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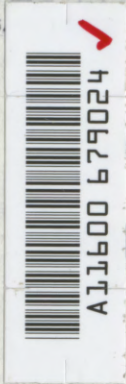
EXAMINATION OF THE FIRST IMPLEMENTATION OF
SECTION TWO OF THE TWENTY-FIFTH AMENDMENT

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HEARING
BEFORE THE
SUBCOMMITTEE ON
CONSTITUTIONAL AMENDMENTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S.J. Res. 26

PROPOSING MODIFICATION OF THE TWENTY-FIFTH
AMENDMENT OF THE CONSTITUTION OF THE UNITED
STATES

Printed for the use of the Committee on the Judiciary



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THE 25TH AMENDMENT

TUESDAY, FEBRUARY 25, 1975

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL
AMENDMENTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 318, Russell Senate Office Building, Senator Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh (presiding) and Fong.

Also present: J. William Heckman Jr., chief counsel and Marilyn R. Berning, assistant clerk.

Senator BAYH. We will convene our hearing.

This morning, we are beginning a series of hearings designed to review and analyze the implementation, for the first time, of section 2 of the 25th amendment to the Constitution and to examine the way it has operated as well as to examine several proposals that have been made for its modification and improvement.

I have a few words as an opening statement here, but I know our lead witness, the distinguished Senator from Rhode Island, is carrying many burdens and is anxious to get on about this business. If my distinguished colleague from Hawaii feels compelled to proceed now, he certainly may, and I might suggest we permit the Senator from Rhode Island to proceed.

Senator FONG. Yes. I know the Senator from Rhode Island is very busy. I had breakfast with him and he had to run away very early. So I think we can proceed, Mr. Chairman, without our statements at the present time.

[S. J. RES. 26, 94th Cong., first sess.]

JOINT RESOLUTION —Proposing modification of the twenty-fifth amendment of the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of several States within seven years after the date of final passage of this joint resolution:

"ARTICLE—

"SECTION 1. If an individual takes the office of Vice President under section 2 of the twenty-fifth article of amendment and subsequently becomes President under section 1 of that article at a time when more than twelve months remain in the term of the President, then—

"(a) there shall be a special election for the offices of President and Vice President,

"(b) section 2 of the twenty-fifth article of amendment shall not apply to the vacancy in the office of the Vice President caused by such individual becoming President,

"(c) such individual shall serve as President only until a President elected in such special election takes the oath of office of President,

"(d) the Speaker of the House of Representatives, shall in addition to his duties as Speaker, act as Vice President, and perform the duties of that office, with one exception that the President pro tempore of the Senate shall serve as President of the Senate with voting privileges, until a Vice President elected in such special election takes the oath of office, and

"(e) in the event the Senate shall be equally divided, the Secretary of State may cast a vote to break the tie.

"SEC. 2. The provisions of this Constitution relating to the appointment of electors for President and Vice President shall apply in the case of special elections required by section 1(a). The Congress shall by law prescribe the date for such elections and such other matters relating to such elections as may be necessary to effectuate the purpose of this article.

"SEC. 3. The individuals elected as President and Vice President in a special election required by section 1(a) shall become President and Vice President upon taking their respective oaths of office. Nothing contained in this article shall affect the terms of the President and Vice President as prescribed by section 1 [Section 1] of the twentieth article of amendment."

**STATEMENT OF JOHN O. PASTORE, SENATOR FROM RHODE ISLAND;
ACCOMPANIED BY, MARTIN DONOVAN, LEGISLATIVE ASSISTANT**

Senator PASTORE. I want to thank the chairman and also the members of this committee for the opportunity to present my views on the 25th amendment, its operations, and in particular my own proposal to perfect its provisions.

Now, I want to say at the very outset that what I am proposing to do has nothing to do with, nor casts any reflection on, the present incumbents of the Office of the President and Vice President. As a matter of fact, realizing the procedure for the adoption of a proposal to amend the Constitution, takes years and years, the present incumbents would not even be affected by my proposal. At this juncture I would also like to say that what this committee set out to do in proposing the 25th amendment did meet the need of the moment. Certain events triggered the first operation of the 25th amendment. At that time we had the resignation of a Vice President. There was a vacancy in that office. And realizing, of course, that the Vice President is only a breath away from the Presidency and there might be a vacancy in the Presidency, as did occur, we had to have a line of succession that would make some sense, and you provided that succession.

But the fundamental question that has bothered me for the longest time is that our forefathers in adopting our Constitution specifically provided that the people through electors would elect the President and that a President, in order to be an effective President, must be mandated by the people of the country.

The turn of events has been such that the first Vice President appointed under the 25th amendment did in fact become the President of the United States by virtue of that amendment and under the 25th amendment he in turn had to appoint a new Vice President, which of course he did. He appointed Nelson Rockefeller who was confirmed both by the House and by the Senate.

The purpose of my proposal is to allow the voice of the people to be expressed through an election should the situation ever arise where an appointed Vice President succeeds to the Presidency. It may never

recur, but if it happened once it could well happen again. It strikes me that fundamentally, this concept of election is the very efficacy of our democratic system.

Now, I realize that if this situation occurs within 1 year before a general election, you would have a problem as to time. So in my proposed amendment I have deliberately and intentionally stated that if this occurs within the 1 year, then you do not have a special election. But should a situation occur where you would possibly have an appointed President and an appointed Vice President, if that situation arises beyond this period of 1 year, then the Congress of the United States shall call a special election. If the people of this country should want to elect this appointed President, it is their privilege and their prerogative, but at least he will have to present his views to the country as a whole. That to me is very important, because for the very efficacy of democracy, you have to have a man chosen by the people.

Now, expressed in very simple terms that is all my amendment does. That is all it does.

I repeat again, what you did was worthwhile. It has worked well. No one questions that. But the point is that at the time that you were considering the 25th amendment, it was a very remote feeling, I would assume, on the part of this committee or anyone else that the occasion would ever arise that an appointed Vice President would in fact become the President of the United States.

Now, I repeat again, this is not directed to Gerald Ford. This is not directed to Nelson Rockefeller. This has nothing to do with the individuals. I am merely discussing a matter of principle. I am discussing an incident of principle and all I am saying is that in the event that both the President and the Vice President become appointed officials rather than elected officials, then if this occurs 1 year before the next general election, the Congress of the United States shall call a special election.

Senator FONG. Those circumstances, Mr. Senator, you would have to set certain date limits, would you not, because this would—if you do not set the date limits the President could wait until the year and then try to appoint his Vice President to get away from an election.

Senator PASTORE. No. Under my proposal the election process is triggered the minute that the appointed Vice President becomes the President. Under the 25th amendment he shall appoint a Vice President. But, if he refuses to do that it would not make any difference at all. The minute you have an appointed President then under my amendment you will have to have a special election process set in motion.

Senator FONG. If he takes some time in appointing that Vice President—

Senator PASTORE. It would not make any difference.

Senator FONG [continuing]. And the Congress defers in the confirmation, then what happens?

Senator PASTORE. Well, you could—as a matter of fact, if the committee were amenable to my proposal, they could write right in the amendment itself that he shall act within a period of 10 days or what have you. I mean, after all, that is only a detail. I would not excuse it.

Senator BAYH. I do not want to interrupt the Senator. Are you through?

Senator PASTORE. Only one more thing. I ask, Mr. Chairman, that at this point the text of Senate Joint Resolution 26 be printed in the record. I also have a statement here that I ask to be placed in the record as though read and a section by section explanation of the proposal along with a brief prepared by my assistant and the Library of Congress. I ask that that also be made a part of the record.

Senator BAYH. Without objection, so ordered.

[The material referred to follows:]

[S. J. RES. 26, 94th Cong., first sess.]

JOINT RESOLUTION

Proposing modification of the twenty-fifth amendment of the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

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"(d) the Speaker of the House of Representatives, shall in addition to his duties as Speaker, act as Vice President, and perform the duties of that office, with one exception that the President pro tempore of the Senate shall serve as President of the Senate with voting privileges, until a Vice President elected in such special election takes the oath of office, and

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"SEC. 3. The individuals elected as President and Vice President in a special election required by section 1(a) shall become President and Vice President upon taking their respective oaths of office. Nothing contained in this article shall affect the terms of the President and Vice President as prescribed by section 1 of the twentieth article of amendment."

TESTIMONY BY SENATOR JOHN O. PASTORE

Mr. Chairman, before I begin, I would like to thank you for the opportunity to present my views on the 25th Amendment and its operation and, in particular, my proposal to perfect those procedures.

As I have said publicly many times before, I have no quarrel with every section of the 25th Amendment and what it proposes to accomplish. Its provisions to fulfill a vacancy in the office of Vice President are undisputed. It works smoothly, as

we have already seen. It establishes a badly needed mechanism for transformation of power to the Vice President in the event the President is incapacitated.

But the scope of the 25th Amendment must be limited so that an appointed official should not succeed to the Presidency except on an interim basis. This is precisely the reason why I have introduced a joint resolution to amend the Constitution to provide for a special election once an appointed Vice President accedes to the Presidency to fill a vacancy. My sole purpose is to correct what I perceive to be an omission, if not a flaw, in the 25th Amendment.

A look at the proceedings of the Constitutional Convention of 1787 clearly demonstrates that our founding fathers intended that the President and Vice President should be elective officers and that they explicitly rejected the notion that the President should be appointed.

Article II, Section 1, of the Constitution declares without equivocation that the President and Vice President "be elected."

Therefore, under my proposal there would be a special election for the office of President and Vice President if an appointed Vice President accedes to the Presidency with more than twelve months to serve.

The special election would be held on a date to be set by Congress. I want it distinctly understood that my proposal in no way affects the powers of the present incumbents in these offices. This is not the reason for my proposal. As a matter of fact, the present situation may never rise again; on the other hand, it could, and that is the reason why I believe that the Constitution should be perfected in this manner.

I would like, at this time, Mr. Chairman, to include as part of my remarks a memorandum prepared by my staff and the staff of the Library of Congress which sets forth the legal and historical background for my proposal and also contains a section-by-section analysis of S. J. Res. 26.

POPULAR ELECTIONS AND THE TWENTY-FIFTH AMENDMENT: AN HISTORICAL AND LEGAL ANALYSIS

I. INTRODUCTION TO THE PROBLEM

An examination of our election machinery and the portions of the United States Constitution dealing with the office of the President and Vice President reveals a serious condition which is diametrically opposed to the American concept of popular elections.

Under the Constitution, as it stands today, it is possible that the Office of the President and the Office of the Vice President be occupied by appointment rather than by electoral process. Conceivably this situation could continue for almost four years before a national election was held.

By operation of the Twenty-Fifth Amendment to the Constitution, if the office of the Vice President becomes vacant, the President shall appoint a new Vice President.

During that term, if the office of President becomes vacant the "appointed" Vice President will become the President.

Again, by operation of the Twenty-Fifth Amendment, this new President appoints a Vice President. We then have both offices filled by appointed individuals rather than by elected individuals. How many times this process could reoccur in the span of the original four-year term is left to conjecture.

The possibility of these events actually coming to pass was either overlooked by the framers of the Twenty-Fifth Amendment or considered too remote to warrant a separate clause in that Amendment. Perhaps the problem was not considered serious at that time. Times change.

As Richard P. Longaker, Professor of Political Science and Chairman of Department, University of California, Los Angeles, concluded in his article "Presidential Continuity: The Twenty-Fifth Amendment".

"When the twenty-fifth amendment is first applied, flaws now hidden will no doubt appear. Some of the inevitable imperfections are already evident, though their seriousness will depend on factors extrinsic to the wording of the amendment. (See, "Selected Materials on the Twenty-Fifth Amendment, Oct. 1973, Committee on the Judiciary, pg. 211, at 236).

Professor Longaker was indeed prophetic in his remarks in February of 1966. Today we are facing the appearance of one of these flaws, no longer hidden, but patently obvious. While the idea of repealing the Twenty-Fifth Amendment

need not be considered, some consideration must be given to an amendment which will improve the Twenty-Fifth Amendment. President Harry S. Truman, as indicated in the House documents of the 1st session of the 79th Congress (June 19, 1945 p. 6272) seemed genuinely concerned that it was undemocratic for a Vice President who had succeeded to the Presidency to be able to appoint his successor. He said in a letter to the Senate:

"* * * it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act.

I do not believe that in a democracy this power should rest with the Chief Executive.

Insofar as possible, the office of the President should be filled by an elective officer. There is no officer in one system of government, besides the President and Vice President, who has been elected by all the voters of the country".

How much more undemocratic would it be for the appointed successor to appoint his successor? This situation should not be tolerated in our democratic system.

At this juncture, the concept of electing the President, should be analyzed from historical and legal viewpoints to remove any question as to the intent of the framers of the Constitution and the courts.

II. HISTORICAL BACKGROUND

From the creation of the presidency to the present, that office has been one that has been dominantly characterized as elected as opposed to appointed. The Constitutional Convention in 1787 had as one of its main objectives the development of the office of the President. One of the first provisions discussed at that Convention was the manner of electing the chief executive of the States. The first proposal was made by James Wilson, a lawyer, a chief architect of the Supreme Court and one of Washington's initial appointments as Associate Justice. Wilson's proposal was that the President be named by direct "election by the people". The proceedings of the Convention were secret, but according to James Madison's *Journal*, at least six delegates, including Madison himself and four other lawyers, endorsed Wilson's suggestion. No less than eight other methods of electing the President—among them the electoral college system—were proposed. Some of them were first adopted and then reconsidered and rejected. Not until the final weeks of the Convention was the electoral college method adopted. Thus, it was quite clear from the beginning of our constitutional form of government that the office of the presidency was to be an elected one and not an appointed one.

Moreover, at the Convention of 1787, Edmund Randolph submitted a plan of a national government in which he proposed "a national executive to be chosen by the national legislature for the term of ---- years . . . and to be ineligible a second time." Charles Pinckney, at the same time, proposed "that the executive power be vested in a President of the United States of America, which shall be his style; and his title shall be 'His Excellency.' He shall be elected for ---- years, and shall be reeligible." The first decision of the Convention was that the term of the Executive should be seven years. James Wilson proposed that there should be "certain districts in each State which should appoint electors to elect outside of their own body." In these three propositions were the essential elements of nearly all the features of the plan ultimately adopted. Again such propositions make it quite clear that the Convention's concept of the President was one that called for his election rather than appointment.

It should be noted that the Convention first adopted a resolution that the Executive should be chosen by Congress; it also adopted a resolution that the executive power should be vested in one person. Elbridge Gerry proposed that the Executive should be elected by the governors of the several States; this plan was defeated. Alexander Hamilton presented a draft of a constitution to the Convention according to which the choice of a single executive officer, a President, was to be made by electors chosen by the people similar to the way they are now actually chosen; and in case there was no choice by a majority of such electors, then an election from among the three highest candidates was to be made by a body of second electors two for each State, to be chosen by the first electors at the time of voting for a President who were to meet in one place and to be presided over by the Chief Justice.

The whole focus of the Convention of 1787 was in terms of electing the chief Executive and not appointing him. It was not until the final weeks of the Convention that the electoral college method of electing the President was adopted. It

was not an ideal way or even the best way of choosing a President; rather it was a compromise device. The Convention refused to give the election of the President to the people; it also rejected amendments to give each State one vote for President; and it defeated a proposition to give a casting vote to the President of the Senate.

Alexander Hamilton in the *Federalist* No. 68 (March 12, 1788) asserted the following in emphasizing the need for having the President elected:

"The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit, that the election of the president is pretty well guarded. I venture somewhat further; and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages; the union of which was to be desired.

"It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.

"All these advantages will be happily combined in the plan devised by the convention; which is, that the people of each state shall choose a number of persons as electors, equal to the number of senators and representatives of such state in the national government, who shall assemble within the state and vote for some fit person as president. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the president. But as a majority of the votes might not always happen to center on one man and as it might be unsafe to permit less than a majority to be conclusive, it is provided, that in such a contingency, the house of representatives shall select out of the candidates, who shall have the five highest numbers of votes, the man who in their opinion may be best qualified for the office."

III. LEGAL BACKGROUND

Article II, Section I of the Constitution explicitly states that the President and Vice President of the United States "be elected". The immediate source of Article II was the New York Constitution in which the governor was elected by the people and thus independent of the legislature. His term was three years and he was indefinitely eligible. However, the ultimate plan that was adopted by the Convention was not one that was based on the New York way of electing its governor. The adoption of the electoral college plan came late in the Convention which had previously adopted on four other occasions provisions for the election of the Executive by the Congress and had twice defeated proposals for the election by the people directly. The electoral college, however, probably did not work as any member of the Convention could have foreseen because the development of political parties and nomination of presidential candidates through them and the designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory. But the college remains despite numerous efforts to adopt another method.

Article II, Section I, Clause 2 of the Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Although Clause 2 seemingly vests complete discretion in the States, certain older cases recognized a federal interest in protecting the integrity of the process. The Supreme Court has upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any qualified person as a presidential elector, *Ex Parte Yarbrough*, 110 U.S. 651 (1884). The *Yarbrough* Court found that it is the duty of the Government to see that citizens may exercise the right to vote freely and to protect them from violence while so doing and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, *Id.*, 662. That Court also found that the right to vote is based upon the Constitution and not upon State law and that Congress has the

power to pass laws for the pure, free, and safe exercise of this right, *Id* 663-664. Its power to protect the choice of electors from fraud or corruption was sustained in *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934).

More recently, substantial curbs on state discretion in regulating the selection of electors have been instituted by both the Supreme Court and Congress. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down a complex state scheme which effectively limited access to the ballot to the electors of the two major political parties. In the Court's view, the system violated the equal protection clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. The Court denied that the language of Article II, Section I, Clause 2 immunized such state practices from judicial scrutiny, and the Court rejected the notion that Article II, Section I of the Constitution gives the States the power to impose burdens on the right to vote where such burdens are expressly prohibited in other constitutional provisions.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld the power of Congress to reduce the voting age in presidential elections and to set a thirty-day residency period as a qualification for voting in presidential elections; the rationale was that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment may override state practices which violate that Amendment and substitute standards of its own.

IV. SUMMARY AND ANALYSIS OF THE PROPOSED AMENDMENT

It seems quite clear, both from a historical analysis and a legal analysis, that the concept of the presidency was embodied with the understanding that the office was to be an elected one as opposed to being an appointed one. Moreover, the right to vote for the President has been upheld and safeguarded as the above cases have indicated. Congress has the power to protect that right to vote for the highest office of the land as well as the power to protect the election of the President and the Vice President from corruption, *Burroughs and Cannon v. United States, supra*.

It is now time for reflection to see if we have not strayed somewhat from our basic goal of rule by the people. If we have we must take the necessary steps to return to our primal goals.

When the Twenty-Fifth Amendment was being considered, arguments were made as to whether or not we needed to have a Vice President appointed, should a vacancy in that office occur. Some felt that the Succession Act of 1947 was adequate assurance of continuity of leadership. However, at least two-thirds of the Senate, two-thirds of the House, and three-quarters of the States decided that we should always have a Vice President. It is believed that this office is the best grooming one can have in case he be called on to succeed to the Presidency.

All this precaution is admirable and, indeed, prudent. The one vital ingredient missing is the choice of the people. The established machinery is admirable, but it should apply only to provide a suitable interim president—one who would serve only until the people choose a new President and Vice President by election.

In addition, a limit must be placed on the term of a president who neither faced an election nor received the mandate of the people. He should not be permitted to appoint his own successor. These choices must be returned to the people at the earliest practical time. No alternative can suffice if we are to remain a democracy.

The American people are willing to forego immediate choice in return for the assurance of capable leadership in a time of crisis accompanying a vacancy in the presidency.

However, it is doubtful that the American people want to give up this choice covering an indeterminable number of possible presidents for possibly four years.

To restore this choice to the American people the Pastore Amendment would provide for a special election for president and vice president when an individual who has been appointed Vice President by operation of the Twenty-Fifth Amendment succeeds to the office of the President.

A section-by-section analysis of the Pastore Amendment follows:

"Section 1. If an individual takes the office of Vice President under section 2 of the XXVth article of amendment and subsequently becomes President under section 1 of that article at a time when more than twelve months remain in the term of the President, then—

"(a) there shall be a special election for the offices of President and Vice President,

"(b) section 2 of the XXVth article of amendment shall not apply to the vacancy in the office of the Vice President caused by such individual's becoming President,

"(c) such individual shall serve as President only until a President elected in such special election takes the oath of office of President,

"(d) the Speaker of the House of Representatives, shall in addition to his duties as Speaker, act as Vice President, and perform the duties of that office, with the one exception that the President pro tempore of the Senate shall serve as President of the Senate with voting privileges until a Vice President elected in such special election takes the oath of office, and

"(e) in the event the Senate shall be equally divided, the Secretary of State may cast a vote to break the tie."

This section is designed to create a special election for the office of President and Vice President when an appointed Vice President pursuant to section 2 of article 25 succeeds to the presidency pursuant to section 1 of that amendment.

More than twelve months must remain in the term of the former president in order for the election process to be implemented. This was done to provide enough time for proper choice of candidates by all parties wishing to announce a candidate. Any time less than twelve months was not considered to constitute an abrogation of the electorate's constitutional right to choose the president by election.

The special election process was provided in order to avoid any possible unconstitutionality of a special election grounded on an interpretation of the necessary and proper clause of Article I.

Section 2 of the XXVth article of amendment shall not apply to the vacancy in the vice presidency because that vacancy will automatically be filled by an acting Vice President in the person of the Speaker of the House of Representatives. This avoids the necessity for repealing any portion of the Twenty-Fifth Amendment.

The Speaker of the House of Representatives would assume all duties of the Vice President but would not give up his duties as Speaker in order that there be as little change as possible in the status quo during the transition period after a vacancy. This is also in keeping with the spirit of the current laws of succession. The one exception to the Speaker assuming all of the vice president's duties is that the President pro tempore of the Senate became the President of the Senate assuming this natural function. This was done in order that the leadership of both legislative bodies remain separate.

The President pro tempore would retain his voting privileges in order that no state be deprived of its two votes. In the event of a tie in the Senate, the Secretary of State may cast the tie-breaking vote. This was done because the Secretary of State is the next in line of succession in the Executive Branch behind the Vice President who would normally have that right under the Constitution.

The appointed vice president who succeeded to the presidency would serve as president and not as "acting president". His term would end when the newly elected president (after the special election) took his oath of office. The Speaker and the President pro tempore would return to their normal functions when the Vice President elect took his oath of office.

"Section 2. The provisions of this Constitution relating to the appointment of electors for President and Vice President shall apply in the case of special elections required by section 1 (a). The Congress shall by law prescribe the date for such elections and such other matters relating to such elections as may be necessary to effectuate the purposes of this article".

This section is designed to afford the special election the same treatment as a regular election and to utilize the existing system for elections. The only substantial change would be the date for such elections.

Under the Pastore Amendment Congress is given the flexibility to establish the date of election as circumstances dictate.

"Section 3. The individuals elected as President and Vice President in a special election required by Section 1(a) shall become President and Vice President upon taking their respective oaths of office. Nothing contained in this article shall

affect the terms of the President and Vice President as prescribed by section 1 of the XXth article of amendment."

The intent of this article is to insure that the individuals elected in a special election would serve only the remainder of the established term. This also precludes the necessity of repeal of the 20th Amendment.

The Pastore Amendment strives to work within the framework established by the Constitution from its inception to the present day. It begins and ends with the proposition that the people should elect their President and Vice President and to preserve this right this constitutional amendment is required.

Senator BAYH. Could I ask you to think out-loud on a matter?

Senator PASTORE. Yes.

Senator BAYH. I have been involved in this matter since its infancy. I have the mixed feeling of—I guess it goes with some very human feeling of pride of being involved—but concern over some things that are happening now that I wish were not, as a result. This is in reference to the decisions of the person chosen and I think we have that liability regardless of how the individual is chosen.

As best I can recall, the whole purpose for this article 2 was to use it. It could not be used unless the circumstances which the Senator from Rhode Island is concerned about took place.

Senator PASTORE. That is right.

Senator BAYH. I mean, one can argue that you should have a Vice President just to function as a Vice President while I am prepared to accept the fact that the Vice President today has been utilized. Since President Truman started utilizing Alben Barkley, we had a change. Instead of the Vice President being, as John Nance Garner described him, as not worth a pitcher of warm spit and other less flattering descriptions, we have had the Vice President perform a living role. But the real reason for this was to provide someone who could fill in and could provide continuity in a manner that would be acceptable to the people, and we have gone through very tortuous circumstances with the Agnew-Nixon double whammy—the likes of which we have not seen in 200 years. I may be wrong, but in my judgment the 25th amendment made it possible for us to change leaders without going through an impeachment trial. There are some people that say, we should have purified ourselves. We should have gone through some sort of a catharsis which I do not think would have benefited anybody. An impeachment would have disrupted the country, torn us up, I think. Even though the Judiciary Committee in the House, which is one of the most salutary things—few salutary things that happened in this tragic time—did give the people a chance to see men and women of both parties struggling with their consciences and making an objective appraisal. I just want to say that the only reason the Amendment is there is in the event it has to be used. The impact of your amendment, which we are going to give serious consideration to, would suggest there would be no other purpose for article 2 except for a loss of both the President and Vice President.

Senator PASTORE. That is right.

Senator BAYH. And let me ask about one concern.

Senator PASTORE. Before you do, let me say this: what you set out to do, you did perfectly. You did marvelously well. But I do not think it entered anybody's minds at the time that we were going to meet with the situation that confronted us when Nixon resigned.

Senator BAYH. Not the Agnew-Nixon thing. No, sir.

Senator PASTORE. You see, I am not saying it is a flaw, although it could be considered a flaw, but it is an omission that is understandable. What you started out to do, you did very, very well. You filled the Office of the Vice Presidency, and today in the kind of world in which we live we need a Vice President to assist the President in his many chores. Under the Constitution, his only right as you have well said is to preside over the Senate. He does not even have a right to speak unless the Senate gives him permission to speak. All he has is the power to break a tie. That is the only time he can vote. We understand all that, but today in the complexity of our modern world, a Vice President is a very, very important Ambassador for the President. He assumes chores that have to do with the domestic situation as Nelson Rockefeller is doing.

I repeat again, this is not aimed at the personalities, this is not aimed at Gerald Ford as the President. This has nothing to do with him because it could not affect him in the least. It has nothing to do with Nelson Rockefeller, but all I am saying is in the annals of our history, and I hope this Republic lasts for all eternity, the time might come when this may happen again. What if it does happen soon after the general, quadrennial election? Let's assume that by some unexplainable or unimaginable situation, we lose a Vice President and then a President who have been elected by the people within a month after they qualify for the office. This country will be subjected to being governed by two individuals who have not been elected by the people, for a period of almost 4 years.

Now, it may be a good thing, it may not be a good thing, but after all, it is inimicable to the very sense of our Constitution which provided that the people through the electoral college shall elect their President. That is the bulwark of democracy, because if our Founding Fathers wanted to appoint, they would have provided for it. Moreover, that argument was made during the Constitutional Convention. That argument was made, and it was finally decided that he had to be elected, and that is the reason why they wrote it into the Constitution. All I am saying is that the situation that exists today, you see, is inimicable to that original sense and that concept, that it could happen again in the future, and that we ought to begin to think about it.

I realize this is a highly academic situation, but there are those of us who believe that we have a responsibility to respond in the construction of our Constitution to make it perfect, as perfect as it can be. We are worried about the present situation and the real possibility that it could arise again.

Senator BAYH. May I ask if you would just give us your thoughts about one of the concerns I have about the alternative of an election, and I am normally an election man. As you know, you have been a cosponsor of our efforts in which we are continuing to do something about the electoral college. The people do not elect the President. The people elect the electors. The reason the electoral college was designed is not being fulfilled. We would all be passed if the system was individual electors casting individual votes; yet they may. So, the theory of an election is good.

Now, your proposal would elect both the President and the Vice President?

Senator PASTORE. That is correct.

Senator BAYH. Therefore, you would not have a split between the Presidency and the Vice Presidency as some proposals which would just elect the President?

Senator PASTORE. That is right.

Senator BAYH. Nor elect a Vice President to fill the vacancy by an election?

Senator PASTORE. That is right.

Senator BAYH. The period by which we change national leaders—other than the normal quadrennial period, death, assassination, resignation—is a very emotional period. It is a time of instability, instances of doubt, and in this instance, an unfortunate situation that had not existed in 200 years. I do not think my distinguished colleague from Hawaii, who helped put this together, and I know I did not, could envision this kind of thing happening. We hope and pray it does not happen again. But if the situation goes to the very credibility of the previous election, then it is different than the Kennedy situation or a Roosevelt death. I just ask you to give us your thoughts about those two particular times because I am certain you can remember the spirit of the country—the concern that people had. The question was raised, could we get along without an FDR? What about the Kennedy assassination where the country doubted—they wondered? The fact that there was a Vice President who could move on in there with a ready transition, sort of like a rock, I mean caused us all to rally around him and to get together and to unite. Both the men that succeeded were wise enough to say, “OK, let us pull together and carry on the former leader’s mandate.”

Now, the only down side I can see about an election—we are all committed to elections, but they are not without significant controversy. Also, they are not without divisiveness and polarization; and that kind of experience would be thrust on the country at a time when we really need something to pull us together.

Senator PASTORE. Well, that is true, and you are reciting in a very indirect way what I said at the convention in 1964. At a time when Lyndon Johnson was up for election. Of course, Lyndon Johnson was elected as Vice President of the United States. It is not the same situation of which we are talking about now. He was an elected Vice President and he would step into the Presidency, and in a case like that my amendment would not take effect. I said at that convention in 1964, and I can echo what I said, “In a moment of national tragedy, the Nation took a measure of that man, and Lyndon Johnson was not found wanting.” However, he was an elected Vice President.

But today the situation we have, neither the President nor the Vice President is elected by the people. And in the minds of some people, that raises the question whether democracy should operate in that way.

Now, understand, maybe through the appointment process you might possibly get a better man than if he were elected President, but that is not the point. The point is that it should go back to the people. The appointed Vice President who becomes President shall only be an interim President. Then if he wants to stand up before the people and if the people elect him; then he is mandated by the people. I think that even Gerald Ford would feel more comfortable if he had been elected as President of the United States.

Not that I am faulting him that he was not. I mean please do not misunderstand me, but I would like to feel that I am in the Senate of the United States because the people sent me here, and not because the Governor appointed me to come here. It is a comfortable feeling to know that the people sent you here.

Senator BAYH. Indeed it is. I have just gone through that for the third time. It is a sense of satisfaction.

Senator PASTORE. I have been through it five times.

Senator BAYH. Well, I know I am still in the minor leagues compared to my distinguished colleague from Rhode Island. But let me share a thought with you. You might comment or not, about the similarity between the way the second section of the 25th amendment is supposed to work and the present electoral process, where the Senator from Rhode Island knows painfully well we elect electors, 535 or so, I guess. We elect two or three more from the District of Columbia now. Three. So it would be 538 electors.

Senator PASTORE. Well, of course, the Senator from Rhode Island has always felt we were a government of the people, for the people, and by the people, and I believe in popular elections, but in this day and age, and in this point in time, I do not think you would ever pass it in the Senate of the United States, because that is a unibody.

Senator FONG. Coming from a small State, you would look at it twice, would you not?

Senator PASTORE. No. No. As a matter of fact, I am really for popular elections. I feel that this is a government of people and that the people ought to elect their President directly without regard to the electoral college, but you cannot argue that the electoral college defeats the purpose of my amendment for the simple reason that even those electors are elected.

Senator FONG. But in view of the fact that we have to proclaim a day in which the delegates would be elected to go to the convention, then you are going to have to have a convention, and after the convention there will be time for elections. It will probably take about 4 or 5 months before the machinery can be put into action.

Senator PASTORE. That is right, and the present—

Senator FONG. You do not figure that the 1 year you propose is a little short?

Senator PASTORE. No. As a matter of fact, the 1 year term, you see, would make my amendment inoperable. In other words, if the election was to take place, let us say, on November 5, 1976, whatever the date, and the vacancies occur, you see, on November 10th of 1975, my amendment would not apply, you see. But if it occurred before the 1 year—now, you could make it 18 months. I do not care how you make it but the point here is that it has got to be a convenient time in order for the Congress to stipulate what the procedure shall be. It might be a regular full-blown convention, it could be a mini-convention, it could be the executive committee of the parties. It could be almost anything. But that would be up to the Congress. The Congress would spell out the procedure and the procedure would have to be consonant with what the time element might be.

Senator BAYH. I just want to complete my thought of a moment ago. This is to suggest that the electoral college would defeat the purpose of the Senator's amendment. But rather, it is to suggest that if

there was a fault in the way we approached the Ford and Rockefeller nominations in Congress, it was that some of our colleagues did not understand what their role was. Their role was to serve as an elector— even more than the elector that is elected in a Presidential election. There was no question. Some of our colleagues on the floor debated this, countrarywise, but they must not have been present when we were forming this on the floor. The debate is replete time after time where the Senator from Indiana, the Senator from Illinois, Senator Dirksen, and several others who were involved in this, the distinguished gentleman from Hawaii, stressed the fact that our role was to represent the people. This was not an advise and consent process like an Ambassador or Cabinet official. That is why we brought in the House, the most populous body. I do not know whether that eases the concern that the Senator from Rhode Island has. I would feel a bit easier about this if, indeed, our colleagues had recognized that the process was more than advise and consent.

Senator PASTORE. Well, now, if you look at related situations, under the Constitution, if you look at the 12th amendment you will find that the House does make a choice where there is a tie between two candidates, but you have got to realize the predicate there is that these two candidates did go before the people. Article 20 of the Constitution has to do with qualifying an elected Vice President to assume the office of the Presidency until the President qualifies, but there again he had been elected by the people. So, if under the Constitution, the requirement is that you must be 35 years of age before you can ascend to the Presidency of the United States, and by chance, as has happened many times in the Senate, a person who has not yet reached eligible age has to wait before he can take his oath of office to qualify, in that particular case the 20th amendment is invoked but there again they are dealing with individuals who have been elected by the people.

So, if a young man or a young woman who runs for the Presidency is elected to that office when they are 33 years old, or 34 years old, the 20th amendment is invoked to say that the Vice President shall be the acting President during the inability of the elected President to qualify. And then when he becomes 35 years of age, automatically he takes the oath of office and the Vice President steps down from the acting Presidency.

I want to thank the committee for your kindness and your courtesy, and I hope that we have been somewhat helpful.

Senator BAYH. We appreciate your concern, Senator Pastore.

Senator BAYH. I have here a statement of Charles A. Wright, who is the Charles T. McCormick Professor of Law at the University of Texas, who is one of the distinguished constitutional Lawyers of the country who was asked to testify. Mr. Wright found it impossible to be here but did send a rather comprehensive statement which I think will be helpful to us to submit in the record.

[Statement referred to follows:]

STATEMENT OF CHARLES ALAN WRIGHT

I am Charles Alan Wright. I hold the Charles T. McCormick Professorship of Law at The University of Texas. For many years I have taught Constitutional Law and I have written extensively in that field of the law. Like all of those who are interested in the Constitution and the form of government we

enjoy in this country, I followed closely the process that led to the adoption of the Twenty-Fifth Amendment in 1967 and the two very recent occasions in which the provisions of § 2 of the Amendment, dealing with a vacancy in the office of the Vice President, have been used.

In my judgment the Twenty-Fifth Amendment has worked well. It would, I think, be a mistake to propose any change in it.

In part that conclusion stems from my general attitude that we should proceed very cautiously indeed in amending the Constitution. After the adoption of the Bill of Rights in 1791, the Constitution was amended only 12 times in 160 years. It is true that we have turned to the amendatory process more frequently in very recent years, with four amendments adopted and another pending for ratification since 1961. Of course we should not refrain from amendments when the need for them is clear. Article V is as vital a part of the Constitution as any other. Nevertheless constitutional amendment should not be undertaken lightly, and should not be attempted until there is a clear national consensus that the Constitution, as it stands, is defective in some particular and that the proposed change would indeed be an improvement.

I am not persuaded that either of these criteria is satisfied with regard to § 2 of Amendment XXV. The objection seems to be that for the first time in our history we have a President and a Vice President, neither of whom has been elected by the people. The events that have led to the present situation are unprecedented in our history, and while the same result could occur under more routine circumstances—as if, for example, an elected Vice President who were to succeed to the Presidency on the death of the incumbent were himself to die or become disabled while in office—the possibility that this circumstance might occur for brief periods on very rare occasions does not seem the kind of real need for which the amendatory process is intended.

More fundamentally, the objection to the present state of affairs seems to me more verbal than real. It is only in the most formal and technical sense that our regular Vice Presidents are “elected.” It stretches reality to suggest that the voters of the country really chose to have Calvin Coolidge or Harry Truman as second in line for the Presidency. I suggest that that is true also of Lyndon Johnson. Although he may have helped the 1960 Democratic ticket in the South, and his presence on the ticket may have tipped the scales in a close election, it is far from clear that he would have been the winner in a separate election to be Vice President.

Although President Ford and Vice President Rockefeller have never been elected to national office, their nominations as Vice President were confirmed by both Houses of Congress, in which the elected representatives of the nation do sit. They were each, when nominated, men of national stature with wide experience in public affairs, who do not suffer from comparison with the great majority of vice-presidential candidates hastily chosen by one who has been nominated for the Presidency at the end of a hectic convention and routinely approved for second place on the ticket by the convention itself. The careful scrutiny given every aspect of their lives in the confirmation process provides safeguards wholly unknown in the selection of most of our Vice Presidents.

Thus I think that the procedure introduced in 1967 has functioned well when it was put to the test—and it seems to me far superior to any alternative I have heard discussed. Surely it would be unthinkable to go back to the former student in which the Speaker of the House of Representatives was next in line if there was a vacancy in the Vice Presidency. History is filled with those who have served the country well as Speaker who would have been ill-suited, often because of age, for the Presidency. There is the further difficulty that the Speaker not infrequently is not of the President's party, and to make him next in line incurs a substantial risk that the fortuities of death or disability may take the Presidency away from a party that has been given a popular mandate to lead the country for four years and give that office to the party rejected at the polls.

For similar reasons I reject proposals that there should be a special election for Vice President if that office becomes vacant or that if one who has become Vice President should succeed to the Presidency, he should have to stand for office in a special election shortly thereafter. I think that the party system as we have known it in the United States, with choice made every four years between two strong and responsible parties, has contributed greatly to the stability of American government. I think it would be a distinct step in the wrong direction to move toward a parliamentary form of government or even to edge gingerly

in that way by providing a machinery that, under some circumstances, would require election of a national officer other than at the regular four-year periods.

I close as I began. I think § 2 of the Twenty-Fifth Amendment has worked well under difficult circumstances and that it should not be changed.

Senator BAYH. Our next witness is to be the distinguished Junior Senator from Maine, Senator Hathaway, who will be here in about 5 minutes. He is in another committee.

Pending his arrival, I will read my statement and ask that it be put in the record at the beginning, and ask unanimous consent that the Senator from Hawaii be permitted to insert any remarks prior to putting it in the record.

Many serious students of democracy and the American experience have suggested that the events of recent months, which led to the elevation to our highest office of a man not directly selected by a vote of the people, raise fundamental questions about the nature of our democracy. The Senator from Hawaii is one of those.

Several serious proposals, including his, have been put forward to change the existing Presidential succession mechanism. Because the subcommittee believed that these concerns merited a full examination, we decided to convene these hearings.

Two things should, I think, be pointed out initially. First, because our Constitution still contains the anachronistic electoral college system, we do not choose our Presidents by direct popular vote—something which hopefully Congress and the States will consider changing in the near future by constitutional amendment.

Second, since the ratification of the 12th amendment, our Vice Presidents are “elected” to the Nation’s second highest office only in the most technical sense. As one observer has commented, “It stretches reality to suggest that the voters of the country really chose to have Calvin Coolidge or Harry Truman as second in line for the Presidency.”

As we look back and see more recently how President Truman performed as President, we may not remember that at the time he succeeded to the Presidency or at the time he was chosen, there was great question as to the wisdom of that choice, and that it was the strong personality of the Presidential candidate, President Roosevelt, that was the subject of the major thrust of that election.

Nevertheless, because of the use for the first time of the provisions of the 25th amendment, we now have as our President a man who was actually elected to public office by only that fraction of 1 percent of the electorate that makes up a congressional district. In addition, Congress, in the second use of the 25th Amendment, has selected as Vice President a man who actually failed in several attempts to win election to national office. There has been no serious question in the public mind of President Ford’s legitimacy, however. He is President. And this is perhaps the amendment’s strongest point. But we must nevertheless ask ourselves does this departure from the central mechanism of democracy pose any long-run problems for the basic fabric of our system? And if not, why has it succeeded? If we are concerned about the imperfections of the 25th amendment, which I think many of us are now, and many of us were at the time we were considering it several years ago, we must also ask ourselves how do we make it more perfect. What are the solutions which have less than perfection?

I introduced the 25th amendment 11 years ago in the 88th Congress and, with the help of many others, including the distinguished Senator from Hawaii, guided it through the process of congressional approval and State ratification. We believed it was necessary to provide a mechanism to deal with two problems that were then much on the public mind. First, because of the tragic death of President Kennedy, we had no Vice President. This was the 16th such vacancy in our history. Second, the nature of the Kennedy assassination reminded us of the potential problem of the temporary physical or mental incapacity of a President. This question had arisen during President Eisenhower's term, and had been a nagging problem of concern to many since Woodrow Wilson's day.

I see our distinguished colleague from Maine is here, and I think I will ask unanimous consent to put the remainder of the statement in the record.

[The statement referred to follows:]

OPENING STATEMENT BY SENATOR BIRCH BAYH, CHAIRMAN

Today the Subcommittee begins a series of hearings designed to review and analyze the implementation for the first time of Section 2 of the 25th Amendment to the Constitution and to examine various proposals that have been made for its modification.

Many serious students of democracy and the American experience have suggested that the events of recent months, which led to the elevation to our highest office of a man not directly selected by a vote of the people, raise fundamental questions about the nature of our democracy. Several serious proposals have been put forward to change the existing Presidential succession mechanism. Because the Subcommittee believed that these concerns merited a full examination, we decided to convene these hearings.

Two things should, I think, be pointed out initially. First, because our Constitution still contains the anachronistic electoral college system, we do not choose our Presidents by direct popular vote—something which hopefully Congress and the States will soon change by Constitutional amendment.

Second, since the ratification of the 12th Amendment, our Vice-Presidents are "elected" to the nation's second highest office only in the most technical sense. As one observer has commented, "It stretches reality to suggest that the voters of the country really chose to have Calvin Coolidge or Harry Truman as second in line for the Presidency."

Nevertheless, because of the use for the first time of the provisions of the 25th Amendment, we now have as our President a man who was actually elected to public office by only that fraction of one percent of the electorate that makes up a Congressional district. In addition, Congress, in the second use of the 25th Amendment, has selected as Vice-President a man who actually failed in several attempts to win election to national office. There has been no serious question in the public mind of President Ford's legitimacy. He is President. And this is perhaps the amendment's strongest point. But we must nevertheless ask ourselves does this departure from the central mechanism of democracy pose any long-run problems for the basic fabric of our system? And if not, why has it succeeded? If we are concerned about the imperfections of the 25th Amendment, how do we perfect it?

I introduced the 25th Amendment eleven years ago in the 88th Congress and, with the help of many others, guided it through the process of Congressional approval and state ratification. We believed it was necessary to provide a mechanism to deal with two problems that were then much on the public mind. First, because of the tragic death of President Kennedy, we had no Vice-President. This was the 16th such vacancy in our history. Second, the nature of the Kennedy assassination reminded us of the potential problem of the temporary physical or mental incapacity of a President. This question had arisen during President Eisenhower's term and had been a nagging problem of concern to many since Woodrow Wilson's day.

I think it is quite safe to say, however, that neither I nor any other member of Congress specifically foresaw that the provisions we drafted for the filling of a vacancy in the Vice-Presidency would first be used after the resignation of both the President and the Vice-President upon disclosure of unlawful acts. Indeed, if one looks back at the amendment's legislative history, the principal focus of controversy was on those sections dealing with Presidential disability rather than those providing for filling a Vice-Presidential vacancy. In almost 200 years, we had never lost both a President and a Vice-President during one four year term, though we had experienced the problem of Presidential disability on several occasions. However, the very fact that the 25th Amendment's first test came under these bizarre and unforeseen circumstances indicates to me in a very important way that we did not err in amending our governing document.

Some thoughtful men have strongly criticized our wisdom in adopting the 25th Amendment. These critics of the amendment, however, seem to overlook what may well have been its most significant contribution. Under the most adverse circumstances, it vastly facilitated the removal of a President who had totally lost the respect and confidence of the American people. I say this because I do not believe that Richard Nixon would have resigned and turned the Presidency over to Speaker Carl Albert, a Democrat. The Nixon departure could have come, in the absence of the amendment, only after a difficult and divisive impeachment trial. Even the studious and deliberate considerations of the House Judiciary Committee, would, I am sure, have assumed a much more acrimonious and partisan nature.

It is easy to find fault with the 25th Amendment. It is much more difficult to envision an alternative solution which does not possess greater imperfections. What were the alternatives?

Prior to ratification of the 25th Amendment, the question of Presidential and therefor Vice-Presidential succession, was governed statutorily by the Presidential Succession Law which provides that if both the office of President and Vice-President are vacant, responsibility will fall on the Speaker of the House of Representatives, and next to the President Pro Tempore of the Senate. Neither of these congressional leaders is selected for their positions with any thought as to their qualifications for the Presidency. The people of the entire country would be unprepared for their sudden succession to the Presidency. As President Truman noted twenty years earlier, there was a clear need that "a plan of succession be devised so that the office of President would be filled by an officer who holds his position as a result of the expression of the will of the people." There were several plans suggested to meet the agreed upon criteria—the ability to serve as President, acceptability by the American people, and the ability to work with the President as Vice-President. The suggestions for choosing a new Vice-President fell into the following categories: (1) the choice should be made by the Electoral College; (2) by the President; (3) by the Congress; (4) by the President and the Congress acting together; (5) by a special election for Vice-President; or (6) that there should be two Vice-Presidents elected at the time of each general Presidential election.

The Electoral College was rejected on the ground that as a historical curiosity it would not command the respect and support of the American people. Most of our citizens have never met or heard the name of a Presidential elector.

A special election for Vice-President was rejected because of concern about delay, the departure from our system of quadrennial presidential elections, the cost involved, the divisive partisan effect it would have on the country at a time when unity was needed and the possibility that a special election might produce a Vice-President of a different party who would not be able to work effectively with the President.

The selection of a new Vice-President by the Congress alone was objected to on the grounds that if the President and the majority of Congress represented different parties, Congress might not select a Vice-President from the President's party and thus the new Vice-President would not be able to work closely with the President.

Presidential appointment was ruled out on the grounds that the people should be involved in such an important choice, and that no President should be given the complete authority to appoint the person who could become his successor.

Finally, the election of two Vice-Presidents was not considered feasible because it might lead to confusion and divisiveness in the executive branch.

The method finally chosen, that of Presidential nomination and confirmation by majority vote of both Houses had, we believed, these virtues: first, it would assure

that the person nominated was a member of the President's own party and thus of compatible temperament and views; second, the confirmation by both the Senate and the House would tend to create public confidence in the selection. This involvement of both Houses of Congress, instead of only the Senate which has the traditional role of advise and consent, was deemed appropriate for the selection of the nation's second highest officer since it would evaluate a Vice-Presidential selection over other Presidential appointments. This would, we hoped, more accurately reflect the wishes of the people than either House alone, and would thus increase public confidence in the final choice. It cannot be emphasized too strongly that the role of the Congress was to be—and is—in this one, unique instance that of surrogate electors. Congress is to represent the people of the country in a Congressional election of, and not merely acquiescence in, the choice of a new Vice-President.

I was deeply concerned that during the debate on the Rockefeller nomination many of my colleagues in the Senate did not recognize their independent role as surrogate electors for over 210 million American people. Congress is to represent the people in electing a new Vice-President. This responsibility is quantitatively different than any other.

The 25th Amendment's first off-spring, President Ford, in his first address to the Congress very aptly summed up his responsibility and that of the Congress when he said, "Frequently, along the tortuous road of recent months, from this chamber to the President's house, I protested that I was my own man. Now I realize that I was wrong. I am your man, for it was your carefully weighed confirmation that changed my occupation. I am the people's man, for you acted in their name, and I accepted and began a new solemn trust with a promise to serve all the people."

Most of us pray that we should never again experience any of those circumstances which in this instance, or in others, might require the use of the 25th Amendment. Unfortunately, history has shown us we pray in vain. Prudence requires that we be prepared for those eventualities of death, disability or disasters which may overtake a national leader. In my view, the 25th Amendment, with all of its implications, leaves us better prepared to meet the uncertainties of the future in an imperfect world ruled by imperfect men.

Senator BAYL. It is an honor to have with us one of our distinguished colleagues who has contributed greatly to our deliberations on many issues over the past months and years, and has expressed a deep concern over this matter which is before us. We appreciate the fact that you have taken the time from a busy schedule, Senator Hathaway, to be here. Why do you not proceed please, sir?

