERICAN, Baltimore, Maryland
May 27 - Old Magic There as Smiling Ike Tells of Ills That Beset Him as President
NEWS-FREE PRESS, Chattanooga, Tennessee
May 25 - Former Succession Law Urged Reinstated

NEWS-TRIBUNE, Fullerton, California
Jun 3 - This Problem Should be Solved
NEWSWEEK, New York, New York
Apr 27 - Calling All Worriers

OMAHA WORLD HERALD, Omaha, Nebr.
May 19 - Eisenhower to Discuss Problem of Succession
May 26 - Give Vice-Chief Right to Decide
Jun 8 - Good Morning
THE OREGONIAN, Portland, Oregon
May 25 - Constitutional Amendment Urged by Senators to Solve Woes of Presidential Succession
May 26 - Eisenhower Offers Views on Problem of Presidential Succession
May 29 - Patient Prescribes

PATERSON EVENING NEWS, Paterson, N. J.
May 23 - Bar Forum on VP Vacancy in Capital Monday
May 24 - Succession Report Made
THE PITTSBURGH PRESS, Pittsburgh, Pa.
May 26 - Ike Draws Line to White House
May 26 - When the President is Sick
May 29 - The First Small Step to Safety
THE PLAIN DEALER, Cleveland, Ohio
May 24 - Presidential Filling of VP Vacancy Urged
May 28 - Law Urged on Disability of President
THE POST-STANDARD, Syracuse, N.Y.
May 24 - Urge President be Authorized to Name Veep
PROGRESSIVE, Madison, Wisconsin
May - The President's Successor (Sen. Frank Church)
THE PROVIDENCE JOURNAL, Providence, R. I.
May 24 - Would Let President Fill Vice Presidency
May 26 - Eisenhower Gives Views on Disability

RADIO-TELEVISION DAILY, New York, New York
May 18 - Ike to Speak at Succession Forum
READER'S DIGEST, New York, New York
Mar - Help Wanted: A U. S. Vice President
RICHMOND TIMES-DISPATCH, Richmond, Va.
Jun 7 - A Vice Presidential Vacancy
ROCKY MOUNTAIN NEWS, Denver, Colorado
May 27 - When the President is Sick

ST LOUIS POST-DISPATCH, St. Louis, Mo.
May 26 - Eisenhower Gives Ideas on Vice Presidency
Jun 1 - Presidential Disability Plan at Last?
ST PETERSBURG TIMES, St. Petersburg, Fla.
Feb 29 - Some Senate Stirring on Succession
May 24 - Presidential Successor Plan Announced
May 26 - Ike Suggests Emergency Succession Authority
SALT LAKE TRIBUNE, Salt Lake City, Utah
May 22 - Senate Subcommittee Asks Vice President Succession
May 26 - Ike Says Vice President Must Decide Disability
May 27 - Bar to Push succession Law Moves
May 27 - Lessons From Eisenhower's Disabilities
SAN DIEGO DAILY TRANSCRIPT, San Diego, Calif.
May 29 - Clarification of Succession to Presidency Needed
THE SAN DIEGO UNION, San Diego, Calif.
May 30 - Revamp Urged in Presidential Succession
SAN FRANCISCO CHRONICLE, San Francisco, Calif.
May 24 - A Plan for Presidency Succession
SAN FRANCISCO EXAMINER, San Francisco, Calif.
May 19 - Succession Issue
SAN JOSE MERCURY-NEWS, San Jose, Calif.
May 24 - If LBJ were Disabled
SAN JOSE NEWS, San Jose Calif.
May 23 - Senators' Study Supports Appointed Vice President
SAVANAH EVENING PRESS, Savanah, Ga.
May 27 - Succession Suggestions Come Forth by Bushels
THE SEATTLE DAILY TIMES, Seattle, Wash.
May 26 - Up to Vice President When to take Helm - Eisenhower
THE SHREVEPORT TIMES, Shreveport, La.
May 24 - Parties Seek Amendment on Vice-Presidency
THE SOUTH BEND TRIBUNE, South Bend, Ind.
May 24 - Senators Favor Succession Amendment
THE SPOKESMAN-REVIEW, Spokane, Wash.
May 25 - Vice Presidency Proposals Worthy
THE SPRINGFIELD UNION, Springfield, Mass.
May 26 - Ike Says Vice-President Needs Disability Power
STATE JOURNAL, Topeka, Kans.
Mar 19 - New Succession Plan Supported
THE SUN, Baltimore, Md.
May 24 - Succession Plan Backed
May 26 - Second Place Health Rule Advocated
THE SUNDAY STAR, Washington, D. C.
May 24 - Senate Unit Set to Vote Presidential Succession Resolution
SUNDAY STAR-LEDGER, Newark, N. J.
Jun 14 - Congress Getting Closer to Succession Plan
SYRACUSE HERALD JOURNAL, Syracuse, N. J.
May 26 - Ike Would Let Veep Step in for Ill Chief

TERRE HAUTE TRIBUNE, Terre Haute, Ind.
May 21 - On the Line
May 26 - The Empty Vice Presidency
TIME, New York, New York
Jun 5 - Grappling with Succession & Disability
TIMES-PICAYUNE, New Orleans, La.
May 26 - Ike Favors VP Take-over Law
TIMES UNION, Albany, N. Y.
May 19 - Most Urgently Needed Legislation of our Time
May 26 - Ike: More Power for Future Veep
THE TOLEDO TIMES, Toledo, Ohio
May 26 - Ike for Giving Vice President Crisis Powers
TULSA WORLD, Tulsa, Okla.
May 26 - Ike Outlines View on VP's Crisis Action

WALL STREET JOURNAL, New York, New York
May 26 - Eisenhower said the Vice President must Decide
THE WASHINGTON DAILY NEWS, Washington, D. C.
May 26 - Ike Urges President Succession Plan

WASHINGTON POST, Washington, D. C.
Dec 28 - Bar Calls on Congress to Clarify Problem of a Disabled President
Jan 10 - The Succession Emergency
Jan 22 - Filling Vice President Vacancy Recommended
Jan 23 - Hearings Under Way on Vice Presidency
Jan 24 - Safeguarding the Presidency
Jan 25 - Succession and Disability are Issues
Jan 26 - To Avoid a Vacuum
Feb 25 - Bar Group Presents Plan on Presidential Disability
Feb 26 - Amendment to Ease Succession Given Bipartisan Support
Mar - A Mad Gamble on Succession
Mar 5 - Ike Backs Plan to Fill No. 2 Spot
Mar 6 - Act Now, Nixon Urges, On Succession Laws
Mar 9 - To Narrow the Risk
Mar 19 - LBJ on Succession
May 24 - Senators Back Amendment on Presidential Succession
May 26 - Pilot at the Controls
May 26 - Eisenhower Discusses Presidential Disability
Jun 9 - The Presidency: Succession and Disability

WILLIAMSPORT GRIT, Williamsport, Pa.
Jun 7 - Timely Step in Right Direction

WORCESTER TELEGRAM, Worcester, Mass.
May 24 - Presidential Succession Plan Wins Favor

YOUNGSTOWN VINDICATOR, Youngstown, Ohio
May 26 - Ike Offers Opinion on Succession
May 27 - Ike Agrees with Bar Group on Succession Plan

NOTE: In addition to the 127 papers listed above, the National Editorial Association devoted it's Main Street - U.S.A. column to the subject of Presidential Inability and Vice Presidential Vacancy. Over 200 local newspapers subscribe to this column.

88th Congress - Second Session
Report No. 9 - August 3, 1964

LEGISLATIVE ANALYSIS

PRESIDENTIAL DISABILITY AND VICE-PRESIDENTIAL VACANCIES

S.J. Resolution 139 - Senator Bayh
And Other Proposals

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AMERICAN ENTERPRISE INSTITUTE

For Public Policy Research

SUMMARY OF PRO AND CON ARGUMENTS

from

LEGISLATIVE ANALYSIS

* * *

PRESIDENTIAL DISABILITY AND VICE-PRESIDENTIAL VACANCIES

S.J. Resolution 139 - Senator Bayh
And Other Proposals

This synopsis of the principal arguments is supplemental to the full Legislative Analysis and is not intended to be all inclusive or to pass judgment on the arguments.

1012 Fourteenth Street, N.W., Washington 5, D.C. 20005
EXECUTIVE 3-8205

SUMMARY OF PRINCIPAL ARGUMENTS FOR THE BAYH PROPOSAL

The States would be more apt to approve a constitutional amendment containing a specific method for determining when the President is unable to perform his duties than a proposal merely giving the Congress the power to devise a method by statute.

The inclusion of a specific procedure would avoid the uncertainty and possible delay involved in leaving the problem for action by the Congress in the future. The time to agree on a method is now, while there is general interest in the subject of inability.

A broad power enabling Congress to adopt and re-adopt methods, as it sees fit, for determining Presidential inability would be contrary to the separation of powers doctrine.

The Constitution is specific in its provisions dealing with removal of the President by impeachment, and it should be specific with respect to his removal during periods of inability.

While the Bayh proposal provides a specific procedure which could be invoked promptly in the absence of congressional action, it would vest the Congress with the power to require concurrence by a body other than the Cabinet. In fact, the Congress could designate itself as the body to grant or withhold concurrence. Also, the Congress would have authority in the nature of a veto power in the event a President declares that he is able to resume his duties but the Vice President, with the concurrence of the Cabinet or such other body as may be designated by law, declares that he is not able to do so.

Proposals for a legislative solution without a constitutional amendment are not free from constitutional doubt. We cannot afford to risk having a period of indecision and delay while the constitutionality of such a solution is being tested.

Selection by the President of a nominee to fill vacancies in the Vice-Presidency would follow the traditional practice of nominating conventions. Confirmation by a majority of the Congress would tend to create public confidence in the selection.

Vice Presidents should not be selected by members of the Electoral College, as suggested by some, because the members are not widely known and have not gained the confidence of the public on a national basis.

The existing succession law is unsatisfactory for a number of reasons. For example, the Speaker of the House (next in line after the Vice President) is sometimes the leader of the opposite political party. Moreover, the office of Speaker may be vacant for a substantial period between final adjournment of one Congress and commencement of the next.

SUMMARY OF PRINCIPAL ARGUMENTS AGAINST THE BAYH PROPOSAL

The specific method contained in the proposed constitutional amendment would suggest a variety of questions and invite prolonged debate in state legislatures. It would be difficult, if not impossible, to obtain ratification by the required two-thirds of the States.

The Congress can be relied upon to devise a prompt and proper solution if given a clear constitutional authorization and mandate from the States to do so.

Such an authorization would not be inconsistent with the separation of powers doctrine. An analogous power, for example, is the power of the Congress to remove the President by impeachment.

The Constitution generally sets forth basic principles and leaves specific methods for the Congress to determine. Rigid procedures should not be frozen into the Constitution in a situation of this kind.

A constitutional amendment is not necessary. A proper legislative solution can be devised. Legislation along the lines of the informal arrangement adopted by Presidents Eisenhower, Kennedy, and Johnson, for example, would not be open to serious constitutional challenge.

The President should not be required to submit his nominee to fill a vacancy in the Vice-Presidency for congressional confirmation. Party control of the Congress has changed from time to time during presidential terms. If confirmation is advisable, action by the Senate, as in the case of cabinet officers, should be sufficient. The traditional prerogative of the President to select his top associates with Senate approval should not be impaired.

The Electoral College is the proper body to fill vacancies in the Vice-Presidency. It is a popularly elected body which reflects the will of the people at the time of the most recent presidential election. This important new function would upgrade the Electoral College.

Apparently vacancies in the office of Vice President have not created any major problems. The office was vacant for nearly four years following Mr. Truman's succession to the Presidency and will be vacant for more than a year during the current presidential term.

The next in line for the Presidency, after the Vice President, should be an elective officer. The Speaker of the House (next in line after the Vice President under existing law) is elected by the Representatives of the people every two years and is the logical successor when the office of Vice President is vacant.

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PART I - PRESIDENTIAL DISABILITY

The Constitution provides that in case of the President's "inability to discharge the powers and duties of the . . . office the same shall devolve on the Vice President . . . ." But who would decide when the President is unable to discharge his duties? Who would initiate such a proceeding? Would the Vice President be entitled to serve as President for the rest of the term or temporarily during the period of inability? If the Vice President serves temporarily, who decides when the President's "inability" has ended? These are some of the questions to which Part I of this Analysis is addressed.

President Garfield lingered for 80 days after he was shot by an assassin. President Wilson suffered a stroke during his term which left him unable to discharge his duties for many months. General Eisenhower has stated that he was unable to perform his duties on three occasions while he was President and that in each instance "there was some gap that could have been significant . . . ." Fortunately, no great national crises have arisen during periods of Presidential inability. But, it seems generally agreed that clear procedures should be adopted so that prompt action can be taken in the event such a crisis arises.

The relevant provision of the Constitution reads as follows:

> In Case of the Removal of the President from Office, or at 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. 1/

The Congress has established a line of succession in the event there is neither a President nor a Vice President, but as pointed out by Representative Celler, "It is a curious thing that Congress has never enacted legislation to implement the inability clause . . . ."

Last December, following the death of President Kennedy, Senator Bayh and others proposed an amendment to the Constitution (S.J. Res. 139) to provide a procedure for the Vice President to act as President in the event the President becomes disabled. This would also provide for filling vacancies in the Vice-Presidency.

1/ U.S., Constitution, Art. II, §1. cl. 6.

In January of this year the American Bar Association called a conference in Washington on the problem and later, in May, the Association sponsored a national forum on the subject. 1/ The general consensus of the Association supports the Bayh Amendment.

Following hearings before a Subcommittee of the Senate Judiciary Committee 2/ the Bayh proposal was favorably reported to the full Committee on May 27, 1964.

HISTORY OF THE PROBLEM

Constitutional Convention

Presidential succession was the subject of scant attention at the Constitutional Convention of 1787. 3/ On August 6, 1787, a Committee of Detail, which had been formed on July 23 to consider various matters, presented a draft of the Constitution to the Convention, providing in material part:

> In case of his [the President's] removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed. 4/

This section (Article X, Section 2) was not discussed until three weeks later. On August 27, Hugh Williamson of North Carolina suggested that "the Legislature ought to have power to provide for occasional successors . . .", 5/ and then moved that discussion of the entire matter be

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1/ Participants in the conference included Walter E. Craig, President, ABA; Herbert Brownell, a former Attorney General of the United States; John D. Feerick, Attorney, New York; Lewis F. Powell, Jr., ABA President-Elect; Sylvester C. Smith, Jr., and Ross L. Malone, Past Presidents, ABA; and Edward L. Wright, Chairman, House of Delegates, ABA.

2/ Subcommittee on Constitutional Amendments.

3/ This area is explored in detail in John D. Feerick, The Problem of Presidential Inability -- Will Congress Ever Solve It?, 32 Fordham Law Review 73 (October, 1963); Ruth C. Silva, Presidential Succession, (1951).

4/ 2 The Records of the Federal Convention of 1787, 186 (Farrand ed. 1911 & 1937). (Hereinafter cited as Farrand.)

5/ Ibid., p. 427.

postponed. John Dickinson of Delaware seconded the motion for postponement and asked: "What is the extent of the term 'disability' and who is to be the judge of it?" 1/ Unfortunately, these questions were never answered.

On August 31, a number of matters, including presidential succession, were referred to a Committee of Eleven. It delivered a Report on September 4, in which it recommended an office of Vice President, the election of President and Vice President by the electoral college, and the following succession provision:

> In case of his removal as aforesaid, 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. 2/

On September 7, the following provision was added to the Report:

> The Legislature may declare by law what officer of the U.S. shall act as President in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly until such disability be removed or a President shall be elected. 3/

The underscored words were inserted on the motion of James Madison in order to permit a special presidential election to fill the offices of both the President and Vice President.

On September 8, a Committee of Style was formed to revise the style of and arrange the articles agreed to by the Convention. Its members were five lawyers -- Alexander Hamilton of New York, William S. Johnson of Connecticut, Rufus King of Massachusetts, James Madison of Virginia, and Gouverneur Morris of Pennsylvania. The Committee was given no power to make substantive changes in the draft of the Constitution submitted to it. Yet, when the two succession provisions submitted to the Committee are compared with the one provision reported by the Committee, certain differences will be noted:

1/ Ibid.

2/ Ibid., pp. 493, 495.

3/ Ibid., p. 535. (Emphasis added.)

As Submitted: 1/	As Returned: 2/
Sec. 2: In case of his removal as aforesaid, 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.	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 period for chusing another president arrive.
Sec. 1: The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.	

In view of the prior drafts, it seems evident that the word "same" was intended as a substitute for "powers and duties." (It is to be noted that the "same" devolves in all four cases.) Similarly, it seems evident that the adverbial clause, "until such disability be removed," which had appeared, substantially, in both provisions submitted to the Committee, was intended to apply to a Vice President who acted in a case of inability as well as to an officer appointed by Congress.

Succession of John Tyler

Until 1841, the succession provision had never received any application. Then, on April 4, 1841, President William Henry Harrison died in office. John Tyler, Vice President at the time, asserted his right to the office and title of President, and thereupon took the presidential oath, gave an inaugural address, and served as President for the remainder of Harrison's term.

Tyler's claim to the office of President was not without objection. Former President John Quincy Adams, then a member of the House of Representatives, stated in his diary for April 6, 1841 that Tyler's assumption of

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1/ Ibid., pp. 573, 575. (Emphasis added.)

