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OBLIGATION ON PRESIDENT AND CONGRESS TO FILL VICE PRESIDENTIAL VACANCY

Reference is made to your inquiry requesting information on the above. Specifically, you ask whether the legislative history surrounding §2 of Amendment 25 reveals any congressional intent relative to the obligation on the President to act promptly in submitting a nominee or nominees to fill a vacancy created by the death, resignation, or removal of the Vice President.. Additionally you ask what procedures attend implementation of that section.

Section 2 of Amendment 25 provides that—

> 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 House of Congress.

With a couple of minor exceptions to be noted shortly, §2 drew very little attention. Stated differently, there was virtual unanimity regarding both the purpose and import of this provision. One of the principal purposes of the Amendment -- and clearly the chief purpose behind §2 — was "to provide for filling of vacancies in the office of the Vice President whenever such vacancies may occur." Senate Report No. 66, 89th Cong., 1st Sess. (1965), at 4.

Noting that "[n]o replacement provision is made in the Constitution where a vacancy occurs in the Office of the Vice President," the Senate Committee report recommended §2 in order 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 had been confirmed by a majority vote in both Houses of Congress. Id., at 14.

The need to fill in this constitutional omission was explained as follows:

> 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. Ibid.

The report concludes in this particular with the observation that the procedure authorized by §2 would insure selection of a Vice President who is compatible with the President. Thus --

> 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 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. Id., at 15.

The House Committee report on that body's companion measure, H.J. Res. 1, "adopt[ed] 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." House Report No. 203, 89th Cong., 1st sess. (1965), at 4. Consequently, the majority report adds nothing new to illuminate procedural or other considerations affecting §2. Interestingly individual additional views of Rep. Edward Hutchinson and then Rep. Charles McC. Mathias, Jr., do, in part touch upon that section, principally to offer alternative methods of taking care of the problem of Vice Presidential vacancy. In recommending a plan whereby succession to the office of Vice President would be automatic by attaching to the "holder of some other office in the administration," Rep. Hutchinson alluded to possible problems he perceived under §2, including that of temporizing by the principals . He said:

> 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.
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> 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.
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> 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. Id., at 18-19.

Rep. Mathias took occasion, as he did during the hearings and as he would do again in debate, to challenge section 2 as a "grant of power to the President to nominate his heir." Id., at 22.

Insofar as the Committee reports are concerned, discussion of the need for "urgency" is largely confined to carrying out the various steps in determining whether Presidential inability persists or has terminated in accordance with section 4. Senate Report No. 66, supra, at 3.

Notwithstanding that one of the proposals before the Senate Judiciary Committee required the President to forward a nomination "within thirty days" after "the removal of the Vice President from office, or his death or resignation," the matter was hardly discussed in what constitutes a 272 page printed hearing. Presidential Inability and Vacancies in the Office of Vice President, Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, 88 Cong., 2d sess. (1964). See S.J. Res. 139, 83th Cong., 1st sess., reprinted at 11-13 of the Hearings. A rare exception was the exchange between a counsel for the Minority and the late Prof. Clinton Rossiter. Asked whether the 30-day provision in S.J. Res. 139 should be clarified so as to make clear that the President was authorized to make additional nominations in the event the first failed to be confirmed during the specified time, Prof. Rossiter observed:

> My reaction to that would be that of the nonlawyer. I can imagine again a sticky situation here. I would simply strike out the 30 days, and either leave it or put in the word "immediately," or "at his earliest convenience," or something of that sort.
>
> Again, I think we have got to have faith in the good will and commonsense, indeed, statesmanship of those who govern us, and if the President doesn't act to fill the Vice Presidency, obviously he is derelict in his duties. Presidents are not generally derelict in their duties and I think we could count on his filling that, or rather nominating a man to fill that office very speedily indeed.
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> So my, what Senator Connally used to call horseback opinion is, take out the 30 days and either leave it as blank, in other words, the President is to act in a way at his own convenience or put in the word "immediately" or perhaps "with all due deliberation."

At 229.