STATEMENT OF HON. WILLIAM D. HATHAWAY, A U.S. SENATOR FROM THE STATE OF MAINE

Senator HATHAWAY. Thank you very much.

I suppose I could say the same thing you said about putting my statement in the record. Anybody who has trouble sleeping nights could read this in the record, but at the risk of boring you with something that I have already talked about at the time President Ford was nominated by former President Nixon for Vice President, let me proceed.

I really appreciate the opportunity to come before this subcommittee Mr. Chairman, Senator Fong, to discuss our recent experience with the 25th amendment. I should begin by congratulating the chairman for his foresight and his perseverance in the development and enactment of this amendment. I voted for it when I was in the House of Representatives. I am firmly convinced that its very existence was a critical factor in the avoidance of a major constitutional crisis last summer. Without the procedures it provided, the transfer of power which became necessary would have been significantly more difficult.

I really do not come before this subcommittee this morning to criticize the provisions of the 25th amendment. It seems to me to be a well-

balanced and reasonable method of handling a complex and a difficult problem.

I know Senator Pastore, who I believe has already testified, has submitted a bill providing for a special election of an appointed Vice President if he should succeed to the Presidency, and although I think that this resolution has considerable merit, I have some reservations about it which I will be glad to go into in detail if the committee wants me to, at the end of my statement.

My real interest today is to call attention to a particular facet of the question of Presidential succession which the 25th amendment does not deal with and to suggest a possible solution to that problem which would not require tampering with the amendment itself. I refer to the question of succession in the case of a double vacancy—the death or incapacity of both the President and the Vice President. Of course, the chances of this occurring have been greatly diminished by the adoption of section 2 of the amendment, providing for Presidential appointment to fill a vacancy in the Office of Vice President.

But, as we have learned, the mechanics of this process still allow some substantial period between the occurrence of the vacancy and the confirmation of a new Vice President. In this regard, I would point out that we have been without a Vice President for 6 of the last 16 months, even with the terms of the 25th amendment fully operational. The significance of a Vice Presidential appointment—and the importance of its confirmation—does not allow for a hurry-up process, nor should we want it to. Because of the uniqueness of providing for the appointment of such an official, a reasonable amount of time must be allowed for maximum consideration and citizen input into the decision. For this reason, the question of succession should something happen to the President during one of these periods, is one which deserves serious consideration.

A second reason the present succession arrangement deserves scrutiny is its relationship to the confirmation process itself under the 25th amendment. It is my concern that the present succession act can create a pressure on the Congress to act hastily or imprudently in the confirmation of a Vice Presidential nominee.

As an example, consider a situation similar to the one which faced us in the fall of 1973: A vacancy in the Vice Presidency with the President under the threat of impeachment by a Congress controlled by the opposition party. The Congress is faced with several difficult alternatives; (1) move ahead with impeachment, even though this would place one of its own—the Speaker of the House—in the Presidency or (2) confirm the Vice Presidential nominee (in order to clear the way for impeachment) even though his patron may turn out to be a wrongdoer. A preferable alternative might have been to await the outcome of the impeachment proceedings and complete the confirmation when and if the President was exonerated.

A similar situation could arise where a vacancy occurs and the President has a fatal illness; again, the pressure is on Congress to confirm in order to avoid the appearance of foot dragging to promote the Speaker of the House. In both cases—or in others I am sure could be dreamt up—a pressure to confirm is placed on the Congress which might well conflict with our best judgment as to the proper length of the confirmation process, or even what its final outcome should be. My basic point,

Mr. Chairman, is that the Speaker's present place in the line of succession creates an inherent conflict of interest, a conflict so obvious that our efforts to avoid the appearance of improper motives can actually impair our performance of other constitutional tasks.

Senator BAYH. Would the Senator yield just a moment?

Senator HATHAWAY. Certainly.

Senator BAYH. Are you saying either directly or by inference that you have a dual problem? On one hand, if you have the wrong kind of man there who is selfish and power hungry, there would be foot dragging in the House so that he might succeed. On the other hand, the situation which we have just gone through, where the Speaker could not in any way have been accused of that. We might not take as long and be as prudent as otherwise would be the case, to avoid the appearance of playing politics.

Senator HATHAWAY. Yes. That is correct. As the law stands now, our safety net—that is, the present succession act—is not very satisfactory, especially when the Speaker of the House belongs to a party different from that of the President. My suggestion is to alter the succession act in such a way so as to remove this pressure from the Congress and provide a more palatable succession mechanism, should its use become necessary.

My proposal would provide that in the case of a vacancy occurring in the offices of both the President and the Vice President, there will be a special Presidential election with the highest ranking officer of the House of Representatives of the same party as the outgoing President serving as acting President until such election is held. This approach is identical in principle to the Succession Act of 1792 which was enacted in the Second Congress by some of the same individuals who drafted the Constitution, and which remained in force and effect as law of this land for 94 years. I should also point out that it is substantially the same as the succession act proposal submitted to the Congress by President Truman in 1945. The original act was altered in 1886 and again in 1946, with the result that under present law the Speaker of the House succeeds when a double vacancy occurs.

Under the bill I am proposing, the term of the specially elected President would be limited to the time that is remaining in the outgoing President's unexpired term. In this way, the traditional rhythm of our quadrennial Presidential elections, falling as they do every leap year, would remain undisturbed. As to the procedure to be followed in nominating and selecting candidates, the bill would leave this to State law, as is currently required by our Constitution. I would assume that should this measure be enacted, the State would move expeditiously to enact appropriate legislation with regard to a possible special election so that the 90-day time table in the bill could be met.

There seems to be little question of the constitutionality of the special election approach to the resolution of a double vacancy problem. The Constitution expressly provides that succession, in the case of a double vacancy, is a matter to be determined by statute and, as noted earlier, the first statute passed in this area did provide for such an election. For the benefit of the chairman and any other committee members interested in this question, I have submitted with my remarks an excellent memorandum on the question done by the Congressional Research Service as well as a letter from three eminent constitutional

scholars, Paul A. Freund, Raoul Berger, and Abram Chayes, attesting that—"In our view, the constitutional text, the debates at Philadelphia and the practice under the Constitution leave no doubt that the Congress has the power to provide by statute for a special Presidential election in the event the offices of President and Vice President both become vacant."

By Mr. Hathaway:

S. 2678. A bill to provide for a special election for the Offices of President and Vice President when the Offices of President and Vice President are both vacant. Referred to the Committee on Rules and Administration.

Mr. HATHAWAY. Mr. President, I am today introducing legislation which would provide for a special Presidential election should the Offices of President and Vice President both be vacant at the same time.

In candor, I must admit that this bill is intended to deal specifically with the potential situation confronting the Congress should the present President resign or be removed from Office before the confirmation of his Vice-Presidential designee. But while the present situation may have engendered consideration of this approach to Presidential succession, the principle it establishes is a sound one of general applicability to circumstances of a similar nature.

In essence, the bill provides that in the case of a vacancy occurring in the Offices of both the President and Vice President, there will be a special Presidential election, with the highest ranking officer of the House of Representatives of the same party as the outgoing President serving as acting President until such election is held. This approach is identical in principle to the Succession Act of 1792 which was enacted in the 2d Congress by some of the same individuals who drafted the Constitution and which remained in force for 94 years. This act was altered in 1886 and again in 1947 with the result that under present law the Speaker of the House succeeds when a double vacancy occurs. I have attempted in the bill to deal with one of the major ambiguities of the 1792 act, which is whether the term of the new President would be 4 years or for the remainder of the unexpired term of his predecessor.

Under the bill I am proposing, the term of the specially elected President would be limited to the time remaining in the outgoing President's unexpired term. In this way, the traditional rhythm of our quadrennial Presidential elections, falling as they do every leap year, would remain undisturbed. As to the procedure to be followed in nominating and selecting candidates, the bill would leave this to State law, as is currently required by the Constitution. I would assume that should this measure be enacted the States would move expeditiously to enact legislation with regard to a possible special election so that the 90-day time table in the bill could be met.

There seems to be little question of the constitutionality of the special election approach to the resolution of a double vacancy problem. The Constitution expressly provides that succession, in the case of a double vacancy, is a matter to be determined by statute and, as noted earlier, the first statute passed in this area did provide for such an election. For the benefit of my colleagues interested in this question, I will have printed in the RECORD at the end of my remarks an excellent memorandum on the question done by the Congressional Research Service as well as a letter from three eminent constitutional scholars, Paul A. Freund, Raoul Berger, and Abram Chayes attesting that—

In our view, the Constitutional text, the debates at Philadelphia and the practice under the Constitution leave no doubt that the Congress has the power to provide by statute for a special Presidential election in the event the offices of President and Vice President both become vacant.

Assuming the constitutionality of a special election then, why would this approach be better than the presently established system? This question, it seems to me, boils down to one of the legitimacy of government in a democratic society. My introduction of this plan intends no disrespect for the distinguished Speaker of the House, who would fill a Presidential vacancy should one occur under present law. But the Speaker of the House has never sought the Presidency nor have all the voters of the Nation had an opportunity to pass on his qualifications for this awesome Office. Furthermore, my introduction of this plan intends no disrespect for the distinguished minority leader of the House who has been nominated as Vice President by the President. But the same considerations

apply—Mr. FORD has never sought the Presidency nor stood before the national electorate. Further, there is something troubling about a President who is under threat of impeachment or forced resignation having the power to name his successor.

In either case—the succession of Mr. FORD or Mr. ALBERT—the country would have a President not elected by the people. This result I find incompatible with the basic principles upon which the Nation was founded and upon which the legitimacy of our form of government rests.

It will be charged, I suppose, that what I am proposing constitutes a political attempt to nullify the mandate of the voters in the last election. I should say first that in making these remarks I indicate no prejudgment of the outcome of the current controversy surrounding the President. My remarks and my proposal are directed solely to what happens if a vacancy occurs, not whether such a vacancy ought to occur. When put in this context, such charges have little merit. The mandate of last November's election belongs to Richard Nixon and Spiro Agnew, not their political party. While winning the White House, Republicans actually lost strength in the Senate and among the Nation's Governors. Given this fact, who is to say with any assurance what the mandate of 1972 was? Second, I cannot accept the charge of "power grab" or "coup" when the question is actually being returned to the people, the ultimate arbiters of power within our system.

If the President leaves office, the mandate of last year is negated; it seems logical to me to allow the people themselves to decide who shall then receive what only they can rightfully give.

Finally, and this is one of the differences between my bill and the original 1792 Succession Act, my proposal would provide that the "interim" President—who would serve between the occurrence of the vacancy and the special election—would in fact be a member of the political party of the outgoing President. In this way whatever party mandate which does attach at the preceding Presidential election would be maintained until the people render their new judgment. In the present case, the highest ranking officer of the House who is of the same party as the previous President, and who would under my proposal, become Acting President, is GERALD FORD of Michigan.

Before concluding my remarks, I should acknowledge a debt of gratitude to several individuals whose wisdom have made this proposal possible. I refer of course to Professors Freund, Berger, and Chayes, who have provided advice on the constitutionality of the special election, although they have not considered the specific provisions of this bill, and also especially to Mayor Kevin White of Boston who first discovered the possibilities of this procedure and brought it to the attention of the Nation.

These are troubled and difficult times for all of us. The measure I propose will not settle events finally or immediately. But it will insure that control of our basic decisions and, indeed, our very future will remain directly in the hands of the people.

Mr. President, I ask unanimous consent to have printed in the Record the two documents I have mentioned in the course of my remarks, the letter from the law professors and the Library of Congress report on this matter; and I further ask unanimous consent that the bill be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., November 1, 1973.

HON. KEVIN H. WHITE,
*Mayor of Boston,
Boston, Mass.*

DEAR MAYOR WHITE: You have asked if, under the Constitution, Congress has the power to provide by statute for a special election to fill the office of President in the event that both the offices of President and Vice President become vacant. In our opinion, Congress has such power.

Article 2, section 1, clause 6 of the Constitution provides:

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice

President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

The matter was expressly considered in the Constitutional Convention and the debates show conclusively that the Framers intended to empower the Congress to call a special election in those circumstances.

On September 7, 1787, it was moved in the Convention that the Legislature should designate by law which officer of the United States would act as President in the event of vacancies in the offices of both President and Vice President and that "such officer shall arrive." James Madison objected to this language on the ground that it would prevent the vacancy in the Presidency from being filled by a special election. He therefore moved to change the language to read that the officer who was designated to "act as President" do so "until such Disability be removed, or a President shall be elected." Madison's amendment was carried and with minor stylistic changes was incorporated in the final text of the Constitution.

The Second Congress, of which Madison himself was a member, exercised this very power when it enacted the Succession Act of March 1, 1792, providing for a special election in the event of a simultaneous vacancy in both Presidential and Vice Presidential offices. 1 Stat. 239. Actions of the First and Second Congresses are traditionally given great weight on questions of Constitutional Interpretation. *Myers v. U.S.* 272 U.S. 52, 175 (1926).

The text of the relevant sections of the Act of 1792 is attached to this letter. You will note that the Act provided for the special election to be omitted if the double vacancy occurred within six months of the expiration of the Presidential term. It also stipulated that the president pro tempore of the Senate (and if there was none the Speaker of the House) should act in the interim until the special election; and that the person elected should serve for a term of four years from the next inauguration day following the special election. These features are remarked here not to suggest that they are Constitutionally required, but to indicate the flexibility that is available to the Congress in dealing with the practical questions involved in a special election.

The Act of 1792 remained law for almost a century. Then the mechanism of Presidential succession was changed to provide that in the event of the vacancy of both the offices of President and Vice President, one or another member of the Cabinet in the order therein provided should "act as President." But the statute went on to provide that Congress should assemble within twenty days, presumably to consider what further action to take.

The 1886 statute was in turn replaced in 1947 with the present law providing that in the event of the vacancy of both the offices of President and Vice President, the Speaker of the House of Representatives would act as President to be followed by the President pro tempore of the Senate to be followed by ranked Cabinet officers for the remainder of the then Presidential term. 3 U.S.C. 19.

These subsequent enactments are further evidence of the broad and flexible authority available to Congress in fulfilling its Constitutional mandate to provide for continuity in the office of President in case of "removal, death, resignation or inability of both the President and Vice President."

In our view, the Constitutional text, the debates at Philadelphia and the practice under the Constitution leave no doubt that the Congress has the power to provide by statute for a special Presidential election in the event the offices of President and Vice President both become vacant.

Yours very truly,

PAUL A. FREUND.
ABRAM CHAYES.
RAOUL BERGER.

ATTACHMENT

(Second Congress. Session. 1. Ch. 8. 1792, 1 Stat. 239.)

SEC. 9. *And be it further enacted*, That in case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected.

SEC. 10. *And be it further enacted*, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall

also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

SEC. 12. *And be it further enacted*, That the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.

Approved, March 1, 1792.

CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C.

From: American Law Division.

Subject: Provision for Special Election in Event of Vacancies in Offices of President and Vice President.

This is in response to your request for consideration of the constitutional validity of a provision for special elections to fill the offices of President and Vice President when both become vacant. It appears that the language of the Constitution does not preclude provision for such an election and may be read to support that alternative; when the debates in the Constitutional Convention are reviewed, such support becomes much clearer and stronger. It therefore may be concluded that the proposal under consideration is consistent with the Constitution.

Although the Constitution has been amended twice now in some respects of presidential succession¹ the pertinent language remains that of Art. II, § 1, cl. 6. "In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

The final clause "or a President shall be elected" is, of course, consistent with the view that the designated officer should serve until the next regular presidential election or with the view that Congress could provide for a special election. In any event, the language does not preclude the calling of such an election. But the Convention materials amply demonstrate that authority for Congress to call a special election in the event of a vacancy in both offices was intended.

The report of the Committee on Detail, which had considered and blended many of the details of various plans offered to the Convention, contained the following language with regard to succession. It will be noted that no provision for a Vice President had yet been made. "In case of his removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed." 2 M. Farrand (ed.), *The Records of the Federal Convention of 1787* (New Haven rev. ed. 1937), 186. Madison reported no debate on this language when the sections on the Presidency were considered on August 24, 25 and 27. It is noted that consideration of the entire clause was postponed because some members were concerned about the ambiguousness of the word "disability", *Id.*, 427, and on August 31 all postponed sections were referred to the Committee of Eleven for consideration. *Id.*, 473. The above quoted language thus went to the Committee as reported.

¹ 20th Amendment §§ 3, 4; 25th Amendment.

In the report of the Committee of Eleven, the above quoted language was retained with the exception of the substitution of the Vice President for the President of the Senate. *Id.*, 499. No provision for succession beyond the Vice President was included. Farrand's report of the notes of McHenry, one of the Members of the Committee of Eleven contains the following: "No provision in the above for a new election in case of the death or removal of the President." This would appear to negate the inference that the language "until another President of the United States be chosen" would have allowed Congress to provide for one.

When the section was considered on September 7, Randolph of Virginia moved to add the following: "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 the time of electing a President shall arrive."

However, Farrand continues, "Mr. Madison observed that this, as worded, would prevent a supply of the vacancy by an intermediate election of the President, and moved to substitute—until such disability be removed, or a President shall be elected—." The motion was then adopted. Further, reports Farrand:

"It seemed to be an objection to the provision with some, that according to the process established for choosing the Executive, there would be difficulty in effecting it at other than the fixed periods; with others, that the Legislature was restrained in the temporary appointment to 'officers' of the U.S.: (They wished it to be at liberty to appoint others than such.)"

"On the motion of Mr. Randolph, as amended, it passed in the affirmative." *Id.*, 535.

It seems evident, therefore, that the Convention consciously chose to substitute language which gave Congress the option to provide for a special election if both the Presidency and the Vice Presidency became vacant. But the Committee on Style in reporting what is in essence the clause as it now appears in the Constitution rendered the final passage to read "until the disability be removed, or the period for choosing another President arrive." *Id.*, 599. Without recorded debate, the Convention when it reached this section changed it back to "or a President shall be elected." *Id.*, 626. The decision of September 7 to leave Congress with the power to provide for a special election was thus confirmed.

Apparently, the only reference to the question in the ratifying conventions in the States occurred in Virginia, where George Mason, a delegate who had refused to sign the Constitution, objected that the clause did not require a speedy election of another President in case of vacancy in both the Presidency and the Vice Presidency. Madison responded: "When the President and Vice President die, the election of another President will immediately take place; and suppose it would not,—all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and continue only to such expiration. This can rarely happen." 3 J. Elliot, *Debates on the Adoption of the Federal Constitution* (New York: 1888), 487–488. Obviously, Madison was saying that Congress could provide for a special election but was not required to do so; it could provide for the devolution of the powers and duties of the office upon some other officer until the next regularly scheduled election.

It therefore appears that the Convention consciously chose to recognize power in Congress to provide for a special election in the event of a vacancy in both offices. Nothing has been found in the debates of the Convention or of the ratifying conventions to negate the conclusion, nor does the Twenty-fifth Amendment which made significant changes in this area touch upon this question so as to require a different conclusion.

When in the Act of March 1, 1792, Congress established a policy on succession, it included § 10, 1 Stat. 240, which provided for a special election in the event of a vacancy in both offices. The section read:

"Sec. 10. *And be it further enacted*, That whenever the offices of the President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing:

Provided: There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act."

The significance of this enactment for purposes of constitutional interpretation may well be gleaned from the comment of Chief Justice Taft who observed, when the protective tariff was challenged, that the first such law was enacted in the First Congress. "In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928). See also *Myers v. United States*, 272 U.S. 52, 175 (1926).

When President Truman recommended in 1945 changes in the law of presidential succession, he included a special election of the President and Vice President when both offices became vacant. H. Doc. No. 246, 79th Cong., 1st sess. (1945); 91 *Cong. Rec.* 6272 (1945). A bill was reported to the House embodying this recommendation, H.R. 3587, 79th Cong., 1st sess. (1945), § 3(f), but it was struck on the House floor, primarily because the schedule set out could possibly cause great instability in the country and because the States would be required to legislate a number of changes in their election laws. 91 *Cong. Rec.* 7024-7025 (1945). The House then passed the bill but it was not considered by the Senate; in 1947, however, a bill identical to the House-passed bill, thus omitting the special election provision, was passed by the Senate and accepted by the House.

In conclusion, then, it seems clear that the language of Art. II, § 1, cl 6, especially when considered in light of the events leading to its adoption by the Constitutional Convention, provides adequate support for the proposed bill.

JOHNNY H. KILLIAN,
Legislative Attorney.

S. 2678

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 19 of title 3, United States Code, is amended to read as follows:

"Section 19. Vacancy in the offices of both President and Vice President.

"(a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President or Vice President to discharge the powers and duties of the office of President prior to the 20th day of January in the fourth year of the current Presidential term, and—

"(A) if the Speaker of the House of Representatives is a member of the same political party as the President regularly elected for that term, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as a Representative in Congress, act as President until the inability is removed or until a President and Vice President take office for the remainder of the term in which the vacancy occurs; or

"(B) if the Speaker of the House of Representatives is not a member of the same political party as the President regularly elected for that term and the Minority Leader of the House of Representatives is a member of the same political party as the President, then the Minority Leader shall, upon his resignation as Minority Leader and as Representative in Congress, act as President until the inability is removed or until a President and Vice President take office for the remainder of the term in which a vacancy occurs.

"(2) If by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President or Vice President to discharge the

powers and duties of the Office of President, on or after the 20th day of January of the fourth year of the current Presidential term, and—

“(A) if the Speaker of the House of Representatives is a member of the same political party as the President regularly elected for that term, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President until the inability is removed or the end of the term in which the vacancy occurs; or

“(B) if the Speaker of the House of Representatives is not a member of the same political party as the President regularly elected for that term and the Minority Leader of the House of Representatives is a member of the same political party as the President, then the Minority Leader shall, upon his resignation as Minority Leader and as Representative in Congress, act as President until the inability is removed or the end of the term in which the vacancy occurs.

“(b) (1) (A) If under subsection (a) the Speaker of the House of Representatives or the Minority Leader of the House of Representatives fails to qualify as acting President, and if, by reason of death, resignation, removal from office, or inability, there is no acting President to discharge the powers and duties of the office of President prior to the 20th day of January in the fourth year of the current Presidential term, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President until the disability is removed or until a President and Vice President take office for the remainder of the term in which the vacancy occurs: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, Secretary of Housing and Urban Development, Secretary of Transportation.

“(B) If under subsection (a) the Speaker of the House of Representatives or the Minority Leader of the House of Representatives fails to qualify as acting President, and if, by reason of death, resignation, removal from office, or inability, there is no acting President to discharge the powers and duties of the office of President on or after the 20th day of January in the fourth year of the current Presidential term, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President until the disability is removed or until the end of the term in which the vacancy occurs: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health, Education, and Welfare, Secretary of Housing and Urban Development, Secretary of Transportation.

“(2) An individual acting as President under this subsection shall continue so to do as specified in paragraph (1) of this subsection, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

“(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

“(c) (1) If there is neither a President nor a Vice President to discharge the powers and duties of the office of President because of death, resignation, removal from office, inability, or failure to qualify, occurring prior to the 20th day of January in the fourth year of the current Presidential term, then on the 90th day (excepting holidays) after the date on which the acting President under paragraph (1) of subsection (a) or under paragraph (1) (A) of subsection (b) takes the oath of office of the Presidency, there shall be appointed electors of the President and Vice President in the manner such electors are provided for in a regular election for the offices of President and Vice President.

“(2) Electors appointed on such 90th day shall meet and give their votes on the 7th day following the date of their appointment.

“(d) Subsections (a) and (b) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (b) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the Speaker or the Minority Leader of

the House of Representatives, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

"(e) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President."

SEC. 2. (a) Section 101 of title 3, United States Code, is amended by—

(1) striking out "The term" and inserting in lieu thereof the following: "(a) Except as provided in subsection (b), the term"; and

(2) adding at the end thereof the following new subsection:

"(b) A President and Vice President elected under section 19(c) shall commence their term of office on the second day after the date on which the result of the electoral vote is announced by the President of the Senate and such term shall end at noon on the twentieth day of January next following the next regular election of a President and Vice President."

(b) Item 19 of the table of sections of chapter 1 of title 3, United States Code, is amended to read as follows:

"19. Vacancy in the offices of both President and Vice President."

Senator HATHAWAY. I should note that one of the differences between my bill and the original 1792 Succession Act is that my proposal would provide that the "Interim" President—who would serve between the occurrence of the vacancy and the special election—would in fact be a member of the political party of the outgoing President. In this way, whatever party mandate which attaches at the proceeding Presidential election would be maintained until the people render their new judgement.

It seems to me, Mr. Chairman, that this alternative is much preferable to the present situation. It would enable Congress to move deliberately and with confidence in the consideration of a Vice Presidential nominee, secure in the knowledge that should something happen to the President in the meantime, the question of succession would return to the people.

In a double vacancy situation—or in a situation where there is a cloud over the Vice Presidential appointment—a major consideration must be to maintain the legitimacy of the Government. And in our system, Mr. Chairman, legitimacy comes only from the people. While agreeing with the thrust of the 25th amendment, there are situations—such as those I have alluded to—where it does not offer sufficient protection to this principle. I urge the chairman to give serious consideration to my proposal as an alternative to changing the amendment; although it is pending before another committee, the Rules Committee, any interest expressed in this proposal by this subcommittee would be a significant spur to the adoption of this bill as legislation.

I thank you very much, Mr. Chairman, for allowing me to appear before the committee. I should add that Congresswoman Pasty Mink has introduced a similar bill in the House of Representatives. I introduced this bill at the time President Ford was being considered for Vice President.

Thank you.

Senator BAYH. I appreciate your taking the time to let us have your thoughts. Do you have a bit more time that we could explore some other new avenues of this?

Senator HATHAWAY. Yes.

Senator BAYH. The way I understand your proposal, Senator Hathaway, is that you feel we should continue to implement the provisions

of the 25th amendment, in the event there is either a double tragedy at one time, as one could envision an airplane accident involving both the President and Vice President, or some crazy catastrophe of violence. In that instance, the measure that you propose would be implemented in which you would have a temporary President for 90 days during which the Nation would choose a President of their own true election, and a Vice President.

Senator HATHAWAY. That is correct.

Senator BAYH. I think that proposal has considerable merit to it. In thinking about the 25th amendment when we were going through the process, we had to draw the line as to what we felt had traditionally been constitutionally established and what we felt could indeed be enacted by statute. I think your assessment is right, that not only does the Congress have the authority to enact such legislation short of a constitutional amendment, but because it traditionally certainly has been handled that way. This was one of the weaknesses that one could perceive in the 25th amendment; that perhaps it did not go far enough.

Another factor we considered which probably would have to be dealt with by constitutional amendment, particularly since we have dealt with this area for the first time by constitutional amendment, is disability. There was some line of thought that that should be handled by statute prior to taking action. Nothing had been done prior to the 25th amendment. I think once the 25th amendment was enacted we, by precedent, established this constitutional domain. One of the weaknesses that still exists in the 25th amendment that we were painfully aware of was what do we do if the Vice President becomes disabled? We have a situation under the 25th amendment, the other section, not being questioned here, so far not being implemented fortunately, but if a President becomes disabled we have in the past through the 25th amendment to make the Vice President acting President and to then test that, as you know.

What we do if the Vice President becomes disabled, we do not have that. That is a weakness.

The decision that we had to make which resulted in the continued existence of the shortcoming you pointed out, as well as the one I just pointed out, was that we thought one constitutional amendment could carry on this great a load. You get beyond a certain point and then you begin to pick up all of those that are shooting at the imperfections. It does not take long until you get more than one-third of any one body and then you are through.

Senator HATHAWAY. Right.

Senator BAYH. Now, you suggested that you had some reservations about Senator Pastore's provision. Could you share those thoughts with us, please?

Senator HATHAWAY. Well, with regard to Senator Pastore's amendment, I think there is a need to allow the people in every possible case that we can to elect their own President and certainly his principle is right, that when an appointed Vice President succeeds to the Presidency he really has not been elected by the people even though he has been approved by the Congress. It would seem to be almost a natural followup to Senator Pastore's recommendation that we abolish the

Office of Vice President altogether, and when a President is out of office for one reason or another during his term, we simply have a special election.

I know Dr. Schlesinger has spoken at great length with regard to his proposal and I think Dr. Schlesinger's point of view has a great deal of merit. The Vice President, of course, has of recent date been used by the President in various capacities and he has turned out to be sort of an additional Cabinet member who has proved to be useful to at least the last two or three Presidents, but I think it is probably an office that we could get along without. We have gotten along without it for many years in our history when, through some misfortune, there has not been any person in that office for a period of time.

Senator BAYH. May I explore that idea with you?

Senator HATHAWAY. If we are going to elect a President when there is an appointed Vice President, you know, it seems to me to follow naturally why have the office at all? If he is going to be appointed to take care of the contingency of the President leaving office before his term is up, so that he can take over, and yet we are going to elect one in that situation, why not just leave it vacant and when the President does leave office, have some appointment procedure analogous to the one I outlined in my statute such as the ranking Member of the House of Representatives of the party of the President take over during the 90-day period when we have the special election.

Senator BAYH. The major concern I have about the Schlesinger proposal, is that, although the Vice President has been ridiculed as part of our governmental institutions, it seems to me the one role the Vice President does play is to have an unquestioned continuity of authority whenever a President is taken from us. Let's ignore the past experience—the unfortunate experience—we have only had one, in 200 years and hopefully it will be at least 200 more before we have another one like this. But the more traditional loss of a leader, the Kennedy and the Roosevelt experience that I mentioned to Senator Pastore, is a real shock to the country. I mean, it really is like an amputation of a leg. The Nation is sort of unstable and it needs something to lean on. The fact that there is a person who can succeed and put a firm hand on the steering wheel to grasp the reins of leadership is something that sort of shores up the country in an hour of real need for that kind of thing.

Now, if during that period we had to go to Mr. X or Mr. Y who could conceivably be the minority leader of the House, it would seem to me that this would be a disabling kind of thing. Your proposal makes good sense to me—if you can provide an alternative. I want you to analyze what I am saying and critique it in your way. I know you can. For about 30 days after the succession of Gerald Ford it was a honeymoon period with no one questioning him. Everybody said the 25th amendment really gave us continuity but the criticism started arising when President Ford granted immunity to President Nixon, then wanted to raise taxes and started performing Presidential functions. This would be the same kind of criticism that would be directed at any President chosen by any means. We did have continuity; the authority was passed and nobody questioned the fact that Gerald Ford had the authority.

I wonder if that is not perhaps the most important role the Vice President can play under normal circumstances.

Senator HATHAWAY. Well, it seems to me that although you can say since President Ford was confirmed by the House and the Senate, at least he had some kind of a mandate in that respect, that the people would probably grant a honeymoon period and retain confidence in the minority leader of the House in about the same way. If you go back to the days when Franklin Roosevelt passed away, for example, and Harry Truman, because of strength and power of Franklin Roosevelt, played a very minor role as his Vice President, I think the people at that time, extended to him a honeymoon period and it was not much different than if he had been minority leader of the House because he was certainly not known very well. People did not have any opportunity to make any judgment of him when he was Vice President and nevertheless, we weathered that storm without any difficulty; quite fortunately Harry Truman turned out to be an excellent President. And I think with an interim one, especially when he is going to serve for a 90-day period and people know they are going to have an opportunity to choose their own person in 90 days, I do not think that the people of the country would lose confidence in the country going on for that period of time under the leadership of either the Speaker of the House or, if the House was constituted the way it is now, or the minority leader of the House. Those two officers are important in themselves and I think people recognize that the people elected to those offices in the House of Representatives are normally outstanding people and probably of the same caliber and ability as the person who is designated by the President to serve as Vice President.

Senator BAYH. There was this grandiose appointment sermon down at the East Room of the White House in which the Nation got a glimpse of Jerry Ford, almost for the first time. We did hold these hearings and he was the Vice President. President Truman was the Vice President and Vice Presidents had traditionally moved on up in the election procession. That is one thing that was considered, although I am not saying that I do not think you have a good point there. As I mentioned in my opening statement I do not think a lot of people expected Truman to be President of the United States when they voted for F.D.R.

Let me ask you about another question. One of the things that we weighed in considering the 25th amendment was the problems that had existed in the past with the various succession statutes and whether we should incorporate those by constitutional amendment. We then decided not to do so. This is one of the problems that would be presented by your statute that we could address ourselves to, or maybe you do not share the beliefs of this problem. We can only have one president. We found some pretty good quotes that either you are President or you are not President. When you are President you are not anything else, and if we take the Speaker of the House and elevate him even for 90 days as President, what happens to him after his 90 days? You see what I mean? I mean, you are comingling Legislative and Executive authority. And, once a person is taken out of a role, then how does he reassume it?

Senator HATHWAY. Your point is that the bill does not provide for what happens to him afterwards. I presume he would go back to being Speaker of the House or the minority leader, whatever the case might be. A much inflated one, I would say, but nevertheless—

Senator BAYH. He might never be the same.

Senator HATHWAY. He might never be the same personality-wise.

Senator BAYH. I have no problem with your succession as far as permanent presidency is concerned. I know when I study it I have a problem. I can anticipate that there may be a significant constitutional question where somebody is made temporary President and then reinserted in their earlier role. This was one of the major reasons for the feeling that we needed the other section of the 25th amendment. I think there was good constitutional authority to interpret what the Constitution said prior to the 25th amendment—that the Vice President could indeed move in and take over as President if the President were disabled. However, with disability, you have a different question than you have with death. When the President is dead, the Vice President moves in and is President. The circumstances do not arise that a dead President is going to reassert himself. Once a person becomes President can he ever be anything else? I do not ask you to have an immediate solution but that is a question that I think we had better look at.

Senator HATHWAY. Right. I am gratified you called it to my attention. I assumed in the bill based on the existing constitutional language that either the Speaker or the minority leader, would be interim or acting President and he would be so labeled and go back to where he came from. That does not preclude him from running himself as a candidate for President.

Senator BAYH. To keep from having a direct breach or division of power, would he have to resign as Speaker? Could one continue to be Speaker and Acting President at the same time?

Senator HATHWAY. I would suppose that he could not because of the separation of the branches of Government.

Senator BAYH. I would like for us to resolve this. I think your idea makes good sense and we might think about that.

Senator HATHWAY. But I do not see anything offhand that would be difficult about a leave of absence type of situation where he can be reinstated in his role as Speaker of the House or minority leader. He has been elected in normal circumstances. Although the Speaker does not have to be an elected official, under normal circumstances he is elected for a 2-year term, so there is no violation of that by going back to the office to which he was elected.

Senator BAYH. Well, I would like to think about that further with you. This is a contingency that we have not provided for. Are you at all concerned about one other aspect of the general election under those circumstances? Given the time of crisis that would follow the loss of two leaders, either at the same time or during a short period of time, and the divisive characteristic of an election, have you considered the instability that would follow? I mean, you know, we could have a Donnybrook. And this is not the kind of thing that really pulls the country together despite what people say.

Senator HATHAWAY. That is true. But many other countries operating under the parliamentary form of government do this and it has proven to be not that divisive or not that unstablizing for those countries. I am sure that this country is stable enough to withstand a special election without having any divisiveness.

Senator BAYH. I think our responsibility, as I am sure you recognize, is to look at all eventualities and normally think this country can withstand almost anything. It has. The most extreme situations occur during a war and we have had election during wars.

Well, unless you have further comments—

Senator HATHAWAY. No. Thank you very much, Mr. Chairman.

Senator BAYH. I look forward to discussing this further with you and I appreciate your insight in bringing this to our attention.

Senator HATHAWAY. Thank you.

Senator BAYH. You are certainly welcome.

Our next witness is Chairman Peter Rodino of the House Judiciary Committee. We just received word that they have had a vote over there and he will be here within the next 4 or 5 minutes if he is not here earlier.

[A short recess was taken.]

Senator BAYH. We will reconvene if you please.

We are privileged this morning to have with us the chairman of the House Judiciary Committee, the Honorable Peter Rodino, a man that I have had the good fortune to work with over the years, and who has exhibited a great deal of leadership in this important area of the Judiciary.

I say to you, Mr. Chairman, not as a colleague in the Congress but as a citizen of this country, that we are all in your debt for the exceptionally difficult job that you carried with great valor in trying times through the months of 1974. We are glad to have you with us here and we are looking forward to your comments on our efforts to examine the 25th amendment.

**STATEMENT OF HON. PETER W. RODINO, JR., A REPRESENTATIVE
IN CONGRESS FROM THE 10TH CONGRESSIONAL DISTRICT OF THE
STATE OF NEW JERSEY**

Mr. RODINO. Thank you very much, Mr. Chairman.

Senator, in view of the fact that we did go through a very trying period where the 25th amendment came into practice, I feel that whatever experience we can offer might be helpful during your consideration of this matter.

I have a prepared statement which I would like to read.

Senator BAYH. Please.

Mr. RODINO. Mr. Chairman, in the 10 short years since its recommendation by the Congress, and in the 8 short years since its ratification by the States, the 25th amendment has already played a vital role in the course of our history.

I think it is unquestionable that without section 2 of the 25th amendment, this Nation might not have endured nearly so well the ordeal of its recent constitutional crisis.

This subcommittee and you, Mr. Chairman, of course, took the lead 10 years ago in drafting the 25th amendment, and the smoothness with which power has shifted under extraordinary circumstances is strong evidence of the amendment's usefulness and of your own foresight and wisdom. The Nation owes a debt of gratitude to your leadership.

No one could have foreseen the totally unprecedented situation where serious criminal conduct and abuse of power could produce not one, but two vacancies in the office of Vice President within the short span of 10 months.

With that predicament now behind us, however, this seems a particularly useful time to consider some of the issues the implementation of the amendment may have raised.

First, it is apparent that if there are weaknesses in the 25th amendment, they are not weaknesses of workability. The amendment works, and in my judgment works well. The mechanics of nomination and confirmation are sound; the President retains the right to choose an individual with whom he is compatible; and, the people are assured of an individual whose integrity is measured by exhaustive scrutiny of their elected representatives.

Some, however, have been genuinely troubled by the fact that presently neither the President nor the Vice President of our country is an elected official.

Moreover, our current President was himself elevated by an individual, who, shortly thereafter, was forced to resign to avoid certain impeachment; subsequently, our Vice President was chosen by the unelected President.

Although these are serious and legitimate concerns, we must recognize that they were clearly not created by the 25th amendment; if anything, these problems would have been made unimaginably worse without section 2 of the 25th amendment.

Had there been no amendment, not only would the Nixon and Agnew resignations still have left the Nation without a nationally elected executive, but the uncertainty and partisan divisions which would have been inherent in the operation of the succession statutes might have threatened the very constitutional process which ultimately preserved our institutions. Or, barring that, they might have rendered any "new administration" wholly unable to govern.

The 25th amendment permitted the constitutional process to proceed in such a way that the American people could have confidence that no one sought partisan advantage. A Republican President, if removed from office, would be replaced by another Republican President. And if the Nation were to undergo the trauma of an impeachment, it could at least be assured that a reasonable constitutional mechanism for continuity was available.

Any process which seeks to provide for succession in the event of constitutional crisis must elevate, at least temporarily, those who have not been elected to national office. At least the 25th amendment achieves this without injecting partisan issues, while assuring close congressional scrutiny of the new national officers.

The problems of unelected Presidents and Vice Presidents are nonetheless very real, and perhaps we should consider whether under certain circumstances mechanisms beyond the 25th amendment ought

to be made available. I know that Senator Pastore has proposed that whenever a 25th amendment Vice President assumes the presidency, Congress make arrangements for a special election if more than 1 year remains of an unexpired term. The Judiciary Committee in the House may wish to take a look at similar suggestions. At the present time I think that it bears scrutiny.

This morning, however, I would like to take a minute to address the operation of the 25th amendment itself as it has been implemented by the President and by the Congress.

At the time of the consideration of the Rockefeller nomination, in remarks before the Sigma Delta Chi Society of Professional Journalists, President Ford suggested that definite time restrictions be written into the amendment. The President urged that new language in section 2 be added to impose a stated deadline for the Congress to confirm a Vice President. If that period were to pass without affirmative action, the Congress would then be required promptly to begin hearings on another nominee.

Mr. Chairman, I strongly oppose the President's recommendation. A time deadline in my judgment, is inconsistent with the responsibility the Constitution imposes. At the very heart of the 25th Amendment is the notion that this is not an ordinary advise and consent proceeding. Under the Constitution this appointment alone is subject to the scrutiny of both Houses.

Because the people are not afforded the opportunity to cast their own vote, it would be unthinkable to place on their representatives the burden of reaching a rushed judgment. There has been no evidence that the Congress has taken its responsibility under this amendment lightly; it has not been dilatory, it has not been obstructive. If it has taken special care, and perhaps a week or a month longer than the President might have wished, it has done so because of the special responsibility we have felt to insure and restore confidence in our Government's integrity.

Senator Cannon's committee and the House Judiciary Committee would have done the nation a great disservice if they had failed to make the most exhaustive inquiry into all relevant aspects of the nominee's qualifications and fitness to hold this high office.

But the very extensiveness and exhaustiveness of the committee's investigations has raised some questions that I know trouble members of the Judiciary Committee in the House.

In the case of the Ford nomination our committee had investigators and lawyers in Grand Rapids, Mich. within 24 hours of the President's selection. Every agency of the Federal Government was contacted and a request went out for all files in their possession relating to the nominee.

The Judiciary Committee staff, working closely with the Joint Committee on Internal Revenue Taxation, conducted an independent audit of Mr. Ford's tax returns, reviewed his personal financial records and interviewed hundreds of individuals as part of the investigation.

In addition, all members of the committee had access to, or were briefed on, the information generated by the FBI in its own full field investigation. Thirty-three officers and more than 350 special agents interviewed more than 1,000 people in all parts of the country, resulting in more than 1,700 pages of reports.

The Rockefeller investigation, because of the complex questions of family wealth, was even more extensive, as it should have been. All aspects of the nominee's private and public life were probed and scrutinized intensely over a period of more than 4 months.

The very intensity of these two inquiries, however, has raised serious questions within our committee regarding the reasonable limits of a 25th amendment investigation. On the one hand, the inquiry must be wholly thorough and complete, commensurate with the responsibility the Constitution imposes. On the other hand, very great care must be taken not to obscure the genuine larger issues, to preserve the nominee's civil liberties and to protect his reasonable right to privacy regarding matters that do not bear on his fitness to govern.

In the case of the Rockefeller nomination particularly, many times it became extremely difficult to draw the line between relevant matters relating to the nomination and matters intrusive upon the rights of other members of the Rockefeller family.

Perhaps the reason these issues have caused such difficulty is that no clear enunciation has ever been made as to precisely what standard it is that marks the criterion for our judgment. The lengthy and very scholarly hearings held on the amendment in 1964 and 1965 did not address this question in any real depth. We all agreed that Congress was to have a major role and that we should be expected to subject any nominee to a wide range of questioning on public policy issues. But just what it was that we were to examine about each nominee's life and fitness was not as fully considered.

Perhaps that would not have presented a significant problem had not the first implementation of the amendment taken place in an atmosphere clouded by Watergate and on the occasion of the resignation of a Vice President charged with serious criminal conduct. Suddenly we in the Congress were faced with a new responsibility: an obligation to insure a man's integrity as well as to judge his philosophy and competence.

I believe that the Senate Rules Committee, the House Judiciary Committee and the Congress as a whole fully met that responsibility. Congress conducted fair, thorough and very useful investigations. But I hope that this subcommittee, under your chairmanship, will explore the whole larger issue of what it is that the 25th amendment requires of a committee investigation.

In doing so, I know the subcommittee will be applying very sensitive balancing tests: the need to quickly fill a vacancy versus the need to be thorough, the need to probe a man's integrity versus the need to protect his civil rights, the need to make an individual judgment versus the need to reflect the views of one's constituency.

Finally, if I may, I would like to make two short additional observations. One is that, no matter how attractive a proposition it may seem, the American Bar Association's proposal for joint confirmation hearings by the House and Senate is probably an unwise idea. Each House has its own responsibility, and only by holding separate hearings can each House be fully accountable and responsible for its separate judgment. It is no accident that the Constitution subjects this appointment alone to the scrutiny of both Houses.

Second, I would hope that in the future the Department of Justice will follow the example of its conduct during the Rockefeller investi-

gation, when it made the FBI field reports fully available to all members of the committee. In the case of the Ford nomination, access to these reports was much too narrowly limited, and I, as chairman of the House Committee, strongly objected to a proposal to limit access to only the chairman and ranking minority member. Only reluctantly did I agree to a compromise proposal whereby a subcommittee had full access to the FBI reports in order to brief the other members of the full committee. In something as important as the selection of a Vice President, there can be no justification for denying to Members of Congress all materials necessary to making the most informed possible judgment. The situation that prevailed during the Rockefeller hearings was much healthier, and I trust the Department will follow that course in the future. Congressional committees have the capacity and the maturity to prevent leaks of confidential material, and it is essential that they proceed only on the basis of the most complete information.

Mr. Chairman, I very much appreciate having had the opportunity to discuss some of these important issues with you this morning, and these narrow aspects of the 25th amendment. Again I think it is worth noting once more that the Nation owes to your leadership a very genuine measure of gratitude.

Thank you.

Senator BAYH. Thank you very much, Chairman Rodino, for your thoughtful reference to the junior Senator from Indiana, as well as taking your time from a busy schedule to let us have the benefit of your particular insight.

Do you have a few moments for us to explore this further?

Mr. RODINO. Yes.

Senator BAYH. You were absolutely right when you said it was no accident that the Constitution, through the 25th amendment, subjects the nomination and election of a new Vice President under the terms of the 25th amendment to both Houses. This was designed to emphasize the unique characteristic of this particular choice compared to other choices in which Congress has a role, and to emphasize the additional responsibility that those of us in Congress have in this choice.

Let me just explore a few thoughts with you. You are in a unique position to lend expert testimony in several areas that relate to how the 25th amendment works. Do you feel that if the 25th amendment had not been in the Constitution that it is reasonable to have expected that President Nixon would have resigned?

Mr. RODINO. I hardly believe so, Senator. I think that when you view what the possible succession might have been, the pressures that might have been to the contrary, President Nixon himself might under those circumstances not have resigned. I believe that while the impeachment process worked as it did, with the overwhelming evidence that we brought forth, the resignation was a consequence that was almost inevitable. But we have got to consider, too, that in all of us, partisan considerations do arise. Had there been a question as to whether the succession might have gone without a Vice President to the Speaker of the House, who is a Democrat, and whether this would not have aroused those in the Republican Party who have felt strongly, and of course considering, too, that the people and the people's will had been expressed some time previously, there might have been serious ques-

tions. For that reason I believe that because of the 25th amendment, the transition became a lot easier and less difficult.

Senator BAYH. Well, the events surrounding and comprising Watergate had dealt a damaging blow to the political processes of our country. I think the confidence of the American people in their political leaders at all levels is at an all-time low by almost any yardstick.

One of the few salutary events that occurred during the Watergate experience, if one may describe it as that, at least in my judgment was the manner in which your committee pursued its responsibility under the Constitution. There literally live and in full color before the American people was the legislative process, the constitutional process exposed for their examination. They could look into the hearts and minds of your colleagues on the judiciary. They could follow your efforts successfully I think to be an objective presiding officer.

Now, if this is not a fair question, then we will just strike it from the record, or if it is a question that might for obvious reasons be best not answered, then the same will follow.

It is awfully difficult to be in a position of weighing motives and once we weigh other's motives, then I think we are subjecting ourselves to the same test.

As a member of the other body and as a citizen, I got the impression that you and your colleagues were going through a great deal of soul-searching, that there was perhaps as nonpartisan an approach to a problem that had severe parts and overtones as we have ever had in our country. Certainly much more so than was the case when we had the last impeachment situation with Andrew Johnson. That is not a chapter of our history we can be too proud of.

Here is where the question comes. If your colleagues had known that this impeachment would have led to the elevation of the Speaker of the House, a Democrat, a colleague, would this have made that process of objectivity more difficult?

Mr. RODINO. I think, Senator, that there is no question it would have made it more difficult. I have attributed courage to the members of my committee who did search their conscience and search their souls and then ultimately came to a decision. However, I think that a great deal of their ability to arrive at the judgment that they did was the awareness, that there was a 25th amendment, awareness, that there was a Vice President who would be the nominee of the President and compatible with the President and of that party. On the one hand it is difficult to say whether it would have created more difficulties on top of the fact that impeachment was calling into judgment a President of the United States who could ultimately be removed. In itself this is difficult enough, but members of a certain party, knowing that the success might go to another party, would, of course, have found it even more difficult. While I think that that is not quite an answer, nonetheless it does demonstrate that the 25th amendment, having worked the way it did, made it possible for those at least who did rise to the occasion to do so. With the recognition that there was this constitutional process which would safeguard at least what they considered and what many might have considered to be the mandate of the people in the previous election.