2/ Ibid., pp. 598-99. (Emphasis added.) The words "until the period for chusing another president arrive" were changed to "until . . . a President shall be elected" on September 15, since the latter words were the ones agreed to on September 8. The Committee's change in this regard appears to have been an oversight.

the title and office of the Presidency

is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice President, on the decease of the President, not the office, but the powers and duties of the said office. 1/

Various newspapers of the day attacked Tyler's assumption of the office. Some leaders of the Whig party joined in the attack. Daniel Webster, then Secretary of State, is said to have been of the view that the powers and duties were inseparable from the office and that any succession by a Vice President was to the office of President for the remainder of the term. 2/ Representative John McKeon of New York urged the House of Representatives to address Tyler as "Vice President, now exercising the office of President." 3/ Senators William Allen and David Tappan of Ohio suggested that he be referred to as "the Vice President, on whom by the death of the late President, the powers and duties of the office of President have devolved." 4/ The Congress decided against these suggestions and accepted Tyler as the new President. Seven other Vice Presidents were to become President through succession so that the Tyler precedent was to assume the force of law.

First Case of Presidential Inability

On July 2, 1881, President James A. Garfield was shot by an assassin and for the next eighty days he lingered between life and death unable to discharge the powers and duties of the Presidency. 5/ Garfield's only official act during the inability was the signing of an extradition paper.

Several weeks after Garfield's shooting, the Cabinet met and unanimously agreed that Vice President Chester A. Arthur should act as President. A majority of the Cabinet, including Attorney General Wayne MacVeagh, believed that if he did act, because of Tyler's interpretation

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1/ 10 Adams, Memoirs of John Quincy Adams, (1876), pp. 463-64.

2/ Silva, op. cit., pp. 15-16 & n. 8.

3/ Congressional Globe, 27th Cong., 1st Sess., (1841), p. 3.

4/ Ibid., p. 4.

5/ See generally, Silva, op. cit., pp. 52-57.

that it is the "office" which devolves, he would become President for the remainder of the term and Garfield would be thereby ousted as President. This view was supported by some of the outstanding authorities on the Constitution of the day. Arthur refused to act under these circumstances. The inability crisis came to an end on September 19, 1881, when Garfield died and Arthur became President. Arthur urged the Congress to act on the inability problem.

Second Case of Presidential Inability

On September 25, 1919 President Woodrow Wilson became ill. On October 2, he had a stroke, which paralyzed his left side. As a result, he was rendered incapable of discharging the powers and duties of his office for the rest of his term. 1/ While Wilson lay disabled, many insisted that Vice President Thomas R. Marshall act as President. He refused to do so for fear of ousting Wilson. Some twenty-eight bills became law by default of any action by the President. Few public matters reached him. Mrs. Wilson, the White House physician, Dr. Grayson, and other members of the White House staff administered executive affairs and, since the people seldom saw Wilson, rumors circulated that he had either gone insane or died.

Wilson did not call any meeting of the Cabinet until April 13, 1920. In the interim, the Cabinet met unofficially under the direction of Secretary of State Robert Lansing. When Wilson learned of these meetings, he forced Lansing to resign since he believed that Lansing was seeking to oust him as President. This inability crisis came to an end on March 4, 1921 when Warren G. Harding was sworn in as President. The inability problem was discussed in Congress but, again, nothing was done.

Third Case of Presidential Inability

On September 24, 1955, President Dwight D. Eisenhower was stricken with a heart attack and the gap in the law relating to Presidential inability once more forcibly presented itself. 2/ Domestic and foreign affairs were in apparent calm so that the question of the Vice President's role did not become a serious problem. Management of the Government was assumed by a group consisting of various members of the White House staff and Cabinet. During Eisenhower's absence from Washington the Vice President presided over meetings of the Cabinet and National Security Council. Former President Eisenhower has said that he was "practically incommunicado" for a week. Thereafter, he was kept informed

1/ This period is the subject of Gene Smith, When the Cheering Stopped, (New York: William Morrow, 1964).

2/ This period is covered in Hansen, The Year We Had No President, (1962), pp. 61-68.

of these meetings by his assistant, Sherman Adams, but it was not until three or four weeks later that he was able to assume fully the essential burden of the office. 1/ Although the Government seemed to run smoothly enough during the inability, all "were well aware that a national or international emergency could have arisen during the President's illness to make this unofficial government by 'community of understanding' entirely inadequate." 2/

The problem of presidential inability was revived on two other occasions during the Eisenhower administration. On June 8, 1956, Eisenhower suffered an attack of ileitis and the following day he underwent an emergency operation. He was discharged from the hospital on June 30 and returned to the White House in July. On November 25, 1957, he suffered a "little stroke" which temporarily impaired his speech but he was back at work after a few days. Due to his own illnesses, Eisenhower was particularly concerned about the problem and repeatedly urged Congress to take steps to solve it. Again, no action was taken.

ATTEMPTS AT SOLUTION

1956-1958 Congressional Hearings

The Eisenhower inabilities prompted the Congress to reexamine the inability problem. Hearings were held by the House Judiciary Committee in 1956 and 1957 and by the Senate Judiciary Committee in 1957 and 1958. 3/ It seemed generally agreed during these hearings that there is a serious problem and that any solution should make these points clear in order to eliminate the problem caused by the Tyler precedent: (1) that in cases of death, resignation and removal, the Vice President succeeds to the office of the President for the remainder of the term, and (2) that in case of inability, the Vice President exercises the powers and duties of President for the period of inability. It seemed to be generally agreed also that no definition of inability should be enacted into law. In the hearings before the Senate Subcommittee on Constitutional Amendments, there seemed to be a general consensus that a constitutional amendment would be necessary for any real solution, however, there was general disagreement on the specific method for determing the existence and termination of an inability. Numerous proposals were advanced variously

1/ Former President Eisenhower, address before the ABA National Forum on Presidential Inability and Vice-Presidential Vacancy, Washington, D.C., May 25, 1964.

2/ Sherman Adams, Firsthand Report: The Story of the Eisenhower Administration, (1961), p. 192.

3/ The testimony given at these hearings is summarized in Feerick, op. cit., pp. 110-120.

giving the decisive role to the President, Vice President, Cabinet, Congress, Supreme Court, or an Inability Commission. No action was taken by the Congress.

Informal Agreements

After the conclusion of these hearings and in March of 1958, President Eisenhower made a public announcement that he had entered into a letter agreement with Vice President Nixon providing as follows:

(1) In the event of inability the President would - if possible - so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office. 1/

This agreement was adopted by President John F. Kennedy and Vice President Lyndon B. Johnson and, recently, by President Johnson and Speaker John McCormack.

The major arguments made against this arrangement as a permanent solution are as follows: First, it does not have the force of law. Second, if the "office" devolves on the Vice President in cases of death, a correct legal interpretation of the constitution dictates that it devolve in cases of inability as well. Third, the letter agreement depends solely on the good will of both the President and the Vice President (or, as now, the Speaker). It would not be effective if the President became mentally incapacitated, or if the President and Vice President had a poor working relationship. Fourth, in the case of the Speaker, it places a tremendous burden on him, since under the present succession law he would have to resign both as Speaker and as a Member of Congress before he could act as President, even if it were for a week.

1963 Congressional Hearings

Hearings were held before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee in June, 1963. Representatives

1/ White House Press Release, March 3, 1958.

of the Administration, the American Bar Association, the Association of the Bar of the City of New York and the New York State Bar Association testified in favor of a constitutional amendment which would (1) recognize the Tyler precedent in cases of death, resignation and removal, (2) provide for devolution of only the powers and duties in case of inability, and (3) leave it to Congress to establish by statute a method for determining the commencement and termination of an inability. This proposed amendment was S.J. Res. 35 and the Subcommittee reported it to the full Committee after its deliberations. It was on the Judiciary Committee's agenda at the time of President Kennedy's death.

Death of President Kennedy and the 1964 Congressional Hearings

The death of President Kennedy stimulated much discussion and real concern about the problems of presidential inability and succession. Inability took on urgent importance because of the realization that, had our late President lived, hovering unconscious between life and death for a period of time, chaos and confusion might well have resulted since no one would have been clearly authorized by law to determine the inability of the President.

The concern over these problems caused Congress to reexamine inability once again and to consider the problem of how to fill a vacancy in the Vice-Presidency. The Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, under the chairmanship of Senator Birch Bayh of Indiana, held hearings in January and February of this year, at which some of the Nation's leading experts presented their views on these problems.

The need for Congressional action on inability was particularly emphasized by many of the witnesses. Much support developed for the type of proposal endorsed by the American Bar Association. That proposal calls for a constitutional amendment embodying these points:

1. 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.

2. The amendment should provide that the inability of the President may be established by his declaration in writing. 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 with the concurrence of such other body as the Congress may by law provide.

3. 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.

4. 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.

Among those expressing support for this proposal were Senator Jacob K. Javits, Former Attorney General Herbert Brownell, Professor Paul A. Freund of Harvard Law School, Walter E. Craig, President of the American Bar Association, Lewis F. Powell, Jr., President-elect of the American Bar Association, James C. Kirby, Jr., former chief counsel to the Subcommittee on Constitutional Amendments, Doctor Paul Dudley White, and John D. Feerick, New York attorney. Former President Eisenhower and Vice President Nixon were also in agreement with the proposal. Eisenhower felt, however, that if there were a disagreement between the President, on the one hand, and the Vice President and Cabinet on the other, the issue should be referred to a commission consisting of the three senior Cabinet officials, the Speaker and minority leader of the House, the President pro tempore and minority leader of the Senate, and four medical persons recognized by the American Medical Association (and selected by the Cabinet). The findings of this commission could, Eisenhower said, be submitted to Congress for approval. Professor Ruth C. Silva, generally regarded as a leading scholar on succession, was also in agreement with the proposal, except that she thought it unnecessary to make provision for a disagreement situation and she objected to giving Congress any power at all to designate the body to function with the Vice President in determining the commencement and termination of an inability.

Senator Roman L. Hruska, testifying in support of his S.J. Res. 84, stated that the determination of a President's inability should be left to the Executive. He was of the opinion that the Cabinet was the best possible body and that it should be specified as the body in a constitutional amendment. Instead of giving Congress carte blanche authority to designate a body other than the Cabinet (points 2 and 3 above), Senator Hruska would provide that Congress could designate another body "within the Executive Branch." The Senator would keep Congress out of the disagreement area entirely. Senators Edward V. Long and Frank E. Moss testified in favor of S.J. Res. 139, which, as revised, embodies the four points favored by the American Bar Association.

Professor Clinton Rossiter of Cornell University and Richard Neustadt of Columbia University suggested a jointresolution by Congress endorsing the Eisenhower-Nixon, Kennedy-Johnson and Johnson-McCormack type of

arrangement. Their view is that a constitutional amendment is unnecessary. Sidney Hyman felt that the Vice President should be given the power to declare a President disabled in the event of a great emergency and suggested that a constitutional amendment might be necessary. Professor James MacGregor Burns of Williams College favored a constitutional amendment in broad terms which would permit Congress to set up an inability commission consisting of the Chief Justice, two ranking Cabinet members, the Speaker and the President pro tempore. Each member would have the power to appoint a doctor to gather facts. Former Attorney General Francis Biddle suggested a commission of three Cabinet officials. This commission could declare an inability to be temporary or permanent. In the latter case, the declaration would have to be sent to Congress for approval. Martin Taylor of New York was of the opinion that a constitutional amendment along the lines of S.J. Res. 35 should be adopted.

PRINCIPAL ISSUE INVOLVED IN THE BAYH PROPOSAL

The inability provisions of the Bayh Resolution (S.J. Res. 139) may be summarized as follows:

1. If the 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.

2. If the President does not so declare, the Vice President may do so with the written concurrence of a majority of the heads of the executive departments or of such other body as Congress may by law provide. Upon transmittal to the Congress of such a declaration by the Vice President with the required concurrence, the Vice President shall immediately become Acting President.

3. The President may resume the powers and duties of his office whenever he declares that no inability exists, unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress upholds the declaration of the Vice President by a two-thirds vote of both Houses, he shall continue as Acting President; otherwise the President shall resume his powers and duties. 1/

The Bayh proposal has been favorably reported by the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary and is now pending before the full Committee. It embodies the

1/ The full text of S.J. Res. 139 in the form approved by the Senate Subcommittee on Constitutional Amendments is set forth in Appendix A, page 46 .

principles of a consensus of American Bar Association leaders and experts worked out in a conference held in Washington last January. 1/

The Keating Proposal

Senator Keating, a member of the Senate Subcommittee on Constitutional Amendments, is "somewhat leery" of incorporating a specific method in the Constitution and so he joined in reporting the Bayh Resolution on a single condition: When the proposal reaches the Senate floor, he will seek a change to authorize the Congress to determine by statute the procedures by which a President would be declared unable to discharge his duties and the method by which he would regain the powers and duties of his office. However, Senator Keating has agreed that if his amendment is defeated, he will support the Bayh proposal as it presently stands. If his amendment is adopted, Senator Bayh and other Subcommittee members will support the Resolution with the Keating amendment. 2/

Arguments For a Specific Method

State legislatures would be more apt to approve a constitutional amendment containing a specific method than they would a simple provision giving the Congress a "blank check." 3/

The inclusion of a specific procedure would permit prompt action and avoid the uncertainty and possible delay involved in leaving the decision entirely up to the Congress. The question has been considered in Congress for many years, but the Congress has not acted. The time to agree on a method is now, while there is general interest in the subject of inability. A mere enabling amendment would postpone the decision on a method to a time when there might be little interest in the problem.

Simply to grant Congress a broad power to adopt and re-adopt methods, as it sees fit, for determining Presidential inability would be contrary to the spirit of separation of powers. The Legislative Branch should not have broad and exclusive power to decide whether the President is able to perform his duties.

The Constitution is specific in its provisions dealing with removal of the President by impeachment, and it should be specific with respect to his removal during periods of inability.

1/ The names of some of the participants in this conference are shown above, page 2, note 1.

2/ See statement by Senator Keating, Congressional Record, May 27, 1964, p. 11711.

3/ Ibid.

While the Bayh proposal provides a specific procedure which could be promptly invoked in the absence of congressional action, it would vest the Congress with the power to require concurrence by a body other than the Cabinet if it thinks best. In fact, the Congress could designate itself as the body to grant or withhold concurrence. Moreover, the Congress would have authority in the nature of a veto power in the event a President declares that he is able to resume his duties but the Vice President with the concurrence of the Cabinet or such other body as may be designated by law declares that he is not able to do so.

Arguments Against a Specific Method

A specific method would invite prolonged debate in state legislatures over detailed language and would make it difficult to obtain ratification by the required two-thirds of them.

The Congress can be relied upon to devise a prompt and proper solution if given a clear constitutional authorization and mandate from the states to do so.

Such an authorization would not vest excessive power in the Congress or be inconsistent with the separation of powers doctrine. The Congress has always had the power to remove the President by impeachment. There is no basis for assuming that the power to provide a method for determining inability would be abused.

The Constitution generally sets forth basic principles and leaves specific methods for the Congress to determine. Rigid procedures should not be frozen into the Constitution in a situation of this kind.

OTHER APPROACHES

Legislation Without Constitutional Amendment

Obviously, it is desirable that any permanent solution to the inability problem be free from constitutional doubt. Although some authorities have expressed the opinion that the problem can be solved under the existing provisions of the Constitution by legislation, 1/ most authorities appear to be in agreement that a constitutional amendment is necessary. Some hold that the power of the Congress under Article II, Section 1, Clause 6 is limited to fixing the line of succession and therefore it can have no other power in this area. 2/ Some

1/ Corwin, The President, Offices and Powers, 1787-1957, (1957), pp. 54-55.

2/ Inclusio unius, exclusio alterius. See Davis, Inability of the President, S. Doc. 308, 65th Congress, 3d Session, (1918), pp. 13-15.

argue that the Vice President or the person next in the line of succession now has the constitutional power to declare a President disabled as ancillary to his duty to act in a case of inability. Thus, it is argued, if a statute sought to divert the determination from him, it would conflict with the Constitution. Another argument is that by virtue of the Tyler precedent, the word "office" has been interpreted as being the antecedent of the word "Same." Since the "Same" devolves in all cases, a statute providing for devolution of the "powers and duties" only, in a case of inability, would not be consistent with the Constitution as interpreted. Others take the view that there is such doubt on the point that prudence requires a constitutional amendment.

Supreme Court Participation

Objections to proposals to permit initial participation by the Supreme Court or by any of the Justices thereof have been made in a letter from Chief Justice Warren to Senator Keating as follows:

> It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.

On the other hand, proponents of such proposals point out that the Chief Justice presides during Senate proceedings for removal of the President by impeachment.

Commission on Presidential Inability

It is argued that since the question of whether a President is unable to perform his duties is essentially a fact-finding problem, a commission could be created by legislation to make such determinations. The main objection made to this approach is that a method for prompt action is required and that groups of this kind frequently find it difficult to reach prompt agreement. Another argument is that the Congress does not have the power under the Constitution to enact legislation to create such a commission.

S.J. Res. 35 - Senators Kefauver and Keating

This proposal would eliminate the devolution problem by providing that in cases of death, resignation and removal, the office devolves on the Vice President, while in case of inability, the powers and duties devolve on the Vice President until the inability be removed. It has been suggested that to be consistent with the language used in the Twelfth and Twentieth Amendments and to make the status and period of service of the Vice President indisputably clear, it would be preferable to provide that in the former cases, the "Vice President shall become President for the remainder of the term," and that in the latter, "he shall act as President until the inability be removed or the term expires, whichever may occur sooner."

Under this proposal, the commencement and termination of any inability is left to such method as Congress may by law provide. This proposed constitutional amendment also states that Congress may declare "what officer shall then be President, or in case of inability, act as President," where there is neither a President nor Vice President, and such "officer" shall become or act as President until a President shall be elected or, in case of inability, until the earlier removal of the inability. Objections have been made to use of the word "officer" because of the difference of opinion over whether the Speaker and President pro tempore are officers. It has been said that the word "person," which is used in the Twentieth Amendment, is preferable. The words "shall be elected" might be construed to permit a special presidential election. If the "officer" becomes President, should he be subject to this possibility, or should he serve for the rest of the term? The proposal is silent about Article II, Section 1, Clause 6.

