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addnl Views - 17-21

PRESIDENTIAL INABILITY AND VACANCIES IN THE  
OFFICE OF THE VICE PRESIDENT

MARCH 24, 1965.—Referred to the House Calendar and ordered to be printed

Mr. McCULLOCH, from the Committee on the Judiciary, submitted  
the following

REPORT

[To accompany H.J. Res. 1]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution do pass.

The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

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 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 the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

“SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

“SEC. 4. Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their 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.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, 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."

#### PURPOSE OF THE AMENDMENT

The principal purpose of the amendment is to distinguish between inability voluntarily declared by the President himself and inability declared without his consent. In the former case, the President can resume his duties by making a simple declaration that the inability has ceased; in the latter, the measure provides procedures for promptly determining the presence or absence of inability when that issue is present.

The amendment makes no changes in sections 1 and 2 of the constitutional amendment proposed by House Joint Resolution 1 as introduced; it does make changes in sections 3 and 4 and it eliminates section 5 by merging the substance of that section with that of section 4.

The changes made by the amendment in section 3 clarify the procedure and clarify the consequences when the President himself declares his inability to discharge the powers and duties of his office. There are two: First, the amendment indicates the officials to whom the President's written declaration of inability shall be transmitted, namely the President pro tempore of the Senate and the Speaker of the House of Representatives. The committee deemed it desirable to add this specification which was absent from the joint resolution as introduced. Second, the amendment makes clear that, in case of such voluntary self-disqualification by the President, the President's subsequent transmittal to the same officials of a written declaration to the contrary, i.e., a written declaration that no inability exists, terminates the Vice President's exercise of the Presidential powers and duties, and that the President shall thereupon resume them. In short, it is the intent of the committee that voluntary self-disqualification by the President shall be terminated by the President's own declaration that no inability exists, without further ado. To permit the Vice President and the Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Sections 4 and 5 of the amendment proposed by House Joint Resolution 1, as introduced, dealt respectively with the devolution upon the Vice President, as Acting President, of the President's powers and

duties pursuant to a declaration of his inability made by the Vice President and other officials, and with the procedure upon subsequent declaration by the President that no inability exists.

The amendment places the substance of former section 5 into section 4, in order to emphasize the committee's intent that the procedure provided by former section 5 relates only to cases in which Presidential inability has been declared by others than the President. Two identical changes are made in former sections 4 and 5. First, the term "principal officers of the executive departments" is substituted for the term "heads of the executive departments" to make it clearer that only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. The substituted language follows more closely article II, section 2, of the Constitution, which provides that the President may require the opinion in light "of the principal officers in each of the executive departments \* \* \*." The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.

The second change made in former sections 4 and 5 is to specify the President pro tempore of the Senate and the Speaker of the House of Representatives as the congressional officials to whom declaration concerning Presidential inability shall be transmitted, as is done in section 3.

The language of former section 5 of House Joint Resolution 1 is further amended to make clear that if Congress is not in session at the time of receipt by the President pro tempore of the Senate and the Speaker of the House of Representatives of a written declaration by the Vice President and a majority of the principal officers of the executive departments contradicting a Presidential declaration that no inability exists, Congress shall immediately assemble for the purpose of deciding the issue. Finally, the language of former section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.

The committee deems it essential in the interest of stability of government to limit to the smallest possible period the time during which the vital issue of the executive power can remain in doubt. Under the bill, following a Presidential declaration that the disability previously declared by others no longer exists, a challenge to such declaration must be made within 2 days of its receipt by the heads of the Houses of Congress and must be finally determined within the following 10 days. Otherwise the President, having declared himself able, will resume his powers and duties. An unlimited power in Congress might afford an irresistible temptation to temporize with respect to restoring the President's powers. In this highly charged area there is no room for equivocation or delay.

## STATEMENT

For its report herein the committee adopts in substantial measure the report of the Senate Committee on the Judiciary to accompany Senate Joint Resolution 1, namely, Senate Report No. 66, 89th Congress, 1st session:

*The constitutional provisions*

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the Executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the office of the Vice President. Article II, section 1, clause 5, 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.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) 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.

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.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

*The inability clause and the Tyler precedent*

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

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

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

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

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability," North American Review, vol. 133, p. 442 (1919).)

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President; to declare that the powers of the office are inseparable from the office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5, of the Constitution which provides that:

The Senate shall choose their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler, and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants the President. It has been reported by a Presidential secretary

of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

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.

President Kennedy entered into a similar agreement with Vice President Johnson as did President Johnson with Speaker John McCormack and Vice President Hubert Humphrey. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

#### THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives

of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of Executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience with the Constitution the inability clause remains an untested provision of uncertain application.

#### METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the Presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5, of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication Congress does not have the authority to legislate with regard to the situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18, gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Acting Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

#### *Filling of vacancies in the office of the President*

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice, and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass.

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the Office. Although much deliberation ensued regarding the official functions of the office, little

thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice-Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

#### THE URGENCY OF AMENDMENT

The death of President Kennedy and the accession of President Johnson in 1963 pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice-Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional

amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However, the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6, which states that—

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.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4, provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22, can be the President of the Senate.