Senator BAYH. I would like to explore the full ramifications of that possible influence on objectivity. I think the first inference that

one has in thinking about the possibility of turning over of the Presidency to a partisan of the other party is that members of the President's party might have reservations because of the political repercussions they would face at home. On the other hand, is it not possible that the converse would be true, that those who were of the party of the new officer would lean over backward to be objective? Thus, that party would not be as perceptive and as determined as they otherwise should be to do what was absolutely right based on the issue before them.

Mr. RODINO. I think you are absolutely right. There is no question, Senator, that the thought did arise in the minds of many Democrats at the time when there was a vacancy, that if the vacancy were not filled in accordance with the 25th amendment, succession might go to the Speaker of the House who is a Democrat, and there was this talk. I mean one cannot deny that. And some may have felt strongly so and with justification at least in their own minds, that perhaps the then President and the then administration should not be governing any more and that that might have been an opportunity to do it without the benefit of the 25th amendment. And these were I think discussions that were had.

I know that I myself made my views known the first time that the 25th amendment was implemented, when the question was raised, again genuinely, that there was a cloud over the head of the then President Nixon, a cloud because resolutions of impeachment had been introduced into the House. Some questioned whether, even with the 25th amendment, the then President should have had the right to nominate and then have someone confirmed whom he nominated, because they felt that because of the cloud there, was a question as to whether or not impeachment might result in ultimate conviction. Those people felt justified in possibly taking what might have been a shorter route of removing a President and then, of course, we would have been confronted with the question of having to turn over the Presidency to a member of another party. That certainly in my judgment would have not been in keeping with what the constitutional amendment intended and with what I felt was a wise amendment and a timely amendment.

Senator BAYH. May I ask you to give us your judgment as to the role of the Congress under the 25th amendment and whether this was fully exercised. It seems to me that we made it rather clear that Congress was to play a very deep role of representing 210 million people in the electoral process. That was the only way we could in good conscience deny the people a right to exercise their franchise. I think both committees pursued their responsibilities in a very forthright manner.

In the debate on the floor of the Senate, I must say, I became concerned over those who, at least in what they said, felt that there was important responsibility to go along rather than to exercise an independent judgment served by the electors. By the time you gentlemen and ladies of the House got through I sensed there was more a feeling of an election than had been the case in the Senate. Maybe that is being unduly harsh of my colleagues. It is not intended in any way to be critical of individuals. But, that is just the sense I felt when I was over there and participating to a very limited extent in the debate.

Would you give us your thoughts on that role?

Mr. RODINO. Yes, Senator. As you recall, we were clear when we adopted the 25th amendment, and the report was clear, as to the question of nominating one who was compatible. I think there was no question that we all construed that this should be a member of the President's party and a person whose views would be compatible in the sense of political philosophy as such.

However, again I do not believe, at least I as a member of that committee during the course of the hearings and during the course of debate did not construe it to be a simple advise and consent procedure where the nomination is made and the Senate normally finds certain qualities of fitness and competence and that is it.

I think that, while the President has a right to nominate an individual with whom he is compatible, on the other hand, I think that giving to the two Houses for the first time the ability to express themselves renders it different. I think the phrase used was that by giving the broadest possible acceptance, the electorate almost might have had an opportunity to express itself. The nearest way that this possibly could have been expressed, I believe, or carried out in a manifesto, was to assure that the House would be made part of this confirmation proceeding. And so for that reason you and others suggested this and I think it was wise.

I think, therefore, that it becomes incumbent upon us in trying to interpret the amendment to insure that we ought to examine not only a man's view but also his integrity, his commitment to human values and human freedoms, and I think that the Congress should confirm only those individuals who have demonstrated and acted upon a deep-seated belief in those values. I think therefore the Congress in a sense acts as well, and using your own word again, as surrogates of the people in the only way that I think it is possible for a representative body to speak for the people. And this is the reason why I believe that it is so tremendously important, too, that we set no time limitations on the investigations and on the inquiry, because I think then we would be sacrificing what needs to be done in an effort to expedite something which may not turn out in the best interests of the public.

Senator BAYH. Despite what the President may have made, you think it is pretty difficult to put a time limit on the search for truth.

Mr. RODINO. I would oppose that very vigorously. I think, Mr. Chairman, that if I had been imposed upon in that way, I would have expressly stated that I believe that we would be doing a disservice to the American people. As a matter of fact, when the President did call me to talk with me about the 25th amendment and merely to inquire how we were proceeding, I told him that we were doing as we had done in his case, in the case of President Ford when he was the Vice President-designate. Despite the fact that he was a member of the House of Representatives, and it had been suggested in the press, that, you know, because of cronyism we might just go ahead, I thought that we should conduct a very thorough and yet expeditious kind of inquiry and when it was complete and when that investigation satisfied the minds of those who were inquiring so that they could make a judgment which was responsible, only then should they come to a conclusion. Therefore I would oppose that. And I think it would be unwise.

Senator BAYH. Well, the administration will be represented tomorrow by the Department of Justice. I am anxious to see what they have

to say now after we have gotten by an election. We do have a Vice President and the process is functioning.

Mr. RODINO. Well, I would like to state, Senator, that you should remember that there was a Democratic majority in the Congress during the implementation of the 25th amendment, under serious circumstances where we could really reasonably have questioned whether the President of the United States, and I am referring to the former President, when he was under a cloud of impeachment, where one could have used that as justification and said, well, this is a President under the cloud of impeachment, he may not be the President at the time, he may be impeached, and confirmation may not yet then have come. It was asked, "Should we proceed?" And I remember that these questions came before me and I assured as chairman of the committee that despite some of the protests, and they are a matter of record, that we would not interpose what I thought might have been the kinds of objections that do not really lie under the constitutional amendment.

Senator BAYH. I would like to share with you one reservation I have about the 25th amendment as one who was at least partially involved in its conception.

In our wildest imaginations we could not have anticipated the tragic sequence of events—dual resignations under a cloud of misconduct of our two highest officers. We had no precedent. To imagine that, I suppose, would have been subject to ridicule. One of the reasons for the 25th amendment was the general acceptance over 200 years of moving forward in quadrennial steps. The people speak. They expect that certain policy be followed for a 4-year period. Thus, the President by appointing someone and us electing someone of his own general philosophy are really following the will of the people expressed in the last general election.

In this particular circumstance, the charges which were brought against the President went to the credibility of the election process that chose him; went to the tactics that were used to influence the mandate which was to be perpetuated. If we could look back and say, "well, this could happen," we might have had cause to at least think about exempting those provisions from the 25th amendment. I do not know how in the world you would word it for those exemptions. But, as someone who is involved in the process, does that concern you at all? Are we free now to say, well, this is never going to happen again? What do you think about it?

Mr. RODINO. No. I do not believe, Mr. Chairman, that we can say that this is never going to happen again. As you well have stated, I doubt that there were any of us who had a hand in this measure that ever conceived that this situation would have occurred. This was one of the reasons why, incidentally, some of those who felt that maybe we should not go forward with implementation of the 25th amendment at the time that President Ford was the Vice-President-designate because many thought that the election process might have been questioned because of the tactics that might have been employed.

How you do this very frankly, while I have been concerned about it, I as yet have not really been able to get through the maze of all the questions that arise. I think, however, that we would have to take a

look at that aspect of it. I think that hopefully your hearings may develop something like that and my committee on the House side at the present time, while we have not yet referred any matter relating to the 25th amendment to the particular committee for any further hearings, nonetheless it is something that we have discussed and I think may require some further consideration.

How you get to it I do not know. If we are going to try to provide for every foreseeable kind or unforeseeable kind of contingency, I do not know that we would ever get through, and I believe that human beings, even Senators and Congressmen, have limitations. So we have a difficult process before us.

But I think on the whole again, Mr. Chairman, that this has served us well and we ought to address ourselves to some of the problems. As I say, maybe Senator Pastore's version, his proposal for an election if there is a period of 1 year, maybe that ought to be looked at.

Senator BAYH. One can envision structurally language that would take into consideration the Watergate circumstances. It seems to me, however, very unwise to amend the Constitution to deal with something that has happened once in 200 years if, in the process, you make it more difficult to handle a situation that occurred 16 times prior to that. Well, we are going to study that.

One last thought concerns the whole business of standard which you mentioned in your testimony. Could you help us as someone who has been involved in this? What standard should we apply? I do not know how you apply it in terms of days, hours. The disparity in time between the Rockefeller and Ford hearings was based on differences in the complexity of the men's backgrounds.

And circumstances at the time.

Mr. BAYH. Circumstances. The people were much better served to know these things before we voted—before Governor Rockefeller particularly became Vice President Rockefeller. What standards would you impose? We assume that we could trust the judgment of the respective committees to explore anything that they felt was reasonable or would have a reasonable impact on the plan to be President of the United States or Vice President.

I think you and Senator Cannon, one of your committee members, pretty well followed that rule. How, is there another standard? Help us as we look further.

Mr. RODINO. Well, again, Mr. Chairman, I think it comes down ultimately not to writing standards but I think to the individual judgment of the member, whether Senate or House, who is going to vote, bearing in mind that there is a question of integrity that we seriously had to consider rather exhaustively because of Watergate and because it imposed upon us a greater responsibility. Again this was dictated by the circumstances that prevailed prior to the nomination of now Vice President Rockefeller, and the circumstances in his own case of his vast wealth. There were those who felt that vast wealth of itself should have almost precluded his becoming the Vice President because he could ultimately become the President and would there be a conflict. I remember that I then stated rather emphatically, if we were to proceed on that basis, we would almost be saying that a man of great

wealth—and this county understands the system and encourages individuals to explore their talents and those talents could bring them great wealth—was precluded from becoming the President of the United States or the Vice President under and through the 25th amendment. And I could not see that.

On the other hand, in that case it became a question that needed to be looked at rather exhaustively, together with the regular standards that one would expect of a public servant who is going to be considered for a position a heartbeat from being President. We would expect the highest standards and by the highest standards we mean not only the standards where he is a man of integrity, a man of honesty, a man of complete dedication. But also in my judgment, and this is why I talked about a feeling that individual Members make their own judgment here. We would have to ask how he feels about the public and the public interest and public trust as a whole. Does he serve the party's interest more than he does the public's interests? Does he serve in a way that would insure that if he were to become President, he would be discharging a responsibility to all the people?

I think there are, then, questions that would arise at that time. I doubt that you could write specific standards. I doubt that seriously.

Senator BAYH. Is there anything we could do about a concern I know you and I have had in a number of other areas relative to information that is leaked? I think your insistence that individual Members be given all the information necessary to make the choice is the only decision you can make. Frankly I think the public has a right to know all of the facts upon which we make our decisions. There is that information, in some of these FBI files, that is not facts—that is heresay. I am sure the average citizen does not realize that. Is there anything that we need to do there or can do without muzzling the Members?

Mr. RODINO. Well, I for that reason emphasized in my prepared statement to the chairman, I believe the Members have got to be given full access to those files since they are the ones who in the first instance are going to be making this important judgment.

Now, again, we know that it is difficult to keep some people from leaking, and this does occur. However, in the main, if you look at what did take place, the material that we talked about that was leaked was material that was almost public, that had been made public, and frankly I think that the public does have a right to know, especially in instances where an individual is being judged who may be in a position to become President of the United States.

I think maybe if a lot more individuals had known a lot more about some of the people who had been elected to public offices, maybe those people would not have been elected to public offices.

Senator BAYH. No, I think you are right. We certainly do not want to get in the position of muzzling. As I say, I think the people have a right to all the facts. It is the quasi-facts, the rumors and hearsay that are a problem. The matters that were made public action in particular instances, I know people had a right to know.

Well, you have been very kind and I know you are busy. I appreciate your help with our hearings. We will call on you again as we go

ahead in the next year or two with some of the joint ventures that we are working on.

Mr. RODINO. Thank you very much, Mr. Chairman. Gentlemen, I know you have some in mind and we will be glad to cooperate and discuss those matters with you.

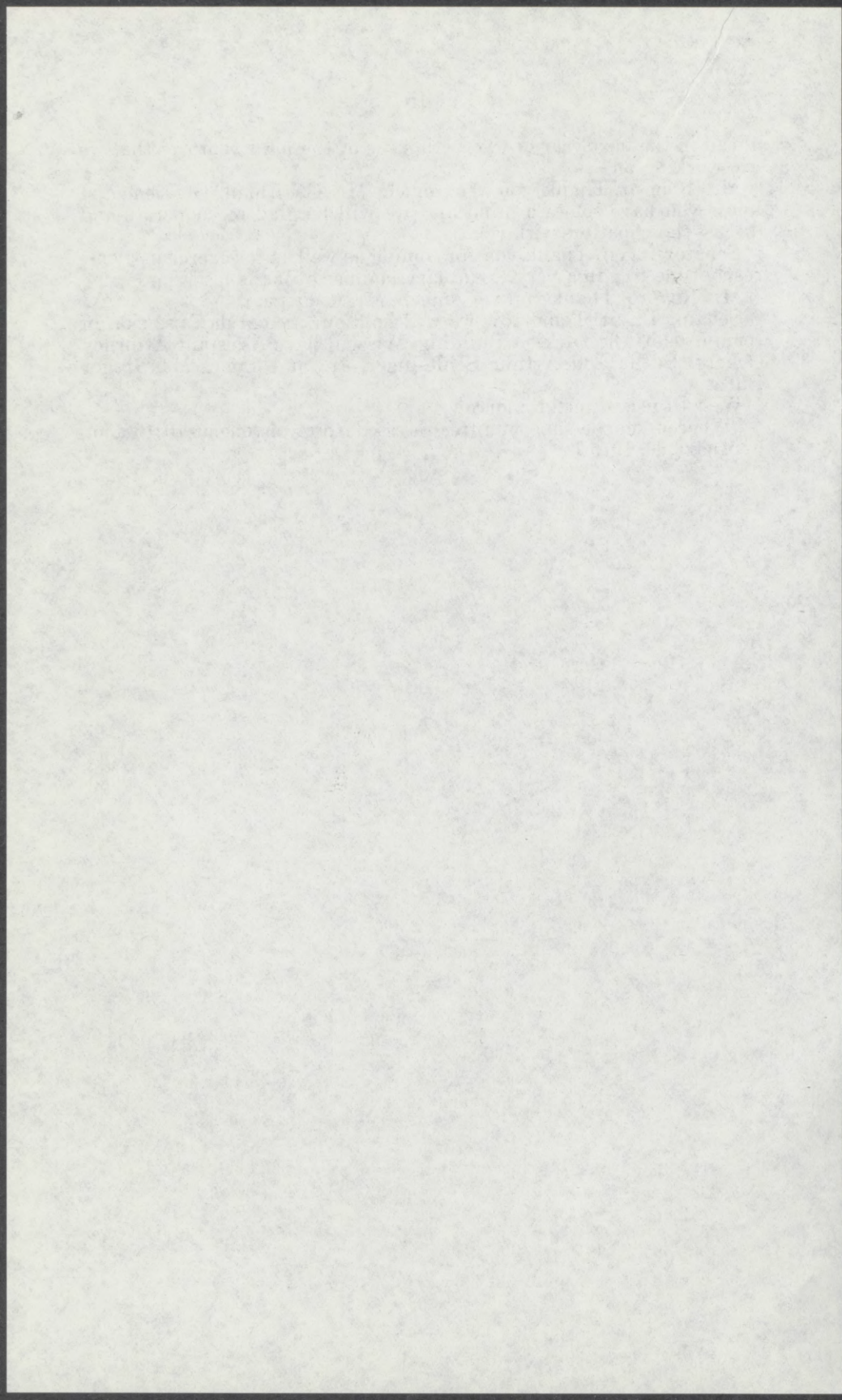
Senator BAYH. Thank you for coming as well as for exercising your responsible role in a very exemplary manner over the last year.

Mr. RODINO. Thank you very much, Mr. Chairman.

Senator BAYH. Tomorrow we will hold our second day's session in room 6202 of the Dirksen Building. We will have Assistant Attorney General Scalia and Arthur Schlesinger, Jr., and James MacGregor Burns.

We will recess until tomorrow.

[Whereupon the subcommittee recessed, to reconvene at 10:10 a.m., February 26, 1975.]



THE 25TH AMENDMENT

WEDNESDAY, FEBRUARY 26, 1975

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 318, Russell Senate Office Building, Senator Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh and Fong.

Also present: J. William Heckman, Jr., chief counsel and Marilyn Berning, assistant clerk.

Senator BAYH. We have three distinguished witnesses this morning. I would like to start out with the representation from the administration, the Honorable Antonin Scalia, Assistant Attorney General, Department of Justice.

Mr. Scalia, we appreciate your being with us this morning to get us started with this second day of hearings. If you will just proceed in the manner you see fit, please.

Mr. SCALIA. I will essentially be following the printed statement that I believe you have before you. There are a couple of technical corrections in it which I will give to the reporter. I will read it as corrected.

STATEMENT OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. SCALIA. Mr. Chairman, I am happy to respond to your invitation to testify on S.J. Res. 26. This proposal would amend the 25th amendment to provide that where a Vice President who has come into that office under the 25th amendment succeeds to the Presidency with more than a year remaining in the Presidential term, a special election shall be called to select both a President and a Vice President.

I understand the intent of the proposal to be that the term of the persons so elected will extend only to the end of the unexpired Presidential term, although its language does not use the clearest formulation, it seems to me, to achieve that end.

Under the proposal, the Vice President who has succeeded to the Presidency will serve as President only until the winner of the special election is sworn in; and during that period the Speaker of the House will serve as Vice President, except that the President pro tempore of the Senate will perform the Vice Presidential function of presiding over the Senate and the Secretary of State will have the power to cast a tie-breaking vote in the Senate.

The Congress would be given authority to fix the date for the special election and, presumably, the date of the swearing in.

Mr. Chairman, the Department of Justice opposes Senate Joint Resolution 26. We take this occasion, however, to urge this subcommittee to recommend clarification of certain aspects of the 25th amendment which may create doubt and confusion at a time when complete certainty is particularly important.

Let me discuss first the proposed joint resolution. I start first from the premise, which I trust all of the members of the subcommittee will share, that the Constitution is not lightly to be amended. To propose a change in the existing provision on vacancies, less than a decade after its last revision, is to contribute to an appearance of impermanence that is inconsistent with the very concept and purpose of a constitution. Of course, a change must be made if it is needed, but the reasons should be weighty and clear.

I am unable to find that condition met in the present case. Our Presidency has recently come through a period of political turmoil unmatched in the nearly 200 years of its existence. We have survived that ordeal without suffering any vacancy in the office, without resort to a temporary caretaker Chief Executive, and without sacrificing the legitimacy and moral authority of the Presidency. On that evidence, I am not predisposed to support short-order constitutional revision in order to abandon a system which, when put to what must be the supreme test, has worked.

I turn, however, to an examination of the theoretical advantages which appear to be the object of the proposed revision. They really come to just one: The assurance of an elected Chief Executive in the unlikely event—the event never occurred until 1974—that both the elected President and the elected Vice President should no longer be in office. Even then, the assurance would only be accorded if the double vacancy should occur before the last quarter of the Presidential term. An evaluation of the proposed amendment must assess its success in achieving this objective, and the attendant disadvantages.

The proposal will assure an election in the limited circumstances in which it applies; but it is in my view doubtful that the process of that election or its result will bear much resemblance to our normal Presidential selection. As our Presidential election process has evolved, the contest for the party nomination is as important as the election itself, in a sense more important, because it is at that stage that the range of choice available to the voters is narrowed from numerous possibilities to a very few serious candidates. The process of seeking the party nomination begins some 9 months before the election itself with State primaries beginning in March, leading up to the party conventions in July and August. There follows a 3-month period of intensive campaigning by the chosen candidates, which, given the size and diversity of our country and the complexity of the issues that confront it, is none too long to place the candidates' personalities and programs before the voters.

Now, it should be apparent that this "normal" election process cannot possibly be indulged in the circumstances which would call for application of the proposed amendment—while a President who has been sworn in as a caretaker, with no more authority than that status

confers, seeks merely to hold things together for his successor. Both the nomination and the campaign periods will have to be drastically shortened. I invite you to consider how the outcome of the last few Presidential elections would have been affected if both the nomination and election campaigns had terminated, let us say, one-third through. It seems to me very likely that the party nomination process will be radically altered, and perhaps driven back into whatever, in these health-conscious days is the equivalent of the smoke-filled room. Given the shortness of time in which to smooth out differences and draw diverse elements within the party together, the likelihood of substantial splinter parties is clearly increased, and hence the risk of having the election decided in the House of Representatives under the 12th amendment to the Constitution.

In short, unless the Government is to be left in the hands of a powerless caretaker over an intolerably long period, it does not seem to me that the process which the proposed amendment established would produce the people's choice in anything like the normal sense. Let me turn now to some disadvantages which the pursuit of this goal clearly entails.

First there are disadvantages of what I might call a practical nature. One of the purposes of having a Vice President is to assure the existence of someone who is prepared to assume the highest office at a moment's notice, familiar with the personalities and problems of the administration, educated in the functioning of the Presidential office, ready with the staff and the resources to take over the job at once.

The proposed amendment, when it applies, will disregard those considerations, and to the extent it produces a result different from the present provision must create a transition period in which the executive branch and the Government are enfeebled. Of course this effect can be eliminated or at least reduced, by the Congress' providing for a lengthy period between the election of the new President and his swearing in. But that of course merely prolongs the effects of the second practical difficulty with the scheme, which is the undesirability of a "caretaker" regime.

Last year, during the period when there was considerable doubt about the ability of President Nixon to survive the Watergate scandal, it was commonly felt that the uncertainty of the administration's tenure was having a substantial and harmful effect upon the conduct of our domestic and foreign affairs. Imagine how much more enfeebling it could be when there is no uncertainty at all when it is absolutely sure that the incumbent who has just arrived, will depart within a few months. Such certainty can be avoided, I suppose, and the effectiveness of the entering President elevated to that of a possible long-term President if he chooses to run in the special election, which is, I suppose, a likely prospect. But that likelihood raises yet another practical difficulty. The burdens of entering upon the office of the Presidency are surely enough without adding to them the need to conduct a full-scale and probably highly compressed election campaign.

I shall next allude briefly to what I consider a major theoretical difficulty with the present proposal. While seeking, in my view vainly,

to give effect, even in emergency situations, to the modern constitutional principle of direct election of the President, it sacrifices another constitutional principle that is much more achievable and no less important.

It is the presumption of our system that major changes of direction in the executive branch of Government are to be made no more frequently than every 4 years. In modern practice this is assured even when the elected President does not complete his term, since the Vice President is invariably his running mate on the same party ticket.

This principle has given our Presidency a strength and our national policy a stability that have not been achieved by those parliamentary democracies which operate on the general basis that a Chief Executive should be replaced whenever a majority of the electorate disagree with a fundamental policy he is pursuing.

The 25th amendment as now written assures the continuation of our constitutional principle of stability even in what might be termed a double emergency, when both the elected President and his running mate have left office. For the nomination of a successor will have been made by one of these individuals and hence will presumably reflect the same political and governmental philosophy. The proposed amendment, on the other hand, would permit a Republican administration to be replaced by a Democratic one, or vice-versa, within 1 year after its election.

Finally, in the area of theoretical difficulties with this proposal, I cannot avoid commenting upon the peculiarity and undesirability of having a voting presiding officer of the Senate and of having tie votes in that elective body broken by the Secretary of State, who is an unelected official from another branch of the Government. Why not the Chief Justice, one might ask?

It seems to me, Mr. Chairman, that the adoption of the 25th amendment in time for use in our recent constitutional crisis was extremely fortunate. Its use had been accepted and it has worked well. In these difficult times in which he has come to office, President Ford has been compelled to make some difficult decisions which were bound to arouse strong opposition from one direction or another.

The fact that some of his actions have provoked criticism is not remarkable. What is remarkable and important for our present purposes is the fact that the new President found he had the legitimacy and the moral authority necessary to exercise firm leadership.

To return to my first point, I am reluctant to discard so soon a newly adopted constitutional amendment which has worked so well. I am all the more reluctant because I believe the theoretical justification for the new proposal is unsound, and its practical application fraught with difficulty.

With your indulgence, I would like to devote the remainder of my comments to some clarifications in the meaning of the present 25th amendment which this subcommittee could profitably achieve.

First there is the problem of the relationship between the 25th amendment and the Presidential Succession Act. As you are aware, the latter act was passed pursuant to the constitutional provision 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.

The statutory implementation of this constitutional provision establishes an order of succession which consists of the Speaker of the House, the President pro tempore of the Senate and then Cabinet officers beginning with the Secretary of State.

The first question posed by the intersection of this provision with the 25th amendment is whether the amendment can be invoked by a person who is an Acting President under the statute.

That is, assuming that both the President and Vice President are killed in a single catastrophe, can the Speaker of the House who takes over under the Presidential Succession Act nominate a person to become Vice President? The scant legislative history on this point appears to indicate that the answer is "No." This seems to me the most satisfactory conclusion, since one of the essential features of the 25th amendment is eliminated when the nominating President cannot trace his tenure to a political mandate from the entire electorate.

Another series of questions is posed when, after the 25th amendment machinery has already been set in motion, the incumbent President dies without a Vice President in office. This would have been the case had President Ford died before the congressional approval of then Governor Rockefeller. That is, once a President has forwarded a nomination under the 25th amendment to fill a vacancy in the Vice Presidency, will the Speaker of the House become the Acting President if the President dies before congressional action on the nomination? The legislative history of the amendment is again scant on the point, but the answer appears to be "Yes."

The issue then raised assuming that the Speaker has become Acting President while nomination for President is still pending, is what is his relationship to that already initiated 25th amendment process? Need he, or indeed can he, withdraw the nomination? If the nomination subsists and is approved, will the Vice President thereby created displace the Speaker and become President?

There is no clear answer to these questions in the legislative history of the amendment, but the portions referred to with respect to the earlier questions seem to display an assumption that once the nominating President dies the entire 25th amendment process is terminated and thereafter only the Presidential Succession Act controls. I am of the view that this is the preferable disposition. The reason I am of that view is that any theory that would allow the nomination to subsist should also logically lead to the conclusion that the nominee, if approved, not only becomes Vice President but thereupon immediately supplants the Speaker as President. Otherwise there would be created a Vice President who has more apparent entitlement than the Acting President to the post of Chief Executive.

Senator FONG. The Speaker becomes President, then he has the right to nominate the Vice President.

Mr. SCALIA. Well, as I am pointing out, that is not at all clear. I would say not.

Senator BAYH. He is not Acting President, he is the President.

Mr. SCALIA. No; he is Acting President under the present provisions of the law. The question is, as Acting President, what functions of the President can he perform?

Senator FONG. He succeeds to the presidency, doesn't he?

Mr. SCALIA. He succeeds to the presidency the way the provision reads, that he shall act as President.

Senator BAYH. Well, I was going to wait for you to finish your statement but I would like for you to examine article II, section 1, which is the most basic document of the vice presidential transition and find the language that says the Vice President shall become President.

You don't need to look because it isn't there. And the Tyler precedent, as you recall, was what established that. There was a strong body of thought at that time that Tyler, the first Vice President to succeed to the Presidency, was just Acting President. It was thought there should be a mechanism for choosing a new President other than Tyler's full assumption of the power—that he really didn't perform the full powers and duties of the office over everything, full salary and all the powers and duties. Since that time we have assumed, I think quite rightly so, that the Vice President does serve as President.

We take that for granted now, but at the time we were implementing the language of article II, section 1, it certainly was not, am I wrong in that?

Mr. SCALIA. No, sir, you are not wrong. But the current Succession Act makes very clear the congressional intention that the Speaker shall act as President. It does not say "be" President, which could have been set forth with perfect clarity. He has generally been referred to as Acting President.

Senator BAYH. Does it prescribe any way to diminish his powers or to choose a successor other than he?

Mr. SCALIA. No, sir.

Senator BAYH. Don't you suppose that the directors of that statute if it were their intention to choose the Speaker as the next in line of succession, they would have also chosen a way to remove him and put someone in there permanently?

Mr. SCALIA. Perhaps, but—

Senator BAYH. Perhaps—why not?

Mr. SCALIA. They well may have intended the somewhat mild language, "shall act as President," to mean that there are certain powers of the Presidency which this individual cannot perform. I would think the first one on the list would be nomination under the 25th amendment.

I am not trying to establish that what I say is necessarily the case; it is simply my best judgment on the matter. If I were certain that it was correct, indeed I would not raise the issue. I am raising it precisely because I agree with you that it is very much debatable.

Mr. BAYH. I appreciate your bringing it up because I don't think it is crystal clear and we must study this. I'll be glad to get the opinion of our next two experts who are historians of the first degree in this and other matters.

You stated that you feel the legislative history, would suggest that the Speaker does not have the full powers of the Presidency. Now, I would like to know what that legislative history is. Certainly it cannot

be found in the words of the Succession Statute other than, shall act. If one predisposes that one shall act as President, first I think you assume he has all the powers and duties of the President.

Second, if you suppose that he shall act for only so long and be replaced, it would be reasonable to suggest that the drafters of the statute would determine how this choice is made; what the vehicle for the replacement is, wouldn't they?

Mr. SCALIA. They might have intended to leave it open for the Congress, where the situation demanded, to provide for an election by statute. That certainly is one possibility.

The legislative history on the point, Senator, as I say, is scant and you made some of it, so, if you didn't have that in mind then the legislative history—

Mr. BAYH. I was there when it was passed—the 25th amendment. I can tell you a little bit about what was at least in one Senator's mind when that was happening. I am not too sure that is relevant as far as the Succession Act.

Mr. SCALIA. I think maybe we are getting sidetracked into another problem. I am really—

Mr. BAYH. I don't think so. This is very much on target and I compliment you for bringing it to our attention. I just want to make sure that we fully explore each other's minds here.

Mr. SCALIA. My point is that I am really not concerned right now about whether the Speaker is acting President or full President under the present Succession Act. The point I am concerned about is whatever you call him, was it contemplated that he would have the power to put the 25th amendment into operation? I say, it seems to me unlikely because one of the premises of the 25th amendment was that the nominating President would himself be a choice of the people, or trace his succession back to a choice by the electorate. That was indeed the whole premise of the thing. That premise is eliminated when the Speaker takes over—who may well be of another political party.

Senator BAYH. Let me go back into previous legislative history which was available to those who wrote the present Succession Act and was available when we were writing the 25th amendment. The first Succession Act did provide for a temporary succession to the Office of the President and specified or inferred there was to be an election to fill the vacancy, if there was a double vacancy.

Now, if the drafters of the present Succession Act had intended that follow, what you infer, and having had that kind of legislative history don't you think they would have written what the predecessor did, indeed, what the constitutional fathers did at the very moment they were, the ink was hardly dry on the Constitution and the ratification and everything?

Mr. SCALIA. Senator, had they adverted to the matter that closely, that is very likely, but as you may recall, disability was more the focus of the entire debate on the 25th amendment.

Senator BAYH. We are talking about the Succession Statute.

Mr. SCALIA. I understand that. What I am saying is the legislative history on the portion of the 25th amendment dealing with succession is not as expansive as one would want it to be. The real focus and interest of the Congress in 1965 was on Presidential disability; that

portion of the amendment received much more of the congressional attention.

I am by no means certain that the conclusion I set forth here is the one the Supreme Court would arrive at. As I say, if I were I wouldn't have raised the matter. The whole point is it is not clear and this is a matter that ought to be absolutely beyond question.

Senator BAYH. We will study it in some detail and I compliment you on bringing it to us. I would like to suggest that a number of people emphasized that we gave more attention to the disability part of the 25th amendment than we did to the Vice-Presidential vacancy part.

This is true basically because in looking at history we had had disabilities but we had had no dual deaths in a 4-year period. It is not true that we did not seriously consider that particular section nor that we were not prepared to accept the eventuality of its implementation.

In fact, there would have been absolutely no reason to put it in there if we hadn't feared that we would have to use it. That was one of the things I remember particularly, although we had not experienced it. We had gone for long periods of time—almost the whole term short of 1 month. In Truman's case we had gone a very few months. We knew we were flirting with danger. We put it in there feeling that we might use it.

Thus, the fact that the Speaker would assume the full powers and duties of the Office and that this could indeed change an administration 180° after a very short period of time from an election, was considered.

If we hadn't expected the Speaker to have the full powers and the duties of the presidency, I don't think we would have been that concerned. I don't know how a man can be President and just be part-President. If you look at the debate, that was one of the concerns we had about disability.

From Henry Clay to Harry Truman, we had ample precedent that the Vice President could move in under the Constitution and exercise the powers and duties of the office in the event of disability. That is there. The question was, a living, disabled President who we hope and pray to God removes this disability and becomes well again, how does he reassert himself.

Most historians and students of the Constitution were of the opinion that once that Vice President moved in and assumed the powers and duties under the disability provision of the Constitution the other President was out.

Now, if that were the case under disability—and I remember discussion on it—if that were true under the Vice President's assumption under the powers and duties of the disability provision, wouldn't it also be true if the Speaker moved in?

Are we questioning whether he would have the powers to declare war or ask the Congress to declare war?

Mr. SCALIA. The problem is you have to decide the present question by looking at the 25th amendment, which is the last portion of the Constitution on the subject, and determining what was intended there. What I am pointing out is there are some peculiarities, some very profound peculiarities, about having the Speaker exercise that particular constitutional function.

For example, a President can submit a nomination under the 25th amendment. Would the nomination of the deceased President subsist when the Speaker takes over, would it still lie on the floor in the Senate and the House? If you say yes, the question I will ask then is "Well, one of the functions of the President is to withdraw nominations: Can the Speaker who sees himself about to be forced out of office by the nomination which the outgoing President submitted, withdraw that nomination?" Was that intended by the 25th amendment?

Senator BAYH. I think the answer to both those questions is, yes, the nomination persists and the new President has the power of any President to withdraw it.

Mr. SCALIA. Well, it seems to me that that would clearly——

Senator FONG. When the President dies, I think that automatically dies.

Senator BAYH. You think it automatically dies?

Mr. SCALIA. I think it does, too, but——

Senator FONG. If you appoint an agent and you are deceased, why, the agency is gone, that is simple law.

Mr. SCALIA. Senators, you complimented me for bringing this before you. As I point out later in my testimony, I really don't deserve the compliment because I didn't think these issues up. These issues were foisted upon me; they were what we were worrying about while Vice President Rockefeller's nomination was pending. The Office of Legal Counsel, in particular, would have had to provide advice about what happened if, while that nomination was still pending, President Ford had died or for some other reason left office.

The questions are real ones.

Senator FONG. We didn't have any question that if the Speaker assumed the presidency he would be the President. He would have all the powers. I don't think there was any question in the minds of our committee about that, the thrust of that amendment really was on disability. We were looking to see how the President could regain his power once he was disabled, that was the thrust of that amendment.

Mr. SCALIA. I frankly could find nothing directly in point. The closest thing to legislative history I could find were some exchanges, Senator, in which it was asked "Well, what if the remaining President dies before he can nominate a Vice President, then what happens?" The response was simply "Then the ordinary Succession Act applies and the Speaker takes over." One would have expected a followup to that: Well, can the Speaker then submit a nomination?" That followup never came.

Senator BAYH. Perhaps the followup should have come. I don't know whether the words used were: takes over; or shall be President. One would assume that if the Speaker takes over as President he would have the powers and duties of the office of the President. I am sure that is what was in my mind. I may have been in error then, but I am sure that is what we were thinking about. We felt if there were to have been qualifications on the succession of the Speaker, it would have been put into the succession statute as it had been in succeeding succession statutes. This was not a new idea, it had been suggested before and been changed.

Now, we don't need to pursue this further, but in light of our colloquy, you might go back and reread it and then let us have your thoughts on it.

Mr. SCALIA. I certainly will, sir. I am sure that my thoughts will not be that the matter is clear.

Senator BAYH. Plus the other matter that you raised. I am sure it isn't as clear as we would like to have it. These are very real questions in light of what we have gone through. I imagine what you must have been going through.

In your statement you suggest that under normal nomination following the death of a President it is true that the customary practice with respect to the nomination by a deceased President appears to be that they subsist without the necessity of renewal by their successor.

Mr. SCALIA. Yes, sir. I did not bring those citations with me but we have documented instances in which that happened.

Senator BAYH. Your thrust is that the Vice Presidential nomination is different because of the continuity in office—the 4 years?

Mr. SCALIA. Yes, it is a different question really. There is no other nomination that goes to both Houses. It is a nomination in a very unusual sense.

Senator BAYH. Oh, it is. Well, excuse me.

Senator FONG. As a committee member I will say that the assumption was very clear on this, that if the Speaker took over he had all the powers of the President. I think that is the reason why nothing was said on that question.

Mr. SCALIA. Let me add just one other reason why it seems to me that result is not one that I would readily reach. If he has all the powers, one would think that he ought to proceed under the 25th amendment. If he can, one would think that he ought to. There would be a lot of pressure for him to use the 25th instead of just staying in office.

If he does that, you will not only have the nomination submitted by somebody who is not in line of succession from an election by the entire people but you will also be creating a caretaker President. Because, as soon as he submits that nomination he knows that—

Senator BAYH. No. He submits the nomination for the Vice President not the President.

Mr. SCALIA. And you assume, then, that the Vice President who comes into office in a manner that I think has a higher dignity than the manner in which the Speaker came into office, should remain as Vice President and not succeed to the presidency?

Senator BAYH. That is right.

Mr. SCALIA. That again seems to me to be an odd feature.

Senator FONG. If he wishes, he could resign the Presidency and go back to be Speaker.

Senator BAYH. No, I don't think he could because he couldn't become President without resigning not only his speakership but his congressional seat. That is why I think your theory lead to all sorts of consequences, many of which we were concerned about. That was one of the reasons we were concerned about the whole disability and the vice presidential replacement business. What sort of position would this put the Speaker in?

You can't be fish or fowl. You either have to be a legislator or an executive branch member. I don't know how he could go back to a speakership.

Senator FONG. I could foresee where the Speaker says he doesn't want to be the President, he wants to be the Speaker. He will tell his Governor that once I become President I want to resign and want you to reappoint me to the House, and the House could make him Speaker.

Senator BAYH. That could happen.

Senator FONG. I could foresee a Speaker that doesn't want to be President.

Mr. SCALIA. Of who wants to be Speaker.

Shall I proceed?

Senator BAYH. Yes; please.

We obviously have a great interest in the points you raise to have interrupted you like this.

Mr. SCALIA. Let me skip a few pages, Senator, because my main point was just to bring the problem to your attention and not necessarily to discuss all of the ramifications of it. I would like to just sum up on this problem by saying that these matters may seem remote from the practical world but I assure you that they are not. Three months ago they were of immediate significance. What I urge upon you is the importance of solution agreed upon in advance rather than concocted for the occasion. I don't think it matters terribly much what solution you choose, but it ought to be clear and agreed upon well in advance.

The second difficulty relating to interpretation of the 25th amendment which I would like to bring to your attention is the problem of making the determination of Presidential inability. This problem has not yet been raised in a practical context but it concerns the issue of who may participate in the determination of Presidential inability under section 4 of the amendment. That section, as you know, covers situations in which an ailing President is unwilling or unable to declare his own inability to discharge the powers and duties of the Office, which he can do under section 3. In such event a declaration of such inability can be made to the Congress by the Vice President and, this is the language of the amendment, "a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide."

Upon such declaration the Vice President assumes the Presidential functions and retains them until the President transmits to the Congress his written declaration that no inability exists, with provision for rejection of such presidential declaration by the Congress in the event of an opposing declaration by the Vice President joined by, once again, "a majority of either the principal officers of the executive department or of such other body as Congress by law may provide."

Congress has, in fact, made no provision for such other body, so the constitutional function of determining Presidential inability now rests with "a majority of the principal officers of the executive department." The important issue which requires clarification is whether this phase includes a Cabinet member's acting replacement, his Under Secretary, Deputy Attorney General, or other designated official, in the event the Cabinet member himself has died, resigned, or is sick

or absent. Such substitution is the rule with respect to other functions of the Cabinet members.

The statute governing the Justice Department, for example, provides that when the office of Attorney General is vacant, "the Deputy Attorney General may exercise all the duties of that office." But such statutes cannot be dispositive with respect to constitutionally prescribed functions." There the intent of the Constitution itself must govern. With respect to this intent, there is a direct conflict between the House report on the proposed 25th amendment, which stated that the acting head of a department would be authorized to participate, and the Senate floor manager, Senator Bayh, who in the floor debate expressed his opinion that an acting head could not participate. As a matter of statutory construction, it is exceedingly difficult to predict how the Supreme Court would choose between these two highly authoritative indicia of legislative intent.

With respect to this particular problem, it is simple for the Congress, by statute, to provide a clear and dispositive solution. Whatever the phrase "principal officers of the executive department" may mean, it is clear under the amendment that the necessary determination can be made by "such other body as Congress may by law provide." I urge you to consider recommending adoption of a provision which would specify that the determination of inability is to be made by Cabinet secretaries only, or, if you wish, by Cabinet secretaries or their replacements.

I tend to favor the former, not just because I'm appearing before this particular subcommittee, but because of the possibility that a Cabinet secretary's first assistant, not to mention a more junior assistant, if he should succeed to the vacancy, will be overly deferential to both the President and the other Cabinet secretaries, with the result that his judgment will not be as bold and independent as it should be. Moreover, there is something to be said for the proposition that in order to tell when the President is sick, it helps to have known him well when he was healthy. Those below the Cabinet level may not possess this qualification.

Senator BAYH. We had a memorandum, prepared by the Library of Congress, which we put into the record to substantiate our thinking on this. I don't know whether you were involved in the situation while President Nixon was President, but when you weighed the transition and the possibility of impeachment that must have been a terrible time.

I am of the opinion that that would have probably been like Ned in the third reader compared to a disability problem. Normal disability where a President is aware of his disability or is unconscious, can be handled.

But, in a Woodrow Wilson situation, where the President may be at least partially impaired but doesn't realize it, you have a problem. One of the things we were trying to do was to make it possible for the Cabinet or some other body to make an objective choice without the possibility of being fired.

A case in point is the way Wilson treated Lansing, the Secretary of State. Lansing was the only one that exercised any initiatives or realized what was going on. They went for months without a Cabinet meeting. Lansing tried to keep things going and was dismissed, as I recall. Historians cannot tell me whether that was right or not.

If you can give the President the right to fire every Cabinet official and keep doing that, you are going to make the replacements to follow very subservient to the President.

We wanted to make certain that any Cabinet official before he has a right to exercise the powers and duties under this section of the disability provision of the 25th amendment, should indeed be confirmed by the Senate. The President should not be permitted one at a time, to remove those who are deeply concerned about his ability to serve.

That was the basis behind the Senate's position. I think without that provision we really are making it impossible to effectively remove the President temporarily for disability.

I don't know whether the Senator from Hawaii recalls that date, but that was the thinking in the Senate's mind in establishing that provision. I don't know the legislative history in the House or how it happened, but this come up one time in the debate.

Instead of answering it and moving on, we answered it and had some time to think about it. Then we came back and documented the thinking. It was not just a quick answer in a debate situation.

Mr. SCALIA. The preference that I just expressed, Senator, as to which way it comes out, is the preference that you share. I must say, though, that it is a mild preference. I think that it is best to let only the Cabinet secretaries make the decision. But really, the nature of the choice is less important than the making of the choice. What is crucial is that a clear answer be provided before the constitutional provision must be used. In this case, it can be done dispositively by statute. There is no question that you can pass a statute which will conclude the issue.

With respect to the first problem that I mentioned, and which we discussed at some length—that is, the relationship of the Presidential Succession Act to the 25th amendment—that you cannot technically resolve by a mere statute, it seems to me. However, for all practical purposes, you can. I think if you pass a statute, concurred in by the executive branch, which expresses your interpretation of how the Presidential Succession Act meshes with the 25th amendment, it is beyond my expectation that the Supreme Court would not accept that determination. In other words, I think you would in effect conclude the matter by amending the Succession Act to make it clear how it relates to the 25th amendment.

Mr. Chairman, that concludes my prepared statement. I am grateful for your attention and will be happy to answer any further questions the subcommittee may have.

Senator FONG. I have no further questions. Thank you for bringing these matters up.

Senator BAYH. I wish you would, in light of our discussion, go back and reexamine the things we both said, look at some of the precedents. I think a strong case can be made for the fact that our Founding Fathers may have indeed intended for the Vice President to have the same authority that you now feel the Speaker would have, as an acting Vice President.

A lot of those people who wrote the Constitution were sitting there in the Congress that came up with the first succession statute. In the succession statute, the succession was to be temporary followed by an election.

That should be weighed against how the country has historically treated the Vice President after the Tyler precedent. At that time, in the light of history, Tyler probably ignored what our Founding Fathers thought. And we haven't done anything about it, in that period of time, over 100 years. There was pretty strong precedent that the Vice President, indeed contrary to what our Founding Fathers may have thought, does have all the powers and duties of the office.

If the country had wanted to change those conditions, certainly they would have done so. Our next witness has perhaps feelings to the contrary, and I am anxious to get his thinking, at least about where we ought to go from here.

Mr. SCALIA. Senator, I think that is right. That is the reason I did not allude to the earlier history of the constitutional provisions in my testimony. They have been applied in a manner so fundamentally different from what was contemplated originally. You can begin with the function of the electoral college, which in the Federalist Papers is described as a group much different from what it has worked out to be. That is why I refer, in my testimony, to the modern principle of direct election of the President. It has, indeed, worked out that way. It was not originally intended to work out that way.

Many of the features of the Presidential and Vice Presidential election have evolved in a manner which the Founding Fathers did not contemplate. It is for that reason that I think what the Supreme Court would place most stress on, if it came to examine the matter, is the theory and the legislative history of the 25th amendment itself. I think they would place much greater weight on that than on the earlier history of the Presidency and the Vice Presidency.

Senator BAYH. Here again, I am willing to pursue this, and I appreciate your bringing it up, but I think you will find, as my distinguished colleague from Hawaii said, perhaps we in our debate conceded the fact that the Tyler precedent changed the original intention of our Founding Fathers. It has become a rather strong precedent and one that we can change, of course, by constitutional amendment.

But I don't believe any of us anticipated that the Speaker would perform a different role than performing the full powers and duties of the Presidency. The Succession Act, although it does use the frame, who shall act as President, does not establish as preceding Succession Acts have, for a vehicle to enact new election procedures in this kind of thing.

Let me ask you a couple of other questions if I might and then I don't want to belabor this. Are you speaking for the Attorney General?

Mr. SCALIA. For the Justice Department; yes, sir.

Senator BAYH. Is the Justice Department speaking for the President?

Mr. SCALIA. Yes, sir.

Senator BAYH. In other words, what you say has the approval of the President?

Mr. SCALIA. The testimony has been approved.

Senator BAYH. I appreciate that fact, but certainly he must have given a lot of thought on these questions that you have raised.

Now, he gave some thought to another provision of the 25th amendment or the lack of another provision of the 25th amendment. It was rather critical of Congress prior to the election in November. I assume that was not a product of the electioneering he was doing but was a product of deep concern that he had.

He criticized the Congress for dragging its feet; urged them to hurry up. At one time, he suggested that we should have a time limit put on the enactment of the 25th amendment. Has he changed his mind; is this just a passing thought; or what is his position on this right now?

Mr. SCALIA. No, sir, I don't think the administration's position on that point has changed. However, I don't think that position was relevant to amending the 25th amendment, or even to clarifying its provisions.

Senator BAYH. Well, let me suggest that it was a lot more relevant than anything you brought to our attention. The matters you brought to our attention are measures you say there are some questions about. There is no question about the fact that the 25th amendment not only does not provide for a time limit, it is unquestionable that that has been resolved in the negative. There is ample debate. Both Senator Ervin and myself talked about the folly of setting a time limit on the search for truth.

Congress should be given whatever time they felt necessary and prudent to make a wise choice. Now, if the President still feels that we were dragging our feet and still feels that we should put a time limit, why didn't you testify to that extent—if you are speaking for him?

Mr. SCALIA. Senator, you didn't let me finish.

Senator BAYH. You may now have as much time as you want. There is no time limit on you.

Mr. SCALIA. I started to say that I did not mention it in my prepared testimony because the administration's position is not relevant to an amendment, of the 25th amendment, or to a clarification of the provisions of the 25th amendment. The administration's position continues to be that it would seem desirable to establish a time limit, but it should not be done by an amendment of the 25th amendment. It should rather be done by the Congress.

I think the preferable way would be for the House and Senate rules to provide what in their view they consider a reasonable period for action upon these nominations. Once again, it is important that it be established outside of the context of any specific case, outside of the political controversy you get into then. I think it would be desirable—and the administration feels it would be—for the House and the Senate by their rules, to set forth well in advance of this problem's arising again, how long they ought to take to act on the nominations.

Senator BAYH. Well, if you or the President feel that, why didn't you tell us? Obviously, we are talking about succession statutes—things that are beyond the province that can be done without a constitutional amendment here. You suggested yourself that we passed a law signed by the President relative to this matter.

If the administration feels we should have a time limit placed on the succession statute, who didn't you suggest that in your statement?

What should the time limit be; what does the President think the time limit should be?