S.J. Res. 84 - Senators Hruska and McClellan

This proposed constitutional amendment would repeal Article II, Section 1, Clause 6 of the Constitution. It clarifies the problem created by the Tyler precedent by providing that in cases of death, resignation or removal, the Vice President shall become President for the remainder of the term, while in case of inability he shall act as President until the inability be removed or the term of President shall expire. Congress is given the power to establish a procedure for determining the commencement and termination of inability, but such procedure "must be compatible with the maintenance of the three distinct departments of government, the legislative, the executive, and the judicial and the preservation of the checks and balances between the coordinate branches."

The wording of this proposal has been objected to on the ground that it would leave in doubt the constitutionality of almost any procedure

that Congress might establish. It provides that Congress may declare by law what "officer" shall act as President in cases of death, resignation, removal or inability of both the President and Vice President" and that such officer shall act until the inability be removed or expiration of the term. Use of the word "officer" has been opposed for the reason given above under S.J. Res. 35. It would also seem advisable that it be explicit that this "officer" shall become President in cases of death, resignation and removal, since he would act for the rest of the term anyway under the proposal.

S.J. Res. 139* - Senators Bayh, Pell, Randolph, Bible, Moss and Burdick

As revised, this proposed constitutional amendment would eliminate the devolution problem by providing that in cases of death, resignation, or removal, the Vice President would become President. 1/ The President could declare his own inability in which event the Vice President would discharge his powers and duties. The Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, would have the power to declare the President disabled. The President would resume his powers and duties on the second day after his own declaration of ability unless the Vice President, with the written concurrence of a majority of the heads of the executive departments, transmits within two days to Congress a written declaration that the President is not able. In such a case, the Vice President would continue to act as President and Congress would have the duty of deciding the issue immediately. A two-thirds vote of both houses would be required to prevent the President from resuming his powers and duties.

S.J. Res. 140* - Senator Keating

This proposed constitutional amendment would provide for devolution of the office upon an Executive Vice President in a case of death, resignation or removal of the President. In a case of death, resignation or removal of the Executive Vice President, or where the office of President devolves upon him, the office of Executive Vice President would devolve upon a Legislative Vice President. In a case of inability of the President, the Executive Vice President would discharge his powers and duties as an Acting President until the inability were removed or for the rest of the term, and if both the President and the Executive Vice President were disabled, the Legislative Vice President would act as President

* Proposals marked with an asterisk in this section contain features relating to filling a vice-presidential vacancy. These features are commented upon in Part II, infra.

1/ The wording of the revised S.J. Res. 139 was reported in The New York Times, May 28, 1964, p. 22.

until the inability of the President or Executive Vice President were removed or for the rest of the term. This proposal would give Congress the power to provide what "person" becomes President or acts as President in cases of death, resignation, removal, or inability of the President, Executive Vice President and the Legislative Vice President. Such person takes over for the rest of the term, or until the earlier removal of the inability. As in S.J. Res. 35, Congress would be granted the power to establish by law a method for determining the commencement and termination of inability of the President, Executive Vice President, or Legislative Vice President. This proposal does not specifically repeal Article II, Section 1, Clause 6 of the Constitution.

S.J. Res. 143* - Senator Keating

This proposal is similar to S.J. Res. 140 in abolishing the office of Vice President and creating offices of Executive and Legislative Vice Presidents. It differs in that it retains the present wording of the succession provision and does not give Congress broad inability power.

S.J. Res. 155* - Senator Randolph

This proposed constitutional amendment contains the usual provisions that in cases of death, resignation or removal, the Vice President becomes President for the remainder of the term. In cases of inability, the Vice President would discharge the powers and duties until the end of the term or the earlier removal of the inability. The amendment provides for a Permanent Commission on Prevention of Lapse of Executive Power consisting of the members of the House and Senate Judiciary Committees. All questions of a President's or Vice President's inability (the commencement, duration and termination thereof) would be determined by two-thirds of the members present and voting. The Commission would operate under such rules as Congress prescribes by concurrent resolution. The argument has been made that such a commission would be too large and of such a political nature that it is doubtful whether it could function properly in a case of inability. The Commission would be given the power to declare the probable duration of an inability and if it were declared to be in excess of six months, a Second Vice President would be elected by Congress.

This proposed constitutional amendment states that Congress may provide for cases in which there is no person who is qualified as President, Vice President or Second Vice President, declaring what person shall then act. The proposal, also, would permit the President to delegate in writing such of his powers and duties to the Vice President as he deems appropriate. There is no language that the President could revoke any such delegation at will. The proposal contains no explicit provision for the repeal of Article II, Section 1, Clause 6.

S.J. Res. 157 - Senator Ervin

This proposed constitutional amendment provides that whenever the House of Representatives declares its belief that the President has suffered an inability, the Senate shall determine whether such inability exists. A vote of two-thirds of the members present would be required for a declaration of inability by the Senate. The Chief Justice would preside over the Senate. Chief Justice Warren has opposed this in a letter to Senator Keating because of the traditional separation of powers and the possibility of the case reaching the Supreme Court. The President would resume his powers and duties under this proposal by making a written declaration of removal of inability to the Senate and House, whereupon the Senate would determine the question. A vote by a majority of those present would be required to so determine. This proposal would leave Article II, Section 1, Clause 6 in effect. The President would not be given the power to declare his own inability.

S. 2454 - Senator Monroney

This proposal calls for the establishment of a Commission on Presidential Election and Succession to determine the extent to which changes are necessary in the provisions for election of a President and Vice President and successor to the powers and duties of President.

H.J. Res. 28 - Representative Curtin

This resolution proposes an amendment to the Constitution providing that the Vice President becomes President in cases of death, resignation or removal for the rest of the term. The President would declare his own inability and, in such a case, he would determine when the inability terminates. This proposal also proposes an inability commission consisting of the Chief Justice, the senior associate justice, the Secretaries of State and Treasury, the Speaker and minority leaders of the House, and the majority and minority leaders of the Senate. Any two members could initiate action by a statement in writing. After seeking competent medical advice, the concurrence of five members would be necessary for a determination of inability. The Commission would determine the end of the inability in the same manner. The proposal does not expressly repeal Article II, Section 1, Clause 6.

H.J. Res. 77 - Representative Bennett

This proposal is identical to S.J. Res. 35.

H.J. Res. 210 - Representative Robison

This proposal is identical to S.J. Res. 35.

H.J. Res. 272 - Representative Lindsay

This proposed Constitutional amendment provides that in the event of the President's removal, death or resignation, "the Vice President shall become President for the unexpired portion of the then current term." If the President declares his inability in writing, the "powers and duties" of the Presidency would be discharged by the Vice President "as Acting President." The Resolution provides that if the President does not declare his own inability, the Vice President, "if satisfied that such inability exists," may assume the "powers and duties" as Acting President upon the written approval of a majority of the heads of the executive departments. The President would resume the discharge of his powers and duties on the seventh day after making a public announcement that the inability has terminated. However, the Congress would have a part in determining such termination where the Vice President (if supported by a majority of the heads of the executive departments) disagrees with the President. If Congress determines by concurrent resolution, adopted by two-thirds of the members present in each House, that the inability has not ended, the Vice President "assumes" the powers and duties until he states that the President has recovered, or a majority of each House so states by concurrent resolution, or the term ends. The proposal does not make clear who acts in the period up to the time Congress decides the issue. It is silent as to Article II, Section 1, Clause 6 and, in providing that Congress may establish a line of succession beyond the Vice President, it retains the ambiguous words "officer" and "shall be elected." (See comments under S.J. Res. 35.)

H.J. Res. 580 - Representative Halpern

This proposal is identical to S.J. Res. 35.

H.J. Res. 886 - Representative Glenn

This proposal is identical to S.J. Res. 140.

H.J. Res. 933 - Representative Robison

This Resolution seeks to establish by legislation a ten member inability commission whose chairman would be the Vice President or, if there be none, the Speaker. This proposal is subject to the frequently voiced objection that Congress has no power to legislate on inability. Under this proposal, the Chairman would not vote. The Chairman or any three members could convene the commission and the vote of five members would be necessary to declare the President disabled. The commission, in the same manner, would determine when the inability has ended. This resolution would permit the President to declare his own inability and, in such case, the cessation thereof. The Commission would have the power

to declare that the death of the President shall be presumed as well as the power to revoke this declaration.

H.J. Res. 990 - Representative Monagan

The inability provisions of this proposal are substantially the same as those in H.J. Res. 272, with the exception that the President could resume his powers and duties before the seventh day after his declaration of ability provided the Vice President is in agreement.

H.R. 707 - Representative Multer

This proposal suggests legislation to deal with inability. As such, it is subject to the frequent objection that Congress has no power to pass a statute on inability. Under this bill, the House initiates action by a resolution adopted by a majority of those present and voting (provided there is a quorum). Upon receipt of the resolution, the Chief Justice convenes the Senate. A two-thirds vote there is necessary to determine the existence of an inability. Another resolution, adopted by the same two-thirds vote, is required to direct the Vice President to act as President during the inability of the President or for the rest of the term, as may be provided by such resolution. The cessation of the inability is determined in the same manner except that a majority of either House may pass a resolution requiring the Chief Justice to convene the Senate. These inability provisions are made applicable to anyone acting as President. This proposal has been criticized because the President would not perform any function at all (either (a) with respect to initiating action or making a determination himself or (b) with respect to the termination of an inability).

H.R. 1164 - Representative Wyman

This proposal deals with inability by legislation and is therefore subject to the criticism that Congress has no power to legislate on the subject. The President could declare his own inability. Initiating action could be taken by the Vice President or the person next in line. A six member commission, composed of the Chief Justice (who has a vote only in case of a tie), the majority and minority leaders of the House, the majority and minority leaders of the Senate, and the Surgeon General, could determine an inability. The provision with respect to the Chief Justice would be subject to the objections set forth by Chief Justice Warren. The bill is apparently inconsistent as it provides in one part that a majority of the members may convene the commission while, in another, it states that any two members may do so. In any event, four members constitute a quorum and the concurrence of four is necessary to a decision. After determining that inability exists, the Commission would give written notice to the Speaker, President Pro Tempore and the Vice President (or

person next in line). The Vice President then acts as President, and thereupon the matter is reviewed by the Senate if the House requests it by majority vote. If the House fails to make such a request, the Acting President ceases to act. If a request is made, a two-thirds vote of those present (providing there is a quorum) is necessary to determine inability and a similar two-thirds vote is required to direct the Vice President or person next in line to act as President. A determination by the Senate can be revoked in the manner of the "original determination" of the Senate.

H.R. 9531 - Representative Rhodes

This proposal is identical to H.R. 1164.

H.R. 9534 - Representative Derwinski

This proposal is identical to H.R. 1164.

H. Con. Res. 245 - Representative Holifield

This proposal calls for the creation of a joint committee of the Congress to be known as the Joint Committee on Presidential Succession and the Continuity of Government. This committee would investigate and study all the problems of presidential succession.

PART II - VICE-PRESIDENTIAL VACANCIES

THE PROBLEM AND PROPOSED SOLUTIONS

There has never been any procedure by which a vacancy in the Vice-Presidency could be filled. During most of our history the functions of the Vice President were largely ceremonial and very little attention was given to the fact that the Constitution does not provide a method for filling vacancies in the office of Vice President. For almost 37 of 175 years, the Vice-Presidency has been vacant. 1/ Eight Vice Presidents succeeded to the Presidency upon the death of the incumbent. 2/ Seven Vice Presidents died in office. 3/ One Vice President resigned. 4/

Vice President's Role

The Vice President's basic constitutional duties are: (1) to preside over the Senate, in which capacity he may vote when the Senate is equally divided, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

In this century, the importance of the Vice-Presidency has steadily grown. The Vice President has become a regular member of the President's Cabinet, a member of the National Security Council, the head of some executive agencies such as the National Aeronautics Space Council and the Committee on Equal Employment opportunity, a representative of the President on diplomatic tours around the world, and a participant in various ceremonial and political functions of the President. In short, he has become an informed, consulted, and important member of the Government.

Three Succession Laws

Heretofore, all attempts to insure a strong line of succession have been in the form of changes in the line of succession beyond the

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1/ For a recent study of this subject, see Feerick, The Vice-Presidency and the Problems of Presidential Succession and Inability, 32 Fordham L. Rev., (March, 1964), p. 457.

2/ They are John Tyler, Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman and Lyndon B. Johnson.

3/ They are George Clinton, Elbridge Gerry, William R. King, Henry Wilson, Thomas A. Hendricks, Garrett A. Hobart and James S. Sherman.

4/ John C. Calhoun.

Vice-Presidency. The Constitution gives the Congress the power to "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 . . . ." The first law on this subject was signed by President George Washington on March 1, 1792. 1/ This law provided that, after the Vice President, the line of succession would consist of the President pro tempore of the Senate and the Speaker of the House of Representatives, respectively. In the event both of these offices were vacant provision was made for a special election to fill the offices of President and Vice President.

In the 1880's there arose general dissatisfaction with the Act of 1792 due to the fact that at certain periods there existed neither a President pro tempore nor Speaker. On at least two occasions when this was the case (e.g., Arthur's succession to the Presidency in 1881 and Vice President Hendrick's death in 1885), there was also no Vice President, and thus, no successor to the President at all. Another objection to the Act of 1792 was the belief that neither the President pro tempore of the Senate nor Speaker could qualify as "officers" under the succession provision of the Constitution. With the passage of the Act of January 19, 1886, the President pro tempore and Speaker were removed from the line of succession entirely and replaced by the heads of the executive departments in the following order: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy and Secretary of the Interior.

Following the death of President Franklin D. Roosevelt, President Truman declared that the Act of 1886 was undemocratic because those in the line of succession did not include elective officials. He said that the President should not be able to name the person (by Cabinet appointment) who would succeed him in the event of his death or inability. 3/ He favored the Speaker of the House as first in line after the Vice President, because he is elected by the Representatives of the people of the Nation. The succession law was changed. The Act of July 18, 1947 established the following line of succession: Speaker, President pro tempore, Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce and Secretary of Labor. 4/

1/ 1 Stat. 239 (1792).

2/ 24 Stat. 1 (1886).

3/ 91 Congressional Record (1945), p. 6272.

4/ 3 U.S.C. §19 (1958).

1964 Senate Hearings

Need for a Vice President. There was wide agreement at the hearings held by the Senate Subcommittee on Constitutional Amendments in January and February, 1964, on the need for a Vice President at all times. It was said that the Vice President is the one official who is best able to succeed to the Presidency since he has the best opportunity for first hand knowledge of the operations of the Executive Branch of the Government. Neither the Speaker nor Secretary of State, it was pointed out, is selected on the basis of his qualifications for the Presidency and neither is in a position to gain experience in the role of Vice President. Senator Keating and others suggested the election of two Vice Presidents every four years. Former Vice President Nixon has objected to these proposals on the ground that by dividing the "already limited functions of the office, we would be downgrading the vice-presidency at a time when it is imperative that we add to its prestige and importance." 1/ Other points made against these proposals are that it would be difficult to find capable people to run for the office of the second (or Legislative) Vice President and that the existence of two Vice Presidents would impinge on the centralized authority of the President.

Methods of Filling a Vacancy -- Nomination by President. Many of the witnesses testifying at the Senate hearings felt that the President should be given the power to nominate a person for Vice President whenever a vacancy occurs due to the death or succession of the elected Vice President. This is based on the view that such a person would likely be of the same party and views as the President and of compatible temperament, thus assuring a smooth working relationship between the two. It was argued that the President should have this initiative, since the presidential candidate of each party is usually the one to designate the vice-presidential candidate. In order to place a check on the President's nomination and to have a kind of popular basis, a number of authorities thought that the Congress should be given the chance to confirm or reject the person nominated. A few suggested that the Senate alone have this function because it could be convened more quickly than both Houses together and because it has the role of passing on other presidential nominations.

Some witnesses were of the view that the President should submit, not one, but several names to the Congress and that Congress should be required to select one for Vice President. This method, it was said, would assure that Congress had more than the passive role of ratifying the President's nominee and it would also permit a choice. However, some

1/ Richard M. Nixon,"We Need a Vice President Now," Saturday Evening Post, January 18, 1964, p. 6.

feel that such a method would not assure, as readily as the method previously discussed, that the President would obtain the person with whom he could best work. And, it might have the effect of encouraging political dissension at a time when it is least desirable.

Selection by Congress. Some witnesses suggested that the Congress alone should fill a vacancy in the Vice-Presidency, since it is able to exercise a considered judgment and since it consists of the elected representatives of the people. Some objected to giving Congress such a role on the ground that if the President were from the minority party, Congress could select a Vice President from the other party. Others stated that such a method might not give the President a person with whom he could work effectively. In answer, it was suggested that the President could be given a veto over any person selected by Congress. But, it was pointed out that a President might be politically embarrassed or considered reckless by the people if he rejected a person selected by Congress.

Election by Electoral College. Former Vice President Nixon gave the following reasons before the Subcommittee on Constitutional Amendments for proposing that the Electoral College fill the vacancy:

> I think its merits are, first that the electoral college as distinguished from the Congress will always be made upon of a membership, a majority of which is of the President's own party.
>
> The Congress 20 percent of the time during the history of our country has been under the control of a party other than that of the President of the United States. It seems to me then that the electoral college has that advantage over the Congress as the elective body which will select or approve the selection of the new President.
>
> A second point that I should make, however, in this respect is that I feel that it is more important that the new Vice President come from the elective rather than the appointive process.

