SUPPLEMENTAL ~~MINORITY~~ VIEWS

OF

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H. J. Res. 1 as reported would ratify the Tyler precedent of succession to the office of President by the Vice President upon the death of the President; it would provide for filling a vacancy in the office of Vice President; and it would incorporate into the Constitution a detailed procedure for the transfer of executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office.

The Tyler Precedent

No reasonable question any longer exists about the Constitutional succession to the office of President by the Vice President upon the death of the President. Vice President Tyler's claim to the office as well as its powers and duties, upon the death of President W.H. Harrison in 1841, has without exception been asserted on every subsequent like occasion. The country would not now accept any different construction of the Constitutional provision, nor would any different construction be warranted. There is no disagreement over Section 1 of H.J. Res. 1. It makes clear that whenever a vacancy in the office of President occurs,

whether by removal, death or resignation, the Vice President will assume the office as well as its powers and duties.

Filling a Vice Presidential Vacancy

Section 2 of H.J. Res.1 would empower and direct the President to nominate a Vice President when that office is vacant and the citizen so nominated would take office when confirmed by a majority vote of both houses of Congress.

While it is generally assumed each house would act separately, the language employed requires a majority vote of both houses, not each house, to confirm. If, sometime in the future, pressure is brought to bear for Congressional confirmation in joint convention, as some proponents of this measure now advocate, the language of Section 2 may be construed to require only a majority of both houses combined, in that way diluting the vote of Senators. In my opinion, this possibility would be lessened if the language directed the majority vote in each house instead of a majority vote of both houses.

Although the section is silent on the point, it is expected that the majority vote required, so long as each house acts separately, is a majority of the votes cast in each house, a quorum being present. There is no requirement for a record vote, but one-fifth of those present could require it. A secret ballot could not be ordered over their objections.

Procedure for confirmation of nominations by the President by both houses is unique in our experience. All other appointments are submitted only to the Senate, for advice and consent. A good case could be made for submission of this nomination to the Senate alone.

After all, the sole Constitutional duty of the Vice President remains that of President of the Senate; and within the purview of the Constitution, the President, by nominating a Vice President, is choosing their presiding officer. Senate approval of his nominee, as in the case of other Presidential appointments, certainly would have been thought sufficient in earlier periods of our history, and may be sufficient today.

The case for Senate action alone also can be buttressed by an analogy. In those cases where a Vice President is not elected, because of a failure of a majority of the electoral vote, the Constitution directs the Senate to elect one from the candidates who received the two highest numbers.

Finally, in the case for Senate confirmation alone, it may be observed that our Constitutional processes for the selection of our Presidents and Vice Presidents are federal in nature. Presidential electors, chosen in each State in such manner as the Legislature may direct, meet in their respective States and there cast the votes to which their state is entitled. The Senate, too, is a body federal in nature. Each State has an equal vote in the Senate. The Senate represents the States in our legislative branch. It would be wholly consistent with the preservation of the federal structure if the Senate were vested with power either to elect a Vice President to fill a vacancy, or to advise and consent to the nomination of the President for that purpose. Thus far in our history there has been a vacancy in the office of Vice President during a part of sixteen different terms. One vacancy was caused by

resignation of the Vice President. Seven died in office and the other eight succeeded to the Presidency upon the death of the President.

On those occasions when the Vice President's office becomes vacant through removal, death or resignation, it is possible that some division in Congress might occur over confirmation of a President's nomination of a successor. But on those occassions when a vacancy is due to a Vice President's succession to the Presidency, and the new President, so recently a Vice President himself, is called upon to nominate another, the temper of the country and of the Congress is likely to be such as to make Congressional confirmation of the appointment pro forma. Under such circumstances, how meaningful really is the function of Congressional confirmation? The new President might as well be empowered to appoint a new Vice President outright.

Consider the terrible pressures that will immediately come to bear on a newly elevated President to choose a Vice President. No time is specified within which the nomination must be made, but it would be a mistake to believe the new President could relieve the pressure by putting the matter off. As soon as he enters the Presidential stage, the new President will see prospective Vice Presidents and their supporters in the wings. In addition to all of the other cares, duties and responsibilities thrust upon him, he will also have to deal with those who aspire to the second highest office of the land -- the largest plum within his hands.

A better solution to the problem of succession to the office of Vice President would be to provide that the holder of some other office in the Administration should automatically succeed to the Vice Presidency.

It is hard enough for the country to go through the sad experience of a change of Administration at the time of the death of a President, when the succession is automatic. That is the situation now and as it has been. Since 1792 there has always been a known successor to the office of President when there was no Vice President. But upon the ratification of this proposed Amendment, there will be an air of uncertainty, at least for the time during which it takes a new President to nominate and obtain confirmation of his choice -- and this uncertainty will be experienced at a time when the country can least bear it.