Mr. SCALIA. Sir, I think that is an issue that the Members of the Senate and of the House can probably judge better—as to the exact number of days—than the executive branch can. I would pick a number and say maybe 60 days.

Senator FONG. How can you enforce it?

Mr. SCALIA. Well, I think it has a good deal of moral force, Senator.

Senator FONG. It may have moral force, but how can you enforce it if the Senate decides not to proceed, and the House decides to take its time, and the election is pending and Rockefeller would be too good a speaker for the Republican party, how can you prevent delay until after the election?

Mr. SCALIA. Senator, there is no way to force it without setting it in concrete in a fashion that would be undesirable. That is why it shouldn't be in the 25th amendment. You can't predict. It may indeed have to take longer than that.

There ought to be some pressure, some incentive to keep within a certain time period. But ultimately, if the Senate found it couldn't do it, it could just say "We are not going to observe the rule" or "We are going to amend the rule in this case." There is nothing that could prevent that. But, when it did that it would have to take the heat that comes with it. I think it would be less simple for the Senate then to simply say, "Well, when the President is saying we should act more quickly on this, he is just playing politics." The Senate would then be violating its own rule which it made outside of the heat of any political campaign—I think it would be difficult.

Senator BAYH. May I just ask, are you represented by legal counsel here?

Mr. SCALIA. No, sir.

Senator BAYH. Let me suggest that perhaps we ought to go back on that record and you ought to say, "I don't know"—unless you have had direct information from the President that you are speaking for him now.

During the campaign he suggested that the 25th amendment should be amended.

Mr. SCALIA. No, sir.

Senator BAYH. But that a time limit should be imposed? It is hardly incumbent upon you representing the Department of Justice to say that we establish rules or statute—set up those rules, statutes or time limits but do not adhere to them. The only sanction would be public authorization.

Unless you want to pursue me on this; unless you are sure that you are speaking for the President, I must say, I think you are on rather thin ice there.

Mr. SCALIA. Senator, I am confident that the President did not say that the 25th amendment should be revised. I think he said consideration should be given to establishing some pressure for prompt action by a time limit, either through amendment of the 25th amendment, or through congressional action.

I think he referred to congressional action by public law. That leaves open a much broader category of action than just amending the

25th amendment. I do not believe that putting it in the 25th amendment itself is the way to do it. The way to do it is to put it in the House and Senate rules.

I am speaking for the administration.

Senator BAYH. Let me ask you this, are you familiar with the rather extensive debate we had on this very point? We were concerned about foot-dragging. Despite the fact that some people said, well, Congress got caught with their pants down because here they had a President of one party and a Congress of the other and they didn't anticipate this. However, the debate is replete with concern expressed over the exact political mixture that we did find ourselves in?

One of the concerns we had was that the Congress of the opposite party would drag its feet not merely concerned about the passage of the election but just drag its feet period. The Speaker, an officer of the other party, would become the President in the event anything happened. Are you familiar with that?

Mr. SCALIA. Senator, I am not as familiar with it as you are. I read it and I agree with the outcome of that debate. I think it was a sound judgment not to place any time limit in the 25th amendment.

Senator BAYH. You are aware, then, that the absence of a time limit was not by accident but was the product—our design.

Mr. SCALIA. As I recall the discussion, it was confused. Some speakers at some points were talking about succession when you were talking about disability. The issue was raised with respect to both. As I say, I think —

Senator BAYH. The lack of time limit was the product of conscious consideration—determination that we should have no time limit in the Constitution, right?

Mr. SCALIA. Yes, sir.

Senator BAYH. Now, since that is what the Constitution says, how in the world can you pass a statute? How can the Senate come up with a rule or the House come up with a rule which is in direct contravention of what the Constitution says, or means?

Mr. SCALIA. I don't see how it would be in contravention, Senator. There are many functions which the Senate has to perform under the Constitution which are governed by its rules of procedure. Those rules of procedure simply state how the Senate shall proceed.

I do not mean to assert that those rules are in any sense binding upon the Senate except by its own determinations—so that if, for instance, they establish a 60-day time limit and on a particular nomination it turns out that they need more time than that, they can amend their own rule. I don't see how that is at all inconsistent with the 25th amendment. The rule is not binding upon them except by their own act. Its purpose, Senator, would be simply to establish outside of the heat of controversy —

Senator BAYH. Granted, but I don't see how you can establish outside of the heat of controversy, that is the only way to do it. That is why we passed the 25th amendment—after we had the vacancy filled and the Vice Presidency.

But, I don't know how you can establish any precedent nor say the Senate can establish rules. You mentioned you thought perhaps it could be done by statute. How can you pass a law that is directly con-

trary to a decision that was made by the Congress and 38 State legislators that you should amend the Constitution and have no time limit?

It wasn't that we didn't consider a time limit. We considered it and decided we didn't want one. Whereas, in a disability provision we considered that we needed a time limit.

Mr. SCALIA. Senator, it seems to me that what you decided was that you didn't want a time limit in the Constitution.

Senator BAYH. No, we decided that it would not be wise. We decided that was not it at all. We decided that we wanted no time limit whatsoever.

Mr. SCALIA. You decided it would not be wise to put one in the Constitution.

Senator BAYH. No, we didn't. We decided that the whole process should not be limited by time restrictions. That was in the debate. I remember Senator Ervin, as only he can, looking to the galleries and saying, "God forbid that we should put a time limit on the search for truth." There may have been a few amens—at least I thought amens.

Mr. SCALIA. Senator, you may have discussed the absolute question in the context of the constitutional debate, but I submit that all the constitutional failure to include a time limit establishes, is that it was thought unwise to have a time limit imposed by the Constitution, that could not be eliminated or extended in any way except by action through the people. I think that is an entirely different question from whether a time limit imposed by statute, or as I suggest, by House and Senate rule, is desirable.

Senator BAYH. You may be expressing your opinion and that of the Administration but let me tell you, you are not expressing the opinion of the U.S. Senate that passed this Constitution. You go back there and do as thorough a job reading the record on this as you have on the others. I salute you for that. However, I think you will find out you are on very shaky grounds.

Mr. SCALIA. Senator, I don't want to be misunderstood. I am not speaking in any way as to what the Members of Congress at that time may have felt. I am just speaking to what they decided when they did not include a time limit in the constitutional proposal. They certainly did not decide that no time limit could be imposed by House or Senate rule, that is my only point.

Senator BAYH. Well, you just said a moment ago that you thought it was very important. I don't suppose you did this just as a compliment in one area relative to the Cabinet officers that could or couldn't serve. The opinion of the floor leader of the measure, namely, yours truly, was important. The opinion of the debate, of course, is equally important.

How can you say that that is true about one issue in one area and it isn't on the other? There is no question about what Congress wanted. They didn't want any time limit—in any way.

Mr. SCALIA. We are talking about what the amendment intended, that was the intent of the amendment. I am conceding that the Congress absolutely did not intend that the amendment should include any time limit. That is quite a different question, however, from whether the Congress meant to proscribe any time limit by statute or

by House or Senate rule. If they intended that, they might have gone to say, in the 25th amendment: "No time limit on this inquiry shall be imposed by statute."

Senator BAYH. You may sit here right now and tell us genuinely in your heart what you feel, or try to tell us what the President meant when he was giving it to Congress 2 or 3 weeks before election. You may do that. But, you cannot tell us what Congress meant when they passed that constitutional amendment.

I suggest to you that we couldn't even have gotten the votes necessary to pass it. Senator Ervin was indispensable in our being able to put together the necessary three-fourth or two-thirds of the Senate. I am sure they would never have bought it. He made it very clear; we couldn't have passed it if we had a time limit.

How could you suggest that we wouldn't want a time limit put in in this by Constitution but we are prepared to accept it by statute?

Mr. SCALIA. I am sure that is right, Senator, that there was extreme opposition to it. I would have voted against it myself. But, the question there was whether there should be a time limit imposed by the Constitution. What we are now discussing is a totally different question—

That is, whether, assuming that the Congress can take as long as it likes under the Constitution, the Congress should nevertheless in the exercise of responsible Government, establish a presumptive period within which it should act. If that period then expires and the Congress says, "We have to go further," they can always amend the rule.

Senator BAYH. You say a 60-day period is what you would choose?

Mr. SCALIA. I say further that you probably know better than I, but 60 days seems good.

Senator BAYH. I don't think that we should have any limit. That is what I know, and you are wrong, but I want to know what your judgment is.

Mr. SCALIA. I think 60 days is a reasonable time period.

Senator BAYH. Now, does the Administration suggest what criteria for the standard of applying that 60 days would be?

Mr. SCALIA. The criteria?

Senator BAYH. How do you arrive at 60 days? What is the criteria on one side of which it is prudent and on the other side of which is dilatory?

Mr. SCALIA. Well, I suppose you could look to example. President Ford's nomination process when he was nominated to Vice President was disposed of, I believe, in slightly less than that amount of time.

What it comes to is a calculation of how long it ought to take the Congress to investigate the qualifications and hold the necessary hearings and make its decision. Sixty days is a long time for a matter of that much importance to the Republic. Maybe I feel more strongly about it than you do because I was worried about what would happen if the incumbent President were to die while the Rockefeller nomination was pending. It troubled me very much.

I don't think that matter should be left pending any longer than is absolutely necessary.

Senator BAYH. Neither do I.

Mr. SCALIA. I think anything that could be done to put some moral pressure on to expedite the proceeding is desirable. What I am suggesting here is not something that cannot be reversed or undone when it appears necessary. But, it will keep on the desirable pressure to move expeditiously.

Senator BAYH. You know, I think you and I disagree as to what it takes to do that. You suggested that the time frame of slightly less than 60 days for the Ford nomination was not dilatory. I think is what you said.

Mr. SCALIA. What I said was that it was completed in that amount of time. The time is certainly long enough in a normal case.

Senator BAYH. There is no suggestion that the Congress was dilatory in taking that much time for President Ford?

Mr. SCALIA. I have heard none, no.

Senator BAYH. I haven't either. Now, is it fair to suggest that the Ford nomination was a much simpler one confronting the committee that had access to all information than the Rockefeller nomination was?

Mr. SCALIA. I am not sure, Senator, that is the case. You are referring, no doubt, to the financial complications of the Rockefeller nomination.

Senator BAYH. You don't have to be a genius to suggest that there are a lot of different factors to be weighed. As for complicated financial backgrounds, financial and economic power was there in Vice President Rockefeller's background that was not in President Ford's, wasn't there?

Mr. SCALIA. Sir, I really don't want to get into a debate on when it was dilatory and when it wasn't. I am genuinely interested in trying to get adopted a provision that will solve what could be a problem in the future. I don't think it contributes to that to rehash whether there was dilatoriness or not dilatoriness in the past. All is well that ends well, as far as I am concerned, but I was nervous at the time—as President Ford was, and rightly so.

Senator BAYH. The debate is whether it ended well or not. The majority of Congress and the President thought it ended well. I am willing to accept that interpretation. I think where I disagree with you is that if you look again at the debate and the reason we didn't want any time limit in the Constitution, Congress or in the Rules, was that the white heat of publicity, the very thing that President Ford and some of the rest of you were doing and saying, would be a constant thought, as it should be to keep a Congress moving.

I must say I think the Congress acted very expeditiously considering everything. They moved quickly the first time, during President Ford's nomination. Speaker Albert quickly laid to rest the few voices in our party. There were some that said, "wait a minute, don't rush in there, we've got a Democrat one heartbeat away."

It was that public debate about the time limit that said, well we can turn our head if the time isn't right. I for one am unwilling to put a time limit.

Senator FONG. I will say that I agree with the witness here that we could set a time limit if we wished to by statute or by Rules of the Senate. I don't think that we would like to. If we really wanted to I

think we could, even though many believe that we shouldn't have a time limit.

Senator BAYH. Well, that is what makes a ball game—two sides. We appreciate, Mr. Scalia, your taking your time to let us have your thoughts. If you have any other reflections after we are through here, we will be glad to have those for our record or for further testimony as you may see fit.

M. SCALIA. Thank you, Mr. Chairman.

Senator BAYH. We will have a brief intermission so that our reporter can take care of some necessary changes in equipment.

[A brief recess was taken.]

Senator BAYH. Our next witnesses are two scholars whose special and practical experience suggest that they, as much as any other two human beings, could bring insight into the precedent and practice and wisdom of the constitutional provisions which we are now studying, Prof. Arthur Schlesinger, Jr. of the City College of New York and Prof. James McGregor Burns of Williams College.

I don't think it is necessary to further document the academic and practical experience that these men have had relative to being students of the Presidency, which in essence, is what this is all about.

After consulting with the witnesses, they concur in a format of letting each make a statement as long as he desires, there is no time limitation prescribed thereon, constitutionally or otherwise. Then, we will involve ourselves in a dialog between them and me and between themselves.

Professor Schlesinger, if you will initiate this dialog.

Mr. SCHLESINGER. Thank you, Mr. Chairman.

STATEMENT OF ARTHUR SCHLESINGER, JR., CITY COLLEGE OF NEW YORK

Mr. SCHLESINGER. I am happy to have the opportunity today to offer this distinguished subcommittee some views on the 25th amendment. When that amendment was adopted 8 years ago, no one anticipated the circumstances in which section 2 would be applied. I freely include myself among those who failed to foresee the curious future of section 2. However, this failure of foresight does not relieve any of us of responsibility for the mischief that section 2 has caused or of the obligation to begin a search for a remedy.

The Congress has now confirmed two Vice Presidents under the 25th amendment. This experience has plainly demonstrated—or so it seems to me—that the original theory of section 2 has been abandoned. That theory, as set forth in the legislative history, was that election by the Congress was to take the place of election by the voters. As you, Senator Bayh, said in the debate, "If Congress is to choose the man nominated it will * * * act as the voice of the people." And, as he subsequently put it in a statement preceding the first congressional application of section 2, "The role of Congress was to be—and is—that of electors. We are to represent the people of our country in this congressional election of a new Vice President * * *. We are acting as surrogate electors for the people."

The theory that Congress was acting in lieu of the electorate was expressed in the requirement that both Houses—not the Senate alone,

as in the case of other Presidential appointments—must give their consent to the election of a mid-term Vice President. The election of a Vice President, Senator Bayh assured us, was not “just another traditional nomination to be handled in the traditional way * * *. This is a nomination unlike any other.” And, since Congress was supposed to act as the representative of and the substitute for the voters, there is no escape, it seems to me, from the conclusion that it was commanded to apply to a person nominated for the Vice Presidency the same tests that the voters apply to candidates in a regular election.

I do not, in retrospect, think that this original theory was a good idea. The Founding Fathers, after each careful consideration, had rejected the proposal that Congress should choose the Chief Executive. As Gouverneur Morris put it in the convention, the President would be “the mere creature of the Legislature: if appointed and impeachable by that body.” The Constitution even prohibited Members of Congress from serving as presidential electors—article II, section 1. It brought Congress into the picture only in case of a tie in the electoral college.

The 25th amendment has greatly enlarged the congressional role. It gives Congress in relatively routine cases (almost a quarter of the time since the ratification of the 12th amendment) what the Founding Fathers resolved to deny it except in the most extreme cases: control over the choice of a potential President. This control was cloaked in the theory that congressional consideration was the replacement of popular election; and only this theory saved section 2 from moving our concept of government measurably toward a parliamentary concept. For the essence of a parliamentary system, of course, is legislative selection of the Chief Executive.

In any case this theory has turned out to be fiction. Congress in practice has failed to live up to its commitment to serve as surrogate electors for the people. The proof of this is simple and conclusive. If Congress had employed the same criteria voters use in an election, if it had supplied, as it was obligated to supply, an authentic equivalent for the electoral process, Congressman Ford and Governor Rockefeller would not have been confirmed by the overwhelming margins that, in fact, Members of Congress gave them; for it seems improbable that any popular election would have given them such extraordinary majorities. Many Members voted to confirm the names submitted to them who would never dream of marking the ballot for them in a polling booth.

Instead of applying the standards plainly demanded by section 2, they applied the standards routinely used for routine presidential appointments. They viewed the selection of Vice President as another traditional nomination to be voted up or down by the same criteria a Senator would apply to the nomination of a member of the Cabinet. They failed, in short, to meet what would appear to have been their obligations under section 2 of the 25th amendment. And, in justice to them, the theory of section 2 was probably unreal from the start, since it is hard to have the equivalent of an election unless the surrogate electors are offered a serious choice.

The New York Times said in a recent editorial, “In acting upon a Vice-Presidential nomination, the Congress cannot pretend that the 25th amendment conferred upon it the final power that the sovereign people possess in an election * * * Congress instead has the more

limited responsibility to investigate a nominee's probity and to make certain that he is not of such character or temperament as to disqualify him for the Presidency." There could hardly be a more egregious misreading of the clear congressional intent in section 2 to make Congress the surrogate for the electorate. But also there could hardly be a clearer statement of where section 2 stands after its first two applications. It is for this reason that I suggest that the original theory of section 2 has been abandoned.

If this original theory has been abandoned, if Congress has decided not to serve as surrogate electors for the people, then the content of section 2 has been subtly but profoundly transformed. Congress has now reduced the designation of a mid-term Vice President to a status very like that of the nomination of a Secretary of State or of the Treasury. Unless the nominee for Vice President has the most gross disqualifications, Members of Congress evidently feel they must approve him even if they would never vote for him in a Presidential election. The result, in short, is to give the President the practical power to appoint his own successor.

This is surely a situation repugnant to a democracy. I need hardly remind this committee that 30 years ago President Truman secured the repeal of the Presidential Succession Act of 1886 on the precise ground that it enabled him, as a Vice President who had succeeded to the Presidency, to name his own successor when he chose a Secretary of State. "It now lies within my power," he told Congress on June 19, 1945, "to nominate the person who would be my immediate successor. * * * I do not believe that in a democracy this power should rest with the Chief Executive." Yet this is squarely the position in which the 25th amendment has landed our hapless Republic.

I know it is said that Presidents have this power anyway in the nominating convention. But I must agree with Senator Mathias who characterized this argument as a "false analogy" when, as a congressman a decade ago, he wisely declined to join the stampede for the 25th amendment. A Presidential nominee and an incumbent President, Senator Mathias observed, are very different men, moved by very different motives. The nominee at the convention is far more responsive to popular sentiment than the President in the White House. Moreover, there is no law giving presidential nominees a free hand in picking their partners on the ticket. This has not been always, or indeed, often true in the past. I doubt whether it will be always true in the future.

Surely President Truman was everlastingly right in 1945. Surely the Presidency of the United States must never be an office within the power of one man to hand to another. Yet this is where we are today, as a result of the abandonment of the idea that Congress serves as the surrogate for the electorate. And this is only the beginning of the constitutional absurdity into which section 2 of the 25th amendment has plunged us. The situation becomes even more incompatible with the theory of the Republic—and even more preposterous—when one considers that the 25th amendment empowers a mistrusted and discredited President, a President on the brink of impeachment, to name his successor. And what is most incompatible with the theory of the Republic—and what is most preposterous of all is that, as a result of section 2 of the 25th amendment, we now have for the first

time in American history both a President and Vice President who have come to power not, like all their predecessors, through election but through appointment.

This is an extraordinary predicament for a democratic republic. Up to now the right of the people to elect their own leaders had been assumed by definition as the fundamental point of self-government. The Constitution thus required that the President and Vice President "be elected" (Art. II, sec. 1). The 25th amendment has taken upon itself to repeal this point so axiomatic to the Founding Fathers. Today we have the extraordinary situation in which no American outside the 5th District of Michigan has ever voted for the President for national office and no American anywhere has ever voted for the Vice President for national office.

Is this what the drafters of the 25th amendment intended? Obviously not. Let them therefore reassess their handiwork. I do not see how those who in all good faith and hope conceived section 2 of the 25th amendment can be complacent about the way it has worked out. The theory on which it was based—that Congress should act as the equivalent of the electorate—has been rejected. The consequence has been to introduce into our political process anomalies difficult to reconcile with the Constitution or with any reasonable or responsible theory of democracy. Under what I believe is an irreversible and probably inevitable misconstruction of section 2, we have solemnly given any President, in case of a vacancy in the Vice Presidency, no matter how dishonorable or corrupt that President may be, the power to appoint his successor. It is time, I believe, that I believe to return to first principles. These principles, I would submit, are (1) no President, as Mr. Truman so wisely said, should have such power; and (2) all Presidents, as the Constitution so wisely provided, should be elected. These are the principles, I would suggest, that should guide your committee in the task before you.

Senator Pastore on February 5 reintroduced a proposed constitutional amendment—an amendment he had originally, with great prescience, introduced on November 15, 1973—calling for a special Presidential election in cases when an appointed Vice President succeeds to the Presidency and when more than 12 months remain in the Presidential term. May I say at once that the Pastore amendment would be an immeasurable improvement over the present section 2 of the 25th amendment, and I commend it to your consideration.

But I would urge this committee to go much farther and consider the case for abolition of the Vice Presidency altogether. I have set forth that case at length in an article in the fall 1974 issue of the *Political Science Quarterly* entitled "On the Presidential Succession." I would like, if it is appropriate, to submit a copy of this article for inclusion in the record of these hearings.

Senator BAYH. I would like to ask, that without objection, that that article appear at the end of our dialog because I think it does explore your views on the relevancy of the Vice Presidency in great detail.

Mr. SCHLESINGER. At this point, I will offer only a brief summary of some points in the argument.

In the only mention of the Vice Presidency in the *Federalist Papers*, Hamilton noted that the office had been "objected to as superfluous, if not mischievous."

In my judgment history has more than justified both objections. It has shown the Vice President to be both superfluous and mischievous.

It is superfluous because the Vice President has no duties except to preside over the Senate. I know that Presidents say ritualistically they are going to give their Vice Presidents something to do, but this never has amounted to much. There is, first of all, the constitutional problem. The Vice President, as Mr. Truman in his memoirs wrote, "is not an officer of the executive branch"; or, as General Eisenhower put it in his memoirs in 1963, the Vice President "is not legally a part of the executive branch and is not subject to direction by the President." The President, moreover, is given by the Constitution undivided possession of the executive power. "You cannot, under the Constitution," as President Roosevelt said in 1940, "set up a second President * * *. The Constitution states one man is responsible. Now that man can delegate, surely, but in the delegation he does not delegate away any part of the responsibility from the ultimate responsibility that rests on him."

There is, in addition, the practical problem. Presidents will freely delegate power to men they can hire and fire. But they cannot fire their Vice Presidents. This discourages Presidents from giving them jobs at which they may fail—or may succeed too well. No President is likely to be happy if the executive branch begins to fill up with people whose loyalty runs to his Vice President rather than to himself. Now it may be that President Ford and Vice President Rockefeller are going to reverse the course of history and demonstrate that the Vice Presidency can be more than a non-job. But this should be regarded as the final experiment, as the last chance for what has always been up to now a meaningless and futile office. If this experiment fails, I would hope that the country would reach, what seems to me, the inevitable conclusion and abolish the Vice Presidency.

The Vice Presidency is not only a superfluous office on the historical record: it is also a mischievous one, an office of spectacular and, I believe, incurable frustration. The more gifted and ambitious the Vice President, the better qualified at the start for the Presidency, the acute the frustration. Few Vice Presidents have survived the systematic demoralization inflicted by the office without serious injury to themselves. Bill Moyers has correctly called the office "a man-eater. It destroys individuals." Far from being a learning experience, as some political scientists like to believe, the Vice Presidency has been historically a maiming experience.

The only serious argument for it is that it provides for the succession. But surely it is not beyond our resourcefulness to provide for the succession without creating this superfluous and mischievous office. The answer lies, I think, in the principle of the Pastore resolution, that is, succession through a special election.

The fix into which the 25th amendment has got the American Republic is dramatized by comparison with recent developments in France. General de Gaulle designed a powerful Presidency for himself, but even that towering leader did not claim for Presidents of France the authority to appoint their successors, the authority granted American Presidents in particular circumstances when we conceived and ratified the 25th amendment during the high noon of the Imperial Presidency. Instead the French Constitution provides simply that, in case of a vacancy in the Presidency, the President of the Senate becomes Acting President and a new election to choose a new President must be held within 25 days. On April 2, 1974, President Pompidou died. On May 5 the French had an election followed by a run-off on

May 19 and the inauguration of a new President on May 27. In less than 2 months after the death of one President, France had a new President, chosen by the people and equipped by them with a fresh mandate. Which government is more legitimate, the elected government of France after the death of Pompidou or the appointed government of the United States after the resignations of Nixon and Agnew? Which political system, in this respect at least, is more democratic?

Now the oddity is that the system that worked so well last year in France is almost identically the system originally planned for the American Constitution. The early draft of the Constitution thus proposed that in case of a vacancy in the Presidency "the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen." The Vice Presidency came in as an afterthought and not primarily to provide for the succession. The point of the Vice Presidency of course was rather to insure the election of a National President by requiring each elector to vote for two persons, only one of whom could come from his own State. At a time when local loyalties were stronger than national loyalties, it was feared that a single vote system would result in each State's electors casting all its votes for a favorite son. A double vote for President, with one vote, required to be cast outside the State would result, it was believed, in the choice of a President commanding national support, the runner-up would become Vice President. The idea of special elections was retained for the case of a vacancy in both offices. That idea was incorporated explicitly in the Presidential Succession Act of 1792 and implicitly in the Presidential Succession Act of 1886 and was proposed again by President Truman in 1945.

Now, the Vice Presidency lost almost immediately the function for which it was originally designed. It lost that function when the 12th amendment ended the double vote in 1804 and required separate voting for President and Vice President. The fact that the 12th amendment lost its function was perceived at the time, and the logical conclusion was drawn. "The reasons of erecting the office," one Senator said, "are frustrated by the amendment * * *. It will be preferable, therefore, to abolish the office." Henry Adams tells us in his great history of these years that, "had the question risen as a new one, perhaps a majority might have favored abolition" in 1804, but the discussion was hampered by instructions from State legislatures, and abolition was defeated on a party vote. The Federalists thereafter, Adams wrote, were able to charge Jefferson and his party "for putting in the office of President, in case of vacancies, men whom no State and no elector intended for the post."

It is time for us to repair the error of 1804. Let us adopt a constitutional amendment abolishing the Vice Presidency and then provide for the succession in the spirit of the Founding Fathers through a congressional statute reestablishing the principle of special Presidential elections. In case of a vacancy in the Presidency, let us have an acting President drawn, in order to preserve party and policy continuity, from the Cabinet according to the order laid down in the Presidential Succession Act of 1886. And, unless the President vanishes in the last year of his term, let us choose a new President through a special election to be held, say, 90 days. This would only be an election to fill

out a term and would not require the elaborate foreplay of the quadrennial orgy. The national committees, which have become increasingly representative bodies under the new party rules, could canvass opinion and make nominations. Short campaigns, federally financed, would be a blessing infinitely appreciated by the electorate. Perhaps their brevity and their economy might have salutary impact on the quadrennial campaigns, which in recent years have stretched out to intolerable length and swelled to intolerable expense.

I realize that this may seem a drastic proposal. But I believe the experience of nearly two centuries under the Constitution has abundantly demonstrated the hopelessness of the Vice Presidency. The 25th amendment, with the best of intentions, has only compounded the problem. Let us do today what Congress and the Nation should have, and came near doing in 1804.

This concludes my remarks. Thank you for the patience with which you have endured them.

MEMORANDUM ON CANDIDATE SELECTION FOR A SPECIAL
PRESIDENTIAL ELECTION

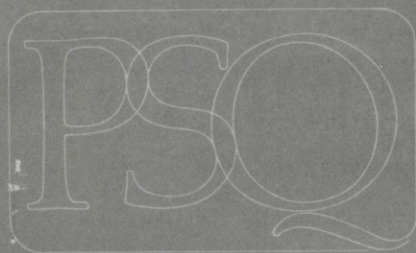
There are three ways by which parties could choose presidential candidates expeditiously if a special election were to be held at some point between the regular quadrennial elections. They are (1) by the national committee; (2) by a national primary; (3) by a national convention. For the purposes of this memorandum I will assume that the special election must take place within 90 days of the event requiring that it be held.

1. *National Committee.* Recent reforms, especially in the Democratic party, have enlarged the number and somewhat increased the representativeness of the national committees. Should the parties decide to give the national committees the power to name candidates in special presidential elections, this would doubtless be a further stimulus to party reform. Nevertheless, the national committees, as constituted at present, do not represent the diverse elements in the party as well as do the delegates to a party convention. Nomination by the national committee would seem to many voters the work of a small coterie of professional politicians; it would fail to bring about the popular participation in choosing the candidate that is so necessary to a successful campaign.

2. *National Primary.* A national primary would obviously bring the voters into the process. Candidates could be selected in various ways: for example, by petition (to get on the ballot a contender must present, say, 100,000 signatures from 40 states, with a minimum of 1000 from each of these states); or by the national committee (to get on the ballot, a contender must be nominated by 5 percent of the committee's membership). One objection to a national primary is that it might give undue advantage to persons whose names are well known and easily recognized. A more serious objection is that it would require the nation to go through two national elections in three months. This would be at best an exhausting experience; and, if the vacancy requiring the special election had been caused by a tragic event like assassination, many people would not be emotionally prepared for a national primary so soon after the event.

3. *National Convention.* For these and other reasons, a national convention seems to me the best solution. A convention would put the choice in the hands of people who have an active concern with politics, thereby reducing the advantages conferred by mere name recognition, but would broaden the base of participation beyond the party professionals. It would do all this without inflicting two elections in rapid succession on the country.

The next question is: how would delegates be chosen? There are a number of possibilities. One would be simply to leave the choice in the hands of each state committee, counting on local pressure to make sure that the results would be representative. Another would be to adopt the proposal made by Woodrow Wilson in his annual message in 1913 and base the convention on the officials elected by the party—senators, representatives, governors, perhaps members of the national committee, with provisions to fill out the delegations in other ways. Obviously this problem requires more thought; but, equally obviously, it is not insoluble.



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ON THE PRESIDENTIAL SUCCESSION

✓ *Arthur M. Schlesinger, Jr.*

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On the Presidential Succession

ARTHUR M. SCHLESINGER, JR.

On the eve of the bicentennial of independence, the American experiment in self-government was confronted by a startling development: the President and Vice President who would lead the celebrations on July 4, 1976, would be persons who had come to office and power, not through election, like all their predecessors, but through appointment. Even more disturbing was the thought that the source of this President's appointment was a former President whose first Vice President had resigned in disgrace as a confessed felon and who himself had resigned in the face of virtual certainty that he would otherwise have been impeached and removed because of high crimes and misdemeanors against the United States.

Nothing like this had ever happened, or could ever have happened, in the earlier history of the republic. The right of the people to choose their own leaders had been assumed by definition as a fundamental point of self-government. A major premise of American politics had always been—at least up to 1967—that the President was an elected, not an appointed, official. The Constitution (Article II, Section 1) expressly provided that the President and Vice President were to "be elected." The Founding Fathers believed that no one who had not been elected to the Presidency should serve as President any longer than necessary to organize a new

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presidential election. The Framers would unquestionably have been astounded and appalled to find as President and Vice President 200 years after the Declaration of Independence two men, neither of whom had ever faced a national election and each of whom owed his office to his direct predecessor.

It was the Twenty-fifth Amendment—ratified in 1967 without, it must be said, any clear view of the consequences¹—that discarded the wisdom of the Founding Fathers and threatened to introduce so extraordinary an innovation into the American system. Under that amendment President Nixon, after the resignation of Vice President Agnew in 1973, named Gerald Ford as his Vice President. When Nixon himself went under, Ford, now President, was obliged by the same amendment to name a Vice President of his personal choice. "For the first time in the history of this great Nation," John Pastore of Rhode Island cried with pardonable senatorial grandiloquence, "the President and Vice President will both be appointed—not elected by the people and not responsive to any mandate from the citizens. The Nation will no longer be democratically governed."²

I

Nixon's Secretary of State, a former professor of political science, had observed in March 1974, "There have been, very rarely, fully legitimate governments in any European country since World War I."³ This was perhaps an imprudent remark from the representative of a government whose legitimacy lay at that very moment (and for many moments thereafter) under the most serious question. But what would Dr. Kissinger make of the legitimacy of an allegedly democratic government headed by two men receiving their office and power through appointment rather than through election?

No doubt such a government, though on the face incompatible with Article II of the Constitution, had become technically constitutional through the Twenty-fifth Amendment. But it could not be said that those who drafted that ill-considered amendment desired this particular result. The constitutionality of the appointive Presidency was thus inadvertent, not premeditated. And for anyone concerned with democracy in a philosophical sense the prospect raised the sternest difficulties. Not only was the conception of the Presidency as an elected office breached; but the assignment to a President of the personal power to appoint a

¹ Certainly not on the part of this writer.

² *Congressional Record*, November 15, 1973, S 20429.

³ *New York Times*, March 12, 1974.

Vice President in case of a vacancy added a quasi-dynastic aspect to the process of presidential succession.⁴

In 1945 President Truman, noting that it lay within his authority to appoint the person (then the Secretary of State) who would be his successor in the event of his own disability or death, said with customary directness, "I do not believe that in a democracy this power should rest with the Chief Executive."⁵ The Twenty-fifth Amendment cavalierly tossed away Truman's old-fashioned scruple and thereby contributed its mite to the aggrandizement of the Presidency. And, if Truman had supposed that the principle applied to himself, an elected Vice President, how much more powerfully must it apply to a Chief Executive who was an appointed Vice President and whose name had never been submitted to a national electorate. A system that permitted an appointed President to appoint his own successor was a system that removed the most vital political choices farther and farther from the people. One doubted whether such a regime could be called, in the phrase with which Professor Kissinger flunked a half-century of government in Europe, "fully legitimate."

The fix into which the Twenty-fifth Amendment placed American democracy was emphasized by a striking contrast with events in France soon after the Secretary of State delivered his excommunication of Europe. General de Gaulle had designed a very powerful Presidency for himself; but even that towering leader had not claimed for Presidents of France the authority the Twenty-fifth Amendment bestowed, in special cases, on Presidents of the United States: that is, the power to nominate his own successor. Instead Article 7 of the Constitution of the Fifth Republic said that in case of a vacancy in the Presidency a new presidential election must be held within thirty-five days. In the meantime, the functions of the President (save for the powers of calling a national referendum and of dissolving the National Assembly) are to be exercised by the president of the senate. On April 2, 1974, President Pompidou died. On May 5 the French had their election, followed by a runoff on May 19 and the inauguration of the new President on May 27. In less than two months, in short, France had a new President, freely chosen by the people and equipped by them with a fresh mandate. Which government is the more legitimate—the elected government of France after the death of Pompidou, or the appointed government of the United States after the resigna-

⁴ The objection that Presidents name their Vice Presidents anyway at the nominating convention is dealt with in the discussion of the Twenty-fifth Amendment below, section X.

⁵ H. S. Truman, *Public Papers . . . 1945* (Washington, 1961), p. 129.

tion of Nixon? Which political system is, in this respect at least, the more democratic?

The signal difference between the French and American systems in dealing with a vacancy in the Presidency is obvious: *the French have no Vice President*. The results surely favor the French on essential tests of legitimacy and democracy. The contrast therefore calls on Americans to reconsider the utility of the Vice Presidency in their own system.

II

History had shown the American Vice Presidency to be a job of spectacular and, I believe, incurable frustration. Gerald Ford, like his predecessors, entered into the office with soothing presidential assurances that he, unlike his predecessors, would be given tasks of substance and responsibility. One could be absolutely certain that these shining prospects would disappear whenever he reached out to grasp them. Nixon, even in his feeble condition of 1974, was no more disposed to share power with Ford than he had shared power with Agnew. When James J. Kilpatrick asked Nixon whether he had told his Vice President of 1971 about the plan for the diplomatic opening to China, Nixon, replying in what Kilpatrick described as an "incredulous" tone, said, "Agnew? Agnew? Oh, of course not."⁶ Yet a year later he kept on as his running mate and successor the Vice President he excluded from his councils. Still President Nixon's tone could hardly have been more incredulous than Eisenhower's when interrogated in 1960 about Vice President Nixon's role in the eight years of the Eisenhower Presidency. To the question "What major decisions of your Administration has the Vice President participated in?" Eisenhower responded, "If you give me a week, I might think of one."⁷

Nor was Nixon merely doing unto others what others had done unto him. He was behaving the way all Presidents have behaved—as they appear to have no inclination and perhaps little choice but to behave—toward their Vice Presidents. It is a doomed office. No President and Vice President have fully trusted each other since Jackson and Van Buren.⁸

⁶ *Washington Star-News*, May 16, 1974. Jeb Stuart Magruder of the Nixon White House writes of Agnew in 1970: "He'd been frozen out by Nixon, for almost two years." J. S. Magruder, *An American Life* (New York, 1974), p. 128.

⁷ *New York Times*, August 25, 1960.

⁸ It should perhaps be added that Polk had amiable personal relations with George M. Dallas, McKinley with Garret Hobart, and Truman with Alben Barkley, but none of

Antagonism is inherent in the relationship. "The only business of the vice-president," wrote the sardonic Thomas R. Marshall, who served for eight years under Wilson, "is to ring the White House bell every morning and ask what is the state of health of the president."⁹ The only serious thing the Vice President has to do is to wait around for the president to die. This is hardly the basis for cordial and enduring friendships. "The Vice President," said Lyndon Johnson, who experienced both ends of the relationship, "is like a raven, hovering around the head of the President, reminding him of his mortality."¹⁰ Presidents inevitably resent the death's head at the feast; Vice Presidents equally resent the monarch who stuffs himself at the banquet table while they scramble for leavings. Elbridge Gerry worried in the Constitutional Convention about the "close intimacy" that he thought "must subsist between the President & vice-president." Gouverneur Morris responded acidly, "The vice president then will be the first heir apparent that ever loved his father."¹¹

The single contemporary point of the Vice Presidency is to provide for the succession in case of the death, disability, resignation, or removal of the President. Of course there have been repeated attempts to give it other points. They have all failed. They are all bound to fail. The Constitution does say that the Vice President "shall be President of the Senate, but shall have no Vote, unless they be equally divided." When there was objection to this in the Constitutional Convention, Roger Sherman observed that, if the Vice President did not preside over the Senate, "he would be without employment."¹² Sherman's observation was prophetic, except that the Vice President's constitutional employment soon became a farce. Agnew as Vice President, for example, never went near the Senate if he could help it. Early Vice Presidents of a philosophical bent filled their days by meditating attacks on the power of the national government. Jefferson wrote the Kentucky Resolution as Vice President, Calhoun the South Carolina Exposition. Their successors have lacked a taste for political philosophy. Richard M. Johnson ran a tavern as Vice President. Thomas R. Marshall and Alben Barkley made jokes. But most Vice Presidents, especially in modern times, have lacked a taste for humor too.

these Vice Presidents played any significant role in the policy decisions of their respective administrations.

⁹ T. R. Marshall, *Recollections* (Indianapolis, 1925), p. 368.

¹⁰ As told by President Johnson in retirement to Professor Doris Kearns, with whose kind permission I am repeating this exceedingly apt aphorism.

¹¹ C. C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington, 1927), p. 682.

¹² *Ibid.*

III

Why have Presidents not given the Vice President serious work? For a long time they supposed themselves constitutionally forbidden to do so. Washington did on occasion ask his Vice President to attend cabinet meetings; but Jefferson as Vice President was quick to erect a wall of separation. "I consider my office," he wrote, "as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations, even were it proposed."¹³ Most Presidents and Vice Presidents have accepted the Jeffersonian doctrine. Thus Truman wrote in 1955 that the Vice President "is not an officer of the executive branch" and Eisenhower as late as 1963 that the Vice President "is not legally a part of the Executive branch and is not subject to direction by the President."¹⁴

The practice of vice presidential participation in cabinet meetings is a recent development. In 1896 Theodore Roosevelt thought it would be desirable "to increase the power of the Vice-President. . . . It would be very well if he were given a seat in the Cabinet."¹⁵ But when he became President himself after an exasperating interlude as Vice President, he did not give his own Vice President, Charles W. Fairbanks, a seat in the cabinet or anywhere else. Vice President Marshall presided at cabinet meetings when Wilson was at Versailles. But, since he regarded himself as a "member of the legislative branch," he questioned the propriety of doing so and carefully explained to the cabinet that he was acting "in obedience to a request" and "in an unofficial and informal way."¹⁶ Harding was the first President to make his Vice President, Calvin Coolidge, a regular at cabinet meetings. Coolidge expected his own Vice President to follow this example; but Charles G. Dawes rejected any such entanglement with the executive as a "wrong principle" and in due course supported farm legislation from his office on Capitol Hill that his President opposed and eventually vetoed.¹⁷ Franklin D. Roosevelt, who from the time of his own vice presidential candidacy in 1920 had cherished the hope of making something of the office,¹⁸ reinstated vice-

¹³ J. D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York, 1965), p. 70.

¹⁴ H. S. Truman, *Year of Decisions* (New York, 1955), p. 197; D. D. Eisenhower, *Waging Peace* (New York, 1963), p. 6.

¹⁵ Theodore Roosevelt, "The Three Vice-Presidential Candidates and What They Represent," *Review of Reviews*, September 1896. TR also thought that the Vice President should be given a vote on ordinary occasions in the Senate and "perchance on occasions a voice in the debates."

¹⁶ I. G. Williams, *The Rise of the Vice Presidency* (Washington, 1956), pp. 109-110.

¹⁷ *Ibid.*, pp. 134, 138.

¹⁸ Franklin D. Roosevelt, "Can the Vice President Be Useful?" *Saturday Evening*

presidential attendance at cabinet meetings, and it became routine thereafter. Truman got Congress in 1949 to make the Vice President a member of the National Security Council by statute. But Vice Presidents continued to operate out of an office at the Hill. It was not till Kennedy that a Vice President was given space in the Executive Office Building.

Nor, despite ritualistic pledges at the start of each new term, have Presidents ever delegated real power to Vice Presidents. FDR did make Henry Wallace head of the Board of Economic Warfare—the only big job handed a Vice President in the history of the American Presidency—but this merely proved the embarrassment bound to arise when an agency chief who happened to be Vice President got into fights with powerful members of the President's cabinet. Nixon as Vice President appointed himself the political hit man of the Eisenhower administration and subsequently as President assigned the same delicate responsibility to Agnew, thereby making him, as Eugene McCarthy wittily said, "Nixon's Nixon." When Ford succeeded Agnew, Nixon began by trying to insert him into the same slot. This is hardly a promising development. If there is anything certain to cast the Vice Presidency into permanent disrepute, it is the theory that the Vice President is the appointed outlet for an administration's partisan rancor.

For the rest the Vice Presidency is make-work. Presidents spend time that could be put to far better use trying to figure out ways of keeping their Vice Presidents busy. "They seek to put him," as Tom Marshall said, "where he can do no harm."¹⁹ So Vice Presidents serve meaninglessly as chairmen of interdepartmental committees like the Aeronautics and Space Council or the Committee on Equal Employment Opportunity. The suggestion is sometimes made that the Vice President could take over the ceremonial side of the President's job. But Presidents perform few ceremonial functions they do not want to perform; and Vice Presidents would be acceptable substitutes only on the most footling occasions. Nor would a purely ceremonial role satisfy any but the most vacuous Vice President. Getting Vice Presidents out of sight through foreign travel is a solution much favored by recent Presidents. This is all make-believe too. Despite the pieties, the Vice Presidency remains "the fifth

Post, October 16, 1920. FDR claimed to regard the Vice Presidency as a major example of "industrial waste" in Washington. He did not think that attendance at cabinet meetings would make much difference but argued that the Vice President should be used to overcome the gap between Congress and the executive branch and to help bring about government reorganization. He acknowledged that a constitutional amendment would be required to give the Vice President serious executive authority but thought that even without an amendment there were things a Vice President could do.

¹⁹ Marshall, *Recollections*, p. 16.

wheel in our government" (Albert J. Beveridge), "the spare tire on the automobile of government" (John Garner).²⁰ As Gertrude Stein said of Oakland, California, there is no there there.

But what of the suggestion, advocated by Roosevelts when they aspired to be Vice Presidents (and forgotten once they became Presidents), that the power of the Vice Presidency might be increased? Carl Kaysen, director of the Institute for Advanced Studies, has made the ingenious proposal, for example, that the Constitution be amended to make the Vice President an officer of the executive branch. Then let the presidential candidate promise the nominating convention that he will appoint his Vice President to one of the four great cabinet offices, State, Treasury, Defense or Justice, and specify which. This would provide a there there. But it would also create problems if the Vice President turned out to fail at the job or to disagree with the policy and could not, like other incompetents or dissidents, be easily dismissed.

Moreover this would have to be an informal, and hence unstable, arrangement; for any formal allocation of power to the Vice President would run up against the clause in the Constitution vesting the undivided "executive power" in the President. And the resistance to any sharing of authority is visceral as well as constitutional. When William O. Douglas, who had been chairman of the Securities and Exchange Commission, suggested to Franklin Roosevelt that he have the heads of the independent agencies report to his Vice President, Henry Wallace, FDR replied, "Would you like to see Henry instead of me? What would Henry know about all those matters?"²¹ No President in the nature of things, is going to yield power to a Vice President.

For this reason, Benjamin V. Cohen, that wise veteran of the New Deal, recommends a different approach. He would frankly recognize that there is, and can be, no there there and have presidential and vice-presidential candidates separately voted upon in the general election. This would have meant in 1968, for example, that Nixon would have been elected President and Muskie Vice President. The fact that Muskie could not have taken part in a Nixon administration would have made no difference, since the Vice President has nothing to do anyway; and Muskie would have been an infinitely more attractive heir apparent. But this proposal raises the possibility of a shift in party control of the White House without the intervention of a new election.²²

²⁰ A. J. Beveridge, "The Fifth Wheel in Our Government," *Century*, December 1909; Garner quoted in J. MacG. Burns, "A New Look at the Vice Presidency," *New York Times Magazine*, October 9, 1955.

²¹ W. O. Douglas, *Go East, Young Man* (New York, 1974), pp. 310-311.

²² So too would Endicott Peabody's otherwise attractive proposal that the Twenty-fifth Amendment be revised to require the choice of a new Vice President, in case of a

Neither of these ideas goes to the heart of the matter. Nor certainly do the reform proposals generated by the Agnew and Eagleton fiascoes. In 1973 the Democrats appointed a Vice Presidential Selection Committee under the chairmanship of Hubert Humphrey, whose own vice presidential wounds had hardly healed. Its recommendation was that the parties slow up the process of nominating the second man by making the convention longer and even, if necessary, holding the choice over to a later meeting of the party's National Committee.²³ This procedure, it need hardly be said, would not have saved the Republicans from twice anointing Agnew, which did not prevent a corresponding committee of the Republican National Committee from contemplating the same change. Senator Robert Griffin of Michigan, the Republican whip, in what he called, presumably as a recommendation, "a small step in the direction of the parliamentary system," would do away altogether with party participation in the nomination and have the new President submit his choice to Congress in the manner in which Mr. Nixon chose Mr. Ford under the Twenty-fifth Amendment.²⁴ This would be another formula for Agnews.

Fiddling with the way vice presidential nominees are chosen is beside the point. The real question is why have a Vice President at all? "His importance," as Woodrow Wilson said, "consists in the fact that he may cease to be Vice-President."²⁵ The only conceivable argument for keeping the office is that it provides an automatic solution to the problem of succession. No doubt it does. But does it provide the *best* solution?

IV

There is first the mystical argument that the Vice President is the proper successor when a President vanishes in mid-course because, as Truman said and many have repeated, "There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country."²⁶ Truman's proposition, advanced nine weeks after Roosevelt's death, was natural enough to a man concerned with legitimating his own recent succession to the Presidency. But insofar as it implied that the voters in some sense intended him or any other Vice President (since 1796) for the Presidency, it was a myth. No one

vacancy, through special election rather than through appointment. See "On the Threshold of the White House," *Atlantic Monthly*, July 1974.

²³ *Congressional Record*, December 21, 1973, S23756-S23758.

²⁴ *Ibid.*, October 23, 1973, S19448-S19450.

²⁵ Woodrow Wilson, *Congressional Government* (Boston, 1901), p. 240.