Senator Birch Bayh of Indiana, Chairman of the Subcommittee on Constitutional Amendments, summarized the main objections to the Electoral College in the following passage from his statement at the outset of the hearings:

> The Electoral College is not chosen, as is Congress, to exercise any considered judgment or reasoning. Its members are chosen merely to carry out the will of the voters in their respective states . . . . The Electoral College is not equipped, nor should it

be equipped, to conduct hearings on the qualifications of the nominee submitted by the President. It would be a cumbersome body to try to assemble quickly and to get to act quickly in emergencies. Much of the general public has no earthly idea who their state's electors are and would be understandably hesitant to allow any such unknown quantity to make an important decision like confirmation of a Vice President of the United States.

The Bayh Proposal

The Resolution (S.J. Res. 139) approved by the Senate Subcommittee on Constitutional Amendments provides 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.

Presumably, the Congress would act on the nomination in joint session and a majority of the total membership would be required for confirmation. The American Bar consensus refers to "a majority of the elected members of Congress meeting in joint session."

Arguments For the Proposal. Selection of the nominee by the President would follow the traditional general practice of nominating conventions.

Confirmation by representatives of the people -- a majority of the Congress -- would tend to create public confidence in the selection. In view of the importance of the office -- particularly because of the possibility of succession to the Presidency -- both Houses of the Congress should participate in the confirmation.

The nomination of several candidates would confuse the situation and tend to hamper the President in obtaining the person with whom he can work most effectively. For the same reason, the proposals for selection by the Congress alone, or subject to presidential veto, would not be advisable.

Vice Presidents should not be selected by members of the Electoral College, as suggested by some, because the members are not widely known and have not gained the confidence of the public on a national basis. The Electoral College is not a continuing body.

The existing succession law is unsatisfactory for a number of reasons. For example, the Speaker of the House (who is next in line after

the Vice President) is sometimes the leader of the opposite political party. Moreover, the office of Speaker may be vacant for a substantial period between final adjournment of one Congress and commencement of the next.

Arguments Against the Proposal. The President should not be required to submit his appointee for Vice President for congressional confirmation. Party control of the Congress has changed from time to time during a presidential term and so congressional power to reject a nominee might well result in the selection of a person for Vice President primarily on the basis of his acceptability to the Congress rather than his capacity to work effectively with the President.

If confirmation is advisable, action by the Senate, as in the case of cabinet officers, should be sufficient. The traditional prerogative of the President to select his top associates with Senate approval should not be impaired.

The Electoral College is the proper body to fill vacancies in the Vice-Presidency. It is a popularly elected body which reflects the will of the people at the time of the most recent presidential election. While the electors may not be widely known under the present system, this important new function would upgrade the Electoral College and encourage the selection of electors qualified to perform this important responsibility.

A majority of the members of the Electoral College would usually be members of the same political party as the President and would very probably seek his advice and follow his wishes.

Vacancies in the office of Vice President have not created any serious problems. The office was vacant for nearly four years following Mr. Truman's succession to the Presidency and will have been vacant for more than a year when the current presidential term ends next January.

The next in line for the Presidency, after the Vice President, should be an elective officer. The Speaker of the House (next in line after the Vice President under existing law) is elected by the Representatives of the people every two years and is the logical successor when the office of Vice President is vacant.

COMMENTS ON VARIOUS PROPOSALS

S.J. Res. 138 - Senator Javits

Whenever the office of Vice President becomes vacant (not later than thirty days before the end of the term) the Acting President would convene the Senate and House in joint session to elect a person to act as Vice President. He would be chosen by a majority of those present and voting from either the heads of executive departments or Members of Congress. An objection to this is that there may be a person outside of these groups who is preferred and who would make a better Vice President. Senator Javits stated at the hearings in January, 1964, that this proposal would be amended to give the President an absolute veto over any person selected by Congress.

S.J. Res. 139 - Senator Bayh

As revised, this proposed constitutional amendment provides that whenever there is a vacancy in the Vice-Presidency, the President shall nominate a person for Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress. The proposal is not clear on whether or not both Houses meet separately or in joint session. Presumably the majority vote would be of those present and voting (provided there was a quorum). This Resolution was recommended by a Subcommittee of the Senate Committee on the Judiciary on May 27, 1964.

S.J. Res. 140 - Senator Keating

This proposal would abolish the office of Vice President and create offices of Executive Vice President and Legislative Vice President. An Executive Vice President, who would be first in the line of succession, and a Legislative Vice President, who would be second in the line, would be elected every four years. The Legislative Vice President would have the duty of presiding over the Senate and, in case of a vacancy in the office of Executive Vice President, he would become Executive Vice President. Former Vice President Richard M. Nixon voiced an objection to this type of proposal, saying that by dividing "the already limited functions of the office, we would be downgrading the Vice-Presidency at a time when it is imperative that we add to its prestige and importance." It has also been said that neither Vice President might be as adequately prepared to assume the powers and duties of the Presidency as one Vice President because the present functions would be divided between two persons.

S.J. Res. 143 - Senator Keating

This proposal is identical to S.J. Res. 140, except that it provides for the devolution of "the Same" in case of vacancy in the office of Executive Vice President.

S.J. Res. 147 - Senator Ervin

This proposal would amend the Constitution to provide that within ten days after a vacancy in the Vice-Presidency or vacancies in both the Presidency and Vice-Presidency, the person acting as President shall convene the Senate and House in joint session to elect a successor to the vacant office(s). A majority vote of those present and voting (provided a quorum of each House is present) would be required to fill the vacancy or double vacancy. The wording of the proposal makes it apparent that the majority vote would be a majority of the combined Members of both Houses present and voting. It has been argued that the vote should be by a majority of each House. Otherwise, the voice of the Senate would have much less weight than that of the House.

S.J. Res. 148 - Senator Church

This proposed constitutional amendment provides that whenever a vacancy occurs in the office of Vice President, the President or Acting President, by and with the advice and consent of the Senate, shall nominate between two and five persons and the House shall immediately, by ballot, choose one to be Vice President. A quorum for this purpose would be two-thirds of the House and a majority vote of the entire House would be necessary for a choice. It may be argued that since the President's nominees must be approved by the Senate before being voted upon by the House, Senate hearings would be necessary. This, of course, might result in delay and, perhaps, excessive partisan activity. It can be said that the nomination of two or more persons, coupled with the large vote requirement for a selection, could result in a stalemate in the House. No provision is made for the filling of a vacancy caused by the death of a President-elect or Vice President-elect before inauguration day.

S.J. Res. 149 - Senator Young

This proposed constitutional amendment provides that whenever a vacancy occurs in the Vice-Presidency, the President or Acting President shall nominate a person for Vice President within sixty days if 120 days remain before the end of the term. The Senate must vote on such nomination within thirty days after receiving it. If the Senate does not consent by a majority of those present and voting, another nomination must be made within thirty days, (provided at least ninety days remain before

the end of the term). This role for the Senate has been questioned because it is argued that the Senate is not, alone, truly representative of the people. The requirement that the President and the Senate act within a certain period of time would introduce a new concept into the Constitution. It has been said that there could be situations where the President or Senate might fail to act within the period required and that any action thereafter might be invalid.

S.J. Res. 155 - Senator Randolph

This proposed constitutional amendment permits Congress to elect a Second Vice President from not fewer than three qualified persons recommended by the national committee of the President's party whenever (1) the Vice President becomes President more than six months before the end of the term, (2) the President is in a condition of inability the probable duration of which is declared by a Commission to exceed six months [and the Vice President is acting as President], (3) the Vice President is in such a condition or (4) there is no Vice President. The procedure outlined in this proposal seems cumbersome and the necessity of providing for a Second Vice President when there exist both a President and Vice President, one of whom is under an inability, has been questioned since in either case there would be a President or Acting President, and since it probably would be impossible to determine definitively the probable length of an inability. The proposal is not explicit that the national committee be required to recommend candidates for Second Vice President. Since the Committee is generally unregulated by either federal or state law, the objection can be made that it should not have a dominant role in the selection of a new Vice President. The proposal contains no provision as to how the Houses of Congress are to vote - jointly or separately - or as to what vote is required to elect a Second Vice President. Further, the proposal is not clear as to what the status of the Second Vice President would be if the disabled President or Vice President recovered. It would have no application to a situation where either a President-elect or Vice President-elect died before inauguration.

H.J. Res. 818 - Representative Ayres

This proposed constitutional amendment provides that whenever a vacancy in the Vice-Presidency occurs, the President shall "as expeditiously as possible" submit to the Senate a list of the names of not less than three nor more than five individuals. The Senate shall choose a Vice President by a majority of the whole, a quorum consisting of two-thirds of the entire Senate. The submission of a list of between three and five persons will not necessarily give the President the person with whom he can work best.

H.J. Res. 858 - Representative Gary

This proposed amendment provides that in a case of vacancy in the Vice-Presidency, the Senate and House shall, meeting jointly, fill the vacancy by a majority vote. Provision is made for the President to convene Congress if it is not in session at the time of the vacancy. It is not clear whether the House would vote as usual, or by states on a unit basis.

H.J. Res. 868 - Representative Auchincloss

This proposal is similar to S.J. Res. 140, with the exception that the two Vice Presidents have the titles "First" and "Second." The comments made under S.J. Res. 140 are applicable here.

H.J. Res. 884 - Representative Fulton

This proposed constitutional amendment is similar to S.J. Res. 155, with the exception that it provides neither for a Vice-Presidential inability nor for a vacancy in the Vice-Presidency due to death, resignation or removal of the Vice President. Like S.J. Res. 155, this proposal would not apply if either the President-elect or Vice President-elect died before inauguration.

H.J. Res. 886 - Representative Glenn

The relevant provisions in this proposal are the same as those in S.J. Res. 140.

H.J. Res. 893 - Representative Gonzalez

This proposal requires the Acting President to nominate a person for Vice President and to convene a joint session of Congress to act on the nomination, at which session a quorum of each House has to be in attendance. A majority of the Members of both Houses who are present and voting would be necessary to confirm the nomination.

H.J. Res. 922 - Representative Cahill

This proposal is similar to H.J. Res. 893.

H.J. Res. 944 - Representative Lindsay

This proposed amendment requires the Acting President to convene a joint session of the Congress to select a person to act as Vice President.

The selection must come from the heads of the executive departments, the members of Congress, or the Governors of the States. A majority of those present and voting (a quorum of each House being required) is necessary for a selection. The Acting President is given a veto over any selection. However, it has been said that a President would be hard pressed to reject a person selected by the Congress even if he disapproved of the nominee.

H.R. 9305 - Representative Ayres

This bill provides that the President must submit a list of names of not less than three nor more than five to the House, from which a Vice President would be chosen. The House votes by States. A quorum consists of a member or members of two-thirds of the States and a majority of the States would be necessary for a choice. This bill appears to be in conflict with the requirement of Article II, Section 1 of the Constitution that the Vice President "shall be elected" in a certain manner. It is argued that a change in this by legislation would be unconstitutional. The bill provides in subsection (4) that the powers and duties of the President "shall not" devolve on the new Vice President. Would this defeat the purpose for filling a vacancy, namely, to have available an adequately prepared successor to take over the duties of the President?

ANALYTICAL TABLES

Table on Presidential Inability Proposals

Table on Vice-Presidential Vacancy Proposals

PRESIDENTIAL INABILITY PROPOSALS

PROPOSAL	FORM OF PROPOSAL		CONTINGENCY	ORDER OF SUCCESSION	WHAT DEVOLVES
S.J. Res. 35 Sens. Kefauver & Keating	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P., then as Congress may by law provide	office
		T E M P	"inability . . . to discharge the powers and duties of the said office"	V.P., then as Congress may by law provide	powers & duties
S.J. Res. 84 Sens. Hruska & McClellan	Constitutional Amendment (Repeals Art. II,§1, Par. 6)	P E R M	"dies, resigns, or is removed . . . "	V.P., then as Congress shall by law provide	office
		T E M P	"unable . . . to discharge the powers and duties of his office	V.P., then as Congress shall by law provide	powers & duties
S.J. Res. 139 Sen. Bayh & others (as revised)	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P.	office
		T E M P	"unable to discharge the powers & duties of his office"	V.P.	powers & duties
S.J. Res. 140 Sen. Keating	Constitutional Amendment (Abolishes office of V.P. & creates offices of Exec. V.P. and Legisl. V.P.)	P E R M	"removal . . . death or resignation"	Exec. V.P., Legisl. V.P., then as Cong. may by law provide	office
		T E M P	"inability . . . to discharge the powers & duties of his office"	Same as above	powers & duties
S.J. Res. 143 Sen. Keating	Constitutional Amendment (Abolishes office of V.P. & creates offices of Exec. V.P. and Legisl. V.P.)		"removal . . . death, resignation, or inability to discharge the powers and duties of the office of President"	Exec. V.P., Legisl. V.P., then as Cong. may by law provide	"same"
S.J. Res. 155 Sen. Randolph	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P., sometimes Second V.P., elected by Cong. from nominees of national committee of Pres's party, then as Cong. may by law provide	office

TERM OF SUCCESSION	WHO INITIATES ACTION	WHO DETERMINES INABILITY	HOW INABILITY TERMINATED
- - - - - - -			
until inability removed	as Congress shall by law provide	as Congress shall by law provide	as Congress shall by law provide
remainder of the term to which the President was elected			
until disability removed or term of President expires	Congress may establish a procedure compatible with maintenance of three distinct departments & preservation of checks & balances	Congress may establish a procedure compatible with maintenance of three distinct departments & preservation of checks & balances	Congress may establish a procedure compatible with maintenance of three distinct departments & preservation of checks & balances
- - - - - - -			
- - - - - - -	Pres., or V.P. & majority of heads of exec. depts., or such other body as Cong. may by law provide	Pres., or V.P. & majority of heads of exec. depts., or such other body as Congress may by law provide	President; but if V.P. & majority of heads of exec. depts., or such other body as Cong. may by law provide, transmits to Cong. declaration that Pres. is unable, Cong. may determine by 2/3 vote of both Houses that Pres. is unable & V.P. continues to discharge powers & duties, otherwise Pres. resumes powers and duties
- - - - - - -			
until inability removed	Congress may prescribe by law the method	Congress may prescribe by law the method	Congress may prescribe by law the method
until disability removed or a Pres. elected			
until end of term for which Pres. elected			

PROPOSAL	FORM OF PROPOSAL		CONTINGENCY	ORDER OF SUCCESSION	WHAT DEVOLVES
		T E M P	"inability . . . to discharge the powers & duties of his office"	Same as above	powers & duties
S.J. Res. 157 Sen. Ervin	Constitutional Amendment				
S. 2454 Sen. Monroney	Legislation to establish a Commission on Presidential Election & Succession & for other purposes				
H.J. Res. 28 Rep. Curtin	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P.	office
		T E M P	"unable to discharge the powers and duties of his office"	individual next in line of succession	powers & duties
H.J. Res. 77 Rep. Bennett	Constitutional Amendment	P E R M	"removal ... death or resignation"	V.P., then as Cong. may by law provide	office
		T E M P	"inability . . . to discharge the powers and duties of the said office"	Same as above	powers & duties
H.J. Res. 210 Rep. Robison	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P., then as Cong. may by law provide	office
		T E M P	"inability . . . to discharge the powers and duties of the said office	Same as above	powers & duties
H.J. Res. 272 Rep. Lindsay	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P.	office

TERM OF SUCCESSION	WHO INITIATES ACTION	WHO DETERMINES INABILITY	HOW INABILITY TERMINATED
until end of term for which Pres. elected or until earlier removal of inability or disability	Commission on Prevention of Lapse of Executive Power consisting of Senate & House Judiciary Committees	Commission on Prevention of Lapse of Executive Power under such rules as Cong. shall prescribe	Commission on Prevention of Lapse of Executive Power under such rules as Cong. shall prescribe
	House of Rep. by proceedings as in impeachment declares its belief that the Pres. has suffered an inability	Senate (presided over by Ch. Just.) may determine by 2/3 of Members present that inability exists	Pres. declares that inability has ended; Sen. (presided over by Ch. Just.) determines by majority of Members present that inability is removed
for unexpired portion of the then current term			
	President or any 2 members of Commission consisting of Ch. Just. (no vote except in case of tie), Sr. Assoc. Just., Sec./St., Sec./ Treas., Speaker, Min. ldr. of H., Maj. & Min. ldrs of Sen.	President or Commission by concurrence of 5 after seeking medical advice	President if he made determination of inability; otherwise, Commission by concurrence of 5, upon motion of any 2 members
- - - - - - -			
until inability removed	as Congress shall by law provide	as Congress shall by law provide	as Congress shall by law provide
- - - - - - -			
until inability removed	as Congress shall by law provide	as Congress shall by law provide	as Congress shall by law provide
for the unexpired portion of the then current term			

PROPOSAL	FORM OF PROPOSAL		CONTINGENCY	ORDER OF SUCCESSION	WHAT DEVOLVES	TERM OF SUCCESSION	WHO INITIATES ACTION	WHO DETERMINES INABILITY	HOW INABILITY TERMINATED
		T E M P	"unable to discharge the powers and duties of his office"	V.P.	powers & duties	- - - - - - -	Pres., or V.P. & majority of heads of exec. depts. in office	Pres., or V.P. & majority of heads of exec. depts. in office	Pres., but if V.P. & majority of heads of Exec. depts. in office transmit to Cong. declaration that inability has not terminated, Cong. may determine by 2/3 of Members present in each House that inability has not terminated & V.P. discharges powers & duties until Acting Pres. declares inability ended, or Cong. by majority of Members present in each House determines that inability has ended, or President's term ends.
H.J. Res. 580 Rep. Halpern	Constitutional Amendment	P E R M	"removal . . . death or resignation"	V.P., then as Cong. may by law provide	office	- - - - - - -			
		T E M P	"inability . . . to discharge the powers and duties of the said office"	Same as above	powers & duties	until inability removed	as Cong. shall by law provide	as Cong. shall by law provide	as Congress shall by law provide
H.J. Res. 886 Rep. Glenn	Constitutional Amendment (Abolishes office of V.P. & creates offices of Exec. V.P. & Legisl. V.P.)	P E R M	"removal . . . death or resignation"	Exec. V.P., Legisl. V.P., then as Cong. may by law provide	office	- - - - - - -			
		T E M P	"inability . . . to discharge the powers and duties of his office"	Same as above	powers & duties	until inability removed	Congress may prescribe by law the method	Congress may prescribe by law the method	Congress may prescribe by law the method
H.J. Res. 933 Rep. Robison	Legislation establishing a permanent commission on presidential disability composed of V.P., Speaker, Pres. pro tem., Sec./St., Sec./Treas., Sec./Def., Maj. & Min. ldrs of Sen. & H.; V.P. to be chairman, or if none, Speaker (no vote)			V.P., then as Cong. may by law provide	powers & duties	as provided in clause 5 of §1 of Art. II of the Const. or Section 19 of title 3 of U.S. Code	President, or Chairman of Comm., or any 3 members	Pres., or Comm. by vote of 5 members	President if he determined inability; otherwise Comm. by vote of 5 members
H.J. Res. 990 Rep. Monagan	Constitutional Amendment	P E R M	"removal . . . death or resignation	V.P., Sec./St., Sec./Treas., Sec./Def., Att. Gen., Post. Gen., Sec./Int. Sec./Agr., Sec/ Comm., Sec./ Labor, Sec./ HEW & such other heads of exec. depts. as may be est. in order of est	office	for the unexpired portion of the then current term			

PROPOSAL	FORM OF PROPOSAL		CONTINGENCY	ORDER OF SUCCESSION	WHAT DEVOLVES
		T E M P	"unable to discharge the powers and duties of his office"	Same as above	powers & duties
H.R. 707 Rep. Multer	Legislation		"unable to discharge the powers and duties of the office of President"	V.P. then as Cong. may by law provide	powers & duties
H.R. 1164* Rep. Wyman	Legislation		"has an inability to discharge the powers and duties of his office"	V.P., then as Cong. may by law provide	powers & duties
H. Con. Res. 245 Rep. Holifield	Create Joint Com. of Congress to study all problems of presidential succession.				