One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to

the officer it designates as next in line in whatever Presidential succeeding law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

#### ANALYSIS

##### *Inability*

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5, of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 1 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3 and 4 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President. By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

The amendment to section 3 makes certain that in cases in which a President himself declares his inability, the period of his disability would be terminated by a simple Presidential notice to both Houses

of Congress. To permit the Vice President and Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and the Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Section 4 of the proposed constitutional amendment deals with the most difficult problem of inability—the factual determination of whether or not inability exists. It provides that whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their 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.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able to perform his office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his office? If the vote were the other way and the Vice President were installed as Acting President,

what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

The second paragraph of section 4 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days. Once the declaration of the President stating no inability exists has been transmitted to the President of the Senate and the Speaker of the House of Representatives, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If within 10 days the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume after the expiration of 10 days the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6, of the Constitution relating to impeachments. The committee contemplates that votes taken pursuant to the provisions of the proposed constitutional amendment will be conducted in accordance with the rules of the House and Senate, respectively, and that record votes may be taken when in conformity with such rules.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

#### *Vacancies*

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he has been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out.

For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a major voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

The committee recommends adoption of the joint resolution as amended.

#### COMMITTEE AMENDMENTS TO HOUSE JOINT RESOLUTION 1 SHOWING OMISSIONS, NEW MATTER, AND RETAINED WORDING

The committee amendments to the House joint resolution are shown as follows: Provisions of the resolution as introduced which are omitted are enclosed in black brackets, new matter is printed in italic, provisions in which no change is proposed are shown in roman.

#### 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 the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. **[If the President declares in writing]** *Whenever the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits a written declaration to the contrary, 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]** *Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their 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.] *Thereafter, when [ever] the President transmits to the [Congress] President Pro Tempore of the Senate and the Speaker of the House of Representatives 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] and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall [immediately] decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, 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.*

#### ADDITIONAL VIEWS OF REPRESENTATIVE EDWARD HUTCHINSON

House Joint Resolution 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 House Joint Resolution 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 House Joint Resolution 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 16 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 occasions 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

House Joint Resolution 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 country 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 not 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 House Joint Resolution 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 House Joint Resolution 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 House Joint Resolution 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.

EDWARD HUTCHINSON.

DISSENTING VIEWS OF REPRESENTATIVE CHARLES McC.  
MATHIAS, JR.

I dissent from the views of the majority of the committee with respect to the grant of power to the President to nominate his heir. I oppose such power as being in conflict with the basic principles of the Republic and the philosophy of the Constitution which tends to disperse, rather than to centralize, power.

The Presidency has always been considered an elective office, but it will not be purely elective if this amendment is adopted.

The Constitutional Convention, as we know it through Madison's Journal, would surely have rejected an appointed Vice President on grounds of principle alone. Modern conditions, while compelling, do not dictate that we abandon principle when we provide a modern method of succession.

The Constitution seeks means to interpose legal safeguards between the weakness, the temptations, and the evil of men and the opportunity to injure the state. We do the same in private life when we ask an honest debtor to execute a mortgage or an honorable man to state his promise or covenant in writing.

By permitting the President to name a Vice President, House Joint Resolution 1 operates on the opposite principle, assuming that a President will always be enlightened and disinterested in naming a Vice President. While this optimism reflects well on the 20th Century's opinion of itself in contrast to the pragmatic 18th century estimate of human frailty, it may not be a prudent basis for constitutional law.

Congressional confirmation of a vice-presidential nominee would be only a mild check and, in my judgment, would be a mere formality in a period of national emotional stress. Most of us who were here in the last dark days of November 1963 would confirm that almost any such request made by President Johnson would have been favorably received by the Congress in our desire to support and stabilize his administration.

Giving the President exclusive power to nominate a Vice President has been justified by a false analogy to the broad discretion allowed modern presidential nominees to express a preference for their running mates. But a presidential nominee and an incumbent President are very different men—even if they inhabit the same mortal frame—and they may be moved by very different motives. A President secure in the White House will have undergone a metamorphosis from his earlier self, insecurely and temporarily occupying the presidential suite at the Blackstone or the Mark Hopkins during the climax of a national convention.

If the presidential nominee really is allowed a personal choice of running mates, he will seek a candidate to complement his own candidacy and to strengthen the ticket. He will want an attractive, vigorous, and patently able associate. The electability of the vice-

presidential candidate is a form of accountability for the head of the ticket. By way of example, recall the probable motives of Senator John F. Kennedy in choosing Lyndon B. Johnson for his running mate and consider whether the same motives would have been decisive with President John F. Kennedy.

Furthermore, the analogy used to justify this amendment would crystallize contemporary political custom into organic law. Current practice at national political conventions and conventions themselves are the creatures of custom only. Customs can and should change as social, political and technological changes affect our way of living. The Constitution cannot and should not be so flexible.

The public today is all too ready to impugn the motives of a President dealing with his Vice President. It is hinted that a President is constantly tempted to relegate the Vice President to a subordinate role in political life. If such motives are credible in daily governmental relations, how much more would they be present in the selection of an heir and successor.

Couple this consideration to the provisions of House Joint Resolution 1 with respect to Presidential inability and the considerations that might move a President to nominate a respectable, but pallid, Vice President. If the heir apparent is to gain certain powers of deposition as well as natural succession, a President may indeed hesitate in seeking a vigorous and aggressive Vice President. Such a danger would not have escaped examination by the framers of the Constitution and should be considered by those who propose to amend it.

CHARLES McC. MATHIAS, JR.

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