²⁶ Truman, *Public Papers* . . . 1945, p. 129.

votes for a Vice President *per se*. He is a part of a package deal, "a sort of appendage to the Presidency" (Truman's own phrase); not an independent choice.²⁷

To this hazy theory of an electorally sanctified connection between the Vice Presidency and the succession there is added the conventional wisdom of political science departments (and of Vice Presidents) that the Vice Presidency is the best school for the Presidency. It is above all, we are told, a "learning office" where men educate themselves for the great responsibility that may one day be theirs. Even if the Vice President has nothing to do, he can—we are assured—watch what others are doing and prepare himself to take over if calamity strikes. Thus Richard M. Nixon: "The Vice Presidency . . . is the only office which provides complete on-the-job training for the duties of the Presidency."²⁸

This implies, one fears, an unduly romantic view of Presidents. Nixon himself made this perfectly clear as soon as he had a Vice President or two at his mercy. Presidents, whatever they may say, do not pick their running mates because they want to raise them up to be their successors. All Presidents see themselves, if not as immortal, at least as good for a couple of terms. They pick a running mate not because he is the second citizen of the republic and splendidly qualified to replace them in the White House but because of occult and very often mistaken calculations about the contribution he will make to their own victory at the polls. "Whether they should or not," Congressman James G. O'Hara of Michigan has realistically observed, "they will not, in the final analysis, choose their Vice-Presidential candidate to succeed them. They will choose them to help them succeed."²⁹

These calculations, I say, are very often mistaken. It is an exceedingly rare case when the vice presidential candidate makes a difference. Very likely Johnson made a difference in 1960. But much more typical was the outcome in 1948. Earl Warren was the most popular governor California had had in a generation, but Truman carried California against the Dewey-Warren ticket. As for the idea, much discussed by the sages of the press, of a "balanced ticket," this is a fraud on the public. It pretends that the Vice President's views will somehow "balance" the views of the President when all our history testifies that they have no impact at all on the President. Should the President die, however, then the difference in views could have a cataclysmic effect. Theodore Roosevelt, recalling what

²⁷ Truman, *Year of Decisions*, p. 53.

²⁸ In his testimony in 1964 before the Senate Judiciary Committee, reprinted in Senate Judiciary Committee, *Selected Materials on the Twenty-fifth Amendment*, Senate Document 93-42, 93 Cong., 1 Sess. (1973), 95.

²⁹ James G. O'Hara, testimony before the Vice Presidential Selection Commission of the Democratic National Committee, November 7, 1973 (mimeo.), p. 10.

had happened when Tyler succeeded Harrison and what might have happened had Grover Cleveland died and Vice President Adlai Stevenson taken over, observed, "It is an unhealthy thing to have the Vice-President and the President represented by principles so far apart that the succession of one to the place of the other means a change as radical as any possible party overturn."³⁰

Presidents not only do not choose Vice Presidents to become successors, but, after they make the White House themselves, they do as little as possible to prepare them to become successors. A Vice President can learn only as much as a President is willing to have him learn—which, given presidential resentment of vice presidential existence, is not ordinarily very much. Truman, recalling how little he had been told as Vice President, tried harder than most Presidents to clue in his second man. His conclusion about on-the-job training is not encouraging. "No Vice-President," he wrote three years after he left the White House, "is ever properly prepared to take over the presidency because of the nature of our presidential, or executive, office." In the nature of things, "it is very difficult for a President to take the Vice-President completely into his confidence." The President "by necessity" builds his own staff and makes his own decisions, "and the Vice-President remains an outsider."³¹

Moreover, seeing things as an ill-informed, impotent, and often sullen outsider, the Vice President will very likely "learn" the wrong things. Lyndon Johnson thought Kennedy too cautious at the time of the Cuban missile crisis and in Vietnam. What Johnson "learned" as Vice President led him on to policies of overkill in the Dominican Republic and Indochina. In any case, where does a successor's responsibility lie? "A Vice-President might make a poor President," said Tom Marshall, who had to reflect on this question in Wilson's season of disability, "but he would make a much poorer one if he attempted to subordinate his own mind and views to carry out the ideas of a dead man."³²

A learning office? With Presidents less generous than Truman—and that in this context is most Presidents, however generous they may be in other relationships—the Vice Presidency is much less a making than a maiming experience. The way most Presidents treat their Vice Presidents, far from preparing them for the succession, is more likely to erode their capacity to succeed. McKinley, wrote Theodore Roosevelt as Vice President, "does not intend that I shall have any influence of any kind, sort or description in the administration from the top to the bottom. This he has made evident again and again. . . . I have really much less influ-

³⁰ Roosevelt, "The Three Vice-Presidential Candidates," p. 292.

³¹ Truman, *Year of Decisions*, p. 54.

³² Williams, *Rise*, p. 110.

ence with the President now that I am Vice-President than I had even when I was governor."³³ Fortunately, for T. R., he only had to endure six months of frustration. When he acquired a Vice President of his own, he could not have been more destructive of poor Charley Fairbanks. He used to regale Washington with Finley Peter Dunne's crack after the President remarked he was going down in a submarine: "You really shouldn't do it—unless you take Fairbanks with you."³⁴ Tom Marshall, who at least extracted a good deal of shrewd humor out of his predicament, concluded that the Vice President "is like a man in a cataleptic state: he cannot speak; he cannot move; he suffers no pain; and yet he is perfectly conscious of everything that is going on about him."³⁵ Lyndon Johnson, when Vice President, once remarked to Franklin D. Roosevelt, Jr., "Your daddy never let his Vice Presidents put their heads above water."³⁶

In recent years, as men of larger aspirations and capacities have responded to the actuarial attractions of the office, the damage to Vice Presidents has increased. The more gifted and ambitious the Vice President, the more acute his frustration—and the less his President is inclined to do to alleviate it. Everyone knows the humiliation that Eisenhower repeatedly visited on Nixon. Malcolm Moos, the political scientist, after watching that relationship as an Eisenhower special assistant, concluded that the office was "a kind of coffin."³⁷ Only a man who has the overpowering ego of a Lyndon Johnson and is treated by his President, as Johnson was, with relative consideration can survive the Vice Presidency; and even Johnson was a subdued and shrunken man by 1963. "It's like being naked in the middle of a blizzard with no one to even offer you a match to keep you warm—that's the vice presidency," said Hubert Humphrey in 1969, eight months after he had been released from confinement. "You are trapped, vulnerable and alone, and it does not matter who happens to be President."³⁸ Few Vice Presidents can survive the systematic demoralization inflicted by the office without serious injury to themselves. Bill Moyers, who was with Lyndon Johnson both as Vice President and President, later remarked that the Vice Presidency "is a man eater. It destroys individuals. This country was very lucky that Harry Truman was the vice president for only a year [actually for less than three months]. When he became President, he still had so much left.

³³ Theodore Roosevelt, *Letters*, ed. E. E. Morison, vol. III (Cambridge, 1951), p. 57.

³⁴ Williams, *Rise*, p. 89.

³⁵ Alben Barkley, *That Reminds Me* (New York, 1954), p. 221.

³⁶ As told by FDR, Jr., to me; Arthur Schlesinger, Jr., *A Thousand Days* (Boston, 1965), p. 704.

³⁷ *Minneapolis Tribune*, June 2, 1974.

³⁸ *Time*, November 14, 1969.

If we had gotten Truman three years later, he would have been much different."³⁹

V

The Vice Presidency does a poor job of preparing politicians to become Presidents. But it has recently begun to do an excellent job of preparing politicians to become presidential candidates. For the Vice Presidency is the only place except the Presidency itself that insures its occupant automatic and comprehensive national exposure. Moreover, a new sense of the frailty of Presidents—FDR's death in office, the attempted assassination of Truman, Eisenhower's sicknesses, the successful assassination of Kennedy, the movement to impeach Nixon—has focused unprecedented public attention on the Vice Presidency. As a result, the Vice Presidency has returned to somewhat the status it enjoyed in the early republic as the stepping-stone to the Presidency. In the 160 years before 1948 only five Vice Presidents had ever won election to the Presidency on their own. Of the five Presidents elected since, three were former Vice Presidents. Every man who has served as Vice President since 1953 has become a candidate for President, except for Agnew, who was well on his way to becoming a candidate until the law caught up with him, and for Ford, whom the office transformed from a little-known congressman into a national favorite in a few weeks and who, even before he became President, seemed destined to be a presidential candidate in 1976.

The irony is that this process has nothing to do with the presidential qualifications a Vice President might have and everything to do with the publicity in which the office bathes him. Whether or not a Vice President is any good, the office instantly makes him a front-runner in the polls. At the same time the office makes it impossible to find out whether or not he is any good. "The Vice President," Donald Graham has written, "is the one American politician who is not held responsible for what he says."⁴⁰ If he makes a hawk or a zealot or a fool of himself, it is always supposed that he is doing so at the behest of his President. No doubt he is, which is one reason why, at the very time the office enhances his political availability, it depletes and despoils his substantive value. So while the Vice Presidency is coming to be the main avenue to the Presidency, it is, alas, an avenue that typically specializes in the delivery of damaged goods.

There is no escape, it seems to me, from the conclusion that the Vice

³⁹ Jimmy Breslin, "Police Riot," *New York Magazine*, September 16, 1968.

⁴⁰ Donald Graham, "The Vice Presidency: From Cigar Store Indian to Crown Prince," *Washington Monthly*, April 1974.

Presidency is not only a pointless but even a dangerous office. A politician is nominated for Vice President for reasons unconnected with his presidential qualities and elected to the Vice Presidency as part of a tie-in sale. Once carried to the Vice Presidency not on his own but as second rider on the presidential horse, where is he? If he is a first-rate man, his nerve and confidence will be shaken, his talents wasted and soured, even as his publicity urges him on toward the ultimate office for which, the longer he serves in the second place, the less ready he may be. If he is not a first-rate man, he should not be in a position to inherit or claim the Presidency. Why not therefore abolish this mischievous office and work out a more sensible mode of succession?

VI

Such a revision of the Constitution would not be an affront to the Founding Fathers. They had no great commitment to the Vice Presidency. Though they had had considerable experience with lieutenant or deputy governors in the colonies and though most of the thirteen states had provided for such officers in their own constitutions, the Constitutional Convention did not resort to the Vice Presidency in order to solve the problem of succession. Instead the August 6 draft from the all-important Committee of Detail proposed that, in case of a vacancy in the Presidency, "the President of the Senate shall exercise those powers and duties, *until another President of the United States be chosen.*"⁴¹ This, it might be noted, was the formula adopted a century and three-quarters later by General de Gaulle for the French Constitution and employed so expeditiously in France in the spring of 1974.

There was some objection to the President of the Senate as acting President of the nation. Gouverneur Morris thought that the Chief Justice should be "provisional successor." Madison suggested that "the Executive powers during a vacancy" be administered by a Council of State.⁴² Wherever the line of devolution went, however, all agreed that it was to prevail only until the voters could choose, *de novo*, a new President by special election.

Then a fortnight before the Convention adjourned, a new drafting committee went off for a weekend and came back with the Vice Presidency. The committee did *not* devise the Vice Presidency primarily as a means of dealing with the succession. The delegates already had a solution to that problem. Indeed, as Charles Warren later wrote, they paid surprising little attention in considering the Vice Presidency "to the chief

⁴¹ Tansill, ed., *Documents*, p. 479. Emphasis added.

⁴² *Ibid.*, p. 621.

part which the Vice-President has, in fact, played in history, that is, to his succession in case of the death of the President."⁴³ The Vice Presidency came to the fore for entirely distinct reasons. Hugh Williamson of North Carolina, a member of the new drafting committee, frankly told the Convention that "such an office as vice-President was not wanted. He was introduced *only* for the sake of a valuable mode of election which required two to be chosen at the same time."⁴⁴

The Vice Presidency entered the Constitution, in short, not to provide a successor to the President—this could easily have been arranged otherwise—but to ensure the election of a *national* President. For the United States had as yet little conviction of national identity. Loyalty ran to the states rather than to the country as a whole. If presidential electors voted for one man, local feeling would lead them to vote for the candidate from their own state. The new draft now recommended that they be required to vote for two persons, "of whom one at least shall not be an inhabitant of the same State with themselves."⁴⁵ By means of the double vote, localism could be overcome, and a President with broad appeal beyond his own state would emerge. "The second best man in this case," as Madison observed, "would probably be first, in fact"⁴⁶—i.e., the favorite second choice would be the person commanding national confidence.

In addition, the double vote was also intended to defeat cabal and corruption in the selection process. Because each elector must vote for two persons without indicating a preference, "the precise operation of his vote," James Wilson observed, "is not known to himself at the time when he gives it." Conspiracy would therefore be "under the necessity of acting blindfold at the election" and would be "defeated by the joint and unforeseen effect of the whole."⁴⁷ Hamilton concluded in *Federalist* #68 that through the double vote the Constitution had made it a "moral certainty" that the Presidency would be filled "by characters preeminent for ability and virtue." Popularity and intrigue might enable a man to carry his own state; "but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union."

Under the double vote, the person winning most votes became President, the runner-up Vice President. It was not logically essential to the

⁴³ Charles Warren, *The Making of the Constitution* (Boston, 1928), p. 635.

⁴⁴ Tansill, ed., *Documents*, p. 682. Emphasis added.

⁴⁵ *Ibid.*, p. 679.

⁴⁶ *Ibid.*, p. 454.

⁴⁷ James Wilson, *Works*, ed. R. G. McCloskey, vol. I (Cambridge, Mass., 1957), p.

operations of the system that the runner-up be anything at all; and no doubt considerations of the succession played a larger part here than were reflected in the discussions at the Convention and in subsequent debates at the state ratifying conventions. For both President and Vice President would have been voted on for the Presidency, and both presumably would be well qualified for the office. The primary point of the Vice Presidency, however, was not as a mode of succession but as an organic part, in Williamson's phrase, of the "valuable mode of election."

VII

Even then the new office was not received with great enthusiasm. Elbridge Gerry told the Convention that he was "ag.st having any vice President."⁴⁸ Gerry was the only member of the Convention ever to become Vice President. George Clinton, not a delegate, denounced the office from outside as dangerous and unnecessary. Clinton later served as Vice President under two Presidents. James Monroe told the Virginia ratifying convention that he saw no need for the office.⁴⁹ The *Federalist* tried to ignore the issue, devoting two quick paragraphs to it in the entire series of eighty-five papers. Noting that the Vice Presidency had been "objected to as superfluous, if not mischievous," Hamilton defended it in perfunctory fashion because the Vice President's casting vote could prevent deadlocks in the Senate and because the Vice President himself could be on occasion a "constitutional substitute" for the President. Privately he complained to James Wilson, "Every body is aware of that defect in the constitution which renders it possible that the man intended for Vice President may in fact turn up President."⁵⁰ The First Congress even wrangled over the question of whether the Vice President should be paid a salary. Some members thought he should only receive *per diem* for those days when he actually presided over the Senate. Finally they voted him \$5000 a year.

The double vote did produce two remarkable figures, Adams and Jefferson, as the first two Vice Presidents. But as an occupation for a grown man the Vice Presidency proved a disaster. "I am Vice-President," Adams told the Senate. "In this I am nothing, but I may be everything"—a concise statement of the paradox of the office. To his wife Adams complained that the Vice Presidency was "the most insignificant office that ever the invention of man contrived or his imagination conceived. . . . I

⁴⁸ Tansill, ed., *Documents*, p. 682.

⁴⁹ Feerick, *From Failing Hands*, pp. 52, 54.

⁵⁰ Alexander Hamilton, *Papers*, ed. H. C. Syrett, vol. V (New York, 1962), p. 248.

can do neither good nor evil." Jefferson called it "the only office in the world about which I am unable to decide whether I had rather have it or not have it."⁵¹ In the meantime, the rise of the party system, a development unanticipated in 1787, was placing the "valuable mode of election" under severe strain. In 1796, the Federalists gave their second ballots to Thomas Pinckney, who was manifestly not the second citizen of the country. Adams himself, the top Federalist candidate, would have preferred, if he had been defeated, to lose to Jefferson rather than to his fellow-Federalist.⁵² In 1800 the Republicans gave the same number of electoral votes to Jefferson, their presidential choice, as they gave to Aaron Burr, a man of undoubted talents who, however, was trusted by no one in the long course of American history, except for his daughter Theodosia and Gore Vidal. Burr was nearly chosen President, though the voters never intended him for the Presidency. The fear of comparable slipups in 1804 led to the adoption of the Twelfth Amendment requiring the electoral college to vote separately for President and Vice President.

With the abolition of the "valuable mode of election," the Vice Presidency lost the function for which it had originally been designed. Separate voting ended any prospect that the Vice President would be the second man in the country. The office would no longer attract men of the highest quality. It would become, as was immediately noted, a bargaining counter in the presidential contest—"a bait to catch state gudgeons," in Gouverneur Morris' scornful phrase.⁵³ Samuel White, a senator from Delaware, summed up with admirable prescience the consequences of the Twelfth Amendment: "Character, talents, virtue, and merit will not be sought after, in the candidate. The question will not be asked, is he capable? is he honest? But can he by his name, by his connexions, by his wealth, by his local situation, by his influence, or his intrigues, best promote the election of a President?" Roger Griswold of Connecticut said that the Vice Presidency would thereafter be "worse than useless." A number of political leaders, Republicans and Federalists—John Randolph of Roanoke; former Speaker of the House, now Senator Jonathan Dayton; Griswold; Samuel W. Dana—drew the logical conclusion. The Vice Presidency was an organic part of a particular mode of election. That mode of election was now about to be terminated. Should not the Vice Presidency therefore be terminated too? "The reasons of erecting the office," Dayton correctly said, "are frustrated by the amendment. . . . It will be preferable, therefore, to abolish the office." Unfortunately for

⁵¹ Feerick, *From Failing Hands*, pp. 66–67, 63.

⁵² Lucius Wilmerding, Jr., *The Electoral College* (Beacon paperback, 1964), pp. 33–34.

⁵³ Michael Harwood, *In the Shadow of Presidents* (Philadelphia, 1966), p. 27.

the republic the effort failed by 19-12 in the Senate and 85-27 in the House.⁵⁴

But the dismal predictions were correct. The Twelfth Amendment sent the Vice Presidency into prompt decline. The first two Vice Presidents had moved on directly to the Presidency. After the amendment the Vice Presidency became a resting-place for mediocrities. Who can remember Burr's successors—George Clinton, Elbridge Gerry, Daniel D. Tompkins? For a generation the Secretary of State became the stepping-stone to the Presidency; thereafter, until very modern times, Presidents were elected from anywhere except the Vice Presidency. In the 170 years since the Twelfth Amendment only one Vice President—Martin Van Buren—has advanced directly to the Presidency by election. More than half our Vice Presidents in the nineteenth century were actually *older* than their Presidents. William R. King, when nominated as Vice President with Franklin Pierce, was known to have an incurable disease and died six weeks after inauguration. Clinton, Gerry, Henry Wilson, Thomas A. Hendricks, and Garret A. Hobart also died in office. Apart from their families, few cared or even noticed. The Vice Presidency was nothing. "It is not a stepping stone to anything except oblivion," said Theodore Roosevelt when Boss Platt conned him into accepting the vice presidential nomination in 1900. "I fear my bolt is shot." Asked if he planned to attend McKinley's second inaugural, Platt replied with relish, "I am going to Washington to see Theodore take the veil."⁵⁵ Four years later the Democrats nominated Henry G. Davis, then 81 years old, for the Vice Presidency (the ticket lost). For thirty-eight years—almost a quarter of the time that has passed since the ratification of the Twelfth Amendment—the republic was without any Vice President at all. No catastrophe resulted.

VIII

Theodore Roosevelt concluded that the Vice Presidency was "an utterly anomalous office (one which I think ought to be abolished)."⁵⁶ He was indisputably right. But what would take its place? How else to deal with the succession? Here it would not seem unreasonable to go back for a moment to the Constitutional Convention. The Founding Fathers were not a pack of fools. While they did not suppose that their descendants would be governed forever by what made sense for an agricultural

⁵⁴ Feerick, *From Failing Hands*, p. 73.

⁵⁵ Williams, *Rise*, p. 81.

⁵⁶ Roosevelt, *Letters*, vol. III, p. 60.

society of four million souls, they had insights into the principles of self-government that later generations did not conspicuously improve.

Their first thought, as we have seen, had been to give the President a provisional successor—most probably the President *pro tem* of the Senate—and then, as soon as possible, elect a new President. When the Convention, for other reasons, moved on to the idea of a Vice Presidency, the delegates resolved to empower Congress to designate the next in succession in case of a double vacancy. The early proposal was that the officer thus designated by Congress should “act” as President “until the time of electing a President shall arrive.” Madison at once pointed out that “this, as worded, would prevent a supply of the vacancy by an intermediate election of the President” and offered language, immediately accepted by his colleagues, stipulating that the designated officer “shall then act as President . . . until the Disability be removed, or a President shall be elected.”⁵⁷ The constitutional scholar Lucius Wilmerding, Jr., accurately stated the principle of the Founding Fathers in a letter to Walter Lippmann in 1946: “A man who had not been voted on for the Presidency ought not to hold the office for longer than it takes to choose a new President.”⁵⁸

Before the adoption of the Twelfth Amendment, Vice Presidents had been voted on for the Presidency. Indeed, as the young republic began to develop and assume a national consciousness, people quickly forgot that the original reason for the double vote was to overcome localism and increasingly supposed that its point was, in the words of Elias Boudinot of New Jersey, “to obtain the second best character to fill the place of the first, in case it should be vacated by any unforeseen accident.”⁵⁹ If the Vice President were thus so well qualified to act as President, the instant problem of succession seemed under control.

So, when the Second Congress passed the Presidential Succession Act of 1792, the act assumed without specification that, if anything happened to the President, the Vice President would take over. If both the Presidency and the Vice Presidency were vacated, Madison’s idea of an “intermediate election” was to prevail. The President *pro tempore* of the Senate (or, if there were none, the Speaker of the House) would “act as President . . . until a President be elected,” and a special election would be called for the next November to choose a new President unless the double vacancy occurred in the last months of the presidential term.⁶⁰

⁵⁷ Tansill, ed., *Documents*, p. 680. Emphasis added.

⁵⁸ Walter Lippmann, “A Letter about Vice Presidents,” *Washington Post*, December 7, 1946.

⁵⁹ Wilmerding, *Electoral College*, p. 30.

⁶⁰ The text of the 1792 Act can be conveniently found in Edward Stanwood, *A History of the Presidency* (Boston, 1901), pp. 36–38.

"It is unlikely," E. S. Corwin, that mordant annotator of the Constitution, has written, "that Congress ever passed a more ill-considered law."⁶¹ This is harsh language. Corwin did not live long enough to see the Twenty-fifth Amendment. Still, the Act of 1792 unquestionably had its defects. Corwin was particularly upset because he regarded the intrusion of the legislative branch into the line of succession as a violation of the separation of powers. (Madison had made this point against the bill in Congress, but Madison was aggrieved because, had Hamilton not intrigued to shift the succession to Congress, Jefferson as Secretary of State would have been next in line. If Jefferson had been President *pro tem* of the Senate and Hamilton Secretary of State, would Madison have cared so much about the separation of powers?) In any case, the Madison-Corwin doubt had not impressed the Committee of Detail in the Constitutional Convention; and it may be considered to have been laid to rest by the long life of the Act of 1792 and by the reenactment of the principle of congressional succession in 1947.

There still remained, though, the more substantial objection that the qualifications for President *pro tem* and for Speaker are less stringent than for the White House. The congressional officers, for example, need not be natural-born citizens; the Speaker may be under 35 (as Henry Clay demonstrated in 1811); and, peculiarly, neither is required to be a member of the body over which he presides, which makes them less than perfect exemplifications of the elective principle. Still, in practice, the congressional officers have met the presidential qualifications most of the time. A graver objection was that they might be on occasion members of the opposite party; in 1792, however, Congress was not thinking in terms of the party system. A still graver objection was that there might be times when there would be neither a Vice President nor a President *pro tem* nor a Speaker.

The Twelfth Amendment came a dozen years after the Act of 1792. It was intended to make it impossible for persons who had not been voted on for the Presidency to become President. It had precisely the opposite effect.⁶² After 1804 Vice Presidents were not voted on for the Presidency except in a highly metaphysical sense. But the retention of the office and the ambiguity of the Constitution enabled Vice Presidents to make themselves President.

IX

The Founding Fathers, so far as we can tell, assumed that, if a President died, the Vice President would inherit the powers and duties of the

⁶¹ E. S. Corwin, ed. *The Constitution of the United States of America: Analysis and Interpretation* (Washington, 1953), p. 387.

⁶² As Lucius Wilmerding, Jr., pointed out in two penetrating essays on the Vice

President but not the office itself; he would only be acting president. Corwin judged it the clear expectation of the Framers that, if there were a vacancy in the Presidency, "the Vice-President should remain Vice-President, a stopgap, a locum tenens, whatever the occasion of his succession, and should become President only if and when he was elected as such."⁶³ A careful modern scholar, John D. Feerick, agrees that the men who signed the Constitution accepted the words limiting tenure ("until . . . a President shall be elected") "as applicable to all successors, including the Vice-President."⁶⁴

The final language was a hurried and cryptic condensation by the drafting committee of two resolutions previously adopted by the Convention. This language—that in case of the President's death, resignation, removal "or inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President"—contained a capital ambiguity. By "same" did the Framers mean merely the powers and duties of the Presidency or did they mean the office as well? Since earlier language consistently had the Vice President acting as President and exercising presidential powers and duties, the Framers plainly thought that the Vice President was *not* to inherit the office. The Twelfth Amendment substantiates this surmise; for it provides that, if a presidential choice went to the House and could not be made before inauguration day, "the Vice-President shall *act* as President, as in the case of the death or other constitutional disability of the President" (emphasis added). But the debate over the Twelfth Amendment showed incipient congressional confusion as to whether the Vice President, in the event of a vacancy in the Presidency, was only to exercise the powers and duties of the office or was to acquire the office as well, thereby becoming President in every sense of the term.⁶⁵

Then in 1841 William Henry Harrison died a month after his inauguration. At last there was brought to test, as John Quincy Adams said, "that provision of the Constitution which places in the Executive chair a man never thought of for it by anybody." Vice President John Tyler in effect staged a constitutional coup by successfully insisting—"in direct violation," Adams testily noted, "both of the grammar and context of the Constitution"⁶⁶—that, when a Vice President inherited the powers and

Presidency, "The Presidential Succession," *Atlantic Monthly*, May 1947, and "The Vice Presidency," *Political Science Quarterly*, vol. 68 (March 1953).

⁶³ E. S. Corwin, *The President: Office and Powers* (New York, 1957), p. 54.

⁶⁴ Feerick adds: "The debates at the Convention clearly show that the Vice-President was merely intended to discharge the powers and duties of the President temporarily. All of the drafts before the Committees of Detail and Style were explicit in this regard." Feerick, *From Failing Hands*, pp. 50–51.

⁶⁵ *Ibid.*, pp. 74–75.

⁶⁶ J. Q. Adams, *Memoirs*, ed. C. F. Adams, vol. X (Philadelphia, 1877), pp. 457,

duties of the presidential office, he inherited the office too and became, not acting President but President in his own right. There were unavailing protests from senators who thought that a man could gain the Presidency only by election.⁶⁷ But Tyler won his point, though the point did not gain explicit constitutional sanction until 125 years later in the Twenty-fifth Amendment.

The United States lived under the Succession Act of 1792 for ninety-four years. Since a double vacancy never occurred, the intermediate-election feature, evidently intended by the Founding Fathers as a routine part of the process, never came into play. In 1881 James A. Garfield, shot by an assassin, died at a time when there was neither a President *pro tem* of the Senate nor a Speaker of the House. If anything happened to his vice presidential successor, Chester A. Arthur, the Presidency would have been in limbo. This was strangely also the case when Grover Cleveland's Vice President died four years later. Moreover, the Republicans were in control of the Senate in 1885, which meant that the President *pro tem* of the Senate, when chosen, would be of the opposite party from Cleveland as well as his statutory successor.

The cry for reform produced the Presidential Succession Act of 1886. The new law put the line of descent through the cabinet, thereby making succession automatic and preventing the mechanics of succession from transferring the Presidency from one party to another without an election. Some members of Congress opposed this idea—among them Congressman William McKinley of Ohio—especially on the ground that it would contravene the elective principle by empowering a President to name his successor.⁶⁸ The 1886 law did not, however, eliminate the idea of intermediate elections. It provided that the cabinet successor should “act as President until the disability of the President or Vice-President is removed, or a President shall be elected.” It was “the powers and duties of the office of President,” and apparently not the office itself, that devolved upon the cabinet successor, and “it shall be the duty of the person upon whom said powers and duties shall devolve” to convene Congress within twenty days, presumably in order to provide for a special election.⁶⁹

463–464. J. Q. Adams' great-great-grandson, Thomas B. Adams, now president of the Massachusetts Historical Society, has speculated that, if a special election had been held following Harrison's death, Henry Clay would probably have been the choice of the nation, in which case there might have been no President Polk, no Mexican War, and a different course of national development. See “On the Threshold of the White House,” *Atlantic Monthly*, July 1974.

⁶⁷ Feerick, *From Failing Hands*, p. 95.

⁶⁸ *Ibid.*, p. 146.

⁶⁹ For text, Stanwood, *History of the Presidency*, pp. 451–452. Emphasis added.

The republic operated under this law for another sixty years. Again no occasion arose to call the provision for intermediate elections into play. Then in 1945 Harry S. Truman, abruptly translated to the Presidency, faced the prospect of serving the balance of Roosevelt's term—nearly four years—without a Vice President. The law of 1886 put the Secretary of State next in line. But Truman, as we have noted, thought it undemocratic for a President to have the power to appoint his successor, contending that the Vice President should always be an "elective officer"—i.e., someone who held public office through election. So he proposed a reversion to the principle of the Succession Act of 1792, though with the Speaker of the House first and the President *pro tem* of the Senate second. There were manifest defects in the scheme. Neither the Speaker nor the President *pro tem*, as we have seen, need be elective officers. Both posts were in part the reward of seniority, which often meant long tenure in a safe and therefore unrepresentative district. James F. Byrnes and George C. Marshall, Truman's second and third Secretaries of State in 1947–1948 were far better equipped for the Presidency than Joseph Martin of Massachusetts, who, as Speaker of the House, was heir apparent for the same period under the Truman reform. In general, Secretaries of State have been more impressive figures than Speakers. Polk is the only Speaker to have made it to the White House.

Truman, however, saw this part of the scheme as provisional. Reaffirming the conviction of the Founding Fathers, he said, "No matter who succeeds to the Presidency after the death of the elected President and Vice President, it is my opinion that he should not serve longer than until the next Congressional election or until a special election called . . . to fill the unexpired term of the deceased President and Vice President."⁷⁰ As Walter Lippmann put it in 1946, the Founding Fathers "thought the country should never for more than a few months have a President who had not been elected. They did not believe, as we now assume, that there could never be a Presidential election except once every four years."⁷¹ If the country was without an elected President, it should proceed as expeditiously as possible to elect a new one. There was nothing sacrosanct about the four-year election system.

X

Truman's proposal that the intermediate election fill the unexpired term has given some trouble to constitutional scholars who read the language

⁷⁰ Truman, *Public Papers . . . 1945*, p. 130.

⁷¹ Walter Lippmann, "Wrong Answer, Right Question," *New York Herald Tribune*, November 12, 1946.

on the Presidency in Article II, Section 1, of the Constitution—"He shall hold his Office during the term of four Years"—as guaranteeing every new President four years in the White House. The Succession Act of 1792 did provide that the term following the special election should be for four years. The Act of 1886 was mute on the point, though the debate assumed a four-year term. It is far from self-evident, however, that the Constitution forbids elections to fill unexpired terms. We have such elections every day for senators and representatives, though they, no less than Presidents, serve for terms specified in the Constitution. The House Judiciary Committee, under the chairmanship of that rugged old Texas strict constructionist Hatton W. Sumners, went into this question at length in 1945 and found no constitutional problem in the case of the Presidency.

The Constitution, the House Judiciary Committee said, "does not provide that the term of each incumbent shall be 4 years, but that the President shall hold his office 'during the term of 4 years.' This language appears to have reference to a fixed quadrennial term, permitting the filling of an unexpired portion thereof by elections. The tradition of special elections for unexpired terms of other officers also supports the provision."⁷² "During" often means "in the time of"; it does not necessarily mean "throughout the entire course of." Had the Constitution said "for a Term of four Years," this would clearly assure a four-year term to every new President. But the Constitution does not say this.

And if John Tyler was correct in saying that a Vice President became President, not just acting president, and if it is correct to construe the Constitution as assuring every President a four-year term, then this reading must surely apply to Presidents who gain the office by inheritance quite as much as to those who gain it by election. This would mean that, when a President dies, the Vice President who succeeds him is entitled to a four-year term of his own. Ben Butler made this point during the impeachment trial of Andrew Johnson. "Whose presidential term is the respondent now serving out?" he asked. "His own or Mr. Lincoln's? If his own, he is entitled to four years up to the anniversary of the murder, because each presidential term is four years by the Constitution."⁷³ But no one has ever argued, not even John Tyler, that a Vice President has any right to do more than serve out his President's unexpired term. On what principle, when there is no Vice President, should a specially elected "constitutional substitute" be in a more favored position?

The House unwisely deleted Truman's provision for special presiden-

⁷² The report is reprinted in the *Congressional Record*, June 26, 1947, 7854-7855.

⁷³ D. M. DeWitt, *Impeachment and Trial of Andrew Johnson* (New York, 1903), p. 411.

tial elections before passing the Sumners bill in 1945, and the Senate took no action on the proposed change in the line of succession. The 1946 mid-term election gave the Republicans control of Congress. The Republican leadership, determined to make Joe Martin Truman's absolute and not provisional successor, now favored Truman's bill while opposing the idea of intermediate elections. As finally enacted, the law thus departed critically from Truman's original intention. He signed it, however, in order to shift the succession back to elective officers.

The elimination of intermediate elections was a bad mistake. The mistake was compounded twenty years later by the ratification of the Twenty-fifth Amendment. Section 2 of that amendment, by authorizing a President, whenever there was a vacancy in the Vice Presidency, to nominate a new Vice President, sanctified the appointive principle at the highest level of government and created the monstrous possibility—within a decade a probability—that an appointed Vice President would himself become President and appoint his own Vice President.

There was some opposition to this procedure. The Presidency, as Charles Mathias of Maryland observed in a brilliant dissent from the House report, would no longer be a purely elective office if the amendment were adopted. The Constitutional Convention "would surely have rejected an appointed Vice President on grounds of principle alone." The amendment, Mathias continued, was based not only on a false view of democracy but on a false view of human nature. It assumed

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.

Mathias dismissed the argument that Presidents picked their Vice Presidents anyway at the nominating convention. A candidate for the Presidency, bent on winning the approval of the electorate, was a different man from an incumbent President safe and secure in the White House. "The electability of the vice-presidential candidate is a form of accountability for the head of the ticket." Once elected, a President could employ any criteria he personally preferred. Since the rest of the proposed amendment gave the Vice President new authority with regard to the declaration of presidential inability, a President might well "hesitate in seeking a vigorous and aggressive Vice President" and prefer instead a "respectable, but pallid" appointment. Congressional confirmation would be "a mere formality in a period of national emotional stress." In addition, the choice by the presidential candidate of his running mate was merely the contemporary political custom. It had not always been the custom in

the past and might not be the custom in the future. Putting it into a constitutional amendment would transform a passing practice into a permanent principle.⁷⁴

Nonetheless, Congress, with the support of the establishment press, the American Bar Association, and, alas, an assortment of scholars, voted overwhelmingly for the Twenty-fifth Amendment. The error was deepened in 1973 when Congress, cheering through the nomination of Gerald Ford, acquiesced in Nixon's interpretation of the amendment as making a Vice President thus nominated not a choice genuinely shared with Congress (as some in Congress had ingenuously supposed when voting for the amendment) but a unilateral presidential appointment subject to congressional confirmation.

XI

This removal of the Presidency from the elective principle is unnecessary, absurd, and incompatible with the constitutional traditions of American democracy. It is also not beyond recall. If the American people want to restore authentic legitimacy to their government, it is plain what must be done. We must adopt a constitutional amendment abolishing the Vice Presidency, an office that has become both more superfluous and more mischievous than Hamilton could have imagined when he wrote *Federalist* #68; and then provide for the succession in the spirit of Founding Fathers through a congressional statute reestablishing the principle of special presidential elections. This principle, announced by Madison in the Constitutional Convention, authorized by the Constitution, applied by the Second Congress in 1792 to the prospect of a double vacancy, reaffirmed in this context by the Forty-eighth Congress in 1886, reaffirmed again by Truman in 1945 (and actually again by Eisenhower

⁷⁴ Senate Judiciary Committee, *Selected Materials on the Twenty-fifth Amendment*, 67-68. Oddly Richard M. Nixon at the time took what superficially appeared to be a similar position, arguing that the selection of the Vice President "should reflect the elective, rather than the appointive process" so that "whoever held the office of President or Vice President would always be a man selected by the people directly or by their elected representatives, rather than a man who gained the office by appointment." On closer examination, however, the Nixon proposal was designed to strengthen the presidential domination of the process. His objection to placing the power of confirmation in Congress was that Congress might be controlled by the opposition party. Instead he proposed that the President make his recommendation to the reconvened electoral college, which "will always be made up of a membership a majority of which is the President's own party," and which would presumably serve as a rubber stamp, as in the quadrennial elections. This seems an emaciated view of an elective process. *Selected Materials*, 94, 97.

in 1965),⁷⁶ would, if the Vice Presidency were abolished, work fully as well for a single vacancy. More than this: it would repair the fatal errors of the Twelfth and Twenty-fifth Amendments and make it certain that the republic would never have to suffer, except as a *locum tenens*, a Chief Executive who, in the words of John Quincy Adams, was never thought of for that office by anybody.

The notion is occasionally advanced that intermediate elections would be unconstitutional. This can be ignored. Madison himself introduced language into the Constitution specifically to make such elections possible. The Second Congress, which contained men who had served five years before in the Constitutional Convention, authorized them by statute. Anything with such patriarchal blessing may be taken as safely constitutional.

Most of the objections to intermediate elections seem to spring primarily from a reverence for routine. The quadrennial rhythm, though not regarded as untouchable by the Founding Fathers, has evidently become sacrosanct for their descendants. Thus Lewis Powell (before, it must be said, his ascension to the Court, though he was still holding forth from a respectable eminence as president-elect of the American Bar Association) rejected the idea of intermediate elections as a "drastic departure from our historic system of quadrennial presidential elections."⁷⁶ One must regard such an objection, especially in view of the clear expectation of the Founding Fathers, as frivolous. If the specially elected President fills out his predecessor's term, the sacred cadence will not be disturbed. If not, then Congress could consider E. S. Corwin's proposal: if the vacancy occurs in the first half of the time, the special presidential election should take place at the time of the mid-term congressional election, thereby preserving the assumption that the terms of the new President, a new House and one-third of the Senate would start together.⁷⁷

⁷⁶ Eisenhower proposed that in case of a double vacancy there should be a return to the 1886 law, but the cabinet successor would be an "acting President" and "unless the next regularly scheduled presidential election should occur in less than 18 months, the Congress should provide for a special election of a President and Vice President to serve out the presidential term." He seemed to believe this would require a constitutional amendment. See Eisenhower, *Waging Peace*, p. 648. It is also of interest that, when the Louis Harris survey put the question in 1973 whether it would be a good idea to have a special election for President in 1974, its respondents favored such an election by 50 to 36 percent. *Washington Post*, January 7, 1974.

⁷⁷ Senate Judiciary Committee, *Selected Materials on the Twenty-fifth Amendment*, 124.

⁷⁷ Corwin, *The President*, p. 57. Corwin's proposal was directed to the possibility of a double vacancy, but it would serve as well for a single vacancy. If the President vanished after the mid-term election, however, it would risk leaving the country in the hands of a nonelected President for as long as twenty-six months.

There is also the objection, formulated by (among others) that thoughtful and lamented student of the Presidency, the late Clinton Rossiter, that "it would be simply too much turmoil and chaos and expense to have a special nationwide election."⁷⁸ But one wonders how carefully Professor Rossiter considered the proposition. This plainly was not the French experience with regard to the Presidency in 1974, nor indeed has it been the experience in parliamentary states where elections are held at unpredictable intervals. Are we to suppose that the French and Italians, for example, are so much more cool and imperturbable, so much more Anglo-Saxon, than the Americans?

It could of course be said that special elections in a time of national disarray might only deepen popular confusions. Would it have been a good idea to hold such elections after the wartime death of Franklin Roosevelt, after the murder of John Kennedy, after a successful presidential impeachment? Hubert Humphrey has made the point that special elections in wartime, for example, might cause dangerous delay and irrelevant bickering at a time when the nation could afford neither.⁷⁹ No doubt such elections would test the poise and stamina of American democracy. Yet what is the gain in undue protectiveness? The same argument can be made against holding presidential elections in wartime at all. The elections of 1864 and 1944 were held in the midst of the two greatest crises of our history. They caused much irrelevant bickering. Had Lincoln and Roosevelt lost, there would have been an embarrassing interlude of lame-duckery and interregnum. But the nation survived these elections without undue trauma. Democracy is a system for foul weather as well as for fair. Though a special election in a time of stress might conceivably demoralize the country, it might equally help it to resolve its confusions and restore its nerve. At the very least it would reaffirm the principle of self-government and place in the White House a man chosen by the people to be their President rather than, as the present system has done, a man chosen by a President who himself was forced to resign to avoid the virtual certainty of being then impeached and convicted for high crimes and misdemeanors.

XII

If the principle be accepted—the principle that, if a President vanishes, it is better for the people to elect a new President than to endure a Vice

⁷⁸ Professor Rossiter's reference, however, was to the proposal of a special election to choose a new Vice President. He might have thought differently if the purpose was to choose a new President. See Senate Judiciary Committee, *Selected Materials*, 136.

⁷⁹ "On the Threshold of the White House," *Atlantic Monthly*, July 1974.

President who was never voted on for that office, who became Vice President for reasons other than his presidential qualifications, and who may very well have been badly damaged by his vice presidential experience—the problem is one of working out the mechanics of the intermediate election. This is not easy but far from impossible. The great problem is that there can be no gap, no chink, in the continuity of the Presidency. “The President under our system, like the king in a monarchy,” said Martin Van Buren, “never dies.”⁸⁰ It would require up to three months to set up a special election. In the meantime the show must go on. If the Vice Presidency were abolished, who would act as President until the people have a chance to speak?

The historical preference, except for 1886–1947, has been for the President *pro tem* of the Senate (Committee of Detail in the Constitutional Convention, Succession Act of 1792) or the Speaker of the House (Succession Act of 1947). But given the regularity with which in recent years one party has controlled Congress and the other the executive branch, this formula risks an unvoted change in party control of the White House and in the whole direction of government. Such a change would be a graver infringement of the democratic principle than the provisional service of an appointed officer as acting President. The confusion would be even greater in the event of temporary presidential disability, in which case the Presidency might shuttle back and forth between the two parties in a period of a few months.

Fidelity to the results of the last election and to the requirements of continuity in policy creates, it seems to me, an irresistible argument for returning the line of provisional descent to the executive branch. A convenient way would be simply to make the Secretary of State acting President for ninety days. If the Secretary of State is foreign-born or under thirty-five or has some other disqualifying eccentricity, then the Secretary of the Treasury could be the automatic successor, and so on down the 1886 list of succession.⁸¹

Then, as soon as possible, let the people make their choice (unless the

⁸⁰ Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* (New York, 1867), p. 290.

⁸¹ In an earlier version of this argument, in the *Atlantic Monthly* (May 1974), I proposed devolution to the Secretary of State only long enough to permit the choice of an acting President from the cabinet. The reason for this was that the Secretary of State might not be the member of the cabinet best qualified to serve as acting President. It then seemed to me that the cabinet itself might well select the acting President, using the corporate authority already bestowed on it by the Twenty-fifth Amendment, which gives a majority of the cabinet, plus the Vice President, power to declare the President *non compos mentis*. An alternative would have been to permit Congress to select an acting President from the cabinet—a device that would preserve continuity, spread re-

President vanishes in his last year in office, in which case it might be simpler to let the acting President serve out the term). Some have argued that a national election is too hard to organize; therefore Congress should choose the person to serve the remainder of the term. But this would give Congress the right, limited as it might be, to elect a President—a right the Founding Fathers carefully denied Congress and reserved for the voters. If it be said that ninety days is not time enough to organize an election, let us recall that the French allow themselves only thirty-five days, and who will say that the French are better organizers than the Americans? This would only be an election to fill out a term and thus would not require the elaborate foreplay of the quadrennial orgy. Candidates can be established with astonishing speed in the electronic age. Let the national committees, which have become increasingly representative bodies under the new party rules, canvass opinion and make the nominations. Short campaigns, federally financed, would be a blessing, infinitely appreciated by the electorate. Perhaps their brevity and their economy might have a salutary impact on the quadrennial elections, which in recent years have stretched out to intolerable length and swelled to intolerable expense.

In doing this, we would not be departing from the spirit and intent of the Founding Fathers. Quite the contrary: we would be reaffirming their view—and what view could be more sensible for a self-governing democracy?—that the Chief Magistrate of the United States must, except for the briefest periods, be a person elected to that office by the people. “We have only to operate the Constitution as the men who wrote it thought it should operate,” Walter Lippmann wrote in arguing for inter-

sponsibility, afford a choice of sorts, and perhaps stimulate Presidents to choose better cabinets. I agree, however, with Richard Neustadt (in the *Atlantic Monthly*, July 1974) that the temporary succession should be automatic within the cabinet.

I still think there is merit in this more complex approach; but on balance I have come to believe that two acting Presidents in a period of three months before a new President is chosen would be too cumbersome and confusing. I therefore now favor the simpler system outlined in the text. I have also dropped the proposal that the acting President be declared ineligible as a candidate in the special election, this in order to avoid the advantage created by the inevitable rush of sympathy to the new person in the White House. Demetrius Sakellarios has reminded me that democracy implies as few restrictions as possible on a people's right to choose its rulers.

I have not discussed the issue of presidential inability—an issue that may have received attention out of all proportion to its importance. In any case, the Vice President is not indispensable to a solution of the inability issue. The majority of the cabinet, when making its determination of presidential inability as authorized in the Twenty-fifth Amendment, could simply designate one of their own number to serve as acting President until the inability is removed.

mediate elections in 1946. "If we are the prisoners of a rigid system today, the fault lies not in the Constitution but in our own habits which have only rather recently become so hard and so fixed."⁸² *

⁸² Lippmann, "Wrong Answer, Right Question."

* This article has been adapted from a new appendix prepared for the forthcoming paperback edition of *The Imperial Presidency*.

STATEMENT OF JAMES MCGREGOR BURNS, WILLIAMS COLLEGE

Mr. BURNS. Mr. Chairman, I am particularly happy, to be here today, to be associated with Arthur Schlesinger—in whatever disagreement with him, I may be—partly because I think he has done one of the best, short studies of the Vice Presidency in this article in the *Political Science Quarterly*.

It is also a pleasure to be addressing a subcommittee chairman who has written the liveliest study of the Vice Presidency, Mr. Chairman, your book, "One Heartbeat Away," makes you the only American who has made the Vice Presidency interesting, and that is a feat.

Senator BAYH. If not salable.

Mr. BURNS. There is a curious reversal in roles here today because it will be my argument that Professor Schlesinger is acting precisely as the kind of political scientist that he ordinarily frowns on, and I will be seeking to act as an historian who would remind my fellow historian that history suggests we are in the process of constant change and that the Vice Presidency should not be evaluated simply on the basis of what has happened in the past but of what might happen in the future.

I would associate myself with the remarks of the Assistant Attorney General, first of all, in that I believe that the system does deserve more opportunity to prove itself.

Professor Schlesinger would give it one more opportunity. He would let the future of the 25th amendment depend largely on how effectively Vice President Rockefeller fills his role. I think the amendment might deserve somewhat more substantial basis for proof than that one Vice Presidency can give it.

Our experience thus far with the two nominations we have had indicate that there is a potential in this amendment that perhaps was not thoroughly understood even by the authors of the amendment, that is, the possibility that a President under fire—this is the kind of President that Mr. Schlesinger is particularly concerned about—would use the choice of a Vice President as a means to try to correct the defects of the administration that are becoming particularly evident at that time.

I am thinking, obviously, of the nomination of Mr. Ford which, whatever one may say about Gerald Ford, obviously was designed in part to compensate for the serious failures and indeed corruption in the Nixon administration. This was an effort to "balance the ticket", as it were, in a very different way.

It seems to me that President Ford shows every indication of living up to at least that single criterion. By the same token, President Ford's nomination of Mr. Rockefeller was an obvious effort to bring the kind of administrative experience and the understanding of economic affairs that Governor Rockefeller had shown in New York State—to bring that kind of experience and background into the administration.

This experience, it seems to me, shows there is a potential in this amendment in that Presidents, again, can balance their administration in order to compensate for some of the failures that inevitably will develop in virtually any Presidential administration.

The Vice Presidency has been mercilessly kicked around as an office. There is a marvelous collection of cracks about it that I won't inflict

on you, mainly because we have heard them all. I think something again should be said for it in terms of the potential in the office.

First of all, note the recent tendency in American history for men, and I hope someday women, of Presidential talent to accept the Vice Presidential nomination—this was not true in most of our history. The fact that men of the caliber—in the Democratic party—of Henry Wallace, Harry Truman, Alben Barkley, Lyndon Johnson, and Hubert Humphrey not only accepted this office but keenly desired it, attests to the importance that at least the practical politicians attribute to the office, even if the academics are somewhat more critical.

While the roster, perhaps, is not quite so illustrious on the Republican side, we do have the examples of Theodore Roosevelt, of Calvin Coolidge—who was at least an experienced politician—of Henry Cabot Lodge and of others.