* Identical bills have been introduced by Rep. Rhodes of Arizona (H.R. 9531) and Rep. Derwinski (H.R. 9534).

TERM OF SUCCESSION	WHO INITIATES ACTION	WHO DETERMINES INABILITY	HOW INABILITY TERMINATED
- - - - - - -	Pres., or V.P. & majority of heads of exec. depts. in office	Pres., or V.P. & majority of heads of exec. depts. in office	Pres., but if V.P. & maj. of heads of exec. depts. transmit to Cong. decl. that inability not terminated, Cong. may determine by 2/3 of Members present in each House that inability has not terminated & V.P. discharges powers & duties until Acting Pres. declares that inability has ended, or Cong. determines by maj. of Members present in each House that inability has terminated, or President's term ends
during the period of inability . . . or until the end of the then current Presidential term.	House of Rep. by maj. of Members present (a quorum being required) requests Sen. to determine whether Pres. is unable to discharge the powers and duties of his office. A copy to be forwarded to Ch. Just.	Ch. Just. convenes Sen. in special sess.; V.P. not to participate. If Sen. determines by 2/3 of Members present (quorum being required) that Pres. is unable, Sen. shall by resolution of 2/3 of Members present direct V.P. to act as President	Maj. of Members present of H. or Sen. may request Ch. Just. to convene special sess. of Sen. Determination of inability may be revoked "in same manner as in the case of the original determination." If determination revoked, Sen. shall by 2/3 of Members present declare Pres. restored to assumption of his powers and duties
during the period of the inability or until the end of the then current Presidential term	President, or V.P. or person next in line of succession or any 2 members of comm. by notification to Presidential Inability Commission composed of Ch. Just., (chairman - no vote except in case of tie), Maj. & Min. ldrs. of H. & Sen., Surg. Gen. of U.S.	Commission convenes on own motion whenever maj. of members believe the Pres. has an inability or Chairman convenes Commission on notification of V.P. or person next in line or any 2 members. By vote of 4 members, Comm. may determine inability. Notice & opportunity to be heard shall be given to the Pres. V.P. or person next in line discharges powers & duties pending final determination. Upon receipt of notice of determination by the Speaker, the H. of Rep. may request Sen. to determine if Pres. has an inability by resolution of maj. of members present. Sen. presided over by Ch. Just. (V.P. not to participate) may declare inability by 2/3 of members present & by resolution of 2/3 of members present direct V.P. or person next in line to act as President	Determination revoked "as in the case and manner of the original determination"

VICE-PRESIDENTIAL VACANCY PROPOSALS

PROPOSAL [1]	HOW ACTION IS INITIATED	HOW VACANCY IS FILLED
S.J. Res. 138 Sen. Javits	Person discharging powers & duties of President convenes both Houses of Congress in joint session to elect a person to act as Vice President	Such person shall be chosen from among the heads of the exec. depts. or Members of Congress by a majority vote of those Members present & voting. (A quorum of each House is required) Each Member to have one vote. Sen. Javits stated at the hearings that he would give the Pres. an absolute veto.
S.J. Res. 139 Sen. Bayh	Whenever there is a vacancy in the Vice-Presidency, the Pres. shall nominate a person for V.P.	Person thus nominated becomes V.P. upon confirmation by a majority vote of both Houses of Congress
S.J. Res. 140 Sen. Keating	Two V.P.'s elected every 4 years - Exec. V.P. & Legisl. V.P.	In case of vacancy in Exec. Vice-Presidency, Legisl. V.P. becomes Exec. V.P.
S.J. Res. 143 Sen. Keating	Same as S.J. Res. 140	(Powers and duties -- not office -- would devolve)
S.J. Res. 147 Sen. Ervin	Person discharging powers & duties of President convenes both Houses of Congress in joint session to elect a successor to the office of V.P., or in case of vacancies in offices of both Pres. & V.P., to elect successors to both offices	The successor(s) shall be chosen by a majority vote of the Members of both Houses present & voting. (A quorum of each House is required).

1/ Except where indicated, each of the proposals listed is in the form of an amendment to the Constitution.

PROPOSAL	HOW ACTION IS INITIATED	HOW VACANCY IS FILLED
S.J. Res. 148 Sen. Church	Pres. by & with the consent of Sen. shall nominate not more than 5 nor fewer than 2 persons qualified for the office	House of Rep. shall immed., by ballot, choose one of these persons to be V.P. A quorum of 2/3 of the total no. of Reps. is required & a majority of the <u>whole</u> shall be necessary to a choice
S.J. Res. 149 Sen. Young	Person discharging powers & duties shall nominate (within 60 days or, if first nomination not consented to, within 30 days after the vote)	By & with the consent of the Sen., Pres. shall appoint a person to be V.P. (If Cong. not in sess., Pres. shall convene Sen. to consider nomination) Sen. shall vote within 30 days after receipt of nomination
S.J. Res. 155 Sen. Randolph	In certain circumstances, the national committee of the President's political party shall recommend not fewer than 3 persons who are qualified to serve as President	From among those recommended, Cong. shall elect a Second V.P. who shall become V.P. in case of vacancy in the V.P. and shall act as V.P. in case the V.P. is disabled or acting as Pres.
H.J. Res. 818 Rep. Ayres	As expeditiously as possible, the Pres. shall submit to the Sen. a list of names of not more than 5 nor fewer than 3 individuals qualified for the office of Pres. The Pres. shall convene the Sen., if it is not in sess., when he is prepared to submit a list	From such list, the Sen. shall choose a V.P. A quorum is 2/3 of the whole number of Senators. A majority of the whole no. shall be necessary for a choice
H.J. Res. 858 Rep. Gary	Pres. shall issue a proclamation convening Congress if it is not in session at the time vacancy occurs	Sen. & House of Reps. shall, meeting jointly and by majority vote, fill the vacancy from among those persons constitutionally eligible for the office of Pres.

PROPOSAL	HOW ACTION IS INITIATED	HOW VACANCY IS FILLED
H.J. Res. 868 Rep. Auchincloss	Second V.P. elected at same time and in same manner as First V.P.	In case of vacancy in First Vice-Presidency, Second V.P. acts as First V.P.
H.J. Res. 884 Rep. Fulton	When V.P. is to act as Pres. for period in excess of 6 mos. (as determined by Commission on Prevention of Lapse of Executive Power consisting of House & Sen. Judiciary Committees), national committee of President's political party shall recommend not less than 3 persons qualified under Const.	Second V.P. shall be elected by Congress from those recommended. Shall perform all powers & duties of V.P. for period V.P. acts as Pres.
H.J. Res. 886 Rep. Glenn	Same as S.J. Res. 140	
H.J. Res. 893 Rep. Gonzalez	Persons discharging powers & duties of Pres. shall nominate (If Cong. not in sess. shall convene both Houses in joint sess.)	Pres. shall appoint a person to act as V.P. subject to confirmation by Sen. & H. of Rep. acting in joint sess. A quorum of each House is required & confirmation must be by majority vote of Members present & voting, each Member having one vote
H.J. Res. 922 Rep. Cahill	Similar to H.J. Res. 893	
H.J. Res. 944 Rep. Lindsay	Person discharging powers & duties of Pres. convenes H. & Sen. in joint sess. Such person shall have right to veto any selection made by Sen. & H. acting in such joint sess. If selection is vetoed person discharging powers & duties of Pres. again convenes both Houses in joint sess. to make another selection	Sen. & H. of Rep. in joint sess. select a person to act as V.P. Speaker shall preside. A quorum of each House is required. Selection shall be made by majority vote of Members present & voting, each Member having one vote. Selection to be made from among heads of exec. depts., Members of Cong., & Gov's. of States

PROPOSAL	HOW ACTION IS INITIATED	HOW VACANCY IS FILLED
H.R. 9305 1/ Rep. Ayres	President shall, as expeditiously as possible, submit a list of not less than 3 nor more than 5 individuals to the H. of Rep.	H. of Rep. shall choose, from such list, an individual to act as V.P. Votes to be taken by States. Representation from each State to have one vote. A quorum consists of a Member or Members from 2/3 of the States. A majority of all the States necessary to a choice.

1/ This proposal would be enacted as a statute -- not a constitutional amendment.

APPENDIX A

S.J. Res. 139[1/]

IN THE SENATE OF THE UNITED STATES

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article ——

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 2. Whenever there is a vacancy in the office of Vice President, the President shall nominate a Vice President who shall take office

1/ As revised and approved by the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary.

upon confirmation by a majority vote of both Houses of Congress.

"SEC. 3. If the 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.

"SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"SEC. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

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Presid succ.

November 29, 1964

Dr. Aaron B. Lerner
School of Medicine
333 Cedar Street
Yale University
New Haven, Connectinutt

Dear Dr. Lerner:

Thank you for your good letter. The suggestion you have made is one which has been advocated from time to time. In the last session of Congress a subcommittee of the Senate Committee on the Judiciary held extensive hearings on the problem of the Presidential succession and eventually reported to the Senate a bill which represented a broad concensus of the best way to deal with this difficult and vital problem. I am asking the subcommittee to send to you a copy of the committee report and the committee hearings. I believe you will find them to be most interesting and enlightening.

In general, I believe there are definite problems in establishing two Vice-Presidents. I would, for the most part, support the conclusions reached by the Bayh subcommittee.

I remember very clearly the fine help your brother, Koochy Lerner, gave to me in my mayorality campaigns. They were a lot of fun and I look back to those days with fondness.

Best wishes.

Sincerely,

Hubert H. Humphrey

Yale University *New Haven, Connecticut*

SCHOOL OF MEDICINE
333 Cedar Street
Section of Dermatology

23 November 1964

The Honorable
Senator Hubert Humphrey
United States Capitol
Washington D.C.

Dear Senator Humphrey:

In the early 1940's, when I was a medical and graduate student at the University of Minnesota working with Dr. Cyrus P. Barnum, I was asked to be an active participant to support your campaign for Mayor. I told Cy that working for the M.D. and Ph.D. degrees simultaneously was all that I could handle, but that I would help you by having my very eager and reliable younger brother, Harry (Koochy) Lerner, take my place. You met several times with my brother and another young boy before various rallies and talks instructing them to hand out notices and posters. Since then my brother has formed a company in Minneapolis that publishes children's books.

The main point of this letter concerns the vice presidential position. What do you think about the possibility of nominating two vice presidents instead of one? That is, each party would have vice president 1 and vice president 2. This change obviously would be of tremendous help in a problem of succession if something happened to the president and there was no vice president after the previous one advanced to the position of president. It also would help to obtain a more balanced ticket if there were one presidential nominee and two vice presidents. However, most important of all, our country is now so large and its responsibilities throughout the world so great that it seems necessary to have an absolute minimum of two vice presidents simply to represent us both at home and abroad.

It may be months before you see this letter so I am not expecting a rapid reply. However, if time permits, please think about this subject and let me know your ideas.

With all good wishes for the next four years as vice president.

Sincerely yours,

Aaron B. Lerner

jer

Aaron B. Lerner, M.D.
Professor of Medicine

JGS/mmc

COPY

Pres. succession
W F.

December 17, 1964

The Honorable Michael A. Musmanno
Justice, Supreme Court of Pennsylvania
811 City-County Building
Pittsburgh, Pennsylvania 15219

Dear Mr. Musmanno:

Mr. L. A. Nikoloric has brought to my attention your proposals for a Constitutional Amendment on the subject of Presidential succession and Vice-Presidential powers and duties.

I know Senator Humphrey will be indeed interested in this proposal. It will be brought to his attention at onee.

Best wishes.

Sincerely,

John G. Stewart
Legislative Assistant to
Senator Hubert H. Humphrey

Stewart

L. A. NIKOLORIC
ATTORNEY AT LAW
SUITE 313 RIDDELL BLDG.
1730 K STREET, N.W.
WASHINGTON, D.C. 20006
338-2911

December 2, 1964

Mr. William Connell
Office of Senator Hubert Humphrey
1313 New Senate Office Building
Washington 25, D. C.

Dear Bill:

Mike Musmanno called me a couple of days ago about a proposed Constitutional Amendment concerning the Vice-Presidency. I am sure you recall him.

This Amendment was introduced in the form of a Joint Resolution last year by Sen. Randolph and Rep. Fulton. I gather it did not make remarkable headway although Kefauver heard Mike on it.

The Amendment makes some sense. Anyway, Mike would like to try again. Out of courtesy to him (he is a good HHH rooter), somebody ought at least to acknowledge receipt of the enclosed materials.

Sincerely,

Mike

L. A. Nikoloric

Encls.
LAN:gk

SUPREME COURT OF PENNSYLVANIA

JUSTICE MICHAEL A. MUSMANNO
811 CITY-COUNTY BUILDING
PITTSBURGH, PENNSYLVANIA 15219

November 28, 1964

L. A. Nikoloric, Esq.
Suite 313 Riddel Building
1730 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Nikoloric:

I was happy to talk with you yesterday and I look forward with pleasure to our getting together in Washington to discuss the proposed constitutional amendment which I have drafted on the subject of Presidential succession and Vice Presidential powers and duties. In accordance with our conversation I am sending you herewith the proposed amendment. It is the same resolution which was submitted to Congress last year, with the exception that I have omitted the provision about a second vice president. I am afraid such a provision would make for an unnecessarily long resolution and Congress could, in any event, provide for such a contingency. *

My constitutional amendment, which was named by Senator Randolph of West Virginia, as the "Musmanno Plan," was introduced in the Senate by Senator Randolph, and in the House by Congressman Fulton. I enclose a tear sheet from the Congressional Record of February 18, 1964, with the speech Senator Randolph made on the floor of the Senate on the measure.

I send along also a tear sheet from the Philadelphia Inquirer of January 26, 1964, containing an article by me on the whole subject. On February 11, 1958, I testified before Senator Kefauver's committee on my proposals. My testimony will be found in "Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Eighty-Fifth Congress, Second Session, pages 67 to 85.

I am eager to have your reaction to my proposal and indeed do hope I may soon have the opportunity to renew our acquaintanceship made during the WONDERFUL, TRIUMPHANT CAMPAIGN!

With esteem and personal regard,

Yours sincerely,

Michael A. Musmanno

* Another change is that the President, and not the National Committee of the dominant political party, makes the recommendation for the new Vice President.

Washington Background

Musmanno Plan Basis Of 'Succession' Draft

By JOHN C. O'BRIEN
Inquirer Washington Bureau

WASHINGTON.

A PROPOSAL for ensuring orderly succession in the event of the death or disability of the President first outlined by Judge Michael A. Musmanno, Justice of the Pennsylvania Superior Court, in an article in The Inquirer, has been adopted in full in proposed Constitutional amendments introduced in the Senate by Sen. Jennings Randolph (D., W. Va.), and in the House by Rep. James G. Fulton (R., Pa.).

Sen. Randolph frankly acknowledged his indebtedness to the Pennsylvania jurist, who testified before the late Sen. Estes Kefauver's subcommittee on Constitutional amendments as long ago as 1958.

* * *

"IN VIEW of the many plans which have been submitted to Congress on this subject," Randolph told the Senate, "I am naming this proposal the 'Musmanno Plan.'"

Among the problems involved in succession, the one that has proved most frustrating in the past is a determination of when a President is incapacitated to perform his duties.

There have been times in the past when the Nation has been virtually without Presidential direction. The most recent was the four hours when President Eisenhower was under anesthesia during an operation for ileitis.

* * *

THERE have been other times when for weeks and months the President was unable to perform his duties. James A. Garfield lingered for 80 days after he was felled by an assassin's bullet.

President Woodrow Wilson, after a paralytic stroke was unable fully to discharge his duties for 18 months. He refused to relinquish his duties to the Vice President.

The Musmanno plan, embodied in the proposed amendment, would make the House and Senate Judiciary Committees a permanent commission to prevent lapse of executive power.