The House Hearings are similarly silent on this point. Presidential Inability Hearings before the Committee on the Judiciary, House of Representatives, 89th Congress, 1st sess. (1965). Questioning of Senator Bayh by Rep. Byron Rogers brought out the point that failure to fill a vacancy in the office of the Vice President would necessitate

recourse to the Succession Law, 3 U.S.C. 19, Id., at 47-50. Toward the conclusion of the hearing, Herbert Brownell, Chairman of the ABA Special Committee on Presidential Inability and Vice-Presidential Vacancy, recommended adding language indicating a sense of urgency in filling such a vacancy, but his comments in this regard were not followed up. Id., at 245.

Only once did the matter arise during the debate, including debate on the conference report, House Report No. 564, 89th Cong., 1st sess. (1965). See 111 Cong. Rec. for February 19, April 13, June 30, and July 6, 1965 for debates. Former Senator Bass called the Senate attention to the absence of any time limits for filling a vacancy in the office of the Vice President. Accordingly, he proposed an amendment calling for inclusion of the word "immediately" so as to accelerate Congressional confirmation of a Vice Presidential nominee. He apprehended that a Congress controlled by a different party than that of the President's might be induced to delay confirmation and thus keep open the chance for operation of the Succession Law with its prime reliance on legislative officers in the highest rank of the order of succession. The amendment was opposed by Senator Bayh who said there was no need for a time requirement in section 2 as distinguished from section 4 since in regard to the former there was a sitting President and the sole need was to provide for a "replacement." Both Senators Bayh and Ervin felt that the House and the Senate would "exercise intelligence and patriotism in a time of crisis." 111 Cong. Rec. 3279 (1965). The entire debate sparked by Senator Bass' remarks has been reproduced and is annexed hereto. See 111 Cong. Rec. 3275-3282 (1965).

As noted in earlier conversations, the legislative history is virtually totally silent with respect to Congressional procedures to be followed in handling a nomination pursuant to section 2. In his individual views, noted supra, Rep. Hutchinson does take note of the uniqueness of having the House play a role in the confirmation process. Also, as noted earlier, existing Committee jurisdictional statements place the matter of "Presidential Succession" in the House Judiciary Committee and the Senate Committee on Rules and Administration. Other matters discussed during consideration of Amendment 25 indicate that--

1: Section 2 is intended to cover the situation where the Vice President succeeds to the Presidency upon the President's death, resignation or removal, or where the Vice President dies, resigns or is removed. The word vacancy as used in section 2 has no application to the question of inability. House Hearings, supra, at 87, 196, 246.

2: If a majority of each House confirms the nomination, the person becomes Vice President for the remainder of the President's term. Confirmation by Congress is necessary. Consequently, where a vacancy occurs during an adjournment, it cannot be filled until the next regular session or at a special session called by the President. Id., at 45, 49 (Cf. provision in section 4 requiring Congress--"if not in session"--to assemble with forty-eight hours from the time the Vice President and Cabinet transmit to the President pro tempore and Speaker their declaration challenging the termination of Presidential inability.). In the event a vacancy occurs during adjournment, the Speaker of the House of Representatives, or the first eligible officer in the line of succession, would discharge the powers and duties of the President should the need

3: The nominee would have to meet the constitutional requirements applicable to the President, i.e., natural born U.S. citizen, at least thirty-five years of age, and a U.S. resident for at least fourteen years.

4: The House and Senate would vote separately on the nomination, and, the vote would be a majority of those members present and voting, provided a quorum is present. 111 Cong. Rec. 7944-45, Senate Hearings, supra, at 10, House Hearings, supra, at 45, 60, 106. See Missouri Pacific Railway v. Kansas, 248 U.S. 276 (1919) and Rep. Cellers' remarks relative thereto at 111 Cong. Rec. 7944, 7946 (1965).

5: There is no limit on the number of names the President can submit to the Congress. Accordingly, if the President's initial nomination fails to be confirmed, he can continue to submit names until one is confirmed. Senate Hearings, supra, at 50.

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