Second, there is public pressure for abler candidates. The American people are now interested in the Vice Presidency. They know it is important; they are concerned about who is chosen. A party that picks a poor, inappropriate Vice Presidential candidate is going to suffer to some degree at the polls.

I think this will be increasingly the case as time passes. The enormous interest in the Eagleton episode attests again to the importance to which the press and the American people assign to this office.

Another argument for an office that admittedly is awkward and sometimes ludicrous, even impotent, is one that is increasingly relevant—the flexibility of the Vice Presidency, partly because it is unstructured, partly because it is an essentially weak office.

The person in the Vice Presidency, the incumbent Vice President, is available to a President on the basis of his different talents and on the basis of what the administration may need at that particular moment. If he has a particular executive competence as Vice President Rockefeller is reputed to have, he can fill that role. If he has had particularly a legislative background, if he is especially adept politically, as Vice President Barkley was, he can fill that role for the administration.

If he has none of those abilities, he can always certainly fulfill some ceremonial role and take some of the burden off the President in that area. Much obviously, depends on the President's needs and one cannot be at all dogmatic about this.

Certain trends are quite evident. One is the decline of the balanced ticket in the old sense. I was speaking earlier of a new type of balanced ticket. The old kind of balanced ticket, of course, was the kind of ticket where the man who had just been nominated for President chose a running mate who would hopefully bring him votes from an opposite wing of the party, whether regional or ideological or perhaps even in personality terms.

So, that if that ticket were elected—of course, both parties indulged in this practice—there would be a guaranteed source of opposition to the President virtually inside his administration. Well, because of fundamental political trends in this century, we have departed, probably for good, from that old concept of the balanced ticket.

The Vice Presidency, indeed, has become so visible and the office in its own way so important—certainly in its negative and obstructive

tionist character—that recently nominated President simply could not afford to choose somebody from an opposite wing of the party.

Hence, I think we will see increasingly the rise of what I have called the first type of balanced ticket, the ticket in which the two candidates are essentially agreed on the main thrust, the main posture of their party and policy and ideology. If that does continue to be the trend, this will work a significant change in the role of the Vice President as we know him today, that is, a Vice Presidency with the kind of function and role that he presently exercises.

Now, I expect that there always would be some tensions. I think one of the most valuable aspects of Professor Schlesinger's work is to indicate the extent to which it is a difficult office, it is an unsatisfactory office for the incumbent and an office on which the President looks with some trepidation and nervousness.

I expect that even with this kind of balanced ticket, there would still be some tension inevitably between the President and the Vice President if only because of the psychological implications of the famous heartbeat.

Inevitably, there will be some differences, the running mate will not have come from exactly the same party background as the head of the ticket. To my mind, this is all to the good. I would urge this particularly to the attention of Professor Schlesinger because he more effectively than I think anyone else in recent years has drawn our attention to the problem of presidential power in his book "The Imperial Presidency."

I should think he—and I hope he will comment—I am sure he will comment on this—I should think he might welcome the prospect that built into the Presidency and possibly with increasing potency as the years go by, there will be a constitutional officer who has a legitimate place in the administration, however anomalous and awkward, a person who cannot be fired out of hand, a person who is established there, a person whose views receive some attention from the press.

If we are really concerned about building around the Presidency certain restrictions and confinements that would not fundamentally hamper him in the exercise of Presidential authority, it seems to me that a somewhat independent Vice President could serve that role.

On the question of simple abolition of the Vice Presidency in terms of how we would resolve the problem of succession, I would again associate myself largely to save time, with the remarks of the Assistant Attorney General. I would not agree with his time schedule. I don't think we need 9 months to elect a President. I think some concession could be made in a special election. I don't think we could telescope it to the degree that Professor Schlesinger has suggested.

We do have the Presidential system. We do have this long rather confused system of choosing—first of nominating and then electing—Presidents. We do feel it is important for a man who is going to occupy that office to subject himself to a series of very demanding tests in States where that candidate will be subjected to the close scrutiny of the voters in all parts of the country.

I see no way to reduce that time to a period of less than 4 or 5 months. There must be, under the present system—unless we change the system—the long process of choosing delegates to national conventions,

the long process of the prenomination campaign, the convention itself and then the election process. Then we would have to allow for at least a month, if not more, for the transition period after the election, that is, a period before the new President could really take hold.

So, I think this is a serious failing in the proposal simply to abolish the Vice Presidency, and I see no easy solution to this. Professor Schlesinger in his article in the *Political Science Quarterly* suggested that perhaps the party national committee could be used to expedite the process, and thus we would not have to go through the full-fledged convention nominating process.

The national committee of the two parties is still, even in the Democratic party where there has been extensive reform, it is still not a representative body, it does not represent the people as fully, say as Congress does. There are many archaic arrangements in the choosing of national committee members. There is an elitist aspect to this, and it will be particularly awkward for a national committee chosen on the standard, political grounds suddenly to be confronted with this tremendously important problem of choosing a Presidential candidate.

The suggestion, however, does raise interesting possibilities. For example, the possibility that if there were further reform in the party system, perhaps there could be a party institutions, party agencies, party committees, party conferences in being, in continuous existence, that could handle an assignment as grave as this assignment would be.

If, for example, we had national party conferences, where at the beginning of the year delegates to a national conference of a size not much less than a national convention, were chosen, and if they existed as delegates recently chosen by the people, and if they had been chosen with the understanding that they might be called on to deal with this serious problem, then I could see possibilities of so rearranging our political system that a speedier special election could be conducted, and that would change my hopes for the kind of drastic change that Professor Schlesinger has suggested.

I make this point, Mr. Chairman, in relation to a broader consideration with which I would like to conclude. I would like to compliment this subcommittee for having handled a series of very difficult problems over the past years such as the one we are considering today.

What concerns me about the way in which this has been done is the fact this subcommittee has had to deal with these matters essentially in an ad hoc, somewhat episodic, somewhat fragmentary, and certainly incremental basis. That is, you have considered questions as they have come up, which is, of course, perfectly logical.

The problem is that it is impossible to pick up any major aspect of the American system for study and reform without looking at the rest of the system. This was the genius of the Founding Fathers—that they had to look on the system in its entirety, and the genius of the Constitution in part, is the way it does hang together, the way in which the major provisions of the Constitution were drawn up in relation to other provisions.

The Presidency was made what it was because the framers understood what kind of a Congress they were establishing, and so on. This is true of the kind of problem, it seems to me, that we face in considering an office that is as relatively impotent as the Vice Presidency.

We cannot consider the Vice Presidency, it seems to me, unless we also look at the role of the Senate. We have had a dramatic example

this week of the potential role of a Vice President in the deliberations of the Senate. I have a feeling that as the pressure on Government increases in future years that the system will become even more poised and balanced within itself.

This question of the Vice Presidency also relates to the question, what kind of Presidency do we want? It relates to the question of the kind of nominating and election system that we have, as I have just suggested. For example, on Professor Schlesinger's suggestion of a national presidential primary, that would certainly expedite a special election. I happen to oppose a national Presidential primary but I would grant that that would be a way of expediting the conduct of a special election.

The question of the Vice Presidency, as I suggested, relates to what kind of party system we have. It relates to the question specifically of whether the Government might finance the party system instead of simply financing candidates. The great reform we have seen in campaign spending and campaign regulation has a very serious side to it in that it may increase instead of curbing the excessive private enterprise we see in the conduct of American electoral politics.

I would submit that that is the kind of consideration that this subcommittee might study as it looks at this question of the Vice Presidency in a broader context. What I am suggesting, Mr. Chairman, is that there is a question of priority here.

I share many of Professor Schlesinger's concerns. I simply am not as concerned as he is about the Vice Presidency. Compared to the other grave problems facing the United States, the Vice Presidency, to my mind, is a very low priority. I am much more concerned, Mr. Chairman, about the reform of the Senate.

I think the Senate, as long as it retains a means of frustrating majority will, is a grotesque example for this country and for the rest of the world, an example of a democracy that cannot govern by the very basic principle of majority rule. I would put that problem higher up in my list of priorities than the Vice Presidency.

As I suggested, some of these other questions—the kind of Presidency we want, the kind of party system we want, the kind of electoral system we want—also have higher priority on your attention at this time, and emphasizes the need of considering these questions in context.

I make a special point of this last set of suggestions because we are entering not only into a Bicentennial year, we are entering into what has well been called a bicentennial era in which we will be celebrating the Declaration of Independence next year and we will be celebrating the Bicentennial of the drawing up of the Constitution in 1987.

A prominent group of Americans very recently has suggested that we should look at this Bicentennial period as a combination of bicentennials, and indeed, devote the period between 1976 and 1987 to a consideration of the American system. They propose that we consider the renewal of our system.

I would propose something perhaps a bit more drastic—that we use that period as a time for reassessment of our whole system in the same mood and with the same comprehensiveness that the Founding Fathers demonstrated in their original drawing up of the Constitution.

Because this subcommittee has established such a notable record in dealing with these problems seriatim, I would hope very much that

this subcommittee could consider a combination of these problems not only during that bicentennial era but beginning now. I think the hour is late and there is a great deal of work to be done.

Thank you.

Senator BAYH. Thank you, Professor Burns. I am not certain where to begin here.

Mr. SCHLESINGER. I would be happy to comment on Jim's statement, if that would help.

Senator BAYH. Well, I have no objection to you doing that. But then, I suppose, he would be permitted the right to comment on your comments.

Mr. SCHLESINGER. Unless you have some questions.

Senator BAYH. Why don't you briefly comment on his statements and Dr. Burns may want to rebut the rebuttal. I am sure you gentlemen can work this out.

Mr. SCHLESINGER. We are interested in hearing your comments on what we both said.

Senator BAYH. I am not too sure that would be as beneficial to the legislative process as having yours.

Mr. BURNS. When I was originally invited to appear here, my response to counsel was that my idea of a Senate hearing of this sort consisted not of academics coming down to inflict their views on public officers but in having a dialogue. I knew both Professor Schlesinger and I looked on you and other members of the subcommittee as people who were deeply involved in this. I think we would be interested in not only the usual kind of exploratory question, but in your own views on this matter.

I think part of my statement was designed to elicit response very much from you as well as from Professor Schlesinger.

Senator BAYH. Why don't we develop that kind of dialogue. I think that both of you qualify, let me say in the finest use of the word, as academicians who have shown by your interest and your practical experience, an ability to breathe a great deal of very practical experience and applicability to your academic views.

I say that not to be over complimentary but I think the record will show that. I was almost tempted to interrupt both of your statements. At times we have had rather significant numbers of students here sitting on the floor, and then they were leaving and going on to the next commitments on their schedule, which is very understandable.

I don't believe they will find any place in Washington right now, two men who are better qualified to bring a great deal of perception to an issue that is very much before us. I for one, appreciate that.

Dr. Burns, your suggestion, perhaps we ought to discuss and consider some of the broader questions of constitutional reform and use our bicentennial as a vehicle and platform, makes a great deal of sense. I think that is very much in line with what Professor Schlesinger was suggesting in looking at the Vice Presidency differently.

I think the assessment that we have tended in the past to react rather than to act, is an accurate assessment, either to Supreme Court decisions or acts of tragic fate. I must say I think perhaps a comment which I hope will not be considered as an excuse, but rather a fact of life that whenever you are charged with the responsibility of a legislative

vehicle which must receive two-thirds support from both Houses, Congress and three-fourths of the State legislature.

It is quite a burden to carry. Just the normal kind of considered judgment, is very difficult to promote that kind of support. I should be but I have been trying and I don't know whether we ought to get into this or not, but one of the things we have been trying to do positively before the fact is to do something about the electoral college system, before we are confronted with another circumstance like the Presidency being given to one who is not the popular choice of the people.

We have had that happen a couple of three times. Frankly, I would like to see that done differently. It is awfully difficult to sustain interest in that. There was a much greater degree of intensity when we finally moved a popular-vote measure through the House and came very close to getting it moved to the Senate, only to have it throttled by the imperfection in our senatorial rules that you brought to our attention.

The interest in 1970 was great because one candidate for the Presidency came within about 71,000 popular votes of having the opportunity to dictate who the Presidency was going to be for the major party candidates. If there had been that small a change in three States, 71,000 I think it was, and Governor Wallace with those 36, I think, electoral votes, he could have determined the Presidency, which is not, I don't think, the American people are prepared for that. That is neither here nor there.

Mr. BURNS. Have you considered the possibility of simultaneously studying a collection of what I would call housekeeping constitutional amendments, which would be designed to deal with some of these very tricky, somewhat controversial questions. I am thinking particularly of the problem you just raised.

If we cannot amend our Constitution to establish direct popular election, and I support your stand for that kind of change, would it be possible to take out this Russian roulette element and at least provide for a system where some person or small group of electors could not plunge us into a very serious constitutional crisis. Could that be combined with such other so-called housekeeping amendments as the timing of elections, the question of a 4-year term for Members of the House of Representatives. I realize that that is more controversial, but I expect that we have more Governors with 4-year terms, we will find more popular acceptance of the 4-year term for Congressmen. There is also the item-veto question.

Would it be possible, without getting now into the merits and demerits of these, would it be possible to group together at least at a minimum level, a combination of amendments that might be considered by State legislatures and by Congress at the same time so that we could at least deal with some of these messy and tricky parts of our Constitution even dangerous parts of our constitutional system today?

Senator BAYH. I am certainly willing to receive that. I am glad to have either one of you gentlemen's ideas as to where we should start on that list. My experience has led me to believe, over a relatively short period of time as chairman of this subcommittee, that in starting with a collection of different ideas, one tends to pick up the opponents of the individual ideas more quickly than the support.

In looking for a two-thirds, we did not deal with some of the obvious imperfections that have been brought to our attention. The next step, what do you do when a Vice President is disabled under the disability provision.

We thought about that. However, we found that whenever we added another idea, we lost some of the necessary two-third votes. I am one, who I hope will never live long enough to lose my ideals.

In a legislative body you are forced to also infuse a good deal of pragmatism as to how you move closer to your ideals. When talking about a two-third vote, it is a tough road. The idea of looking at these and using the Bicentennial as a vehicle, can begin to develop some popular support for the constitutional document for the next 200 years.

That appeals to me. The idea was proposed by some that we have a new constitutional convention. That concerns me because I think there are some very basic and fundamental ingredients in that Constitution, particularly in the Bill of Rights, which are indispensable.

Whether we should subject those to some of the frustrations of the moment, was one of the battles of the prior amendment. I fear what would happen with a new constitutional concept; we would end up with less than the two-thirds votes necessary.

Mr. SCHLESINGER. I think it is a terrible idea. The Articles of Confederation had their obvious defects, and there was need for a Constitutional Convention in 1787; but there are no such comparable genetics in the Constitution, and there is no such need for a convention.

I am interested in Jim's proposal about the way we should spend the years, 1976 to 1987. But, the way we are going now in our public policy, I fear we are more likely to reproduce the chaos of 200 years ago that led to the Constitution.

Mr. BURNS. Let me say I was not proposing a new constitutional convention, nor do I favor it. I do think it is unfortunate that a way of amending the Constitution that was laid out by the framers is now considered so risky in terms of current attitudes toward free speech and the like, that we do not dare hold a constitutional convention.

I think that is a realistic fact that we do not dare do it, and I think that is highly unfortunate.

Senator BAYH. It is highly unfortunate. But it also speaks well for the wisdom of our forefathers, that we should protect some of the basic and inalienable rights from other generations who may object to the motion that would cause them not to realize the importance of them.

Mr. BURNS. If they were really wise, they would not have allowed this method of constitutional convention at all. They didn't evidently think of that. We might be able to conduct a future constitutional convention, and it is too bad that their faith in us is not at present vindicated.

Senator BAYH. Perhaps that was a very human feeling or lack of faith for themselves. They were experimenting here, fearing that their wisdom might not hold up through the ages.

We had two subject matters that have been brought forward here. It is relatively easy to find issues, both of which either of you could write a doctoral thesis on.

One is the wisdom of the 25th amendment, whether it can be approved or whether it can be abolished. I suppose the more immediate question is the relevancy of the Vice President and whether that officer

has a role. Recognizing that, why don't I pose questions and let you gentlemen answer them in any way you see fit; cutting my ideas down to size; perfecting them for your own differences of opinion.

What we are really talking about is the broader subject here, aren't we? Either one of those two components will fit into it, of Presidential power—how it is disbursed; who disburses it; and who are the disbursers and so forth?

Traditionally, the electoral process, the choosing of people in the final sense of the word, has been a matter of constitutional determination by the Congress and the several States.

The nominating process, at least recently, has been a matter of statute, party, and regulation by State law and has not been put into the Constitution.

Is that a fair assessment of where we are now in looking at any changes that might be made, or should we consider that?

MR. BURNS. I would say that is a fair assessment. We have a national political system that is actually regulated by a congeries of States, localities, local and State parties, as well as by Congress, and by the national party.

I think one of the questions this country has to face is whether it wants to develop a national political system governed by national legislation out of this congeries of regional and local regulations.

MR. SCHLESINGER. I should perhaps clarify one point. I did not mean to suggest that action on the 25 amendment should await the success of the Ford-Rockefeller relationship, and their capacity to make something out of the Vice Presidency.

I meant to correct this rather that his really had to do with the question of the abolition of the Vice Presidency. I do believe the section 2 of the 25th amendment is in error. I would be in favor of its deletion, quite regardless of whether Ford and Rockefeller can make anything out of the Vice Presidency or not.

As for the question Senator Bayh just brought up. I would like to discuss it, in connection with Jim Burns' argument that the Vice Presidency, however futile an office it may have been in the past, may in the future become a means of constraint on the Presidency.

Professor Burns suggests that an independent Vice Presidency might be a valuable place from which to exercise such restraint. Now I am extremely dubious that the Vice Presidency is going to become more effective in the future than it has in the past.

We often hear that the Vice President can "balance" the President—as if the views of the Vice President could in some real sense balance the views of the President. But we all know Presidents never pay any attention to the views of the Vice President.

The modern Vice President quickly jettisons his own views or confides them only to the bosom of his wife and does everything he can to prove his loyalty by endorsing the views of the President.

Far from Vice Presidents becoming more independent in recent years, they have become less independent. Some of the more venerable in this room among us may remember when Charles Gates Dawes was Vice President of the United States and so strongly disagreed with what President Coolidge was doing on farm legislation that he lobbied against his own administration on the Hill.

John Nance Garner so disapproved of aspects of the New Deal that he left Washington and stayed away for months in Texas and in fact was hardly in Washington during the last 2 years of his Vice Presidency.

In more recent days we have seen men who, before they became Vice Presidents, had shown notable independence of mind as Senators or Governors, but who, once they became and Vice President, seemed to interpret their responsibility not at all as that of restraining the Vice President but as more a setting forth the President's views in an even more extravagant and uninhibited way than the President himself had done.

I refer, for example, to Vice President Rockefeller's speech in New Jersey a couple of weeks ago. It put certain tendencies in the administration's view in a more dramatic and exaggerated way than the President had put them himself.

The Vice President, it is true, cannot be fired but he can be exiled, and he almost always is because Presidents don't like Vice Presidents. They don't like Vice Presidents because they know the Vice President has only one job: to wait for the President to die. This is hardly the basis for long-lasting and enduring friendship. That is why Presidents like to get Vice Presidents out of the country.

Their views receive no attention from the Presidency in the past and I doubt very much if that is going to change. I really think that the notion of the Vice President as a constraint on the Presidency is a mirage.

I am also perplexed, Jim, by your reference to the Vice Presidency as an "important" office.

Apart from its role in connection with the succession, it seems to me an office of no importance at all, I might add that in connection with the idea of the Vice President as a constraint on the Executive, everyone seems to forget the constitutional point which has been clear within our own time—both Truman and Eisenhower made it in their memoirs—and that is the Vice President is not a member of the executive branch and is not subject to direction by the President.

Senator BAYH. On that point, do either of you gentlemen know of, in modern history, a Vice President who for very long has assumed any initiative on his own, despite Truman's and Eisenhower's memoirs, and the contrary notwithstanding, from a practical standpoint hasn't the Vice President either done the bidding of the President publicly, or again, been exiled to Texas?

Mr. SCHLESINGER. There are two different problems there. I think what Truman and Eisenhower had in mind was not the Vice President defending the Presidential programs in public, but the extent to which he could be given serious executive responsibility within the executive branch.

I notice Governor Rockefeller has been made chairman of the Domestic Council—whatever that may mean. No one seems to have raised the question of how that relates to the constitutional responsibilities of the Vice President.

Franklin Roosevelt made Henry Wallace chairman of the Board of Economic Welfare, but that was an agency that was based on congressional statute and therefore, was in a different category from those based purely on Executive order, and not based on statute.

Mr. BURNS. I think the one problem here, Mr. Chairman, is a problem of historical understanding. The Vice Presidency is such an easily criticized office, such an anonymous office, that I think one would have to explore much more systematically than we have done how much influence the Vice Presidents actually have.

Obviously they do not have a great deal.

My main position is this is an office still of potential importance or more precisely, that it would be well to let this amendment continue for some time to see if under the press of crisis under the kinds of pressures brought on the Presidency, whether it is an office that can be made serviceable to the President in view of the kinds of basic political trends that I see developing in this country.

Mr. SCHELSINGER. We have had 200 years to make something of this office and we have not succeeded in doing so. We have had moments of much greater crisis in our history than we have today. I don't see why you expect—how many years are you going to give them? A third century before you are satisfied that nothing can be made of it?

Mr. BURNS. I think we should keep in mind that history is speeding up, that, things are happening in our system that are hardly expected, like, the reforms in Congress of last fall. They are happening. There are tendencies of party realignment; we are now trying to establish some constraints around the President. This is a time of ferment. It is going to be a time of change.

To answer your question, yes, it might be well to give the country a generation of experience with the 25th amendment, particularly during this period of reassessment that I trust will be lying before us.

Senator BAYH. Let me ask you one question.

Do we really want to happen what you are suggesting may happen? If it doesn't does that necessarily mean the Vice President can play an important role?

You mentioned you thought it was possible. I thought the response of Mr. Schlesinger was based on the fact that you still have hope of development of an independent Vice Presidency.

I haven't given a whole lot of thought to the use of Presidential powers, but it might be divisive. I recall studying the 25th amendment; thinking what happened historically. It was not really the finest hour of American history when we had Presidents and Vice Presidents who did come from different branches of the party. We did have a tug of war going on in the executive branch.

What we want is a strong Executive in which the Vice President is used by the President. That is what concerns me about some of the ideas that have been made for filling Vice Presidential vacancies. Some people say let Congress choose the Vice President, or we will have a special election for the Vice President.

If you do that you increase the chance of somebody of a different philosophy and a different party serving as a Vice President; thus a President will not use them. Rather than looking at the role of the Vice President to develop as an independent public voice, we should hope for the development of the relationship between the President and the Vice President. The Vice President could be used as an Assistant President and with confidence.

Mr. BURNS. So much depends on what we mean by dependence. Obviously what I was talking about was neither utter dependence—as

Mr. Schlesinger has correctly said we have seen in the Vice President all too much of that—or the kind of obstructionism that has resulted in the kind of situations which you mentioned earlier.

What we badly need in the Vice Presidency, in my view is a senior statesman or stateswoman, no matter how old, who is not wholly dependent on the President, who has a national constituency of his or her own.

One of the reasons Cabinet members individually and collectively do not exercise the kind of restraint on the President many of us would like them to exercise is that they are obviously representing regions, special interests, or special kinds of expertise.

What we so conspicuously lack in our governmental system is something the British have made very good use of and that is the senior party leader, often the Cabinet member without portfolio. That is the best way I could paint my picture of the ideal Vice President, as a person who does have his or her own standing in the party, not representing a different wing or ideology, but somebody—in the Democratic Party for example—who would represent the kind of urban liberalism that the party now does represent, but a man who would still have a somewhat different perspective, a man who counsels would be welcomed, a man who not only could not be fired constitutionally but a man whom the President would respect because he would have some kind of national constituency. He did have some standing in his party.

Now all this in turn depends on changes in the party system, which is why I cannot look on the Vice President out of that context; I think it would be too bad for us to experiment with more institutional change in the Vice Presidency while the party system is changing around us which in turn might have profound implications for the Vice-Presidency as well as for the Presidency.

It is that kind of office that I think not only is possible but that various political pressures and demands on our Government system may well produce.

This would be a Vice President that the President would respect because he would need that kind of counsel, and he would have a standing in the Cabinet because he did have that kind of relative independent constituency.

MR. SCHLESINGER. This seems to be an interesting proposal if I may comment. This would be an argument for having an elder statesman as Vice President; someone like Averell Harriman for the Democrats or John J. McCloy for the Republicans, a wise man with experience who does have standing in the country and whom the President could not ignore as easily as he could ignore others. But this idea seems at war with the only real function of the Vice Presidency. For people of that quality and that eminence are going to be men who cannot fulfill the needs for succession because no one wants a man in his seventies or eighties as President of the United States.

I think the need for that kind of senior experience and advice has to be filled by electing Presidents who are prepared to surround themselves with strong men in their Cabinets.

I think much of the problem of the restraint of the President depends on the restoration of the Cabinet; and I think President Ford, whatever defects one may see in his policies, deserves great credit for the high quality of the people he has chosen to the Cabinet, transform-

ing it from the series of faceless clerks which it pretty much was in the Nixon years.

Senator BAYH. Here again, this is a personal relationship of the Presidency. I would assume if the President really wanted to do the job right, he would want to surround himself by Cabinet officials. He would want a Vice President. He would want some people on his personal staff who would say: Wait a minute, don't go out and hold a press conference, but who would be continually testing and continually developing the kind of friendly adversarial role.

But from what I have read, your book, those you have written, is there something about that office as well intentioned as a person may be who goes in there, with President Ford now putting strong people in there, that timely begin to exercise what would seem to be a very interesting role of independence, that the Presidency begins not to understand that important role? Are we expecting something that historically has never happened?

Mr. SCHLESINGER. No, it has happened. I think Presidents until recent years have recognized that they have certain accountability to the executive branch of the Government and to the political party. I agree with Jim that the decay of the political parties has been one factor in the aggrandizement of the Presidency—although I may wonder about the methods he has proposed to arrest the decay of the political party—but this gets back to the electoral process in general.

One of the great mysteries, I suppose, is why the American people twice elected to the Presidency a man who flinched from face-to-face confrontation with anybody except a small group of praetorian guards who carefully understood his weaknesses and carefully played upon them—preyed upon them too. I do think there may be structural restraints on the overweening Presidency—more attention to the party, more attention to the Cabinet, and a more discriminating senatorial role in the confirmation of Cabinet members instead of assuming that unless the man was a proven embezzler the President should be granted his choice.

But these are more direct means of getting at the problems than working through the Vice Presidency. The Vice Presidency has never played that role in the past. I don't see structurally and politically how it would be likely to play it in the future.

Senator BAYH. Let me ask a question. If either of you want to respond or pass the observation to the other you may do so. Let me ask you to comment on the Johnson and Humphrey Vice Presidency. Here you are talking about two very strong men who appeared to have been frustrated in those roles but who also appeared at least to have been given some responsibility. The Vice President's role is nowhere near like the President, but did they indeed in their roles make a contribution? I can't think just because the Vice President is an Indian that he may not be performing a full service for the country and for the President.

The space agency responsibilities, the civil rights responsibilities, just to name a couple, what about that?

Mr. SCHLESINGER. My impression is that every thing that Vice Presidents have done is make work. The only Vice President who has ever been given any operating responsibility was when Roosevelt

made Wallace the chairman of the Board of Economic Welfare, and perhaps Johnson's chairmanship of the Commission on Equal Opportunity or the Space Agency.

When there are foreign travels or make work jobs, it is really because Presidents are not only rendered unhappy by the constant reminder of their own mortality but they like to keep Vice Presidents happy and foreign travel is an easy way to do it.

Senator BAYH. Make-work, or maybe not. If either one of you gentlemen were President, I don't think you would send a Vice President half way around the world unless you thought it was not going to harm them.

Mr. SCHLESINGER. My impression is that when a President sends a Vice President on foreign travel, it is not to do anything the Ambassador or the Secretary of State could not do just as effectively but for symbolic purposes, when it is necessary to show the flag in some dramatic way, as when Kennedy sent Johnson to Berlin at the time of the crisis in 1961.

But that was a matter of public symbobism rather than a matter of the Vice President doing something within the Government.

Mr. BURNS. May I comment on the present potential of Government rather than the historical record? One reason that Vice Presidents have been treated as cavalierly as Professor Schlesinger has been suggesting is the concept of Presidential strength, the assumption by the American people that a President should be masterful, he should be domineering, he should be in charge of the ship of state.

I wrote a book some years ago in which I contended that among the other potential controls around the President that were disappearing the Vice Presidency was, too. The Vice Presidency had simply been drawn into the orbit of the Presidency. I think that is what did happen under recent Presidents. But here I think we should be sensitive to possibilities in the future.

One thing that has happened—there has been a reaction against Presidential power. I think there has been some reaction against the simple manipulative and exploitative use of or for that matter, the ignoring of the Vice President.

I think we are entering an era, with the Rockefeller example, and partly because a President like President Ford is aware of this problem, when Vice Presidents will be used increasingly as—and if—we move away from that old ethic of potential power.

Senator BAYH. Let me ask you to look at the other aspects of the Vice Presidency. I guess the most important reason that exists, is to succeed the President. Apparently, Professor Schlesinger, you do not believe it is beneficial to a Vice President to sit in on the Security Council, Cabinet meetings, and thus become more familiar with the actual working of the Government than would otherwise be the case.

Mr. SCHLESINGER. I would not say it is injurious or beneficial. If we were to say that no one should become President unless he sat on the N.S.C. meetings or whatever, we would never change administration. Obviously every time a new man comes to the White House he has not had the experience. I think often Vice Presidents mislearn things because they are half in and half out of the picture and only see it partially. I think for example, it is known that Vice President Johnson was out of sympathy with the decision reached at the time of the missile crisis.

When he became President himself, he overreacted in face of a supposed crisis in the Dominican Republic.

I am not sure what the Vice President learns is all that significant. Also, they do not know how much they don't learn.

President Truman, who had been a Vice President and therefore thought a good deal about it, wrote in his memoirs: "No Vice President is ever properly prepared to take over the Presidency because of the nature of our Presidential or Executive Office." In the nature of things, Truman said, and he had been both Vice President and President.

It is very difficult for any President to take the Vice President completely into his own confidence.

Senator BAYH. I suppose one could say no one human being could be fully prepared to be President. What Truman said doesn't mean that it wasn't beneficial to him. He can at least think about it and be exposed.

Mr. SCHLESINGER. I don't think the Vice Presidency is a better preparation for the Presidency than being an effective State Governor or effective Member of the U.S. Congress.

Mr. BURNS. We are talking about the possibility of a special election during a President's 4-year term which has been truncated. He is elected to that office. If we are going to make a main point of familiarity with the job I would not exaggerate the familiarity of the Vice President, and I would grant much of your point, but he does know something about the Cabinet, he is familiar with the main figures, he is aware of the administration's policies, he does know something about the political situation, and he does know other situations where they are rather restricted political and policy scopes, the Vice President is in a better position than any other officer in Government to take over if he is a man of quality, personal quality.

That, of course, is a great question. It gets us right back into the question of politics.

Mr. SCHLESINGER. If you have a special election you have a choice between two people and two parties. Therefore, the fact that a man is a Vice President gives him a familiarity with only one set of personnel, one set of policies. Now any time there is a change in administration, you come in with a new collection of people, there is no familiarity with problems, there is no guarantee of wisdom about them. Often policies have to be changed. If one assumes, whatever the existing policies are, they are correct policies, then no doubt there may be an advantage to the country in having someone familiar with those policies and committed to them. But that is not an assumption sustained by history.

I would much rather have someone in many cases who is not committed to or involved with existing policies and personnel, and that seems to be one of the advantages of a special election.

On that score, Jim—

Mr. BURNS. You are changing the subject?

Mr. SCHLESINGER. No. I am going on on the same subject. But I want to say a few words in relation to the feasibility of special elections. But you go ahead.

Mr. BURNS. Just on the point you have made. I would make a major distinction between a special election and a regular Presidential election; everything you say relates to a Presidential election where the

country and the political leadership are confronting the possibility of change, and we may well need a change. But I am concerned about what happens within a 4-year term.

With a President who was elected in a regular election with a mandate to govern for 4 years, we need the experience of those 4 years, we have to know whether the President's program is viable—usually you need a period of at least 3 or 4 years to tell whether it is viable.

I would be very concerned whether the freshness and change I would want to have in a regular Presidential election would be improperly inserted into the 4-year term. While I would not want the successor to be a slavish follower of the President, and as I have been insisting he should be to some degree independent of the Presidential program, I would not want within a 4-year period a violent oscillation which would mean that, among other things, the 1 or 2 years a President might have had for his programs would simply be lost in limbo and we would go off into another direction before we had a chance to evaluate what he was doing.

Mr. SCHLESINGER. If I may comment on that. If it was a good program it would be a shame; if it was a bad program it would be a blessing. And that is a judgement that ought to be left to the people to be made through a special election.

Senator BAYH. You place no value at all in continuity? For a period of time? I read what you say here that perhaps some of the things that may not be beneficial to what you have written before. However, you may have a great opportunity to change almost on the parliamentary system basis where you can recall a President on less than impeachment grounds and thus go to a very basic change in our system.

Mr. SCHLESINGER. I am opposed to that. I do think we elect the President, we don't elect the Vice President. The Vice President is a free rider. I really disagree with Jim's belief that people are going to determine their vote on the President as whether they like the Vice Presidential candidate or not.

I think, if the President goes, that is the time they should have a chance to choose a new President. But I would confine it to exactly that circumstance and not certainly expose the Presidency to dissolution by branches of the Congress.

Senator BAYH. Let's go back to the special election as an alternative to succession. At least one important consideration has to be, the importance of continuity. Then if that is not relevant, you don't have to worry about it.

Let's take a situation like a close Presidential election. Shortly after the beginning of a term the implementation of policies may be different than the predecessor's, some of which are controversial and some of which cannot succeed or fail unless they have time to be implemented. If something happens to that President you have a special election. Close to the beginning it could go the other way. So you have a reversal of policy.

Now, has the 4-year bloc of continuity been good or bad?

Mr. SCHLESINGER. Continuity is not an absolute value. Continuity of sensible policies is a good thing. Continuity of wretched policies is a bad thing.

I think the 4-year term is a good idea. But I don't think there is anything sacred about it. In all of these things I suppose there is a

conflict of principles and one has to make a judgment, it seems to me, as between the advantages of continuity over a 4-year term on the one hand, and the right of the people to have an elected President on the other. On balance, I would prefer the second.

I think the President should be someone elected by the people, and if that has to take place in special circumstances at the expense of continuity, I don't think continuity is that valuable.

Mr. BURNS. There is another aspect of that, Mr. Chairman, that I don't think has been mentioned—an aspect of the special Presidential election—and that is the implications of a Presidential election that is held without Senatorial and congressional elections, which I presume to be the likely procedure.

We have never had this experience. One can argue that it is a good experience for a Presidential candidate to have to run with one third of the Senate and all of the Representatives, candidates for Senate and Representatives, in that there doubtless is some tendency, and I would not exaggerate this either, there would be some tendency for the President to act to some degree as leader of a team. He has to some degree to be concerned about congressional and senatorial races, and granted that many Presidents have tended to run alone, I don't think they ever run as completely separately as obviously candidates would run in a special election.

I think that raises all sorts of speculations, and it would be very hard to predict what would happen. But if again, one is concerned about placing the Chief Executive in political restraint to some degree, as well as governmental restraint, I think one should devote some careful prophetic attention to what would be the implication for the man who does not have to be concerned about the coattails of how people can tie in with his coattails, about his responsibility for the rest of the candidates and indeed to the party as a whole.

Mr. SCHLESINGER. But it can't be said that in recent years the fact that the Presidential candidate has run in the context of House and Senate elections has exercised much restraint on his behavior once he became President.

Senator BAYH. Is that restraint, to the extent there is any restraint, on the recognition of the President that he is a eunuch if he can't get his legislative policies passed through the Congress?

Mr. BURNS. Is the implication of your question that the man who had run in a special election and had become President may lack a certain credibility with Congress who were not elected with him?

Senator BAYH. No. You are concerned about that feature of the special election, because you feel the President might be too independent from the Congress because they didn't run together. That might last from the election until he took the oath of office and suddenly started trying to figure out how he got his program implemented. He would then be confronted with the stark reality that he had to be close enough to that Congress to get a majority vote in each House.

Mr. BURNS. On this score, I would ask Professor Schlesinger a question about the Kennedy administration. I have the impression that one reason President Kennedy did not have more success with Congress was the feeling on the part of Senators and Representatives that he had essentially run his own political enterprise, that even though he said some nice things about congressional candidates on the rostrum and gave them recognition, that their perception of him—perhaps

somewhat unfairly—was that he was an independent candidate, that he was not closely related to them, that he had his own constituency, that he had his own standing in the media, that he had his own kind of separate, autonomous political role.

I have often contrasted this with President Truman. There again, the differences between the Congress and the President were quite acute.

I have the impression that Congress, whatever their differences with President Truman, had a feeling that this was a man who was part of them and not simply because he had been in in the Senate, for of course President Kennedy had been in the Senate, too. But my question is to what degree would you say that President Kennedy did suffer, to some, if indeed I am correct about that perception, and whether or not this kind of problem would not be exacerbated by special Presidential elections without congressional and senatorial participation?

Mr. SCHLESINGER. I think our chairman could answer that question more authoritatively than I. I am rather surprised by the premise of the question, because I did not have the impression that the Kennedy campaign of 1960 was regarded as a lone enterprise. President Kennedy spoke very often for Senators and candidates in 1960, and particularly 2 years later. In 1962, he went into the campaign much more extensively than I recommended to him at the time on the basis of the past experience of Presidents speaking in midterm campaigns.

I would be interested in our chairman's reaction to Jim Burns' thoughts.

Senator BAYH. I suppose I was too detached trying to figure out how to pass the bar examination to make a reasonable assessment of what happened.

Mr. SCHLESINGER. Didn't Kennedy go into Indiana?

Senator BAYH. In 1962 I was the beneficiary of one very important appearance of President Kennedy in a State which had not treated him kindly 2 years earlier.

In examining my own thought processes, I was very appreciative of this. Of course, I really don't know why he did this. I would imagine that the fact that he was conversant with my views as contrasted to my opponent's probably had something to do with him coming in. My views were much closer to his, and my opponent's were almost totally opposed to his.

I am sure it could have had nothing to do with his judgment that the Indiana political climate had changed much during the 2 years in which he had been rather seriously abused at the ballot box. It was the assessment of myself and others that he could be helpful, and he accepted that. A new face in the Senate would be helpful to his program.

I was not privy to any of his decisionmaking process. I am glad that there were others whose judgment was used instead of my distinguished colleague. I think the wisdom of the moment would have been to accept the Schlesinger interpretation of whether he should go into Indiana or not.

Mr. SCHLESINGER. He was right, and it was his own judgment. He knew more about politics than I did.

Senator BAYH. We are all wrong if we think we are going to have a perfect piece of legislation. A constitutional amendment that can

meet all of the contingencies that we can't foresee is very difficult. I certainly would fault the Times' assessment of the role Congress should play; that is not what we intended. I would tend to come down on the side of making my own interpretation—you are right that Congress did not play the kind of independent judgment role that they should have.

We had not a purely surrogate electoral, but we had to balance that off against one other provision in the 25th amendment, namely, trying to get someone who could work with the President. It was an irreconcilable difference between the person that Birch Bayh would vote for to be President and someone who could work with Gerald Ford or Richard Nixon. This is a situation where you had not as pure representation as the constituent voting individually as would otherwise be the case now.

Mr. BURNS. Could I add a word on that?

Senator BAYH. Yes.

Mr. BURNS. I think Professor Schlesinger was a little cavalier in his treatment of the congressional process. Granted, the typical Congress will accept the Presidential nomination for the reasons you have suggested, but I think what should be kept in mind is that given again the enormous attention that is devoted to this question, a President today cannot get away with the kinds of Vice Presidential choices that many Presidents made for their running mates, back in the 19th century.

In short, a President makes that nomination knowing that Congress still has that power, and it is that anticipatory aspect of the nomination that I think is important to remember.

It is largely a Presidential; but, also to a significant degree, a congressional decision for that reason.

Senator BAYH. If I might take just a brief leave here. I think probably Professor Schlesinger agrees. It is my judgment that, for a number of circumstances, Presidential nominees are making a higher level decision, or trying to, as far as basic philosophical differences are concerned. You didn't find Nixon making a choice of someone totally different from him as a Vice Presidential nomination. You didn't find McGovern doing it.

I think the public demands that the Presidential nominee think in terms of who would make a good President. At least that has to be considered. It ought to be good politics.

Second, I can't help but think that a more studied determination is being made by a President, knowing that that nominee must face a test given by Congress, than he makes midnight on the convention.

Senator BAYH. At the risk of missing a vote I am going to have to go. I will come back if there are two bodies or one or none, and I will call. If you feel you must go, maybe I can send some written interrogatories on this.

I want to thank you very much.

[Whereupon, at 1:24 p.m., the hearing in the above-entitled matter was concluded.]

THE 25TH AMENDMENT

TUESDAY, MARCH 11, 1975

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice at 10:15 a.m., in room 2228, Dirksen Senate Office Building, Senator Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Fong, and Thurmond.

Also present: J. William Heckman, Jr., chief counsel and Marilyn Berning, assistant clerk.

Senator BAYH. We will reconvene our hearings on the oversight of the 25th amendment.

Our first witness this morning is our distinguished colleague from Michigan, Senator Robert Griffin.

Senator Griffin, we appreciate your joining us this morning and the thoughts that you can put into this important matter.

STATEMENT OF HON. ROBERT P. GRIFFIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator GRIFFIN. Thank you, Mr. Chairman.

I would begin by commending you for having these oversight hearings and taking the time to focus on the operation of the 25th amendment which was proposed and adopted nearly a decade ago.

It gives me a chance, as one Senator who has been rather close to the confirmation proceedings of two Vice Presidential nominees, serving on the Rules Committee as I do, to give you my observations and evaluation. Generally speaking, I would say that the amendment has worked exceedingly well. I think that it has worked even better than perhaps the architect himself may have expected.

These hearings give me a chance not only to say that, but to focus attention again on a proposal which in effect is an expansion of the 25th amendment, although I conceive of it as being another constitutional amendment. I refer to S.H. Res. 166, which I introduced on October 23, 1973. I introduced that proposal about 2 weeks after Vice President Agnew resigned his office under unprecedented circumstances. It will be recalled that, a little over a year earlier, the Vice Presidential nominee selected by the Democratic Party at its national convention had resigned just as the 1972 campaign was getting underway.

As everyone knows, of course, the circumstances which led to the two resignations were entirely different. However, the two cases, have underscored the urgent need for some reform of the traditional method of selecting the Vice President of the United States.

An essay that appeared in the August 7, 1972, edition of Time magazine included this paragraph:

It is all done in a 3 a.m. atmosphere by men in shirtsleeves, drinking room-service coffee—elated, frantic politicians running on sleeplessness, juggling lists, putting out phonecalls, arguing in the bathrooms, trying to make their reluctant minds work wisely as they consider an after-thought: the party's nominee for Vice President of the United States. It is the worst kind of deadline politics. For a year or two, or even more, the vast American political machine has been rumbling and ramshackling along, sifting Presidential possibilities. Now a running mate must be chosen, checked out, signed on, and presented to the convention with a triumphant but seldom very credible flourish. "Tom who?" "Spiro who?"—all in a matter of hours. It is a procedure that invites error. Thus, most vice presidential candidates are too hastily chosen by only one man and his advisors without any real democratic process or sufficient investigation.

That is the end of the excerpt from the "Time" essay. But how accurately it describes the process that takes place at the convention of both of the major political parties, at least as I have observed it in my political experience! Surely the American people deserve, and ought to demand, a better method than that for selecting a person who stands only a heartbeat away from the Presidency.

In the resolution that I have offered to amend the Constitution. The effect of it would be that nominees for Vice President would not be selected at the party conventions. After a Presidential election, but prior to his inauguration, the President-Elect would name his choice for Vice President, in much the same way as the President nominates a Vice President under the 25th amendment. In a situation where that office for one reason or another becomes vacant. Under the proposal, the nomination would then be subject to confirmation by both Houses of the new Congress which convenes in January following the election.

In other words, my proposal would make certain that each future Vice President, not just those who fill a vacancy, would be carefully selected with Congress as well as the President playing a significant role in the selection process, and following a procedure similar to the one already available for filling a vacancy under the 25th amendment.

Mr. Chairman, it is my strong view that almost any of a number of available alternatives would serve the national interest better than the traditional method which is now used to select the Vice President. But, after careful consideration, I conclude that I favor the approach set forth in this resolution for a number of reasons.

Instead of nominating a Vice President because his selection at the convention would balance the political ticket or payoff a political debt, this proposal would emphasize and focus upon the national need to select an outstanding Vice President who would be highly qualified to step into the shoes of the President of the United States, if necessary.

In contrast to the harried, haphazard way that the Vice President is now selected as an afterthought at political conventions, this proposal would allow the President-Elect, as well as Congress ample time for a sober reflection, through investigation and deliberate consideration in choosing the Vice President.

Speaking through their elected representatives in the Congress, the people would have a stronger, more effective voice in the selection of a Vice President. As a practical matter, the people have little or no voice in this selection process as it now operates.

Mr. Chairman, when I first introduced this resolution, I noted that the media reports, such as there were, generally led off by suggesting that said Senator Griffin proposal would take away from the people the right to elect a Vice President.

I want to suggest that, as I think most people experienced with the political process would recognize, that unfortunately the people have little or nothing to do now with the selection of the Vice President; and it would be my contention that, under the 25th amendment, through their elected representatives in both houses of Congress, the people have more of a voice than they do in the normal election process. I say that because the typical nomination process involves the President-Elect, as has already been indicated, meeting with his advisers in the early morning hours to designate a Vice Presidential nominee. There has been no series of primary elections for the Vice President as there has been for the President. The people have had nothing to do, really, with the nomination process.

Even the delegates at the party's convention realistically have little or nothing to do with the nomination of the Vice President. Then as it works in the normal situation, he is approved by acclamation without any real opportunity for examination of his qualifications. He is then put on the ballot, and he is not voted upon separately by the voters. If there were a separate election—I do not recommend it, of course—then the people would be voting for or against the Vice President. The way it is now, I wonder who can really say that people are voting for or against the Vice President. He is extra baggage who just rides along with the Presidential nominees.

I could conceive of a situation where the choice of a Vice Presidential candidate might be so bad that people would actually vote against the Presidential nominee because of his running mate. But I think it is unrealistic to say that they really vote for or against the Vice President. They are almost always in a practical sense, voting for or against the Presidential nominee.

Senator FONG. In that regard, I want to say in the 1960 convention, after Vice President Nixon was nominated, the Republican Party called a group of people together. I was one of them; 16 of us sat in a room in Chicago, and each one was asked as to the qualifications, and who would he recommend for Vice President. Finally it came down to two people, Henry Cabot Lodge and Truiston Morton. Somehow the opinion Cabot Lodge would be the one, and Cabot Lodge was named by the then-nominee Nixon to be his Vice President.

Then in the convention in Florida, again, after President Nixon was nominated for the Presidency, he called a group again together, and I was one of them again. We were asked as to who we wanted to be Vice President, who we thought would be a good Vice Presidential candidate. Many, many were named. Very few people brought up the name of Spiro Agnew; but the President kept on asking of us what we thought of him. Nobody knew that Spiro Agnew was in the running. Afterwards the nominee said that he wanted Spiro Agnew and Spiro Agnew was nominated.

Then, after Spiro Agnew was nominated, the President asked us to go to a party. Then he told us why he wanted Spiro Agnew; because Spiro Agnew was then a Governor, and as a Governor he knew State affairs. He wanted a man who was experienced in State affairs.

So, I agree with you that actually people do not have much say in nominating their Vice President.

Senator GRIFFIN. Of course, no one can say for sure. I think that it is reasonable to suggest that if a period of time had elapsed, and if there had been a confirmation process in those situations as there is under the 25th amendment when a vacancy exists, this country might have been spared the unfortunate experience of having a Vice President resign on account of certain activities that took place before he was selected. In the case of the President who must survive the trials and challenges of a series of long primary elections, and where the press has looked into every corner of his life, there is little likelihood of that kind of a situation developing. When we put people on the Supreme Court, the Cabinet and in many other important Federal posts, the confirmation process affords an opportunity to prevent that kind of a situation. It seems that making Vice Presidents subject to the confirmation process would be most appropriate, particularly in view of our experience of having so many of our Vice Presidents actually stepping into the Presidency; it seems even more in modern days than in the past.

But, because this has happened, it focuses more attention than ever, it seems to me, upon the need for a deliberate process for selecting the Vice President, one that is a separate process, where he is not regarded as just extra baggage, and where there will be the focus of attention on the nomination that the Office really now deserves.