* * *

THE commission would be subject to call at any time, whether or not Congress was in session, by the chairman of the Senate Judiciary Committee. When summoned the Commission would decide by a two-thirds majority whether the President was in fact "disabled or unable" to discharge the duties of his office.

Once a determination was made that the President was incapacitated, the Vice President would assume the duties of the office. The commission would have the power, also by a two-thirds vote, to decide when the inability or disability of the President had ceased.

The proposed amendment also would provide for immediate selection of a new Vice President in the event the Vice President had to assume the duties of the President.

In the event the Vice President assumed the duties of the office, Congress immediately would elect a Vice President from among three persons of the same party affiliation designated by the national committee of the party.

tee on the Disposition of Papers in the Executive Departments.

The ACTING PRESIDENT pro tempore appointed Mr. JOHNSTON and Mr. CARLSON members of the committee on the part of the Senate.

PETITION AND MEMORIAL

Petitions, etc., were laid before the Senate and referred as indicated:

By the ACTING PRESIDENT pro tempore:

A resolution adopted by General Joseph Wheeler Post No. 62, Veterans of Foreign Wars, Jersey City, N.J., favoring the enactment of legislation to grant pensions to veterans of World War I; to the Committee on Finance.

The petition of Mary Koehler, of Mobile, Ala., relating to the enactment of the civil rights bill; to the Committee on the Judiciary.

CONCURRENT RESOLUTION OF SOUTH CAROLINA LEGISLATURE

Mr. JOHNSTON. Mr. President, I send to the desk a concurrent resolution passed by the general assembly of the State of South Carolina requesting the President of the United States to take necessary action to protect the woolen industry of the United States from encroaching imports of foreign woolen products.

On behalf of my colleague the Senator from South Carolina [Mr. THURMOND] and myself, I ask unanimous consent to have this resolution printed in the RECORD together with my remarks.

There being no objection, the concurrent resolution was referred to the Committee on Finance, and, under the rule, ordered to be printed in the RECORD, as follows:

RESOLUTION BY GENERAL ASSEMBLY OF SOUTH CAROLINA

Concurrent resolution requesting the President of the United States to take such action as necessary to protect the woolen industry of this country

Whereas between 1947 and 1962 the wool textile industry in the United States has lost (1) over 100,000 jobs; (2) about 300 plants or establishments; (3) 21,836 broad looms; (4) 2,169,000 spindles; (5) 1,042 combs; and (6) approximately 60 percent of the machinery used in the industry; and

Whereas it appears that the loss trend will continue unless appropriate action is taken by the executive branch of the Federal Government; and

Whereas these losses are adversely affecting communities on a nationwide basis; and

Whereas it has been previously determined by acts of Congress and opinions of those connected with defense mobilization that an adequate wool textile industry is essential to national security; and

Whereas the late President John F. Kennedy declared, on May 2, 1961, that "It [the textile industry] is of vital importance in peacetime and it has direct effect upon our total economy"; and

Whereas it is recommended by those with peculiar knowledge of the industry to the President of the United States that—

1. Wool product duties be reserved from the negotiating list scheduled to begin in May under the auspices of the General Agreement on Tariffs and Trade;

2. The Government urgently and unremittingly pursue solution of the wool product import problem through international negotiations and accord; or, failing that;

3. The Government act unilaterally to restrain wool product imports to prevent market disruption and to restore and foster fair competition to avert the liquidation of an essential industry; and

Whereas the members of the General Assembly of South Carolina share in the concern for the future of the woolen industry and wish to convey this concern to the President of the United States: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That the President of the United States is requested to take such steps as is necessary to protect the woolen industry of this country and urgently recommend that the President act in the following more specific manner:

1. That wool product duties be reserved from the negotiating list scheduled to begin in May under the auspices of the General Agreement on Tariffs and Trade;

2. That the Government urgently and unremittingly pursue solution of the wool product import problem through international negotiations and accord; or, failing that;

3. That the Government act unilaterally to restrain wool product imports to prevent market disruption and to restore and foster fair competition to avert the liquidation of an essential industry; and be it further

Resolved, That a copy of this resolution be forwarded to the President of the United States, to each Member of the congressional districts from South Carolina, and to the Honorable Edwin Wilkinson, president, National Association of Wool Manufacturers.

Attest

INEZ WATSON,
Clerk of the House.

[SEAL]

CIVIL RIGHTS—RESOLUTION

Mr. JAVITS. Mr. President, I ask unanimous consent to have printed in the RECORD a resolution adopted by the District of Columbia Republican Committee, favoring the enactment of House bill 7152, relating to civil rights.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

RESOLUTION PRESENTED BY THE DISTRICT OF COLUMBIA REPUBLICAN COMMITTEE

Whereas the Republican Party had its origin in contention for human rights and the dignity and worth of the individual; and

Whereas the 1960 civil rights platform of the District of Columbia Republican Committee declared that "We shall not compromise on these fundamental rights of American citizens as guaranteed by our Constitution"; and

Whereas the leadership of the two national political parties has agreed that action on the civil rights bill now under consideration before the Congress should receive nonpartisan support; and

Whereas Republicans in Congress historically have consistently outvoted the Democrats in proportion to their strength on civil rights issues since 1933, and Republican Congressman WILLIAM M. MCCULLOCH, of Ohio, in cooperation with other Republican Members of Congress, has produced Republican majorities on vital amendments to the 1964 civil rights legislation under consideration in Congress, we urge the Republican Party to help insure passage of said bill at an early time; and

Whereas such support will, as it should, remove the question of civil rights from the area of partisan political debate: Now, therefore, be it

Resolved, That the District of Columbia Republican Committee does fully endorse and support the civil rights bill, H.R. 7152, now pending before the Congress, with any modification which shall give increased assurance of the recognition of the dignity of the human personality; and be it further

Resolved, That the District of Columbia Republican Committee does recommend and urge all Republican Members of the Congress to give their full endorsement and support of H.R. 7152; and be it further

Resolved, That a copy of this resolution be sent to all Republican Members of the Congress.

FRED L. DIXON,
Secretary.

FEBRUARY 12, 1964.

APPELLATE JURISDICTION TO REVIEW CERTAIN DETERMINATIONS—RESOLUTION

Mr. JAVITS. Mr. President, I ask unanimous consent to have printed in the RECORD a resolution adopted by the Association of County Officers of the State of New York approving the enactment of House bill 6202, granting appellate jurisdiction to review certain determinations.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

RESOLUTION BY THE COUNTY OFFICERS ASSOCIATION OF NEW YORK

Whereas it is a fundamental principle of our system of government that our courts should always have appellate jurisdiction to review the determination, ruling, and decisions of all public officials, departments, and commissions; and

Whereas this principle is founded upon precedent that no such public official, department, or commission should ever be permitted to assume dictatorial powers; and

Whereas such principle tends to prevent centralization of power in such a public official, department, or commission or in any unit of government whether local, State, or National; and

Whereas the determination of the Secretary of Health, Education, and Welfare of the Federal Government is not reviewable by the courts: Therefore be it

Resolved, That this Association of County Officers of the State of New York records its approval of bill H.R. 6202 which would grant appellate jurisdiction to our courts to review such determinations; and be it further

Resolved, That the executive director be instructed to send copies of this resolution to the New York State Senators and Congressmen and to the National Association of Counties.

Attest:

C. L. CHAMBERLAIN,
Executive Director.

Dated February 3, 1964.

EXECUTIVE REPORTS OF COMMITTEES

As in executive session,

The following favorable reports of nominations were submitted:

By Mr. FULBRIGHT, from the Committee on Foreign Relations:

W. Tapley Bennett, Jr., of Georgia, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to the Dominican Republic;

William Attwood, of Connecticut, to be Ambassador Extraordinary and Plenipotentiary to Kenya;

James D. Bell, of New Hampshire, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to Malaysia;

Robert G. Barnes, of Michigan, a Foreign Service officer of class 1, to be Ambassador

Extraordinary and Plenipotentiary to the Hashemite Kingdom of Jordan; and

G. McMurtrie Godley, of the District of Columbia, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary to the Republic of the Congo.

BILLS AND JOINT RESOLUTIONS INTRODUCED

Bills and joint resolutions were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. HUMPHREY:

S. 2513. A bill for the relief of Mrs. Pearl E. Halverson; to the Committee on the Judiciary.

By Mr. BEALL:

S. 2514. A bill for the relief of Key Suck Yang; and

S. 2515. A bill for the relief of David Allen; to the Committee on the Judiciary.

By Mr. SMATHERS:

S. 2516. A bill to permit the prepayment of FHA-insured mortgages without requiring the payment of an adjusted premium charge in certain cases involving nonprofit educational institutions; to the Committee on Banking and Currency.

By Mr. KEATING:

S. 2517. A bill for the relief of Vicenzo Pulitano; and

S. 2518. A bill for the relief of Phyllis Mayers; to the Committee on the Judiciary.

By Mr. CURTIS:

S. 2519. A bill for the relief of Zehra Ener; to the Committee on the Judiciary.

By Mr. RANDOLPH (by request):

S.J. Res. 155. Joint resolution proposing an amendment to the Constitution of the United States on Presidential power and succession; to the Committee on the Judiciary.

(See the remarks of Mr. RANDOLPH when he introduced the above joint resolution, which appear under a separate heading.)

RESOLUTION

AUTHORITY FOR COMMITTEE ON ARMED SERVICES TO CONDUCT AN INVESTIGATION AND STUDY OF MOVING THE ROME AIR MATERIEL AREA FROM GRIFFISS AIR FORCE BASE, ROME, N.Y.

Mr. KEATING (for himself and Mr. JAVITS) submitted a resolution (S. Res. 298) to authorize the Committee on Armed Services to conduct an investigation and study of moving the Rome Air Materiel Area from Griffiss Air Force Base, which was referred to the Committee on Armed Services.

(See the above resolution printed in full when submitted by Mr. KEATING, which appears under a separate heading.)

JUSTICE MICHAEL A. MUSMANNO, OF THE PENNSYLVANIA SUPREME COURT, PRESENTS WELL-REASONED PLAN FOR PRESIDENTIAL SUCCESSION

Mr. RANDOLPH. Mr. President, the subject of Presidential inability and succession is one that has engaged the attention of the Congress and the Nation's citizens for a century or longer. Interest was always keenest, of course, when, because of some current break, or seeming break, in the continuity of Presidential power, doubts arose as to the depositary of Presidential constitutional authority.

I recall to you the melancholy period when President James A. Garfield was, because of an assassin's bullet, incapacitated for 80 days prior to his death. No authoritative official or body could or would declare that he was unable to attend to the duties of the Chief Executive. As a consequence, we drifted without a responsible hand in the White House for nearly 3 months. The equally painful period is remembered when President Woodrow Wilson, suffering from a paralytic stroke, was unable to fully discharge the momentous duties of his office for 18 months. Thomas Marshall, his Vice President, was willing to assume the responsibilities of the Presidency but President Wilson would not relinquish his authority. He in fact dismissed his Secretary of State when that official, concerned for the affairs of the Nation, called a meeting of the Cabinet. So obdurate was President Wilson in this whole regretful situation that he had, it is contended, his physician publicly declare he would never certify to the disability of the President. Never must we be placed in such an equivocal light before the world.

I have today introduced a proposed constitutional amendment which, if adopted will, I confidently believe, prevent the repetition of the Garfield, Wilson, and other equally unfortunate situations. This amendment to our Constitution will solve the problem of presidential inability and succession and, at the same time, place the Office of Vice President in the setting of dignity and responsibility which it deserves.

In view of the many plans which have been submitted to Congress on this subject, I am naming this proposal the "Musmanno Plan." Its author is Justice Michael A. Musmanno, of the Pennsylvania Supreme Court, a personal friend of mine for a quarter of a century, who has devoted many years of study to the subject. As late as February 1958, the noted jurist testified before Senator Kefauver's Subcommittee on Constitutional Amendments and as long ago as 1929 he wrote a book entitled "Proposed Constitutional Amendments."

Justice Musmanno's plan in essence is as follows: The House and Senate Judiciary Committees will constitute a permanent Commission on Prevention of Lapse of Executive Power. This committee will be subject to call at all times, whether Congress is in session or not, by the chairman of the Senate Judiciary Committee. The committee, when summoned, will decide by a two-thirds majority whether a President, in the event he is apparently disabled or unable to discharge the powers and duties of his office for any reason, is in fact so disabled or unable. You will note the use of the word "unable" here, in addition to "disable," the reason being that there can be a state of facts where the President, although physically able to perform his duties, may be inaccessible as, for instance, in the event of a plane misfortune which could land him in the ocean, in a jungle, or on a desert.

Having declared a Presidential disability or inability to serve, the Commission on Prevention of Lapse of Executive Power would decide later, also by a two-thirds majority, when the inability or disability will have ceased.

This plan, it appears to me, is reasonable, just, workable and wholly democratic. It places in the hands of representatives of the people the serious business of transferring the highest national executive power to an individual other than the President. Many of the plans which have been suggested are fraught with fallacy, danger, and impracticality. For instance, I would not favor the plan which recommends that the Vice President himself declare when he should supersede the Presidency. No person in a representative democracy should be allowed, by his own determination, to displace a higher official.

Nor do I care for the plan which leaves it to the Cabinet to determine whether the President is able to perform his duties. The Cabinet, being composed of Presidential appointees, might have a difficult time making a decision wholly unrelated to their sense of intimacy with the President.

Other plans invest the Supreme Court or a commission headed by the Chief Justice with authority to decide questions on Presidential inability. It would be a mistake to have the Supreme Court determine this delicate question because if litigation should result, the Supreme Court would find itself in the awkward position of having to pass on its own actions or the action of the Chief Justice.

The Musmanno plan is simple, direct and, I repeat, wholly democratic, in resolving the problem of presidential inability which has worried lawmakers and students of government for many decades. This plan goes further and provides for the election of a Second Vice President when the Vice President shall have succeeded the President, permanently or only temporarily.

Under the Musmanno plan we would today have a Vice President. The procedure for the filling of that office, when it becomes vacant, is, like all the provisions in this plan, very simple. The national committee of the political party, of which the President is a member, would submit to Congress the names of three persons qualified for the Presidency; and Congress would elect one of these three persons as Vice President.

In order not to provide for a Second Vice President when the President will, obviously, be disabled for a very short period, the Musmanno plan provides that there shall be no second Vice President unless the vacancy is quite clearly not to endure for 6 months or more.

And now I come to perhaps the most unique feature of the Musmanno plan. Under this proposed constitutional amendment the Vice President would no longer be a member of the legislative department of the Government. He would become, as, of course, he essentially is, a member of the executive department and would be subject to the orders and direction of the President at all times, functioning, indeed, in the President's stead when the President desired to delegate certain presidential

functions to him. This delegation of power could only be done in writing and would last only as long as the President wished it to last.

We concede that the President has too many burdens to carry. He, of course, shall always be the leader of the Nation in every field of government, security, and well-being of the American people, but he should be allowed to delegate to the Vice President, from time to time, ministerial tasks which rob him of time and do not necessarily require solomonic decision. As Justice Musmanno said when he testified before the Kefauver committee:

> As of the present moment the President could not even constitutionally delegate his power to sign important documents in the event some accident disabled his writing hand.

And then there are moments in the life of the Nation when momentous decisions must be made regardless of the accessibility of the President. To quote Justice Musmanno again:

> When President Eisenhower underwent surgery at the Walter Reed Hospital for ileitis, he was under anesthesia, according to a signed article in the Washington Post February 2, for 4 hours. It is frightening to contemplate that if during this period the United States had suffered an atomic or missile attack, there would have been no Commander in Chief to coordinate defense, counterattack, and civilian evacuation. He did ready United States defense forces for emergency before taking the anesthesia.

Under the Musmanno plan the President could delegate his powers for an hour, a minute, or for whatever period a crisis might call for. Again quoting the Justice:

> The President, before entering the hospital, for instance, for major surgery, would delegate his full powers to the Vice President for the period of the operation, and the whole country could be assured that in the event of an attack we would not find our great engine of defense immobilized because of the lack of an engineer to pull the levers.

Of course, this constitutional amendment which I have introduced will be fully considered by the committee to which it is referred and in due time Justice Musmanno will, I hope, be invited to testify. The committee will subsequently report on the plan and the Senate will have the fullest opportunity to consider and discuss it. I thought it might be well, in view of the tremendous interest throughout the Republic on the subject, that I give this outline of the proposed amendment for the benefit of the Senate and all those studying this vital and perplexing constitutional problem.

The ACTING PRESIDENT pro tempore. The joint resolution will be received and appropriately referred.

The joint resolution (S.J. Res. 155) proposing an amendment to the Constitution of the United States on Presidential power and succession, introduced by Mr. RANDOLPH, by request, was received, read twice by its title, and referred to the Committee on the Judiciary.

INVESTIGATION OF ROME, N.Y., AIR MATERIEL AREA TRANSFER

Mr. KEATING. Mr. President, the legislature of the State of New York has just passed a resolution calling on Congress to make a full investigation and review of the impact of the shifting of Rome Air Materiel Area from Griffiss Air Force Base to other facilities. The resolution clearly asks questions that have been in the minds of New Yorkers ever since this transfer of activities was announced. It calls on every Member of Congress from the State of New York to devote his efforts to achieving a full and fair study of the problems involved.

Mr. President, in pursuance of that objective, I submit, on behalf of myself and my distinguished colleague from New York [Mr. JAVITS], a resolution to authorize a full study of the proposed transfer of this very active and expanding facility from Rome to other bases which are becoming obsolete and are facing a declining workload.

I ask unanimous consent to have the resolution of the New York State Assembly, concurred in by the New York State Senate, printed at this point in my remarks.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

RESOLUTION 76

Concurrent resolution of the Senate and Assembly of the State of New York memorializing the Congress of the United States to investigate if it is for the best defense and economic interest of the United States to move ROAMA from Griffiss Air Force Base at Rome, N.Y.