Presidential Inability

H. J. Res. 1 would incorporate into the Constitution a detailed procedure for the transfer of executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office. Such transfer can occur with the President's consent or over his protest. The language of the resolution offers no hint that the determination of inability shall be based on medical or psychiatric evidence. Instead, the determination will be a political one; and here lies a danger in the proposal.

Words written into the Constitution in the past are

now found to have vested powers to extents and in ways not intended by their authors. We should be extremely careful, lest we unwittingly provide tools of power we would ourselves oppose.

Do the provisions of Section 4 of this resolution in effect create a new way in which a President might be removed from office? Might it be possible for a Vice President, sometime in the future, to form a cabal with a majority of the President's Cabinet and seize power from him? Are we, by incorporating these words into the Constitution, providing the machinery by which the stability of the office of President might be undermined? All it takes, under Section 4, is for the Vice President and a majority of the Cabinet to file their written declaration of the President's inability with the President Pro Tempore of the Senate and the Speaker of the House, and the Vice President becomes Acting President. Then the President, dislodged by this maneuver from his awesome powers, is put in the position of having to win back his position by persuading Congress of his fitness. Here again the decision will be a political one. There is no suggestion that medical or psychiatric evidence even be considered. And, if an unpopular President should fail to find support among at least a third of the Senators and Representatives in Congress, he would continue in name only, shorn of his powers and duties. He could apparently make repeated attempts to regain the powers of his office until his term expires. Would these circumstances lend stability to the county or undermine it? On the other hand, suppose an unpopular President is upheld by the Congress with more than one third, but less than a majority of the members sustaining his contention of ability to serve. Is it now possible the same cabal might try again? The President would break it up, if possible, by

changes in his Cabinet, providing he could win the advice and consent of the Senate for his new appointees, but under such circumstances he might not obtain confirmation of his Cabinet changes. Would these circumstances tend to lend stability to the government or undermine it?

Other assumptions might be made to illustrate further how the machinery we now offer the country might sometime be used by men ambitious for power.

We should keep in mind that we are fashioning tools which could be used to unsettle the stability of our government while we mean to promote it.

Section 4 is certainly not intended to provide the tools for power to evil men. Its drafters had in mind an altogether different situation. They suppose an ill President, physically unable to give his consent for the assumption of power by the Vice President. Under these circumstances some alternative to his consent must be devised if the government is to carry on. Thereafter, when the President has recovered sufficiently to resume his duties, or thinks he has, the drafters wanted to be sure of machinery whereby he could recover his powers from a Vice President and Cabinet who might disagree with his own assessment of recovery. Supporters of this proposal call the power of public opinion to their defense and say a Vice President and Cabinet would not dare seize power from a President physically and mentally able, nor withhold power from him once recovered. But public opinion can be molded, and some Presidents in our history have been most unpopular in office, and probably there will be some in the future.

There is no definition of inability or disability in the proposed amendment, nor is there any provision for the definition of this term. If there has existed an uncertainty of Congressional power to define it under existing Constitutional provisions, it is clear Congress will be without power to define an inability after H.J. Res. 1 is incorporated into the Constitution.

The proposal will leave to the President in Section 3, and to the Vice President and Cabinet majority in Section 4, complete power to treat any condition or circumstance they choose as a disability. It is even conceivable, though I hope not likely, that some President might declare himself unable, and state no reason therefor (since no reason is required by the language) in order to avoid responsibility for some unpopular act, devolving the powers of his office upon the Vice President for the time being to accomplish that purpose. After ratification of H.J. Res. 1, the Congress definitely cannot define by law what constitutes Presidential disability. I think a good case can be made to vest that power of definition in Congress. Here would be another check and balance in our system, built in to guard against abuse of power.

It was suggested in the hearings that the President might declare his inability because of absence from the country. It seems unlikely that he would do so because he would want to go abroad with full powers of his office as Presidents have done in the past. But members should know that in the minds of some, the language of this proposal will permit a future President to relieve himself of the burdens of his office, at will, by a declaration of inability due to absence.

The provisions of H.J. Res. 1 leave many questions unresolved. For example, it does not address itself to the problem of what happens if an acting President suffers an inability. It overlooks the possibility of a Presidential inability at a time when there is no Vice President, which might occur soon after a new President succeeded to office and before he nominated a new Vice President. How could the machinery of Section 4 work then? Under the language of that section, it would appear essential that there be a Vice President to trigger the machinery of that section.

In my opinion it would be better to work out the answers to these problems and others before submitting this proposed Amendment for ratification. There is no real urgency. We now have a Vice President, and an executive understanding between him and the President on the matter of Presidential disability. We should not rush this proposal on its way until it is as perfect as we can make it. These other problems will remain unsolved and those who are concerned about a certainty of succession and ability will continue to press for further amendments.

It will be tragic if we have unwittingly deprived Congress of power to move into any breach in the structure here being fashioned.

Respectfully submitted,

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