So, I would say that not only has the 25th amendment worked; it has worked extremely well. It has worked so well that I strongly recommend to the committee and to the Congress that we expand the concept and use it to fill the Office of the Vice President in all situations.

I might just say that I recognize that this would be a small step, or a bow perhaps, to the parliamentary system, although a very small one, because the Congress in the selection of Vice President in other situations would be playing a very, very significant role. I think that is altogether appropriate. The Vice President's only constitutional duty is to preside over the Senate. Just as this procedure works under the 25th amendment for better relations between the Executive and the Congress, I think that it would also serve that purpose in other situations. I think that this is perhaps a bit outside of what the chairman had in mind when he scheduled the oversight hearings on the 25th amendment itself. It is perhaps taking a little liberty to focus attention on a separate amendment, one that could be, I suppose, offered as an amendment to the 25th amendment, but one which I think, would make more sense if it were considered separately.

I thank the chairman for allowing me to make this brief presentation. If there are any questions, of course, I would be glad to try to answer them.

Senator BAYH. We owe you gratitude for taking time out of your schedule to come here and talk to us. It is not out of the purview at all. We have been concerned over the last 10 years or more of providing

continuity in the executive branch, putting credibility into the executive branch. If we cannot recognize the shortcomings of the present system for choosing Vice-Presidential nominees, we err.

The question is what to do about it. I want to study your suggestion very carefully. I am sure the other members of the committee would want to as well. I would hope we can move together on it because of your position on the Rules Committee and having seen this delicate operation of choosing someone who is one heartbeat away from the Presidency.

Let me ask you a couple other questions. I think you are in a unique position because of the two hearings to share your views on. First of all, one proposal that has been made is to abolish the Vice Presidency and to set up sort of a caretaker government while a nationwide election is held. You have been in the governmental process a good number of years, both in the House and in the Senate. You have served in a leadership role in the Senate. You have also participated in two sets of hearings relative to the implementation of the 25th amendment, choosing a successor Vice President. Could you give us your judgment please, Senator Griffin, as to the value or lack thereof of a sitting Vice President?

Senator GRIFFIN. I think it would be a step backward to in effect repeal that part of the 25th amendment which provides a procedure for filling a vacancy. We experienced that kind of a situation over a number of years when there was no procedure, and we had the uncertainty when there was the problem of the tension that is created when the Speaker of the House is of a different political party, and that is sort of the situation, and I think that there is very little in this world that is perfect.

I think the 25th amendment is a vast improvement over the situation that we had or we would have if we went the route that some of the so-called reformers are now advocating. I think that it would be unfortunate—would have been unfortunate for the country and for the world if there had been only a caretaker government following the assassination, for example, of President Kennedy, and the country had to then turn to the kind of turmoil and divisiveness that an election is bound to include.

I think that it was a healthy stabilizing situation that there was a Vice President, the people recognized as being qualified because Lyndon Johnson, of course, had come out of the Senate and was well-known, and the fact that he could step into office was a good thing, not only for our country, but for the world.

I think that is true also following the resignation of President Nixon. I am sure that the 25th amendment and the fact that the Congress had to confirm the nomination must have had an important part in the selection of Gerald Ford as the Vice President, and how fortunate we were in the country, it seems to me, that a man of his stature and recognized ability coming out of the Congress was ready to step in.

I do not think that it would be progress to go backward and set up an election procedure. I think what we have frankly under the 25th amendment is much better.

Senator BAYH. May I ask you to give the benefit of your thinking on another matter that you have had insight into, in the days of the

hearings through the deliberation process, the first Vice-President-designate Ford and then Vice-President-designate Rockefeller. I think you yourself feel that the timing of it should have been different.

First of all, the 25th amendment did anticipate the contingency of a Congress controlled by one party and the Presidency by another. I think that it is fair to say that none of us had dreamt of the circumstances which led to the dual resignation. Perhaps we should have had a better crystal ball. We could at least look back historically and see the possibility and division and political power in the executive and the legislative. Some of us argued against it when in this instance it is the accepted one in the disability matter where you are talking about a live President and not to protect ourselves and feeling that somebody had to be President, whereas if you are having a vice-Presidential vacancy filled, at least during that period of time somebody is President.

We felt the urgency of the time element was not so great. We were concerned about the normal kind of foot dragging. I recall one of the top officials of my party suggested early on that, well, let us not rush. Speaker Albert is a Democrat. Let us not rush on out here and put a Republican in. I think it is to Speaker Albert's credit that in 24 hours he put a stop to that kind of business, and we did proceed, I thought, on a rather high level.

Now, there were criticisms directed at the time of the Rockefeller nomination. Could you give us your assessment of whether you felt the Ford nomination was handled expeditiously and whether it would have been assisted by a time limit of shorter duration than that was taken? And then give us your same appraisal of the Rockefeller nomination, if you will, please.

Senator GRIFFIN. Well, I suppose I could answer by saying that I thought that the Congress took a longer period of time with the Rockefeller nomination than probably would have been justified under normal circumstances, but let me hastily add, Mr. Chairman, that the 25th amendment could survive, and it has survived in these most unusual and unique circumstances of having successive nominations of Vice President and having both the President and Vice President come out of this process. It is my humble judgment that it could almost survive anything, and not only do you have this succession of nominations and confirmations, but as you have pointed out, you have the situation of divided government, the President of one party, the Congress of the other.

I think that we can only go up from here frankly. While I would lean in the direction of supporting some kind of a reasonable limit, probably I would support it, but I am not all that exercised about it, to tell you the truth. I do think we have to keep in mind in regard—oh, there was another factor which I think needs to be mentioned. The Rockefeller nomination came at a most inappropriate—not inappropriate, but unfortunate time, because it was mixed in with the elections of that particular year, and that is a fact of life. It was on the eve of a national election, and I do not really think that we can expect the Congress, being a political institution that it is, is not going to be affected by that.

When the election was over, the Congress got down to work, and it was not too long until the nomination was confirmed. I think the

pressure of public opinion, I think the attitude of the press in a situation like this, is the kind of a force that will generally take care of the situation, so it is not going to be the end of the world, as far as I am concerned, one way or the other, whether we actually have some sort of formal time limitations.

Senator BAYH. I am glad to have your appraisal. I remember Senator Ervin, as only Senator Ervin could, looking into the galleries and saying, God deliver us from even putting a time limit on the search for truth. The others more pragmatic saw that the publicity then would bring a reluctant Congress to fire, but if we assume as you apparently do that the process of the Ford nomination was expeditious—

Senator GRIFFIN. I think it was reasonably expeditious, yes.

Senator BAYH. There were so many circumstances involved. There were many financial business interests involved in the Rockefeller nomination. I suppose it should take a bit more time. I am glad to have your thoughts; and you have been very thoughtful.

Just one quick question: Do you think joint hearings between the House and the Senate committees would expedite this?

Senator GRIFFIN. Probably, it certainly would expedite it. There could be situations where separate hearings might serve a useful purpose. I do not think that they necessarily did with respect to either the Ford or the Rockefeller nominations.

In both of those situations I think it would have helped to expedite the action of the Congress without any loss or disadvantage in the process.

Senator BAYH. Thank you, Senator.

Senator Fong?

Senator FONG. One question, Senator Griffin. Supposing that during the time that the Rules Committee was debating the question as to whether the Vice President nominee was a good man to succeed into the Vice Presidency, the President somehow had died or the Presidency was vacant. Would you say that the nomination that had been made would be dissolved and would be of no effect?

You see, President Ford went to the Orient. There was great doubt as to whether he should go or not. Many people said he should not go until his Vice Presidency was settled, and he did go, and if anything had happened to him there in the Orient, what would have happened to the nomination of Rockefeller?

Senator GRIFFIN. I have to confess, Senator Fong, that I have not reflected on that question or done any research. I do not really know how to respond. I suppose it would be analogous to the appointments of other officials perhaps. Suppose the President had appointed a Chief Justice, and he had not been confirmed, and the President died. There must be an answer to that, but I do not know what it is. I imagine that the argument would be available that even though the situation obviously since the nomination would not have been confirmed at that point, the Congress would be in a very crucial situation there, because they can decide whether to make that man the President if that nomination is still alive.

Senator FONG. If the Congress went ahead and said, we consider this nomination still alive, and then confirmed the gentleman, Mr.

Rockefeller, say, then would there not be a constitutional question as to whether the Congress did the right thing or not?

Senator GRIFFIN. I suspect that there would be.

Senator FONG. In a case like that, I would think that the nomination would have to be moot, that it would be dissolved. The principal is not there.

Senator GRIFFIN. I would like to be enough of a scholar to give you a worthwhile answer to that, but I must confess that I would like to do more research on that kind of a question before I would want to answer.

Senator FONG. Suppose he stepped forward and said I am the President now.

Senator GRIFFIN. Certainly there would be an attempt to have a lawsuit in the Supreme Court on that kind of question if it developed.

Senator FONG. Thank you.

Senator BAYH. Thank you, sir.

We have three very distinguished witnesses here this morning. Our three distinguished witnesses are certainly not strangers to this committee: George Reed, dean of the journalism department, Marquette University, a man who has shared his thoughts with this committee previously, as well as shared his significant talents with the Government of the country; Prof. Paul Freund of Harvard, one of the early day consultants and contributors to the 25th amendment, as well as other matters that have been studied by this committee; Mr. John Feerick, American Bar Association, a distinguished member of the Bar of New York, who also is involved with the legislative draftsmanship offered at an early stage, who has consulted with this committee on a number of constitutional questions.

So, gentlemen, I appreciate this, as you are—that you would take time from your schedules to help lend your expertise in our oversight of the 25th.

Mr. Reedy, we have you listed first. Will you not first give us your thoughts, and then I will ask Professor Freund and Mr. Feerick if they would, and then we can kick it around a bit.

[The prepared statement of George E. Reedy follows:]

MEMORANDUM

MARCH 11, 1975.

Re Twenty-fifth amendment.

To: Senate Judiciary Subcommittee on Constitutional Amendments.

From: George E. Reedy, Dean, College of Journalism, Marquette University, Milwaukee, Wis.

1. The problem in assessing the impact of any Constitutional amendment is to determine reasonable standards by which judgments can be made. In the case of the 25th amendment, there is a temptation to confuse the standards by inserting a political judgment on President Ford. In preparing for this session, I found that those who are opposed to him have a tendency to conclude that the amendment has worked very badly and should be changed. Those who support him have a tendency to conclude that the amendment has worked very well and should remain intact. My own judgment is that both attitudes are irrelevant and that considerations of how well or how badly the President has performed should be excluded from such deliberations. There is no machinery which can produce a perfect President or a universally acceptable President. The best we can do is to establish machinery which will preserve our democratic institutions.

2. Upon that basis, I would like to suggest the following criteria for your deliberations:

(a) Did the amendment permit a swift and orderly transition during a governmental crisis?

(b) Did the American people respond to the new President *as a legitimate holder of executive authority*?

(c) Did the operation of the amendment disturb or threaten in any manner the return to the electoral process of selecting a President and a Vice President in 1976?

(d) Did the operation of the amendment disrupt the normal governmental processes beyond the degree of disruption that inevitably accompanies any transition?

3. The answer to the first question is that the amendment obviously permitted a swift and orderly transition. It provided a stand-in for the Presidency who had been scrutinized by the Congress specifically for his qualifications to play that role. He was a man who had been nominated to that position by the last President to be elected, thus giving a degree of continuity to the public expression in the election. He was a man who had been confirmed in that position by Congress—thus giving the highest degree of public assent to his accession possible without a general election. It seems obvious to me that these factors make the methods of the 25th Amendment far superior to earlier concepts in which the incapacity of both a President and the Vice President would require that the office be filled by men who had not been designated in advance as a stand-in but who had entered government in some other role.

4. The answer to the second question is that the American people obviously responded to Mr. Ford as a legitimate President. The operations of the machinery of the 25th Amendment had prepared them in advance for the possibility that he might take over the position. When he did so, there was not the slightest sign of disaffection. When he made what many Americans regarded as mistakes, there was no demand that he be thrown out on the basis that he did not really belong in the White House anyway. It would require an extraordinary stretch of the imagination to detect any significant feeling of illegitimacy even though he is generally considered to be a caretaker and even though there is substantial opposition to his policies.

5. The answer to the third question is also obvious. The return to the normal electoral process in 1976 is not jeopardized in any manner. Both political parties are preparing for the election and candidates are plentiful. Minor party groups are talking hopefully of a new era in which they might have a chance. The Presidential hopefuls are out beating the bushes for money, convention delegates and organizational support. There is not the slightest indication of any change in the normal rhythm of American politics.

6. There cannot be a conclusive answer to the final question. But it would be difficult to trace any of our present difficulties to the transition. It is possible to speculate that we might be in better shape with a regularly elected President. It would be pure speculation, however, with no supporting evidence and, on balance, it is unlikely that such speculation would be valid. Another President might do a better job but that would be due to the fact that he was following a different set of policies and not because he had been elected. President Ford, as a caretaker, may not be regarded with the same attitude of awe that surrounded his predecessors. But that does not mean his hand has been weakened. The normal government processes seem to be carried on with little change other than in the character of the Chief Executive.

7. When those points are considered, it does not seem to me that any serious case can be made that there are major deficiencies in the transition sections of the 25th Amendment and certainly it is superior to the previous arrangements. Naturally, such a judgment would not preclude efforts to improve the machinery. But it is difficult to devise any significant change other than providing for a general election. This would be a serious step that would raise problems:

(a) What would be the position of the United States under a caretaker during the period between the loss of one President and the election of a successor? Of necessity, there would be a period of some weeks while the campaign was being waged and they would be weeks of uncertainty.

(b) What kind of machinery would be devised for the selection of the candidates? Could the major and minor parties possibly hold nominating conventions in what would necessarily be a brief period? Would the ballot be open to all comers on a "winner take all" basis, thus allowing for the possibility of a very small minority dictating the choice of the President? Would there be a run-off in the event that no candidate received a majority, thus subjecting the American people to two nationwide campaigns in between the regular elections?

8. On balance, I do not think that there is any need to bring on such headaches at the present time. Our experience with the 25th Amendment has not disclosed any major weaknesses. It is unlikely that the circumstances which trigger its machinery will recur many times in the future. If experience does disclose an important deficiency, it can be dealt with later. For the record, I have reservations about the Presidential incapacity provisions of the Amendment but I do not propose to argue them at this hearing. It seems to me that unless someone can demonstrate a powerful case to the contrary, it is the course of prudence to leave the transition sections alone.

STATEMENT OF GEORGE E. REEDY, DEAN, COLLEGE OF JOURNALISM, MARQUETTE UNIVERSITY

Mr. REEDY. Yes, Mr. Chairman, and I will make it brief.

I think there are one or two sections of the 25th amendment that have worked very well. An important indication of its workability is that I can find so little popular interest in the subject. When I was preparing for this hearing, I consulted a number of my friends and people who have studied the matter, and the general conclusion that I came to is that the workings of the amendment are so well accepted, and the legitimacy of the present President is so well recognized, that it does not occur to anyone, except to people who do not like the present President, to challenge the workings of the amendment. Now, to me, that is a very important point.

Whenever we are thinking in terms of government, and thinking in terms of the Constitution, there is always the question of what is legitimate, and what will the people accept? What will they regard as being duly constituted authority? And there is no question whatsoever in my mind that, however people may feel about the present President, they do accept him as duly constituted authority. In fact, about the only people that I have found who were really seeking a change in the amendment were people who regarded themselves as political opponents of President Ford, and who seemed to me to be suffering from some concept that a different method would have produced what they would regard as a better President. And usually, when people do have attitudes on this amendment, for or against, I find that they tend to confuse standards with their own political predilections. In other words, if the machinery produced a President that was not of their particular political persuasion, they reason that there would be some other process that would. That I regard as a totally irrelevant standard.

What I would like to suggest is that there are really four standards as to whether something like this works. First, did the amendment permit a swift and orderly transition? It certainly did. There can be no question about that. Second, did the American people respond to their new President as a legitimate holder of Executive authority? I do not believe that there can be any question about that; they have responded. There is no feeling that the country is now under an illegitimate administration. It takes a terrible stretch of the imagination to detect any disaffection in terms of the President's legitimacy.

Third, it seems to me that the standard should be whether the operation of this amendment did disturb or threaten in any way the normal American political process. This I cannot see. The political process seems to me to be operating as it always has. Candidates are

declaring all over the country—sometimes I think more candidates than people. I do not think anyone has any question whatsoever that in 1976, we will have the normal operations of the two parties, and we will once again produce an elected President.

Third, has the operation of the amendment disrupted the normal governmental processes, beyond the degree of disruption that inevitably accompanies any transition? There cannot be any conclusive answer to that question. One may argue that a government may be better operated under an elected President. I frankly cannot see, in terms of the operation of the Government, that anything has gone wrong simply because of the transition. I think it is a pretty good principle in government that when a thing is working well—and I believe the first two sections have worked well—that it is a point of prudence to leave it alone. Part of the strength of our governmental system is that we have become habituated to it. They are accustomed to this amendment and accept it. And I also think, in a sense, is far preferable to the older system, which after having exhausted the President and Vice President, would start going to the Speaker of the House, the President pro tem, theoretically down the Cabinet officers in a list of seniority. This way, the President now in office, to a certain extent, represents the continuity of the last election, since he was nominated by the President. He can come as close as you can without a general election to getting the approval of the people, through the approval of the majority vote of Congress. And I believe, if anything, this amendment has preserved the normal political process, rather than disrupted it.

But the thing that really impels me to feel that it should not be changed at this moment is that the only significant change that I can see is one that would take us to some form of a general election. And when I start contemplating the results of a midterm election, my mind boggles. I do not know how the candidates would be selected to begin with. Obviously, there would not be much time for the political parties to hold nominating conventions. There would be no time for primaries. There would be no time for campaigning. I presume that they might provide for the selection of a candidate by the two national committees. I have a feeling that that would be very, very unsatisfactory. I do not know how the ballot could be set up. Probably it would have to be some kind of an open ballot, which might have 10, 15, 20 candidates on it; thus raising the very real possibility of a President elected by an extraordinarily small vote—possibly even 20, 25 percent. I suppose you could have a runoff, that would subject the people to the possibility for two elections in the midterm, which would be a very exhausting thing. And I believe that part of that concept that we could have a general election in between the regular Presidential elections arises out of some confusion with the British system. It is not a terribly traumatic thing for the British to have an election at any particular time. It is difficult, of course, and it causes problems. But their political parties are set up for that kind of an operation. They are parties who have a type of cohesion that our parties do not. They are really running for the Parliament, rather than for the office of prime minister. The elections can be held in 6 weeks, and again, this is because in the British system, it is the party rather than that candidate that is running.

Our system is not like that. Our system depends upon individual candidates running. They will pick one party or the other, yes, as their vehicle, and try to work up through that party. But the American voter, when he goes to the polls, is really not voting for the Democratic Party or the Republican Party in a Presidential race. He is selecting between the two men, and under that kind of a system, it is impossible to have the sort of discipline and the sort of structure that would enable these quick elections called in the middle of the term.

So, overall, my feeling is that the amendment has worked extremely well. It has produced a legitimate President. It did give us a swift and orderly transition. The only thing that I can think to do to it that would be a significant change is one that I believe would create a considerable amount of turmoil. Therefore, I believe it is best left where it is. Thank you, Mr. Chairman.

Senator BAYH. Thank you, Mr. Reedy, for your thoughts. You are one who certainly has seen the inner workings of the Presidency, and I appreciate it very much.

Mr. REEDY. Thank you, sir.

Senator BAYH. Mr. Freund, it is good to have you back with us again.

STATEMENT OF PAUL A. FREUND, HARVARD UNIVERSITY LAW SCHOOL

Mr. FREUND. Thank you, Mr. Chairman.

I am a university professor at the Harvard Law School, where I teach constitutional law. Although I was a member of the American Bar Association Commission which supported the 25th amendment, my mind is by no means closed on the subject of Presidential succession. My judgment, however, is that no persuasive case has been made for repealing or altering section 2 of the amendment. In my brief statement, I consider two possibilities; (1) whether section 2 should be repealed, and (2) whether section 2 should be revised to provide for a special election.

First, should it be repealed? Section 2 serves a cardinal purpose of the amendment, namely that the Office of Vice President should not be vacant, thereby minimizing the need to resort to a statutory line of succession. Eighteen times in our history, there has been a vice-presidential vacancy, aggregating more than 37 years. Seven of these have been occasioned by death, nine by succession to the Presidency, and two by resignation.

If the statutory succession fixes on the Speaker, as it has since 1947, or on the President pro tem of the Senate, as it did from 1792 to 1886, certain serious risks are presented. There may be in fact no Speaker or President pro tem, as was true on the deaths of both President Garfield in 1881 and Vice President Hendricks in 1885. This situation impelled the change in 1886 to a Cabinet line of succession. Moreover, a Speaker or President pro tem might be of the opposite party from that of the President, creating the contingency of a political turnover by accident of fate. In addition, there is some question whether the Speaker and President pro tem are officers of the United States within the meaning of article II of the Constitution, authorizing Congress to provide for the succession from this category in case of a double vacancy.

Suppose, then, that the succession statute were revised to fix on heads of departments, as was done from 1886 to 1947. To saddle the Secretary of State with the duties of acting President would grievously dilute both offices. The Secretary might actually be constitutionally ineligible for the Presidency. Appointment to a Cabinet post does not focus on Presidential qualities, but on more specialized training and talents.

For the sake of concreteness, suppose that there had been no 25th amendment during President Nixon's second term. If Mr. Agnew resigned, as he did, would the Congress have been as energetic as it was in the investigations leading to Mr. Nixon's resignation, which would then have left the succession to a reluctant Speaker of the House, of the opposite party? Indeed, would the prosecution of Mr. Agnew have eventuated as it did if there had been a prospect of a double vacancy without the provision for a new Vice President?

To be sure, neither Mr. Ford nor Mr. Rockefeller was elected by the people. But given the selection process governing the nomination of a Vice President at a national convention, can it be said that the consultation and public scrutiny attending the selection process under the 25th amendment were inferior to those attending the vice-presidential selection at the convention? The 25th amendment has served us well in its first extraordinary test.

Should section 2 be revised to provide for a special election? If the objections to the pre-25th amendment procedures are too forbidding for repeal, would a special election procedure be desirable? In the event of a double vacancy under the present amendment, despite the minimizing of that risk—if, for example, Mr. Nixon had resigned before a successor to Mr. Agnew was confirmed—Congress could now provide for a special election, under article II of the Constitution. Such a provision in case of a double vacancy was, in fact, included in the law from 1792 to 1886. There is, to be sure, some question whether a special election for President would have to be for a full 4-year term, under article II. And the problem of an interim succession, pending the election, would remain, in all likelihood weakening the office during the interval.

If there were only a single vacancy, a special election would require a constitutional amendment. If the Vice Presidency were vacant, it seems unwise to bring into play the ponderous mechanism of the nominating and election process, with the risk in the end that a Vice President of the opposite party might be elected. The nominating process, particularly, would be inadequate and might well gravitate to the hands of the national committee of each party, hardly a more democratic method than the process established under the 25th amendment. If the single vacancy is in the Office of President, why not allow the succession of the Vice President to operate as is implicit in the latter office?

A few words may be added on the historical side. It has been argued that the 25th amendment violates the spirit of the Founders, since the Presidential electors were expressly forbidden to be Members of Congress. But this argument overlooks the historical fact that there was every expectation that after George Washington, the election would frequently be thrown into the House and Senate, for want of a majority among the electors. There were no parties at the time, and the

electors were to meet in their respective States without opportunity for consultation or coalitions. The argument from history is at best an ambiguous appeal to an antique system.

I may add just a few words about the proposal this morning, made very interestingly by Senator Griffin; namely, that the provisions for nomination and confirmation of the Vice President be made the general rule, dispensing with the election of the Vice President. It seems to me that there are two major objections to this proposal. I may say, incidentally, it is in a sense flattering to the authors of the 25th amendment that the amendment ought to be extended. But the fact that I like string beans does not make it follow necessarily that I should be a vegetarian.

The first major objection is that there would be some risk of a gap in the Presidential Office itself, pending the selection of the Vice President. Suppose, for example, the President were disabled, either temporarily or permanently, early in his term, before a Vice President was selected. The office would be weakened. There would be all of the turmoil, discontinuity, and uncertainty that the 25th amendment has tried to avoid.

Second, it seems to me that without a vice presidential candidate in the election of the President, the election itself would be adversely affected. My judgment is that the presence of a Vice Presidential candidate on the ticket helps to show the capaciousness of a political party. It helps to avoid the splintering of the major political parties. It helps to moderate ideological cleavages. My guess is, if a President ran alone without a Vice President on the ticket, we would have more Presidential candidates, we would have more sharply ideological cleavages and splinter parties, and at any rate, the effect of the absence of a vice presidential candidate ought to be carefully explored in its political ramifications before we turn seriously to the change proposed by Senator Griffin.

In the end, in dealing with so fundamental a structure as succession to the Presidency, the best guide is the maxim; if there is no need to change, there is need not to change.

Senator BAYH. Thank you, Mr. Freund.

Mr. Feerick?

[The prepared statement of John D. Feerick follows:]

STATEMENT OF JOHN D. FEERICK ON BEHALF OF THE AMERICAN BAR ASSOCIATION
CONCERNING THE 25TH AMENDMENT TO THE CONSTITUTION

My name is John D. Feerick, and I am a practicing attorney in New York. I am privileged to appear before this Subcommittee today on behalf of the American Bar Association.

As this Subcommittee knows, the American Bar Association long has had a deep commitment to the Twenty-Fifth Amendment.

In January, 1964, the Association convened a special conference of twelve lawyers to examine the problems of presidential inability and vice-presidential vacancy—problems that had defied solution since the beginning of our Republic despite efforts by many Congresses. Including among those lawyers were former Attorney General of the United States Herbert Brownell, Federal Judge Walter Craig, then President of the American Bar Association, Professor Paul A. Freund of the Harvard Law School, James C. Kirby, Jr., a former chief counsel to this Subcommittee, former Deputy Attorney General Ross L. Malone, and Justice Lewis F. Powell, Jr., then President-elect nominee of the American Bar Association. That group, of which I had the honor of being a member, made a series of recommendations that paralleled those of the Chairman and ultimately were reflected in the Twenty-Fifth Amendment to the Constitution.

Between the date of that conference¹ and February, 1967, the American Bar Association worked closely with this Subcommittee and the House Judiciary Committee in securing the passage of the Amendment by overwhelming votes in both Houses of Congress and its ratification by forty-seven state legislatures.

In 1973, the American Bar Association established a Special Committee on Election Reform to study a number of matters, including campaign financing, electoral college reform, and the Twenty-Fifth Amendment process which recently had been implemented in connection with President Ford's selection as Vice President. The Chairman of our Committee is Talbot D'Alemberte, a Florida lawyer, and the other lawyer-members are, in addition to myself, Daniel L. Golden of New Jersey, William D. Ruckelshaus and Stephen I. Schlossberg of the District of Columbia, Earl Sneed of Oklahoma and William P. Trenkle, Jr., of Kansas.

In the early part of 1974, our Committee made an extensive review of the proposals for changing the Twenty-Fifth Amendment. We also studied the Amendment's implementation in 1973. In June, 1974, we rendered a report which concluded, and I quote, "that the procedures of the Twenty-Fifth Amendment worked quite well under the extraordinary circumstances surrounding their first implementation after the resignation of Spiro Agnew. The prompt nomination of Gerald Ford by the President and the comprehensive and thorough inquiries made by Congress into his fitness to occupy the Vice Presidency demonstrated the capacity of our system to deal in an orderly manner with a situation of potentially great crisis. We believe that both the Executive and Legislative Branches properly discharged their constitutional responsibilities under the Twenty-Fifth Amendment."

The only recommendation which our Committee made with respect to the Amendment was that Congress should use a single, joint hearing in filling a vice-presidential vacancy instead of separate hearings by each House. In reaching this conclusion, the Committee stated its view that the use of a joint hearing could expedite the process while at the same time assuring a thorough inquiry. The Committee further stated: "While each House ultimately would debate and decide separately, we find no compelling reason for the continuation of the precedent of separate investigations and hearings but, rather, are persuaded by the advantages of a single, joint hearing. It should not be necessary to subject a nominee for the Vice Presidency to dual hearings any more than are nominees for the United States Supreme Court, the Cabinet, and other positions." Attached to my statement as Appendix B is a copy of that report.

The Committee's report and recommendation were approved by the American Bar Association at its Annual Meeting in August, 1974. The Association's action, Mr. Chairman, makes clear its continuing commitment to the Twenty-fifth Amendment and the procedures it prescribes for handling cases of presidential inability and vice-presidential vacancies.

APPENDIX A

(Prior to the National Forum sponsored by the American Bar Association a Conference was held on Presidential Inability and Succession in Washington, D.C. The following consensus and analysis resulted from that meeting.)

CONSENSUS

The Conference on Presidential Inability and Succession was convened by the American Bar Association at the Mayflower Hotel, Washington, D.C., on January 20 and 21, 1964. The Conferees were Walter E. Craig, President, American Bar Association; Hebert Brownell, President, Association of the Bar of the City of New York, and a former Attorney General of the United States; John D. Feerick, Attorney, New York; Paul A. Freund, Professor of Law, Harvard University; Jonathan C. Gibson, Chairman, Standing Committee on Jurisprudence and Law Reform, American Bar Association; Richard H. Hansen, Attorney, Lincoln, Nebraska; James C. Kirby, Jr., Associate Professor of Law, Vanderbilt University, and a former Chief Counsel to the Subcommittee on Constitutional Amendments, Senate Judiciary Committee; Ross L. Malone, Past President of the American Bar Association, and a former Deputy Attorney General of the United States; Charles B. Nutting, Dean of the National Law Center; Lewis F. Powell, Jr., President-Elect, American Bar Association;

¹ The Consensus of the Conference is Attached as Appendix A.

Sylvester C. Smith, Jr., Past President, American Bar Association; Martin Taylor, Chairman, Committee on Federal Constitution, New York State Bar Association and Edward L. Wright, Chairman, House of Delegates, American Bar Association.

The members of the Conference reviewed as a group the following statement at the close of their discussions. Although there was general agreement on the statement, the members of the Conference were not asked to affix their signatures; and it should not be assumed that every member necessarily subscribes to every recommendation included in the statement.

The Conference considered the question of action to be taken in the event of inability of the President to perform the duties of his office. It was the consensus of the Conference that:

Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

Amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

The amendment should provide that in event of the inability of the President the powers and duties, but not the office, shall provide upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.

The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.

The Conference also considered the related question of Presidential succession. It was the consensus that:

The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

ANALYSIS

Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

These agreements, while desirable under the circumstances, do not have the force of law. They are subject to the whims and personal reactions of whoever may be Vice President or President. They can be disregarded at any time by either parties.

An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

Scholars differ as to whether a Constitutional amendment is necessary. Some believe that Congress now has the authority to act. Others believe that Congress has no power whatsoever to legislate on the subject of inability and emphasize that what actually must be resolved is the Constitutional question. It must be clarified that in the case of the President's inability, only the powers and duties

of the office devolve on the Vice President or person next in line of succession. An examination of the Sixth Clause of Section I of Article II of the Constitution (see inside front cover) will indicate why a Constitutional amendment is necessary. This provision of the Constitution applies to succession in cases of both death and inability. John Tyler was the first Vice President to succeed to the Presidency upon the death of the President. His succession established the precedent that upon the death of the President, the successor becomes President rather than "Acting" President.

Since the same Constitutional language applies in the case of the President's inability to act, does the successor actually become President for the remainder of the term, or do merely the powers and duties devolve upon him until the President's incapacitation has terminated?

A question of this magnitude should not be resolved on a balancing of opinions. Concerned here are the very fundamentals of our government, the office of President and the exercise and continuity of Executive power. These should be dealt with by a clearly stated amendment to the Constitution, and not merely by a legislative act which would be subject to Constitutional challenge at the very time we could least afford it.

The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.

Should the procedures for determining the President's inability and termination of that inability be written into the Constitution? The Constitutional amendment should provide for an immediate self-implementing procedure which does not depend upon further Congressional or Presidential action. However, a single method should not be frozen into the Constitution and the amendment should be flexible, giving Congress the legislative power to provide an appropriate body for inability determinations if the need arises. The procedure for determining inability leaves the responsibility, in the absence of further action by Congress, in the Executive Branch of the government. This is compatible with the separation of powers doctrine of the Constitution. It would enable prompt action by the persons closest to the President, and presumably most familiar with his condition.

It would also tend to assure continuity and the least disruption of the functioning of the Executive Branch. When a President's inability ceases to exist, he should be able to regain easily the powers and duties of his office. Thus, if there is disagreement between the President and the Vice President and members of the Cabinet, two-thirds of the Members of Congress should be required to overrule the Presidential declaration that he is able to resume the powers and duties.

The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

This statement merely confirms the past practice established by John Tyler in 1841. It gives Constitutional status to the precedent that a Vice President succeeds to the office itself when a vacancy occurs upon any contingency other than inability.

It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The office of Vice President has become one of the most important positions in the United States. It is no longer a simple honorary position. For more than a decade the Vice President has borne specific and important responsibilities in the Executive Branch of government. It is essential in this atomic age that

there always be a Presidential successor fully conversant with domestic and world affairs and prepared to step in to the higher office on short notice.

It is therefore necessary that the Vice Presidency be filled at all times. In the proposed amendment, the President would choose the Vice President subject to Congressional approval.

It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence, and that the President be granted the generally accepted prerogative of choosing his co-worker. On the other hand, the proposed amendment recognizes the right of the people to have a choice in the Vice President's election through their elected representatives.

It has been suggested that the Electoral College be reconvened to fill the vacancy, but the Electoral College performs functions which are primarily ministerial. It is unlikely that a decision by the Electoral College would command the appropriate respect and support of the people. Nor by use of the College is the country assured a prompt filling of the Vice Presidential vacancy.

The Congress is a numerical counterpart of the Electoral College in which each state has the same representation through its Congressional delegations as there are electoral votes. It is deliberate, easily assembled, and responsible to the people.

CONCLUSION¹

The vital need is for action which will solve these grave problems of Presidential inability and succession. Discussions of these problems have recurred down through the years, especially following events in history which dramatized the need for solutions. But even the interest aroused by the illnesses of President Eisenhower was not sufficient to bring about action. There has been a resurgence of interest, and indeed deep concern, since the assassination of President Kennedy, and once more responsible voices throughout America are calling for appropriate action. There has been little disagreement as to the need. The difficulty has been in obtaining a consensus as to how best to meet the need. Many proposals have been made, and many of these have undoubted merit.

But surely the time has come when reasonable men must agree on one workable method. It is not necessary, as the Washington conferees agreed, that we find a solution free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.

It is the hope and strong recommendation of the American Bar Association, which we know is shared by this Subcommittee, that past differences be reconciled and that a solution be initiated by this session of the Congress. We urge that the solution be in the form of a proposed Constitutional Amendment, although this would not preclude interim legislation pending ratification of the amendment. We do not say that the amendment must follow the Washington Consensus.² There are other worthy proposals which merit your thoughtful consideration. We do think this Consensus, which is now supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field, contains provisions which are sound and reasonable, and consistent with the basic framework of our government.

We respectfully commend these proposals to this Subcommittee with the hope that they will assist you and the Congress in initiating at this session an appropriate Constitutional Amendment.

AMERICAN BAR ASSOCIATION: REPORT TO THE HOUSE OF DELEGATES—THE SPECIAL COMMITTEE ON ELECTION REFORM RECOMMENDATION

The Special Committee on Election Reform recommends adoption of the following:

BE IT RESOLVED, that the American Bar Association recommends the use of joint hearings by both Houses of Congress with respect to the filling of a vacancy in the Vice Presidency arising under Section 2 of the Twenty-Fifth Amendment.

BE IT FURTHER RESOLVED, that President or his designee is authorized to present the substance of the foregoing resolution to appropriate committees of Congress.

¹ Stated by Lewis F. Powell, President-Elect, American Bar Association to Senate Subcommittee on Constitutional Amendments on February 24, 1964.

² It is to be noted that the proposals in the Consensus are not expressed in the definitive form of a Constitutional Amendment. Rather, they are intended primarily as statements of the substance of the principles involved.

REPORT

In creating our Committee, the Association authorized and directed us to examine the effectiveness of the Twenty-Fifth Amendment in providing for a successor to the Vice Presidency. We since have done so and have concluded that the procedures of the Twenty-Fifth Amendment worked quite well under the extraordinary circumstances surrounding their first implementation after the resignation of Spiro Agnew. The prompt nomination of Gerald Ford by the President and the comprehensive and thorough inquiries made by the Congress into his fitness to occupy the Vice Presidency demonstrated the capacity of our system to deal in an orderly manner with a situation of potentially great crisis. We believe that both the Executive and Legislative Branches properly discharged their constitutional responsibilities under the Twenty-Fifth Amendment.

Since the Association played an active part in the formulation of the Twenty-Fifth Amendment, our Committee undertook a detailed review of all aspects of the Amendment's first application, including an examination of the hearings before the House Judiciary Committee and the Senate Committee on Rules and Administration. We believe that those Committees conducted their inquiries with thoroughness and dignity. Understandably, the investigations of each drew on common investigatory arms of government and covered much of the same ground. Vice-President Gerald Ford gave extensive testimony before each and many of the same witnesses testified before each Committee. So, too, many of the same matters were looked into by each Committee. As a result of these separate inquiries, a total of fifty-five days elapsed from the date of nomination of Gerald Ford to the date of his confirmation as our Fortieth Vice-President.

Since Section 2 of the Twenty-Fifth Amendment embodies a principle that it is desirable to keep the Vice-Presidency filled at all times and that a vacancy should be filled with reasonable dispatch, we believe a vacancy could be filled more quickly, without in any way compromising the thoroughness of the inquiry, by the use of joint rather than separate hearings. A joint inquiry not only would eliminate duplication of effort but would tend to increase the effectiveness of the inquiry, since the resources of both Houses would be combined, coordinated and utilized to best advantage. We believe that joint hearings are especially appropriate for the extraordinary event of selecting a Vice-President whenever the incumbent succeeds to the Presidency or dies, resigns or is removed. As Senator Hubert Humphrey stated on October 11, 1973, in recommending the use of such joint hearings, "this would serve the national interest and place this whole matter of the nomination of a Vice-President in the proper stature and context, lifting it out of normal legislative procedures, and putting it on a higher plane of constitutional prerogative".¹ While each House ultimately would debate and decide separately, we find no compelling reason for the continuation of the precedent of separate investigations and hearings but rather are persuaded by the advantages of a single, joint hearing. It should not be necessary to subject a nominee for the Vice Presidency to dual hearings any more than are nominees for the United States Supreme Court, the Cabinet, and other positions.

For the foregoing reasons, we recommend the use of joint hearings in the future to fill a vacancy in the Vice Presidency.

Respectfully submitted,

TALBOT D'ALEMBERTE, *Chairman.*
 JOHN D. FEERICK
 DANIEL L. GOLDEN
 STEPHEN I. SCHLOSSBERG
 WILLIAM P. TRENKLE, Jr.

**STATEMENT OF JOHN D. FEERICK, ESQ., AMERICAN BAR
 ASSOCIATION, NEW YORK, N.Y.**

Mr. FEERICK. Thank you very much, Mr. Chairman. My name is John Feerick. I am a practicing attorney from New York. I appear today on behalf of the American Bar Association.

With the committee's indulgence I would like to ramble a bit, and hopefully, in the process, indicate the views of the American Bar Association as well as my own.

¹ 119 Cong. Rec. S19036 (daily ed., Oct. 11, 1973).

As the committee knows, in the year 1964 the American Bar Association assembled a group of 12 lawyers to study the problems of Presidential inability and Vice Presidential vacancy, and that group came up with a series of recommendations that paralleled the recommendations of the chairman. And those recommendations ultimately were reflected in the 25th amendment to the Constitution.

Between 1964 and 1967 the American Bar Association worked very closely with both the Senate and House Judiciary Committees in the development of the 25th amendment. Notwithstanding, in 1973 the American Bar Association established a special committee on election reform to review a number of subjects, including the implementation of the 25th amendment.

In the year 1974 this committee made an extensive review of all of the proposals that existed at that time with reference to the 25th amendment. The committee's conclusion ran along the same lines essentially of the witnesses this morning, namely, that the amendment had worked quite well in its implementation. The only recommendation that our special committee made to the American Bar Association, which was adopted by the American Bar Association, was that it would be advantageous in future situations of a Vice Presidential vacancy to use a single joint hearing of both Houses of Congress instead of separate hearings. Such a procedure does not require any change in the 25th amendment. It is something that was discussed at the time of the Agnew resignation; indeed, the newspapers indicated that the chairman of the Senate Rules Committee expressed sentiment for such an idea. Senator Mansfield was quoted in the newspapers as supporting such an idea, as well as Senator Humphrey and a number of other Members of both Houses of Congress.

It is the view of the American Bar Association, Mr. Chairman, that a single joint hearing can do the job expeditiously and thoroughly. It is my view that had a single joint hearing been in effect at the time of the Rockefeller nomination, it might have been handled perhaps with more expedition.

On other subjects, Mr. Chairman, I would like to follow up the prior speakers and reflect some observations that I put together with reference to the various proposals. With reference to all of the proposals to abolish the Vice Presidency and to implement some special type of Presidential election system, they scrap two principles that have served this Nation very well, the principles of stability and continuity. For 190 years, whenever a President has gone down, at that point in time, which is usually a great tragedy for the country, the people have known that we now have a new President. His identity was known, and there was his acceptance of his status. Under all of the proposals to go to a special election or to abolish the Vice Presidency, we would be institutionalizing in our system for a period of time a caretaker. In my view, foreign leaders would not be able to effectively deal with such a caretaker and as I see it, a caretaker would not be able to give effective leadership domestically or in the foreign field during that period prior to the election of a new President and Vice President.

I find unclear with reference to the proposals for a special Presidential election just what the election period would be. We had great difficulty at the time of the direct popular election proposal in devel-

oping a formula that everybody would find satisfactory to count the votes alone in a period of 6 or 7 weeks, and I would suggest that any system of a special Presidential election is basically going to turn out to be the present election system.

And if we are talking about the present election system, what we are talking about is a period of almost a year during which time we would have a caretaker President.

Senator Pastore's proposal, I think as I see it, has a number of deficiencies. First of all, the proposal says that if more than a year remains in his term, a special Presidential election takes place. Let us examine that. Suppose in early January in the fourth year of a President's term there should be a vacancy in the Presidency. That proposal would trigger a special Presidential election at the very same time that our regular election cycle has been triggered. So essentially we would be faced with two Presidential elections—one to fill out the remainder of the term, the other to choose a President and Vice President for 4 years.

An answer to that observation is let us use a 2-year cutoff instead of a 1-year cutoff. Let us look at that. Let us assume that the vacancy happened early in the third year of the term and took a year to invoke, or a period of 10 months to invoke a special election process. By the time that that process was finished and we had selected a President and Vice President to serve for 12 months, we would have another Presidential election right away, the regular Presidential election.

All I am suggesting, Mr. Chairman, is that there are very serious practical problems with such a system. They have to be addressed by the proponents of those proposals.

The proposal to abolish the Vice-Presidency to me presents other problems, as Professor Freund pointed out. Neither the Secretary of State or the Speaker might be constitutionally qualified to be President. Indeed, the present Secretary of State, if I am not incorrect, would not be qualified, constitutionally, that is, to serve as President because he is not a natural born citizen of the United States.

Second, the proposal to abolish the Vice-Presidency leaves open the whole problem of Presidential inability. Suppose a President becomes disabled. Who is going to act as President? The Speaker of the House of Representatives, who may be of another party? The Secretary of State?

I think there is a serious problem there.

Senator Pastore's proposal further provides that during the period that the appointed President serves and a special Presidential election takes place, the Speaker of the House of Representatives acts as Vice President but does not serve as President of the Senate.

What that says to me is that the Speaker of the House of Representatives serves in his legislative capacity at the very same time that he is serving in his executive capacity. I think that is an undesirable blending of executive and legislative roles.

Furthermore, during the period that an appointed President is serving and a special Presidential election is taking place, under Senator Pastore's proposal, we would really have no machinery to take care of the case where the appointed President became disabled. If the Speaker were the acting Vice President it is highly unlikely that an appointed President of the other party would turn over Presidential

power under section 3 of the 25th amendment. It also presents a problem with reference to section 4 because, as the chairman well knows, the theory of section 4 was that a Vice President of the President's party and the Cabinet, an executive group, essentially would have the power to declare a President disabled.

Under Senator Pastore's proposal, where the Speaker of the House of Representatives becomes the acting Vice President, essentially we have vested in the Congress the power to declare a President disabled. I think that clearly is not the design of the 25th amendment. I might say I agree with Professor Freund's comment regarding Senator Griffin's proposal. I think it also presents problems under the 20th amendment because the 20th amendment says: If at the time that a President is to take office or in that period prior to inauguration day, a number of contingencies should happen such as the death of the President-elect, such as the failure to qualify of a President, the Vice President-elect acts as President or becomes President, depending on the contingency.

Under Senator Griffin's proposal, we would not have the Vice President and it would seem to me if those remote contingencies occurred, we would have a constitutional crisis of a great magnitude in this country.

Second, it also seems to me on January 20, after a Presidential election, it is time for our national officers to get down to business and the business is, as I see it, to govern this country. A President at that point should have his administration intact and he should be effectively beginning his programs and plans to govern this country for a 4-year period.

If, on the other hand, we say that at that point in time he must nominate a Vice President, what we have is a period of time during which there is no Vice President. And Professor Freund mentioned some of the consequences there. And at the same time the President is diverted from really moving ahead with the plans and programs of his administration.

Finally, I would like to comment with reference to suggestions that I understand President Ford has made concerning time limits in the 25th amendment.

I personally, and I am speaking personally at this point, think that time limits are undesirable. The Congress that proposed the amendment rejected time limits in section 2, and it seems to me that the Congress has the ability, as the voice of the people, to move ahead with the processes as expeditiously as the qualifications of the particular nominee and the public opinion at the time suggest that Congress should.

I think Congress acted quite effectively in handling Gerald Ford's nomination in 55 days, and I think Congress acted equally expeditiously even though over a greater period of time with Vice President Rockefeller's nomination, which did present serious questions that had to be investigated and I do not think the people of this country would have had confidence in the process had that process sped too quickly and those matters not investigated as carefully as they were.

I apologize for just rambling like this, Mr. Chairman, but I sort of wanted to get out my thoughts at the outset.

Thank you.

Senator BAYH. Thank you, Mr. Feerick. I think you rambled rather quickly to the point. I thank you for your observations.

My colleague from South Carolina has another commitment. I will yield so that he can direct questions to our witnesses.

Senator THURMOND. Professor Freund, as I understand the thrust of your statement, it is that the 25th amendment has worked; and as you expressed in your last sentence of your statement, that there is no need to change, there is need not to change. That is your feeling on this matter, is it?

Mr. FREUND. It is, Senator Thurmond, yes.

Senator THURMOND. Professor Reedy, as I understand your position on this question, the thrust of your statement is that you feel that the 25th amendment is adequate, it has functioned properly when we had the change recently in the President and Vice President, and therefore you recommend no change?

Mr. REEDY. That is right, sir. I do not think there should be any change, unless some overwhelming case can be made, and I cannot see it.

Senator THURMOND. Mr. Feerick, from your statement, I construe that the American Bar Association had an active part in the formulation of the 25th amendment; and it is the position of the American Bar Association, and your personal position too, that it has worked, and that there is no need to change. Is that correct?

Mr. FEERICK. Yes, sir.

Senator THURMOND. Except in a few cases like the Vice President in order to save time?

Mr. FEERICK. Yes, sir.

Senator THURMOND. I thank all of you gentlemen. I thank you, Mr. Chairman.

Senator BAYH. Let me direct your attention, if I may, gentlemen, to some questions that were raised before the committee by Assistant Attorney General Leon. He was presenting the administration's position that basically followed your individual assessments that there need not be any major structural change. But he pointed out some questions that were left unanswered in our discussion, and in the words of the 25th amendment. In one instance, indeed, the legislative history in the House would lead to one conclusion; the legislative history in the Senate would lead to the opposite conclusion. I would like to get you gentlemen's opinion as to what you think the appropriate position is; what you felt you had in mind when you were discussing this.

If you have a double vacancy prior to the implementation of the 25th amendment, it is generally understood that the Speaker of the House would then become President under the succession statute. Would he then have the authority to exercise the powers of the President under the 25th amendment? Would he have authority to appoint a Vice President who would then be in a position to succeed him, if tragedy should strike again?

Mr. FEERICK. Maybe, to lead off on that, I certainly do not agree with the administration's representative that there are a number of questions unanswered. I just heard recently—I reread all the legislative history, and certainly the thing that stood out in my mind was how many questions were answered. On that precise situation, I think that the hearings before your committee, Senator, in 1964—and I cite

specifically the testimony of James Kirby, a former general counsel of this committee—made it quite clear that should the Speaker become President in a dual vacancy situation, he would have the power to nominate a Vice President to fill out that term, in the same manner that Gerald Ford had the power upon his accession to the Presidency.