Whereas ROAMA is now located at Griffiss Air Force Base at Rome, N.Y.; and

Whereas this is an integral part of our air defense; and

Whereas the worldwide situation is in such a state of turmoil that our defenses must be at full strength at all times; and

Whereas the withdrawal of ROAMA from Griffiss Air Force Base at Rome, N.Y., would necessarily weaken our position; and

Whereas the moving of ROAMA from Griffiss Air Force Base would have a depressing economic effect on the entire area near Rome, N.Y.; and

Whereas sufficient reason or cause has not been made public of the feasibility of such plan: Now, therefore, be it

Resolved (if the senate concur), That the Legislature of the State of New York hereby memorializes the Congress of the United States to make a full investigation to determine whether or not it is for the best defense and economic interest of the United States to move ROAMA from Griffiss Air Force Base at Rome, N.Y.; and be it further

Resolved (if the senate concur), That copies of this resolution be transmitted to the President of the United States, the Secretary of Defense, the Secretary of the Air Force, the Secretary of the U.S. Senate, the Clerk of the House of Representatives, and to each Member of the Congress of the United States from the State of New York, and that the latter be urged to devote themselves to the task of accomplishing the purposes of this resolution.

By order of the assembly.

ANSLEY B. BORKOWSKI,
Clerk.

Concurred in, without amendment, by order of the senate, February 11, 1964.

ALBERT J. ABRAMS,
Secretary.

Mr. JAVITS. Mr. President, will my colleague yield?

Mr. KEATING. I yield.

Mr. JAVITS. I hope it will be understood that what we are doing is, as lawyers say, "Putting the Government to its proof." We have deep convictions, after considerable investigation, that the path being trod is the wrong one. As the Senator has said, the proposal is to change the location of a vital, active, ground-based electronics communications installation. We do not say that the move should not be taken in an effort to keep alive something that ought not to be kept alive on the ground of national interest and security, but take this position because of our conviction that the decision is an incorrect one. Our duty is to put the Government to its proof, and to make our case as thoroughly as we possibly can.

Mr. KEATING. I thank the Senator for this comment; he is entirely accurate.

The ACTING PRESIDENT pro tempore. The resolution will be received, printed, and appropriately referred.

The resolution (S. Res. 298) was referred to the Committee on Armed Services, as follows:

Resolved, That the Committee on Armed Services, acting as a whole or by subcommittee, is authorized and directed to conduct a full and complete investigation and study of whether it is in the best defense and economic interest of the United States to move the Rome Air Materiel Area from Griffiss Air Force Base, Rome, New York.

For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, whether the Senate is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or members.

The committee shall report to the Senate as soon as practicable during the present Congress the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the Senate is not in session shall be filed with the Secretary of the Senate.

AMENDMENT OF LAWS RELATING TO HOUSING, URBAN RENEWAL, AND COMMUNITY FACILITIES—AMENDMENT (AMENDMENT NO. 423)

Mr. SMATHERS submitted an amendment, intended to be proposed by him, to the bill (S. 2468) to help provide adequate dwelling accommodations for more families who have low or moderate incomes, who are elderly, or who are subjected to the special problems of displacement from their homes by Government action; to promote orderly community development and growth; and to extend and amend laws relating

to housing, urban renewal, and community facilities, which was referred to the Committee on Banking and Currency, and ordered to be printed.

NOTICE OF RECEIPT OF NOMINATIONS BY COMMITTEE ON FOREIGN RELATIONS

Mr. FULBRIGHT. Mr. President, as chairman of the Committee on Foreign Relations, I desire to announce that today the Senate received the nominations of William S. Gaud, of Connecticut, to be Deputy Administrator, Agency for International Development, and William B. Macomber, Jr., of New York, to be Assistant Administrator for the Near East and South Asia, Agency for International Development.

In accordance with the committee rule, these pending nominations may not be considered prior to the expiration of 6 days of their receipt in the Senate.

SENATOR McGOVERN A SPONSOR OF ARMS CONTROL RESOLUTION

Mr. WILLIAMS of New Jersey. Mr. President, several days ago a number of Senators joined me in introducing Senate Resolution 295 to express the support of the Senate for the current Geneva disarmament negotiations and to lend encouragement to the achievement of a verified comprehensive nuclear test ban, among other proposals recommended by President Johnson.

Unfortunately, through an oversight on my part, the name of the distinguished Senator from South Dakota [Mr. McGOVERN] was not included as one of the original sponsors of this resolution.

I regret this error, for Senator McGOVERN, as former Director of the food-for-peace program and since coming to the Senate, has done outstanding work on the problems of disarmament, on economic conversion as the author of some pioneering legislation I was proud to cosponsor, and in the field of international affairs generally. In fact, the Senator gave me a great deal of help in drafting this arms control resolution, making valuable suggestions and lending his strong support to this effort.

For this reason, I ask unanimous consent that Senator McGOVERN be added as a sponsor of Senate Resolution 295 and that his name appear on the resolution at its next printing.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ADDITIONAL COSPONSORS OF BILL AND RESOLUTION

Under authority of the orders of the Senate, as indicated below, the following names have been added as additional cosponsors for the following bill and resolution:

Authorities of December 18, 1963, January 14, 1964, and January 27, 1964:

S. 2396. A bill to revive the office of General of the Armies of the United States and to authorize the President to appoint General of the Army Douglas MacArthur to such office: Mr. BYRD of Virginia, Mr. CARLSON, Mr. COOPER, Mr. COTTON, Mr. CURTIS, Mr. EASTLAND, Mr. FONG, Mr. GOLDWATER, Mr. HARTKE, Mr. HRUSKA, Mr. HUMPHREY, Mr. KEATING, Mr. KUCHEL, Mr. MCCLELLAN, Mr. MILLER, Mr. PROUTY, Mr. SIMPSON, Mr. TOWER, Mr. WALTERS, and Mr. YARBOROUGH.

Authority of February 10, 1964:

S. Res. 297. Resolution to amend rule VII to permit morning business statements or comments for 3 minutes: Mr. BARTLETT, Mr. CLARK, Mr. HART, Mr. MCGEE, Mr. MONRONEY, Mr. RANDOLPH, Mr. SCOTT, Mr. SYMINGTON, and Mr. YOUNG of Ohio.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Bartlett, one of its reading clerks, announced that the House had passed, without amendment, the following bills of the Senate:

S. 573. An act for the relief of Elmer Royal Fay, Sr.;

S. 1206. An act for the relief of Georgie Lou Rader;

S. 1488. An act for the relief of Alessandro A. R. Cacace; and

S. 1518. An act for the relief of Mary G. Eastlake.

The message also announced that the House had passed the bill (S. 1605) to amend the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, to provide for labeling of economic poisons with registration numbers, to eliminate registration under protest, and for other purposes, with an amendment, in which it requested the concurrence of the Senate.

The message further announced that the House had disagreed to the amendments of the Senate to the joint resolution (H.J. Res. 247) to suspend for the 1964 campaign the equal opportunity requirements of section 315 of the Communications Act of 1934 for legally qualified candidates for the offices of President and Vice President; asked a conference with the Senate on the disagreeing votes of the two Houses thereon, and that Mr. HARRIS, Mr. ROGERS of Texas, Mr. MOSS, Mr. ROSTENKOWSKI, Mr. KORNEGAY, Mr. HULL, Mr. BENNETT of Michigan, Mr. YOUNGER, Mr. CUNNINGHAM, and Mr. BROYHILL of North Carolina were appointed managers on the part of the House at the conference.

The message also announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H.R. 6652. An act to authorize the Administrator of Veterans' Affairs to sell at prices which he determines to be reasonable direct loans made to veterans under chapter 37, title 38, United States Code;

H.R. 7751. An act to extend certain construction authority to the Administrator of Veterans' Affairs in order to provide adequate veterans' hospital facilities in Los Angeles, Calif.;

H.R. 8230. An act to amend section 24 of the Federal Reserve Act (12 U.S.C. 371) to liberalize the conditions of loans by national banks on forest tracts;

H.R. 9094. An act to authorize the President to declare July 9, 1964, as Monocacy Battle Centennial in commemoration of the 100th anniversary of the Battle of the Monocacy; and

H.R. 9609. An act to broaden the investment powers of Federal savings and loan associations, and for other purposes.

ENROLLED BILLS SIGNED

The message further announced that the Speaker had affixed his signature to the following enrolled bills:

S. 2064. An act to relieve the Veterans' Administration from paying interest on the amount of capital funds transferred in fiscal year 1962 from the direct loan revolving fund to the loan guaranty revolving fund; and

S. 2317. An act to amend the provisions of section 15 of the Shipping Act, 1916, to provide for the exemption of certain terminal leases from penalties.

HOUSE BILLS REFERRED

The following bills were severally read twice by their titles and referred, as indicated:

H.R. 6652. An act to authorize the Administrator of Veterans' Affairs to sell at prices which he determines to be reasonable direct loans made to veterans under chapter 37, title 38, United States Code;

H.R. 8230. An act to amend section 24 of the Federal Reserve Act (12 U.S.C. 371) to liberalize the conditions of loans by national banks on forest tracts; and

H.R. 9609. An act to broaden the investment powers of Federal savings and loan associations, and for other purposes; to the Committee on Banking and Currency.

H.R. 7751. An act to extend certain construction authority to the Administrator of Veterans' Affairs in order to provide adequate veterans' hospital facilities in Los Angeles, Calif.; to the Committee on Labor and Public Welfare.

H.R. 9094. An act to authorize the President to declare July 9, 1964, as Monocacy Battle Centennial in commemoration of the 100th anniversary of the Battle of the Monocacy; to the Committee on the Judiciary.

ADDRESSES, EDITORIALS, ARTICLES, ETC., PRINTED IN THE APPENDIX

On request, and by unanimous consent, addresses, editorials, articles, etc., were ordered to be printed in the Appendix, as follows:

By Mr. PASTORE:

Address by Robert Moses, president of the New York World's Fair, 1964–65, Corp., at the joint annual meeting of members and directors, at Flushing Meadow, Long Island, on January 22, 1964, being a "Final Interim Report," in the nature of a prospectus on the fair.

Remarks by Robert Moses, president of the New York World's Fair, 1964–65, Corp., addressed to the Society of the Four Arts, Palm Beach, Fla., on February 4, 1964, relating to the preparation and conduct of the fair.

By Mr. JAVITS:

Statement of William Lathrop Rich, chairman of the Committee for the New York-Montreal Seaway, during the hearing of the International Joint Commission on the Champlain Waterway Project, at Sorel, Province of Quebec, Canada, on September 20, 1963.

By Mr. KEATING:

Resolutions of Long Island Federation of Women's Clubs, Inc., relating to the Panama Canal and to commendation of Hon. J. Edgar Hoover.

DISCLOSURE OF FINANCIAL INTEREST

Mr. JAVITS. Mr. President, for many years, I have urged that Congress adopt a code of ethics governing both its Members and employees—a code which

TODAY'S WORLD | The Philadelphia Inquirer
SUNDAY MORNING, JANUARY 26, 1964
NEWS REVIEW & BACKGROUNDS • EDITORIALS & COLUMNS • BOOKS & ART • SCIENCE & EDUCATION

Constitutional Change Proposed To Protect Presidency, Nation

By Michael A. Musmanno
Justice, Supreme Court of Pennsylvania

OF THE many demonstrations of superb statesmanship in the Administration of President John F. Kennedy, one that stood out with particular predominance was his employment of the resources of the Vice Presidency to an extent theretofore unknown.

Presidents Eisenhower and Truman also had recognized that the Vice President should have more to do than merely preside over a legislative body in which he had no vote, except on the rare occasion of a tie.

President Kennedy, however, raised the office of the Vice President to an importance and dignity which took it out of the classification of an understudy, which had seemed to be its only role under the plan designed by the framers of the Constitution.

Even so, the vast potentialities of the Vice Presidency cannot be wholly harnessed and made productive because the Constitution will not permit that type of utilization. Under the Constitution the Vice President has no executive duties to perform, and as presiding officer in the Senate he is not much more than an official timekeeper.

Truman Incident

As a substitute chief executive, the Vice President plays a role anomalous and not in keeping with the genius of our governmental system. In no other sphere of activity—military, civil, commercial, industrial, or fraternal—is a substitute leader held in idleness

An individual acting as President shall continue to act until the expiration of the then current Presidential term, except that (1) if his discharge of the powers and duties of the office is founded in whole or in part in the failure of both the President-elect and the Vice President-elect to qualify, then he shall act only until a President or Vice President qualifies, and (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

If, by reason of death, resignation, removal from office, or failure to qualify, there is no President pro tempore to act as President, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of President, shall act as President: Secy. of State, Secy. of the Treasury, Secy. of Defense, Attorney General, Postmaster General, Secy. of the Interior, Secy. of Agriculture, Secy. of Commerce, Secy. of Labor.

Approved July 18, 1947.

A portion of the law of succession

ton's and John Adams' days. The President of today must study the worrisome problems provoked by the grave, progressive advance of nuclear destructive power, he must be schooled in missiles, satellites, and rockets, confer with scientists, consider a revamping of our educational system with emphasis on the science of survival.

He must have his hand on the globe at all times and concern himself with what is happening in all the European countries, in the Middle East, Far East, Africa and wherever else the Soviet threat of world domination rears its head to strike at our lifelines.

Multiple Duties

involving enforcement of court decrees and the possibility of calling out the National Guard in domestic turbulences.

As head of a political party he must meet with party leaders and map political policy and programs in various parts of the Nation.

Just a Metronome

Ever since the Suez affair, scarcely a day has passed that some international crisis has not snarled the President's desk. He must watch the United Nations on its ever-revolving carousel and international alignments and realignments.

There are National Security

While the President is doing all these things, necessarily breaking many of the rules of good health, the Vice President sits in the Senate, of not much more use to that body or the country than a metronome.

I am recommending something more than a glorified standby. Under my plan he would devote all his time to the Executive Department, of which he is an integral part. He would truly be an assistant to the President and subject to the President's orders at all times. The President would be authorized by my amendment to delegate in writing whatever authority he wished to delegate. This would not mean that there would be any lessening of the accountability in the office of the Chief Executive.

National responsibility must always remain in one person, the President, and by allowing him to decide which powers he will delegate for long or short periods, our Government will have—as it must have—executive leadership in a single man. He must be and always will be the leader of our Nation. His task will always be the dedicated one of guiding the destinies of the American people ever toward the fulfillment of the ideals of the founders of our Republic and the dreams, hopes, and aspirations of the American people.

But the ever-increasing burdens and complexities of the Executive Department absolutely demand that the President have someone to hold the helm for a moment if some transient disability requires he rest.

Delegate Powers

Under the Constitution, as it presently stands, the President may not authorize the Vice President to sign important

"... He was the person who was to decide if and when to use it ..."

mend, the President, if he had to undergo a serious operation, could delegate his full powers to the Vice President and the country would be assured that our great engine of defense would not be immobilized because an enginer was lacking to pull the levers.

If a President dies in office and the Vice President succeeds to the Presidency, who will then be the assistant to the President to accomplish the duties which the Vice President had been performing? There is no provision in the Constitution for such a contingency.

It is startling to recall that in three instances the Vice President succeeded to the Presidency only one month after the President had begun

may provide for other features in the implementation of this Constitutional amendment.

We can entertain the hope that even after setting up machinery for Presidential succession based on a President's inability to perform his duties, the Nation will never have to witness a transfer of the President's office in the midocean of crises, domestic or foreign.

Burdens Pyramid

But, so long as human flesh remains something less formidable than stone and steel, this possibility always hovers within the realm of potential reality and the time to take aboard an additional pilot is not when the ship is headed for annihi-

this field; most are not feasible because they either lack working practicality or confront insurmountable Constitutional barriers.

One plan provides that the Cabinet decide if and when the President should resign if disabled. Since the Cabinet is made up of Presidential appointees, one cannot dismiss the thought that their judgment and decision could well be influenced by personal considerations.

Commission Plan

Another plan proposes that the Vice President decide when he should assume the President's office. This plan is unworthy of consideration.

House into a permanent Presidential Inability Commission.

The membership of such a commission would be large enough and representative enough to speak for all parties, all geographical sections of the country, and all current points of view.

At the same time it would be small enough to meet and act quickly. The chairmen of the committees would be empowered to call a joint meeting of the committees at any time, regardless of whether Congress was in session.

Return to Office

The chairman of the Senate

until the moment he is to become leader himself.

The vice commander of an army, division, or regiment has duties which are indispensable to the success of the military enterprise. He renders continuous and unceasing assistance to his superior and is so intimately associated with what his chief is doing that in the event of an emergency he assumes command without a break in the continuity of operation.

The executive officer of a ship has duties of an extremely important character, aside from taking over the command of the vessel in the event the command devolves upon him.

The vice president of an industrial corporation is not hidden away from the office and the plant of the company until he is summoned to head the business of which he has been kept in complete ignorance. He works by the side of the president of the railroad or steel company or the automobile firm at all times, and he is qualified at every and any moment to undertake with up-to-date competence the responsibility of the president, should it become necessary to do so.

It is nothing short of shocking to learn from former President Truman's memoirs that before he became President he was denied knowledge on the development of the atom bomb. It was not until the day after he had been sworn in as President and had had his first Cabinet meeting that he was informed of the most destructive weapon in the world and learned further that he was the person who was to decide if and when to use it.

Must Ease Burden

Much is being said and written about succession in the event of a Presidential disability. Equally important, however, is the matter of easing the burdens of the Presidency itself.

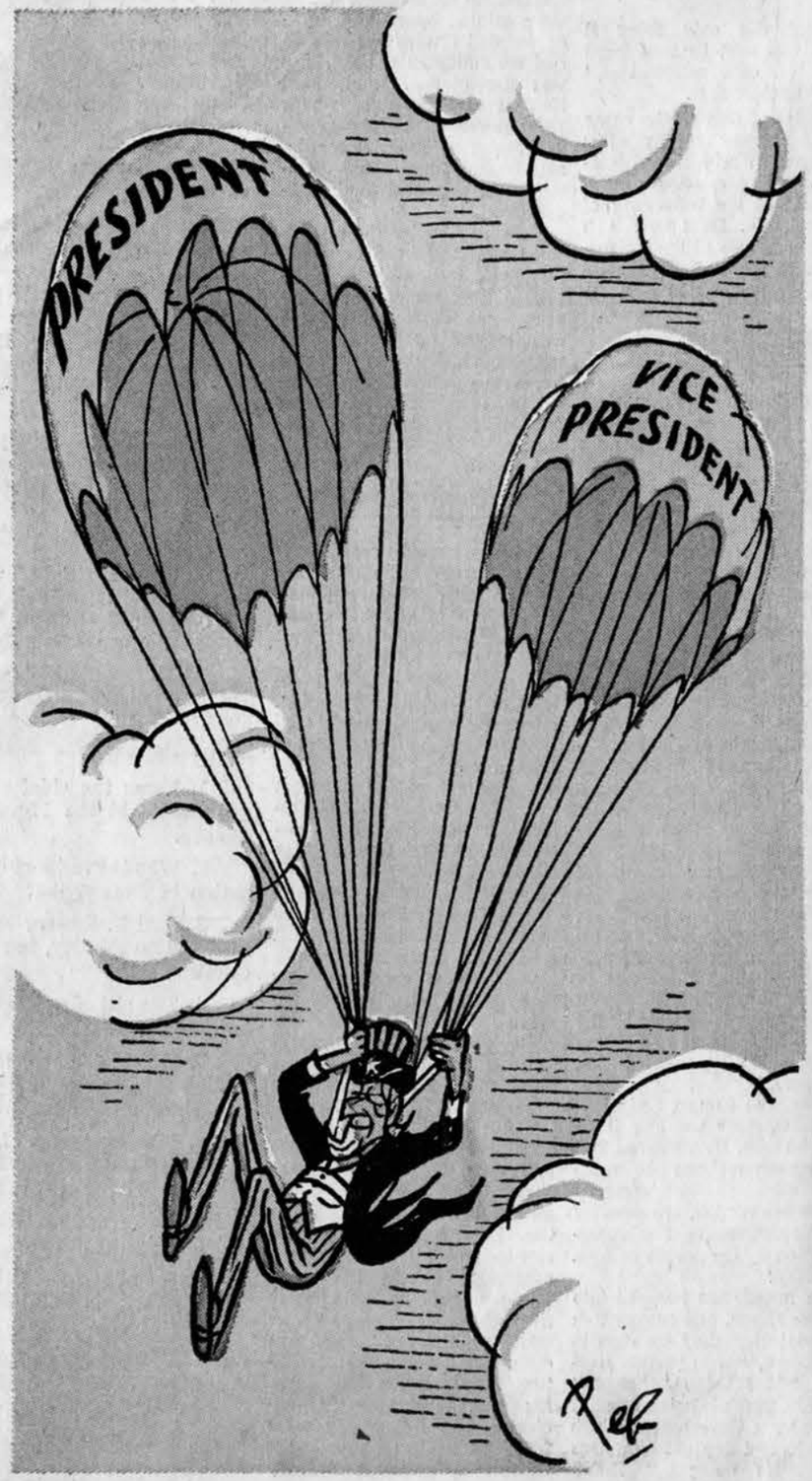
No President can possibly do all the things which the Constitution of 1787 requires of him in the setting of 1964. He cannot read all the reports submitted to him, he cannot meet and talk to all the people which in the full discharge of his functions it would be expected he should meet. He cannot handle all the details of recommendations for legislation, go into the minutiae of the entire military establishment, nor supervise the whole diplomatic corps, review all the criminal convictions under Federal statutes to determine whether he should exercise the Presidential pardoning power.

The President of 1964 must attend to matters not even imagined in George Washington's day. He must be familiar with all the bewildering details of the budget and the tax rate. He must worry over charts depicting trends in our national economy, keep his finger on the pulse of NATO and our ever-growing number of alliances, preside over Cabinet meetings.

He must appoint judges and promote Army, Navy and Air Force personnel, consider foreign aid and reciprocal trade agreements, ponder questions documents in the event some accident disabled his writing hand.

When President Eisenhower underwent surgery at the Walter Reed Hospital for ileitis, he was under anesthesia for four hours. It is frightening to contemplate that if during that period the United States had suffered an atomic attack, there would have been no commander-in-chief to coordinate defense, counterattack, and civilian evacuation.

Under the plan I recommend, Presidents Tyler, Johnson and Truman all served three years and 11 months of their respective predecessor's terms.



A New Proposal

In four other cases where Vice Presidents became President, their incumbencies were not of short duration. Presidents Arthur and Theodore Roosevelt served three years and six months of their predecessors' terms. Mr. Fillmore and Mr. Coolidge served, respectively, two years and eight months and two years and seven months of their predecessors' terms.

So much did Theodore Roosevelt and Calvin Coolidge believe that they were serving out their own incumbencies, that they both declared that the first terms which they served, because of accession to the Presidency, constituted the first term of an enumeration of first and second terms in order to determine whether they should be a candidate for a third term.

Because of the possibility, as demonstrated by the above historical record, that a Vice President may become President for practically the entire term of the deceased or removed President, I am recommending something entirely new in our governmental scheme.

If, for the purpose of conserving the President's health and allowing him to concentrate on the momentous problems of the office, he needs a Vice President who will take over some of the burdens, it naturally follows that when the Vice President assumes the office of the President in his own name, he will need a Vice President to assist him. In the Constitutional Amendment I recommending, when the Vice President becomes President, Congress shall elect a second Vice President who would have all the powers and perform the duties of the Vice President during the time the Vice President holds the office of President.

Revert to Job

The second Vice President will be chosen from not less than three persons qualified under the Constitution for the Presidency and recommended by the national committee of the political party of which the President is a member.

If the Vice President assumes the office of President only temporarily and the President resumes his office, the original Vice President reverts to his Vice President's status and the office of the specially chosen second Vice President would cease to exist. Congress

perilous passage is begun.

In any event there can be no question that the President's burdens have pyramided until no human Atlas can carry them without jeopardizing his health. We do not need, nor do we want in the White House a Hercules of muscle and brawn. We want and can have a President who will exercise at all times the genius of leadership, the courage of initiative, and the dynamic drive of concentrated effort, but we must supply him with an armored knight who will hold off and strike down the ever-pressing foes of distraction, detail, and delay, while the President leads us on to ever greater heights of peace, security, prosperity, and happiness.

With regard to Presidential succession in the event of a temporary disability of the President, I submit a plan which I believe is practical, workable and dignified. Several plans have been suggested in which I believe is practical, workable and dignified. Several plans have been suggested in exclusive power to elevate himself to a higher office in a representative republic. A Vice President who would crown himself in such a fashion would quickly find the crown tarnishing under the people's appraisement of an act which could be interpreted as selfish, egotistic, and unworthily ambitious. Moreover, there have not been lacking examples in our history where our President and Vice President were of divergent political views even though belonging to the same political party, and there have been painful occasions where the Chief Executive and the Vice President were personally hostile to each other.

The only logical governmental body to decide Presidential inability is Congress which is responsible directly to the people. Under the Constitutional amendment I propose, Congress would enact a law resolving the Judiciary Committees of the Senate and Judiciary Committee would preside over the commission. This commission, made up of persons elected by the people and commanding the respect of the entire country, would be entrusted with the delicate and grave task of determining whether a President, because of inability to discharge his powers and duties, should be replaced by the Vice President.

In the event the commission found the President unable to attend to the responsibilities of the Presidential Office, the Vice President would become President for the period of the President's disability.

When the President would have recovered his health or in any way have overcome his inability to act, the commission would restore him to office and the elevated Vice President would revert to his original office. A two-thirds vote of the commission would be required to declare the President unable to discharge the powers and duties of his office, and a similar vote would be needed to restore him to office.

Circumstances could combine to prevent the President from fulfilling the duties of his office for reasons other than ill health. Now that our Presidents fly long distances over oceans, deserts, and mountains a President's plane could be lost, so that days, even weeks, could pass with no news as to whether he had survived.

Don't Tempt Fate

A President could conceivably become captive of circumstances or hostile forces. These things would happen when momentous questions could be demanding immediate answers. In such situations where the President would be unable to perform his duties, even though presumably healthy, the commission would be empowerd to direct the Vice President to become President until the President's inability would have been removed.

Our country has been exceptionally fortunate in that no chaotic interregnum has marred the continuous functioning of our Government in times of national crisis caused by death or disability of the President. It would be folly, however, to go on hoping that fate will always provide a sturdy bridge over the ocean of sorrow and dismay when the President's office empties through tragedy or brute circumstance.

Nor should we close our eyes to the imperative need of empowering the President to delegate duties without diminishing responsibility so that he will always be healthy and prepared to meet any emergency the Republic may face.

The time to act is now.

About the Author

JUSTICE MICHAEL ANGELO MUSMANNO of the Pennsylvania Supreme Court has had a celebrated and often controversial career.

Among other things he has sentenced himself to three days in prison "to see what it's like," defended Nicola Sacco and Bartolomeo Vanzetti in the famous Massachusetts murder trial that ended in their execution and written 11 books, including "Ten Days to Die," about the Nuremberg war crime trials at which he was president judge.

His career of public service began in 1929 as a State legislator. He was elected to the State Supreme Court in 1952, the first American of Italian descent so honored.

During the First World War, Musmanno served in the infantry. In the Second, he was in the submarine service and was twice wounded in combat. He was promoted to captain and served as naval aide to Gen. Mark W. Clark in Italy.

The justice investigated Nazi war crimes after the last war and served as American representative on a repatriation board that sought to restrict the forcible return of Russian displaced persons to the Soviet Union. More recently he was an expert witness at the Adolf Eichmann trial in Jerusalem.

Justice Musmanno

During the early 1950s, Musmanno became known as a relentless foe of Communism, personally led a raid on the Communist Party headquarters in his home city of Pittsburgh, and urged that anyone found guilty of being affiliated with the party be sentenced to 20 years in prison.

His amendment to the succession law is not his first. The Justice's first book, published by Congress as a national document, was comprised of a series of proposed amendments to the Constitution.

Amendment to the Constitution of the United States submitted by Pennsylvania Supreme Court Justice Michael A. Musmanno.

J O I N T R E S O L U T I O N

Proposing an amendment to the Constitution of the United States on Presidential power and succession.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein,) That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

ARTICLE --

Section 1. The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

Section 2. In exceptional circumstances, as determined only by the President, the President may delegate in writing to the Vice President such of his Presidential Powers and Duties as he deems appropriate and the discharge of Powers and Duties so delegated shall have the same effect as if those Powers and Duties were discharged by the President.

Section 3. In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability or disability of the President to discharge the powers and duties of his office, those powers and duties shall be discharged by the Vice President until the inability or disability of the President has ceased.

Section 4. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent

Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine by a two-thirds vote thereof, all questions concerning the inability or disability of the President to discharge the powers and duties of his office, and determine when such inability or disability ceases. Upon such determination, the President and Vice President shall resume their former powers and duties.

Section 5. When a Vice President becomes President by the removal, death or resignation of the President, the new President shall recommend to Congress a candidate for Vice President. The Congress by majority vote thereof shall elect such candidate. If the Congress does not elect such candidate within a reasonable time, the new President shall submit the name of another candidate and repeat the individual recommendations until the Congress shall elect one of such candidates for the office of Vice President to serve until the end of the President's term.

Section 6. The Vice President shall not preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

Section 7. The Congress shall have power to carry this article into effect by appropriate legislation.

Section 8. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress.

Amendment to the Constitution of the United States
submitted by Pennsylvania Supreme Court Justice
Michael A. Musmanno.

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Succession

File

SUPREME COURT OF PENNSYLVANIA

JUSTICE MICHAEL A. MUSMANNO
811 CITY-COUNTY BUILDING
PITTSBURGH, PENNSYLVANIA 15219

February 8, 1965

The Honorable
Hubert H. Humphrey
Vice President of the United States
Washington, D. C.

Dear Mr. Humphrey:

Just as a brief follow-up of my letter of February 4th, I append the AP story of January 29th which mentions my testifying in favor of S. J. Res. 1, whose passage is urged by the President.

Senators Give Succession Bill Wide Support

Phila. Inquirer
1/30/65

WASHINGTON, Jan. 29 (AP). —A chorus of bipartisan support arose Friday for swift Congressional approval of a Constitutional amendment to establish procedures for filling Vice Presidential vacancies and insuring continuity of Presidential leadership.

Its volume far exceeded dissents, which included the expressed fear that the proposed Presidential disability procedures might make possible a coup d'etat to unseat an unpopular President.

Foremost among favorable witnesses before a Senate Judiciayr subcommittee were Nicholas Katzenbach, the newly designated Attorney General, and Herbert Brownell, who filled that cabinet post under President Dwight D. Eisenhower.

Also testifying in favor of the action was Justice Michael A. Musmanno of the Pennsylvania State Supreme Court.

SENATE OK "CERTAIN"

I, of course, intend to continue my active advocacy of this measure until it is part of our Constitution.

With ever-augmenting admiration and personal regard,

Yours faithfully,

Mike Musmanno

February 1, 1965

Memo to John S.

From Bill

If we are involved at all in the Presidential succession bill, which I do not think we are, you might keep Judge Musmanno alerted as to what is going on.

To John S. cc Leg: presidential succession

February 1, 1965

Dear Mike:

L. A. Nikoloric has passed on to me your good wishes and the fact that you were in town recently on the Presidential succession bill.

Now that the President has taken a position publicly, I am sure he will welcome any assistance you can give to him on the matter.

With kindest regards.

Sincerely,

Hubert H. Humphrey

The Honorable Michael Musmanno
Justice
Pennsylvania Supreme Court
Pittsburgh, Pennsylvania

bcc: L. A. Nikoloric

January 25, 1965

M E M O R A N D U M

TO: William Connell
FROM: L. A. Nikoloric
RE: H.J.Res. 154 -- Judge Musmanno

Mike Musmanno has caused the enclosure to be introduced on the House side and will try to have a companion introduced in the Senate.

It has to do with Presidential succession. I have previously written you a memo about this.

This resolution provides in summary:

1. For ratification as a Constitutional Amendment by 3/4 of the States;

2. That the President assign to the V.P. duties as he sees fit;

3. That the V.P. succeed to the dutes of President when the President is incapacitated.

4. That the Judiciary Committees of Senate and House by 2/3 vote decide when the President is incapacitated.

5. That the Congress shall vote on recommendations of a Vice-President succeeding to the presidency to elect a new Vice-President. (Note: What happens if a V.P. dies, etc.?

6. That the V.P. shall not preside over the Senate.

Mike has had himself invited to testify on this before the House Committee and is trying to testify before the Senate Committee.

Musmanno feels pretty strongly about HHH and does not want to take any position contrary to Humphrey's preferences -- or the Administration's. His purpose in trying to see you was to find out your feelings -- if any -- on the matter.

MEMO
TO: William Connell
FROM: L. A. Nikoloric
RE: H.J.Res. 154 -- Judge Musmanno
1/25/65 -- page #2

If you will call me or drop me a note I will let him know your wishes or you can write him:

Justice Michael Musmanno
Pennsylvania Supreme Court
Pittsburgh, Pa.

. . . . . .

Almost any of these proposals are probably workable to some degree. Unless asked to get into this, I should think you people might well stay out of it.

L. A. Nikoloric

Encl.
LAN:gk

Dear Mick -

I enjoyed very much having lunch with you today, and look forward to hearing from you soon.

Congratulations on your getting your (our!) man in! He will be the best since Thomas Jefferson was V.P.!

Faithfully,

Mike & Ellen Weiss

Plan authored by
Justice Musmanno
Supreme Ct of Penna.

89TH CONGRESS
1ST SESSION

H. J. RES. 154

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 1965

Mr. FULTON of Pennsylvania introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States on Presidential power and succession.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. The Vice President shall assist the President and the President shall assign to the Vice President such duties as he sees fit.

"SEC. 2. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President, and shall serve as such until the end of the term for which the President was elected. In case of the inability or disability of the President to discharge the powers and duties of his office, those powers and duties shall be discharged by the Vice President until the inability or disability of the President has ceased.

"SEC. 3. The members of the Judiciary Committees of the Senate and the House of Representatives shall constitute a permanent Commission on Prevention of Lapse of Executive Power. Under such rules as the Congress shall prescribe by concurrent resolution, the Commission shall determine by a two-thirds vote thereof, all questions concerning the inability or disability of the President to discharge the powers and duties of his office, and determine when such inability or disability ceases. Upon such determination, the President and Vice President shall resume their former powers and duties.

"SEC. 4. When a Vice President becomes President by the removal, death or resignation of the President, the new President shall recommend to Congress a candidate for Vice President. The Congress by majority vote thereof shall elect such candidate. If the Congress does not elect such candidate within a reasonable time, the new President

shall submit the name of another candidate and repeat the individual recommendations until the Congress shall elect one of such candidates for the office of Vice President to serve until the end of the President's term.

"SEC. 5. The Vice President shall not preside over the Senate. The Senate shall choose a President of the Senate from Members of the Senate, a President pro tempore who shall act in the absence of the President of the Senate or during his participation as a Member of the Senate in the deliberations of the Senate, and other officers of the Senate.

"SEC. 6. The Congress shall have power to carry this article into effect by appropriate legislation.

"SEC. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."

89TH CONGRESS
1ST SESSION

H. J. RES. 154

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States on Presidential power and succession.

By Mr. FULTON of Pennsylvania

JANUARY 7, 1965

Referred to the Committee on the Judiciary

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Historical Society

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