Senator BAYH. Mr. Ready?

Mr. REEDY. I would tend to agree with that interpretation, because if you look at the language of the Constitution itself, it does not set clear and definite limitations as to the powers of the acting President to act. Consequently, my belief is, in that circumstance, the man who is acting would just act, and thereby would create whatever legal precedents were necessary. The mere action of the acting President would validate the act.

Senator BAYH. Professor Freund?

Mr. FREUND. Yes, I agree with that. I think the President who succeeds by virtue of the succession act to the powers and duties, if not to the office, must be treated as President for purposes of constitutional duties and powers. And one of those duties and powers is that under the 25th amendment. Moreover, the overriding purpose of section 2 was to assure that there not be a vacancy in the Vice Presidency, and that overriding purpose leads to the same conclusion; that the Speaker, on becoming acting President, would have the power to fill up the vacancy with the confirmation of the two Houses.

Mr. REEDY. Mr. Chairman, may I add one thing? While Professor Freund was speaking, however, I looked at article II section 1 of the Constitution, where it says, whatever officer is designated shall act as President, until the disability be removed or a President be elected. The interesting thing to me is, there is no qualification whatsoever put on the word "act." It says, he shall "act" as President. It does not say, he shall act as President except. It seems to me very plain language and I would think if there had been some idea of limitation there would have been a stated limitation. There are none.

Senator BAYH. That very wording caused a great deal of concern on the death of President Harrison, as you all know. Suddenly the Vice President then, by some definitions acting President, assumed the powers and duties of the office and the office itself. It took him, I think, less than 24 hours to strike the acting. Since that time, we have had several generations that the words in the Constitution mean that the Vice President becomes President. If you are a President, it seems, as one person involved, that you cannot say you are President except in this area. You do not have the full powers and duties.

Mr. REEDY. I think, Mr. Chairman, reading from the Federalist Papers, that the spirit of the thing is that he would not necessarily have the mystical status of a President who has been elected. But in terms of what he could do, I would doubt if there is any difference.

Mr. FEERICK. Mr. Chairman, I would like to read in the record, in view of the administration representative's statement, that the answer you elicited during your hearings in 1964 from James Kirby—Kirby says as follows: "If both offices became vacant, then the existing line of succession established by Congress would give us a President; and then he would nominate, and Congress would elect a new Vice President to join him. He would fill both offices * * *" and he proceeds, "The obvious disadvantage is that both could be nonelected officials.

But we wrestle in an area here where there are no good solutions. The nature of the problem is such that any solution is going to be partially undesirable, and one must choose between conflicting considerations, and accept the fact that any proposal is going to be subject to some disadvantage and criticism."

I think that quote is significant, Mr. Chairman, because it certainly was really within the contemplation of the Congress that proposed the amendment that we could have a situation some day, in the history of our country, where nonelected officials occupy the two highest offices.

Senator BAYH. Putting Mr. Kirby's expertise in the proper context—he had been chief counsel of this subcommittee, and had worked closely with the bar association study as they formulated it. At that particular time, I think, he was at Vanderbilt, and spoke with some significant authority and expertise.

Another question that was raised—if a President should nominate a Vice President under the 25th amendment, and then for certain reasons be taken from the scene, voluntarily or involuntarily, the office of the Presidency then would be vacant, but that that vacancy would occur before the Vice President nominated would be confirmed. Would the nomination automatically be made before the Congress? Could it be withdrawn after the Speaker succeeded to the Presidency? If the nomination was subsequently confirmed, would it be for the Vice President, or a man who had prior and a stronger position to be President, than the Speaker who had succeeded to the office?

Mr. FEERICK. To kick it off, the first point I would make is again, the legislative history is clear in this fact, and I would cite your testimony, Senator, before the House Judiciary Committee in 1965. It was made quite clear in the record that, if at a time when a nomination were pending, the President either died, resigned, or was removed—if there was a vacancy in the Presidential Office, and a new Vice President had not been confirmed; at that point in time, the Speaker, by virtue of the succession law, would become President of the United States to fill out the existing term. It seemed to me that, at that point in time, a vacancy, a nomination of the Vice President was pending, that the Speaker could either withdraw that nomination or he could continue the nomination. If he continued the nomination, and Congress confirmed the Vice President, then that person would be Vice President, and the Speaker would be President, unless the Speaker of course chose to resign. In which case, by virtue of succession, the Vice President would become the President.

The question that I have not seen any specific comment on was whether the fact of the Speaker's succession would render moot the existing nomination that was pending in Congress. It seems to me that the Speaker could be counted on to indicate whether he wanted to continue the nomination, because he has the right to nominate a Vice President or to withdraw the nomination. The reason I think that he can withdraw the nomination is because the nomination and confirmation process give both the President and the Congress the powers that each presently has with reference to advise and consent. And under the advise and consent process, the President could withdraw a nomination. I see no reason why the Speaker, under those cir-

cumstances, might not indicate that he wanted a nomination to be withdrawn.

I think that there is an argument, certainly, to say that the nomination has become moot at that time. Because the theory of the 25th Amendment is that the President should be able to nominate someone of his own party, someone of compatible views and temperament. Obviously, if the Speaker succeeded to the Presidency, and he was of a different party than his predecessor President, then I can see a rationale for saying that the nomination should be deemed moot. But it seems to me, as a practical matter, the succeeding Speaker is going to indicate whether he wants the nomination continued or withdrawn, and I think he has the right to withdraw it, and obviously he has the right to continue. And as I would see that situation, his views would become clear under the advent of succession.

Mr. REEDY. Mr. Chairman, I would like to suggest that in a situation such as you have outlined, where very obviously it can be argued any one of a number of ways, that what would happen would be that people would act sensibly at the time. And I think there would be quite a few pressures on them to act sensibly. When you are dealing with the Presidency, there is a certain amount of arbitrariness in approaching the office beyond which a person cannot go; and I think that if the political forces of the country were of such a nature that it were a wise thing to continue the nomination, my belief is that Congress would just decide that the nomination was still before it which would be the prudent thing to do. If the political forces of the country were such to dictate that a nomination should be withdrawn, I have the feeling that the Congress would probably again be prudent, and act accordingly.

I do not think that this is an instance where you have the type of law that ties men's hands so completely that they cannot take a prudent course. The Presidency is such a focal point of our national life, and there could be such tremendous disruptions if a really unpopular course were followed, that I think Congress would just take advantage of that flexibility.

Senator BAYH. I tend to believe that reason would prevail. I said so at the time we were being continuously fed a line of horror stories. The key question here, of course, is what if the reasonable heads in the House and Senate, for reasons that seem good and sufficient to them, might think that the nomination should continue. However, the President, for similarly well-intentioned reasons, comes to a different conclusion. Does the President have the authority, then, to withdraw the nomination, although the Congress wants to go ahead?

Mr. REEDY. Mr. Chairman, I believe that this is a situation that really goes somewhat beyond the so-called legal bounds of authority. I think that if an acting President, under those circumstances, took an arbitrary action that was unpopular in the country, so much turmoil would be created that it would take a very, very unreasonable man to pursue it. There is a certain point, when you are dealing with governments, and when you are dealing with the Constitution, where the political forces are going to dictate the action. We are not here dealing with a series of city ordinances, or a series of laws governing weights or measures or something of that nature. We are dealing here with the substance of Government, and I simply believe that the situation would

be created, and the possibilities of reaction from the country would be so great, that the sensible solution, whatever it would be, would almost dictate itself. I do not think that it is possible to be arbitrary beyond a certain point.

Mr. FREUND. I agree with what has been said and I would think that that agrees with what Senator Griffin said this morning, that that would be analogous to the case where a President died or resigned after making another nomination which was lodged with the Senate.

In other words, we start with the premise that there is no automatic withdrawal of the nomination. From that point on it rests, as has been so well said this morning here, both with the Congress and with the Speaker as incoming President whether to continue the nomination or withdraw it, and that would depend on the circumstances in the country at the time.

Senator BAYH. Do you feel that the incoming Speaker has the authority to withdraw the nomination that was made by his predecessor?

Mr. FREUND. I would assume so if that is the case with other nominations. It seems to me that a President can withdraw a nomination up until the time that the Commission is issued.

Senator BAYH. That was my assessment, but I would like a reading from those of you who spend more time studying the Constitution than I.

Mr. FREUND. Certainly the Supreme Court held that in the case of a Federal Power Commissioner—

Senator BAYH. That would seem to be the situation that exists. Do you gentlemen concur in that?

Mr. FEERICK. Absolutely. I think all the way through the debates on the 25th there is constant reference to the advise and consent process. It is my understanding of the advise and consent process that the President can withdraw a nomination, and as Professor Freund stated, in situations in the past, such as in 1963 when a President died in office and a new President succeeded to the office, that pending nominations remained intact and the new President had an opportunity to indicate whether he wanted them continued or withdrawn. In fact, I think there probably is some recent precedent upon President Ford's succession last summer. I believe he indicated with reference to a number of pending nominations in the Congress his thoughts and desires in the sense of continuing those nominations.

So I tend to agree with Professor Freund's observation that the event would not render the pending nomination of the Vice President moot and of no further effect. On the other hand, I also agree that the President has the power to withdraw or obviously nominate, to continue.

Mr. REEDY. May I make a distinction there, Mr. Chairman. I have no doubt in my own mind that he has the authority but sometimes there is such a thing as authority in circumstances where the authority is moot and where the man may not actually have the power. The reaction again would be too great. I do not think that there can be much question that the acting President would have the authority to withdraw, but he could be in circumstances where the withdrawal would be a very dangerous thing to do, indeed.

Mr. FEERICK. One final note, Mr. Chairman.

I would just like again to refer you back to your statement to the House Judiciary Committee in 1965 where contingencies of this kind were very carefully discussed and a great deal of legislative history was established. In fact, not to complicate the situation, but one interesting example that was given was suppose the President nominated the Speaker of the House of Representatives, and while that nomination was pending the President died. Would the Speaker who is now the Vice President designate nevertheless succeed to the Presidency by virtue of the Succession Law of 1947, and you said quite clearly, and I think correctly, that he would.

Senator BAYH. I must say almost all contingencies were presented to us with the exception of what happens if a Vice President and a President resign under the circumstances that we just witnessed in this country. For some reason or other, the collective foresight of 535 brothers and sisters and distinguished members of the bar who were advising us, did not foresee that.

The one area where the Assistant Attorney General pointed out some legislative history which he said appeared in conference is a matter that I remember very vividly—why the Senate assumed the position that it did. I was not aware that the House took a contrary position. The question was in a much stickier area of disability, which I think was more difficult to deal with in that part of the 25th amendment, which we have just gone through. In the event of the loss of the President or Vice President, the individual involved is gone. In the event of disability he or she is there living, hopefully in the process of recovery, and that makes it a much more difficult situation to deal with.

In the discussion of how this should be done, of course we provided for three levels of decision, (1) the President can make a determination, and could make it voluntary, (2) the Vice President or the Cabinet could make it if the President was not able to do so, and (3) we create a third possibility of how to deal with it in the event that there is a conflict between the President on one hand who says: "I am live and well. Send me back in. I am President." However, the Cabinet and the Vice President on the other hand are saying: "Mr. President, with all respect, you may be alive but you are not well. We feel that the best interests of the country would be better served by you having a little more rest." It does present some very difficult situations.

One of the questions we dealt with was the composition of the Cabinet to make this decision. The question was in the event that there is a vacancy. Does the 25th amendment limit the decisionmaking process? Assuming that the members of the Cabinet were confirmed by the Senate or maybe their designated replacements or their deputies, would they serve in this decisionmaking capacity? There is precedent that the deputies do act in certain other areas. The House apparently assumed the position that the deputy could step in and fill the Secretary's role.

I argued rather strenuously in the Senate, as I recall, that this was not the judgment that we should have. This is not the interpretation that we should follow basically because of the experience that we had had at the time of the Wilson disability where the Secretary of State at that time was the only Cabinet official who exercised any leadership at all. He did call some Cabinet meetings to try to keep the Government moving and for that he was summarily dismissed. One cannot

conceive of the President going down the list and dismissing all those Cabinet officials who had any question about his capacity to serve. If, indeed, the deputies are then able to move in and make that decision, it is possible that we can thwart the objective decision of the Cabinet that was anticipated under the 25th amendment.

What assessment do you gentlemen put on that question?

Mr. FEERICK. Why do I not creep into it this way, Senator? First of all, I think the doubt can be removed by Congress exercising its power under section 4 to make clear the answer to that question. As we know, section 4 gives Congress the power to establish another body and that power to establish another body can be exercised in a number of ways, and the legislative history indicates that one way is to make clear that if there be a doubt here, that the Cabinet who has the power is the Cabinet of people confirmed by the Senate.

Having said that, I would just like to sort of give you some of the impressions I have, Senator, and I must say this is an area in which any responsible representative of the bar should defer to you on. After all, you were the chief sponsor of the 25th amendment and I think in terms of the legislative history, certainly what you said and on the floor of the Congress has got to be extremely important on any question of interpretation.

My understanding of the history of this is as follows: As you pointed out, in the Senate debates of February 1965, in your colloquy with Senator Hart it was indicated that the members of the Cabinet who would have this power with the Vice President would be the confirmed members of the Cabinet, that an under secretary or an appointee would not be eligible to participate in that role.

The following month in March of 1965, the House Judiciary Committee issued its report and its report does contain the statement that should there be a vacancy on the Cabinet, that the Under Secretary would step into the shoes of the Secretary for the purpose of exercising that role. In the Senate debates of July 1965, Senator Kennedy, Robert Kennedy, and I believe at least one other Member of the Senate, reflected similar views as contained in the House Judiciary Committee report.

So that a fair reading of the legislative history does indicate that there is a doubt. I think there is a doubt and there may be an apparent conflict in the record.

It was my impression in the case of the vacancy in the Cabinet that the Under Secretary would step up. I must say that I had the impression that was reflected in the House Judiciary Committee report because this was an evolving thing. As you recall, Senator, language kept changing because of the need to deal with a number of situations, so that by July, 1965, it certainly seemed to me and the way I understood it, the Under Secretary would step into that situation. But I would like to emphasize that if there be a doubt here, it is not an imperfection in the amendment. It is something that is easily dealt with if the Congress chooses to exercise its power under section 4.

Mr. REEDY. Senator, I would like to present one point of view that really goes to my feelings about the rest of the 25th amendment. I am not quite as happy about the sections after section 2 as I am about the first two.

I think that when we are dealing with basic structures of government, that you reach a point where it is a mistake to try to provide in advance for all contingencies. That is really the problem when something like this is being considered, and a collection of horror stories are presented of what might happen under a set of conceivable circumstances. No one can really foresee what some of these contingencies are going to be. And I think not only is it a mistake sometimes to try to provide for every contingency, but that frequently there is a positive virtue in not providing for the contingency.

What we are dealing with here, again, I stress, is not just a city ordinance, not just a law that is going to determine how shops are going to be inspected or what sanitary regulations are. We are dealing with a structure that goes to the basic sources of power, all legitimate power in our society, and I think that when we do reach many of these contingencies, these imaginary horrors, what will happen is that men will act accordingly to the conditions of the times and prudent and pragmatic reactions will flow almost automatically from the political situation in this country.

Yes, I think it is vague and ambiguous and I think it would be a part of wisdom to leave it vague and ambiguous because otherwise you are tying the hands of men in the future who may have to meet a contingency under a different set of circumstances than we had envisioned. They may legally be unable to meet it if too much precision has been put in determining what they will do.

When we are dealing with a basic sort of power and what is legitimate, I think that we can contingency ourselves into a lot more trouble than we will ever get into by leaving it alone.

Mr. FREUND. I really have nothing to add, Mr. Chairman, to what has been said. I think Mr. Feerick has made admirably a balanced, careful presentation and has pointed out a simple, routine clarification through the fortunate provision that Congress made to designate a body that would reflect a resolution of the problem.

Senator BAYH. I do not rest quite as comfortably with that safety valve as you gentlemen do. The asset of flexibility is certainly an asset under some circumstances. This is the most tragic circumstance in the country where there is a President who is mentally incapacitated but does not realize it. This is a true Dr. Strangelove kind of situation. Cabinet officials are trying to protest this and take advantage of the vehicle to do so. Yet, they are summarily dismissed. The only way Congress could appoint a body under the 25th amendment would be to pass some kind of vehicle which would be subject to Presidential veto, I would think.

If the case was apparent enough, I suppose that at least two-thirds of the Congress and the Senate would be reasonable to override the veto.

You are concerned about that, Mr. Reedy. I can see that.

Mr. REEDY. I am deeply concerned. You see, Mr. Chairman, what bothers me about this is that this is a valid approach only if there are objective standards as to when a President has become mentally or psychologically or neurotically or what have you, incapacitated. And there is a very pretty little problem here. When we determine that a man has become mentally incapacitated, what we are really saying is that he is not acting accordingly to the normal standards of

our society. But as nearly as I can determine the normal standards of conduct are frequently the way that the President acts, and as long as we have the uncertainty, the inability to really determine by some standard upon which all reasonable men can agree that a man has lost his marbles, I think that this could open up the possibility of cabals and plots.

Suppose, for instance, that there was a cabal against the President, and what he was doing was simply dismissing the Cabinet officers because they were part of the cabal. I think if you start providing for all of these contingencies rather than meeting them as they come that you might tie the hands of an awful lot of people.

I do not think that there is really any sensible way of handling this question of mental incapacity, and I think that the deeper we get into it, the more we are going to complicate the process and the more likely we are to open up potentialities of coups d'etat.

Mental incapacity! What is it in terms of a man who is at the pinnacle of power, who is the ultimate source of legitimate authority, and in a sense, almost determines what is normal conduct? I think it is a very dangerous thing, Mr. Chairman.

Senator BAYH. I suppose a case could be made that an ordinary, reasonable man test would not apply if anyone even seeks the Presidency.

Mr. REEDY. That is probably true. I have discussed this problem with psychiatrists in an effort to find a concept of normal standards of behavior. The best definition I have ever been able to find boils down to any form of conduct that enables a person to survive as a functioning member of society. What do you do with the man who is at the very top? I really do not know.

I think we are trying to provide something here that cannot be provided.

Senator BAYH. In a cabal situation, the 25th amendment does not prohibit the President from discharging. He may do that. What it does do, the way I see it, is prohibit him from being able to shop of who the final determiner shall be in the place of the man who he has discharged. The duration of the cabal would be limited to 21 days, unless you could get two-thirds of the Congress, the House and the Senate, to go along with the conspirators.

We set a higher test really for removal under disability, if it is contested, than we do for impeachment today. This is done for a very obvious reason, the very concern that you expressed.

Mr. REEDY. I do not think that there is any question about that, Mr. Chairman.

If this possibility is open, if it is possible to launch this kind of cabal, obviously this requires a certain type of political situation in the country. These things do not just appear on the stage. They only appear when you have turmoil of one sort or another.

But, if such a cabal could be launched, I think that all the safeguards that you have down the road would be dealt with accordingly. Sometimes you can write things into a constitution, and they simply will not apply. They simply will not prevent the horrors from happening.

One of the most democratic constitutions that has ever been written was the one that brought Adolph Hitler to power. In terms of all the safeguards of freedom, et cetera, take a look at the Soviet Constitution; it has many more safeguards than we have. The important thing

is the structure that is set up in a constitution. Here I believe that we are in danger of setting up a structure that in time of turmoil could lead us into court politics. Let me let it go at that.

Senator BAYH. Professor Freund and Mr. Feerick, the Bar Association has adopted the position that a joint hearing would be better than a separate individual hearing under the provision of the 25th amendment.

Chairman Rodino suggested that to do so would sacrifice another safeguard which now exists, where each unit is free and separate to go their own way, and reach a separate conclusion.

Would you care to comment on that?

Mr. FEERICK. I would merely point out that we do resort to a single hearing to appoint a Supreme Court Justice and the single hearing has worked quite well in seating men of great ability in that high position. We do depend on a single hearing to fill out Cabinet positions, and in so many other critical positions of the executive department leadership. So, I think from the standpoint of safeguard and security, the Congress has performed its functions splendidly with a single hearing in the filling of other positions. I for one speaking on behalf of the American Bar Association, believe that a single joint hearing by the Congress would be handled very, very conscientiously and would avoid at least the repetition and duplication that does show up as one reads the record of the Ford and Rockefeller confirmation hearings. I think the Congress did its job very well in those implementations. I think in both sets of separate hearings, many of the same witnesses testified before each House of Congress. The same matters were discussed again and again. While there is a check and balance that is certainly very valuable, I do not think that we sacrifice thoroughness if the Congress chose to have a single joint hearing, which is used in connection with all other nominations for high office.

Senator BAYH. Of course, you recall in this particular instance, we wanted to get a special standard, a special responsibility to Congress that was nonexistent in other nominations. That is why we put both bodies in there.

Mr. FEERICK. I agree with what you just said. We keep that in there because the hearing is basically to flush out the qualifications and the background of the nominee. Each House separately debates and reflects the will of its Members in terms of its ultimate action on that nomination. So, I do not think that the concept of a single joint hearing in any way changes the ultimate fact that each House must still separately approve the particular nomination.

Senator BAYH. Let me ask, if you would gentlemen, to share your thoughts on one last area. I suppose it is not technically related to the 25th amendment oversight, but I think it is certainly a ballpark area for us—that is the suggestion made by Senator Griffin relative to using the 25th amendment to pick Vice President.

All of you have suggested initially your thoughts on that. If you would care to expand on them, would you please do so. If you are satisfied with the way we now choose our Vice-Presidential nominee, I would be glad to know that.

If you have any other specific suggestions as to how this choice could be made more prudently, short of the Griffin amendment or beyond it, I would be glad to have your thoughts on that too, please.

Mr. REEDY. I cannot precisely say that I am satisfied with the present method of selecting Vice Presidents. But, on the other hand, I do not believe that we are really going to come to any better way of doing it. The selection of the Vice President is really an integral part of the political process. I do not look upon it as being a frantic, last minute choice that is made at a period of time when men are incapable of making a choice. It may become so under some circumstances, depending upon the personality of the man who has been nominated for the Presidency.

But, I think that to go to some other method of selecting him would disturb the normal political process in this country. I think that it would have a greater tendency to disintegrate the political parties both of which right now are in some difficulty trying to find binding cement. I believe that it would add confusion to have the convention adjourn and have the decision made later. I just think in this particular set of circumstances we are accustomed to it. I really do not think it is working badly. I think we ought to leave it alone.

Senator BAYH. Why? Could you give me some thoughts. I share your assessment there, and the value of the fuselage that may be added to certain crackparts of the political process—the two-party system. That is one of the things that concerns me a little bit about that that would be absent or missing.

But, what is the magic of 1 day or 2 days after the choice of the Presidential nomination? What is the magic of saying that this must be done before everybody goes home? Is not the compromise necessary and the strengthening necessary there? The decision could be made then in a reasonable period of time, after that and prior to the actual election campaign?

Mr. REEDY. No, Mr. Chairman. Of course, I have a theory about the political convention which is somewhat different from that which is generally held. I look upon a political convention as being a microcosm of the entire political process; and the political process is not just a question of people getting out and making persuasive speeches. In fact, some of the finest things in a democracy are things that we really do have a tendency to derogate, logrolling, horse trading and that sort of thing. I think that there is a real virtue to having that choice of the Vice President made within the heated atmosphere of the convention where men are really concentrating, primarily, upon the political forces at play. I think that once they get away from the convention, once they get away from that microcosm, they are going to make the decision on the basis of more sterilized procedures.

I just think that the man who has been nominated for the Presidency should have to confront that problem of who his Vice President is going to be when all the political leaders are there, when they can put pressure directly upon him, when he has a method, really, of working out what is essentially a kind of vector process. I find it similar to the vector process in physics where you have forces going in a number of different directions and you have to determine the main thrust.

For all of the disadvantages of the system, and they are many, at least it brings us in accord with political realities at a white-hot point. I think that is where political decisions are best made.

Senator BAYH. How about you other gentlemen?

Professor Freund?

Mr. FREUND. I will not repeat what I said in my principal testimony about the objections, both with respect to a possible disability early in the term before we have a Vice President under the proposal and with respect to the election process of the Presidency and the possible effect on the two-party system.

I do think that our experience in recent years in some cases with the nomination of the Vice Presidential candidate, will probably make Presidential candidates more sensitive to the need for fuller deliberation, consultation and enquiry. I think we ought to avoid being slaves at the convention to television scheduling, and possibly taking extra days, if necessary, beyond the scheduled timing. But beyond that, I would rest simply with the hope and expectation that in view of recent experiences more care would be taken by prospective Presidential nominees in thinking through their possible Vice-Presidential choices, and doing the investigatory work that is appropriate for the high office.

Mr. FEERICK. I would associate myself with the comments of Professor Freund, and maybe semantically point out that Senator Griffin's proposals really are changing the 12th amendment and not the 25th amendment.

Senator BAYH. We are talking about a different part of the Constitution which, I think, he would like to see added. I would like to ask you gentlemen, after thanking you for making the special effort to help us here, and you have been very helpful, to give some thought, if you will, to that matter of a better choice.

There is a logic in what you say, but there is also a sort of a self-contradiction there on the one hand in saying that we want to make it in the white heat of the political process on the one hand, and yet we want to get a more considered judgment on the other. It is inconceivable, I suppose, that someone who has really been involved in the chase for the Presidency over a period of months has not given some consideration to who his Vice-Presidential nominee might be. But, given a convention deadlock where a dark horse may end up on the 27th ballot as a Presidential nominee, and to expect him to come forward with a Vice-Presidential nomination who is the product of considered judgment, is tough.

I think we can see in the past; of course, hindsight is so much better. Well, give it some thought.

You have been very kind to let us share your expertise. I really do appreciate that. Thank you.

We will recess pending the call of the Chair.

[Whereupon at 12:20 p.m., the subcommittee recessed.]

TESTIMONY OF REPRESENTATIVE BELLA S. ABZUG

Mr. Chairman: Today, as we approach the end of our second century of Democratic government under the Constitution, our President and Vice President are both appointed officials. Moreover, neither our President nor our Vice President has ever faced the national electorate, let alone received any mandate from it. This is no way to run a democracy.

The situation in which we find ourselves has come about as a result of Section 2 of the Twenty-Fifth Amendment to the Constitution, ratified in 1967. Section 2 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 Houses of Congress."

Those who drafted Section 2 were aware that on sixteen occasions, totalling thirty-seven years during our history, the nation has been without a Vice President. Indeed, that fact was a major reason for the inclusion of Section 2 in a Constitutional Amendment whose primary purpose was to deal with the problem of presidential disability. The report of the House Judiciary Committee accompanying the proposed amendment said in support of Section 2 that filling the office of Vice President when it is vacant would permit the person next in line to become familiar with the problems he will face should he be called upon to act as President and would perhaps increase the extent to which the President would take his potential successor into his confidence.

Though they did so only a few years ago, those who drafted, passed and ratified the Twenty-Fifth Amendment could never in their wildest dreams have foreseen the manner and circumstances of its use within the past two years. Vice President Spiro Agnew, facing indictment for bribery and income tax evasion, resigned from office in October, 1973. President Richard Nixon, himself facing a growing likelihood of impeachment, removal from office and criminal prosecution, was permitted to designate his potential successor, Gerald Ford. When President Nixon resigned in August, 1974, Mr. Ford succeeded him in the Presidency and gave him a "full, free and absolute pardon" only a few weeks later. Subsequently, President Ford nominated Nelson Rockefeller as the third Vice President in a period of under fifteen months.

These events demonstrate clearly that Section 2 does not assure anything resembling an orderly scheme of succession in which the public can have confidence. Nor does Section 2 assure that the party having the support of a majority of the electorate will hold the Presidency, for it is highly unlikely that, given the *denouement* of Messrs. Nixon and Agnew, the voters would have elected any Republican presidential candidate in the Summer of 1974.

Under the succession system as it existed prior to the ratification of the Twenty-Fifth Amendment, the Succession Act of 1947 (3 U.S.C. section 19) placed the Speaker of the House, the President *pro tempore* had been elected by the people of only a single congressional district or a single state and might in addition be of a party different from that of the President and Vice President, and that the Cabinet officers had not been elected to their positions by anyone.

The criticisms addressed to the pre-1967 succession scheme have merit, but so do the criticisms addressed to Section 2. I proposed in 1973, and now propose once more, that we reinstitute a succession system which dates back to the birth of the Republic. Upon the repeal of Section 2 of the Twenty-Fifth Amendment, which would itself require a constitutional amendment, my proposal could be instituted by statute. The proposal would provide that in a case in which the elected President and Vice President leave office, whether by death, removal or resignation, a new President and Vice President would be elected in the normal quadrennial manner. This method is not only permitted by the Constitution, but was undeniably envisaged by the Framers.

Article II, Section 1, Clause 1 of the Constitution provides that the President and Vice President "shall hold . . . office during the Term of four Years," and Clause 6 provides that

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall be 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."

In its initial form, the provision which ultimately became clause 6 provided that the Congress

"may declare by law what officer of the U.S. shall act as President in case of the Death, Resignation, or Disability of the President and Vice President; and such Officer shall act accordingly until the time of electing a President shall arise. J. Madison, *Notes of Debates from the Federal Convention of 1787*, 594."

However, Madison "observed that this, as worded, would prevent a supply of the vacancy by an intermediate election of the President, and moved to substitute—'until such disability be removed, or a President shall be elected.'"

Id. Madison's motion was agreed to, and remains in the Constitution to this day.

Early in 1792, the Second Congress passed the first Succession Act. 1 Stat. 239. Section 9 provided that in case of the removal, etc. of both the President and

the Vice President, the President *pro tempore* of the Senate (or, if there were no such official, the Speaker of the House) "for the time being shall act as President of the United States until the disability be removed or a President elected." 1 Stat. 240, Section 9. Section 10 provided

"[t]hat whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act. 1 Stat. 241, Section 10."

The 1792 provision was repealed in 1886, 24 Stat. 2, c. 4, Section 3, and there has never been an instance prior to 1974 in which both the President and the Vice President failed to serve out their terms of office. Partly because of doubt as to whether the Speaker and the President *pro tempore* were "officers" within the meaning of clause 6, the 1886 act removed them from the line of succession and substituted the cabinet officers. 24 Stat. 1, c. 4, Section 1. The act also provided that a cabinet officer could not succeed to the presidency unless (1) he had been confirmed in his cabinet office by the Senate, (2) he was otherwise eligible for the presidency, and (3) he was "not under impeachment by the House of Representatives of the United States at the time." 24 Stat. 2, c. 4, Section 2.

The Presidential Succession Act of 1947 reinstated the Speaker and the President *pro tempore* after the Vice President in the line of succession, on the theory that preference should be given to having an elected official as President. 61 Stat. 380, c. 264; H. Rep. 817, 80th Cong., 1st Session (1947). Both the committee which reported the legislation and the Acting Attorney General were of the opinion that it was constitutional to have the Speaker and the President *pro tempore* in the line of succession. H. Rep. 817, 80th Cong. (1947). The 1947 act continued in force the prohibitions on succession contained in the 1886 act, including the disqualification of anyone under impeachment. 61 Stat. 380, c. 264, Section 1(e). Except for amendment to reflect changes in the composition of the Cabinet, the 1947 act continues in force, and has been codified as section 19 of title 3 of the United States Code.

To summarize, the Framers contemplated, and the Constitution permits Congress to provide for an immediate election of a new President, should the elected President and Vice President leave office before the conclusion of their terms. Under the Presidential Succession Act of 1947, the Speaker of the House would serve as President until the new election was held.

Under my proposal, which was H.R. 11230 in the 93rd Congress and which I shall shortly introduce in the 94th Congress, upon the death, removal from office or resignation of both the elected President and Vice President, the person next in line under the Succession Act of 1947 would serve as President only until the election of a new President to fill out the then-current term. If less than sixteen months remained before the next regularly scheduled appointment of electors, the individual designated under the Succession Act would remain in office for the remainder of the term and no special election would be held. If more than sixteen months remained before the next regularly scheduled appointment of electors, a special election would be held on the next annual Election Day (the first Tuesday after the first Monday in November), and the new President and Vice President would take office on the following January 20th.

The Constitution and the records of the Convention of 1787 do not make clear whether a President and Vice President elected at a special election could be made to serve less than a full four year term. Since the answer to this question

is at best uncertain I would propose that the constitutional amendment which repeals Section 2 of the Twenty-Fifth Amendment also provide that the President and Vice President elected at a special election would serve only until the conclusion of the then-current four year term.

It is inexcusable that in a democracy such as ours, the tumult and agony which has surrounded the Presidency in the last two years has been permitted to occur without returning the choice of the Chief Executive to the people. Numerous nations similar to the United States and every bit as stable have systems which would have afforded the people the opportunity to select successors to Richard Nixon and Spiro Agnew. Indeed, the Framers of our Constitution believed the document provided as much for us.

A great American folk ballad tells of the old man who wouldn't fix his leaky roof when it was raining because he didn't want to get wet and wouldn't fix it when the sun was shining because it wasn't leaking. Now—when we find ourselves and the Presidency in a relative period of sunshine—is the time to fix our roof.

The events surrounding the resignation of Richard Nixon and the accession of Gerald Ford, in addition to pointing out the weaknesses of Section 2 of the Twenty-Fifth Amendment, have also shown a potential for the abuse of the President's pardon power which must be corrected. Since the pardon power is set forth in the Constitution, a constitutional amendment will be required to make the correction.

Prior to 1678, there was no limit on the pardoning power of the King of England. In that year, the Earl of Danby, chief minister of Charles II, was impeached by the House of Commons. Before the House of Lords could proceed to a trial and judgment of Danby, the King gave Danby a pardon. A few years later, Charles himself was forced from office and legislation was passed barring any royal pardon in an impeachment case prior to conviction. The Framers of our Constitution, conscious of the Danby case, provided that the presidential pardoning power should not include "Cases of Impeachment."

The pardon of Richard Nixon by Gerald Ford is analogous to the Danby case, in that it too points out a deficiency in the limitations which the Constitution places upon the pardon power. Even assuming that the Nixon pardon was an entirely voluntary and unsolicited act on the part of President Ford, we should not have in our Constitution the temptation which the pardon power as now constituted might offer to one in line for succession to the Presidency.

Accordingly, I shall shortly introduce a proposed constitutional amendment as follows:

"The President shall lack power to grant any reprieve or pardon to any person who has held the office of President or Vice President for an offense against the United States committed in whole or in part while such person held such office."

This amendment would close the loophole through which Richard Nixon was able to slip, and will assure that should we ever have another experience like Watergate, the biggest enchilada will not be able to escape liability for his crimes.

TESTIMONY BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS—SENATE COMMITTEE ON THE JUDICIARY BY ENDICOTT PEABODY, MARCH 20, 1975

In holding these hearings to review the experience of the 25th Amendment, this Subcommittee is living up to its well deserved reputation for protecting the Constitutional safety of the Republic and I appreciate this opportunity to testify.

In all that has happened in the last two years, it cannot be over-emphasized that were it not for Section 2 of the 25th Amendment, this Nation would have had a vacancy in both the Presidency and the Vice Presidency at the same time. Thanks to the foresight and diligence of this Committee this situation was averted, and when President Nixon resigned we had a Vice President ready and prepared to take up the responsibilities of the Presidency immediately. Thus a serious constitutional crisis was averted.

Because Section 2 did operate, we are now able to evaluate it and we have an opportunity to devise ways to make it operate better. In the light of our experience—particularly in the last 40 years during which four of our six Presidents have been former Vice Presidents—we can also appraise the role as well as the succession of the *Vice Presidency*.

Since January 1972, when I entered the New Hampshire Vice-Presidential primary, I have been campaigning to revise the role and the selection of the Vice President. Before the 1972 National Convention, I took this campaign to 44 States to illustrate by being a candidate, the need to give more attention to the selection of the Vice President. Practice and tradition have always left that decision to the last-minute, haphazard attention of an exhausted Presidential nominee—hardly an appropriate time to consider such an important question. But this is the way it always happens even though the *Convention Rules* and nominating procedures nowhere suggest that he should assume that responsibility.

Since the Convention I have attempted to have the rules of our National Convention amended to require that the identity of all candidates for the Vice-Presidency will be known in advance of the Convention—so that some consensus may develop among the delegates and in the nation, as to the merits and demerits of those who seek the nation's second highest office.

At this very moment I have an amendment to the Preliminary Call of the National Convention that is being considered by the Democratic National Committee meeting at the Sheraton Park Hotel here in Washington.

What has struck me as deficient in the normal nominating procedure, I find even more so in filling Vice-Presidential vacancies under the 25th Amendment. The people are almost completely closed out in determining the identity of the official who may have life or death control over them, indeed over the world in future years.

As Professor Arthur Schlesinger has ably testified before this Committee, the theory that the Congress was to act in lieu of the electorate has not worked out. Instead of applying the standards of the voter in a polling booth, the Congress has acted as though this vacancy was just another appointive position in the Executive Branch to be filled at the whim of the President.

Senator Pastore has urged a special election for the Presidency after an appointive Vice President under the 25th Amendment becomes President. I question why the nation should wait until that situation develops—a situation that would really create a constitutional crisis. When President Roosevelt died and when President Kennedy was assassinated the nation needed a replacement with the full powers and prestige of an on-going President.

I propose a national election for the Vice Presidency to take place within 60 days after a vacancy in the Vice Presidency occurs—unless there is less than 6 months remaining in the term. At least the National Committee of the Democratic Party—now more representative by being over three times its former size—has the capability and authority to nominate the candidate within 30 days and the election could take place within another 30 days.

If such a nomination and election took place, it might happen that the Vice President would be of a different party than that of the President. This raises the one objection—which to many seems overwhelming—that this breaks up the "team" concept of the President and Vice President. But this team is needed only during the election campaign. After that the traditional "well-balanced team" has no function, no effect, no value in actually *governing* the nation. It just doesn't work. Rarely has a President, no matter how close he may have been to the Vice President formerly, delegated any important duties to the Vice President. Power is jealous of power. More often the Vice President is relegated by the White House and the White House Staff to the dim extremities of the Executive Office Building, to be trotted out to perform political chores but little more.

Wouldn't we be far better off to have someone ready to take over the Presidency who truly represents the present feelings of the people? Wouldn't we be far better off now to have a President in the White House of the same party as the Congressional majority?

It is a myth that the Vice President is a Junior Executive. Constitutionally, he is no more so than the Speaker of the House. His only constitutionally prescribed duties are legislative, limited to presiding over the Senate and voting in the event of a tie.

This situation has caused Vice Presidents from Adams to Agnew, and now Rockefeller, to fret about their duties and to end up more frustrated than productive.

Accordingly, I would liberate the Vice President, first under Section 2 of the 25th Amendment and then under the constitution generally. I subscribe to your amendment abolishing the Electoral College and providing for a popularly elected

President. I also recommend a popularly elected Vice President. At the same time—since he does not share one iota of executive power of the Presidency (and I agree he should not)—his duties under the Constitution should be enlarged so that he has a full vote on every issue just as the Speaker of the House does. Thus he would provide the only vote in either Congress speaking for the entire electorate. In this manner, he would gain valuable knowledge concerning national issues—a resource of great importance to him and the nation were he to become President.

There is no reason that the electorate should be deprived of their right to elect a Vice President of any party of their choice, when such a vacancy occurs. The people should not be bound by a decision which they might have made in the past, which events have made inoperative subsequently.

MONTANA CONSTITUTIONAL CONVENTION,
Helena, Mont.

U.S. SHOULD ADOPT A ONE HOUSE PARLIAMENT

1. *25th Amendment*: If we keep the present form of government, the well-drafted 25th Amendment should be retained. Requiring popular confirmation of presidential and vice-presidential nominees ignores the 1972 election returns.

THE SILENT MAJORITY

Nixon, 45,600,000; McGovern, 28,400,000; and not voting, 65,600,000.

In 1974 the turn-out was even worse—38%.

Is the ever lower turn-out the fault of the voters? Of the candidates? Or of the system?

2. *The PARLIAMENT of the UNITED STATES*; The Congress should propose to the several states a UNICAMERAL PARLIAMENT.

Attached are copies of my speeches to the 1972 Montana Constitutional Convention on (a) the Parliament and (b) abolishing the Veto Power.

Also attached is (c) a brochure prepared for a Seminar on Non-Violent Revolution on the same subject.

If the Committee has no objection, I would be honored if these were placed in the record.

Respectfully submitted,

ROBERT LEE KELLEHER.

Enclosures.

EXTRACT FROM RECORDS OF CONSTITUTIONAL CONVENTION OF MONTANA—1972—ON
THE PARLIAMENT

Delegate KELLEHER, Mr. Chairman. I move to substitute for section one, just given by Mrs. Reichert, sections one, two, three, four and five of the proposal that I distributed last week and I believe the clerk has a copy. I wonder if the clerk would be so kind as to read those five sections.

Chairman GRAYBILL. Yes, the clerk will read this and this is Mr. Kelleher's parliamentary system, if you can find it on your desks so you can follow. The clerk will read sections one through five of the substitute motion. Just the italicized part, Mr. Clerk.

Clerk SMITH. (Reading) Section One: The legislative power of the state is vested in the Assembly, consisting of one chamber whose members are designated senators. The people reserve to themselves the power of initiative and referendum.

Section Two: Executive. The leader of the party which has the greatest number of seats in the assembly shall be declared governor. The assistant leader of that party shall be declared lieutenant governor.

Section Three: Selection of Leaders. The leaders and assistant leader of any political party shall be chosen by a direct primary election or by convention or as otherwise provided by law.

Section Four: Cabinet. The governor shall assume the executive authority and shall provide for the proper administration of the laws of the state. He shall appoint a cabinet who shall assist him.

Section Five: Dissolution.

Subsection A: At any time during an assembly session, the governor may call for the dissolution of the Assembly. Upon a majority vote pursuant to this call, the legislature shall be dissolved and new elections shall be held according to law.

Subsection B: At any time during an Assembly session, a majority of the members of the Assembly may call for its dissolution. Upon a two-thirds vote pursuant to this call, the Assembly shall be dissolved and new elections shall be called according to law.

Chairman GRAYBILL. Mr. Kelleher.

Delegate Kelleher. Mr. Chairman, I move that when this committee does arise and report after having had under consideration the sections just read by the clerk, that they recommend the same do pass. Mr. Chairman.

Chairman GRAYBILL. Mr. Kelleher.

Delegate KELLEHER. On the first section, my fellow delegates, you will note in the first Minority Report that I used the word Parliament. I've now substituted the word, Assembly. One of the principle reasons for that was that I had made so many changes in the original parliamentary system to wit, very frequent elections. Under the British and Canadian system, they originally had elections every seven years; now they have them every five years. Under my proposal, we would have elections every two years. This is nothing novel with me. You'll note that on page fourteen of the Majority Report, I merely absorbed their Section three. Senators shall be elected for a term of four years. One-half of the senators shall be elected every two years. In this way, every two years, if half of the Assembly would be up for reelection, and if the people of the state do not like the way the ship of—did not like the way the direction the ship of state was moving—they could change it.

The checks and balances, those hellish words from our friend, Mr. Montesquieu, in his Spirit of the Laws of 1748, are now between—instead of being between the governor and the legislature—they're between the legislature and the people. Every two years, by voting, the people could change their government. If the people like the way the ship of state is moving, all they do is reelect the incumbent senators that are up for reelection every two years. If they don't like the way the ship of state is moving, they defeat them and put the opposition party into office. At that time, the opposition party would assume the position of the chief executive and the people by their action would change the chief executive.

This is highly democratic, very responsive democracy. For instance, we recently have had—have seen here in the Capitol—disputes between the State Board of Health and the governor on the matter of pollution controls. The State Board of Health enacted pollution controls which were much higher, as you know, than those enacted by the Federal Government. The governor disagreed with the State Board of Health.

Now, as a Delegate, I'm not going to take an official position on this dispute. All I'm concerned about is the machinery of government, which, of course, is what we're concerned about in writing this constitution.

If this had been a parliamentary body or a body as I proposed where the executive is the leader of the majority in this chamber, the governor could be called into this chamber during a question and answer period—he'd have two or three days notice in writing of the questions that would be put to him—together with his ministers or cabinet heads or department heads, whatever you wish to call them, that were in any way connected with the matter of pollution controls. Every member of this chamber—we are now, if you will, imagine yourself as members of the legislature rather than of the CON CON—every member in this chamber could ask each one of those ministers or department heads and the governor, any questions that they wished. Now, if the governor satisfied all of your questions and objections, then you would just let the matter stand as it was.

If however, a minister or the governor did not come up with the right answers—let's take the case of the minister or department head (the minister is the department head, you know) if you did not like the answers of the department head—a majority of you—you could vote to censure him and down he would come and he would come back into this chamber whence he came to head a job as a department head, and you would put him back in his seat and then the governor would have to get himself a new department head.

Then, you would go on to the governor and if the governor did not come up with the right answers, ladies and gentlemen, you could ask for a vote of confidence. If you wanted to bring him down, you could get yourself a new governor.

Now, I submit that this is real democracy. This is very responsive democracy. This is, if you will, instant democracy.

Now, before—let's go one step further—before you bring the governor down, you realize, of course, that he is the head of your party and you realize that when you go back to the people, that the governor does not go alone. That's the name of this little game; you go back with him.

So, it better be something that's very, very serious, something of the utmost importance, before you would go that far.

I merely give this as an example to let you know the power that would be in this body and that is all that we are talking about at this convention is the power of the people.

You remember when Larry Margolis was here, the Executive Secretary of the Citizens' Conference on State Legislatures—he said that this body is not representative of the people but that this body IS the people. Now, think about that for a moment. If you accede to that thesis that this body is the people of Montana, then I submit that before you put any control on this body, that you better have a pretty good reason for doing so.

When Ramsey McDonald took office in 1923, he was defining the program of his new ministry—of his new government—and he discussed this matter of how—on what type of a matter you would vote on a vote of no confidence.

"I have a lively recollection of all sorts of ingenuities practiced by oppositions in order to bring a snap division upon the government so that it might be turned out on a defeat. I have known bathrooms downstairs utilized not for legitimate purposes—whatever those are—but for the illegitimate purpose of packing as many members surreptitiously inside their doors as their physical limitations would allow. I have known an adjoining building where there happens to be a convenient division bell used for similar purposes. I have seen this house practically empty when the bells began to ring and then turned into a riotous sort of marketplace by the inrush of members for the purpose of finding the government napping and turning it out upon a stupid issue. I am not going out upon such issue—any such issue."

So have no fear that we're going to be having elections every year. A person who's a member of this legislature under my proposal, would not be in any particular hurry unless it was a matter of great import to himself return to the voters.

He [McDonald] said later: "Nowadays, a member of the majority party in the house will hesitate long before voting against his party leaders. He has no desire to turn out his own party and so bring in the opposition, perhaps thereby losing his seat and the salary attaching thereto. Nor does he wish to incur the expense and undergo the labor of an election. Also at stake are the interests of the twenty-two members of the cabinet with thirty or more other party officials dependent for status and salary on the continued existence of the cabinet. They have strong motives to exert all the influence they can to stave off dissolution."

I quote those sentences only to show you that dissolution is not something that comes on very suddenly. And lest anybody fear that we would be changing governments rather rapidly, I ask you to look to our Canadian cousins to the north in Alberta. I just found out last week that one of the reasons why the Labor Party—I mean the Conservative Party—which just won the elections last fall, was so apprehensive about taking over power was that this is the first time in thirty-six years that they've been in power in Alberta. Apparently, the party that was in power was doing a satisfactory job for some thirty-six years. So, the fact that you do have a very responsive type of government, responsive to the wishes and desires of the people, does not mean that you're going to be changing your government every other day.

If you were governor, which would you rather have? A guaranteed working majority or the veto power? Think about that. You've got to make some decisions during this week and next about the power of the governor. The veto power is like a string that you can pull at but you cannot push.

Mrs. Reichert pointed out that in the last seven sessions, there has been a dispartity between the house and the senate as to political affiliation. I believe—it is my personal opinion—that very likely our state is going to become unicameral, at least from what I hear in my own county of Yellowstone. What if the new, very powerful legislature—I want it to have the utmost power because it is the people—is unicameral and it is of a party opposite the governor's party?

Since we came into the union, seventy-one percent of the time the governor of this state has been of a party other than at least one house of the legislature.

Looking at it from the governor's standpoint, to take a current example, let's go to Washington for a moment. There are at least a half dozen United States senators all of my party and all great and honorable men, who are seeking the office of the presidency of the United States. During this, an election year, what are the possibilities or at least, what are the pressures upon these men to give President Nixon a program that would be of benefit to the people?

These great senators, first of all you must remember are partisan politicians and their job as partisan politicians, when the occupant at 1600 Pennsylvania Avenue is of the opposite political party, is to first bring him down and then we'll start worrying about the people's business.

I think it is time that we Americans stop playing this childish game of who is the leader and begin to take care of the peoples' business, and the best way to do that is by guaranteeing that the chief executive of the state of Montana will always have a working majority in this body—in this hall.

David Patrick Moynihan, former assistant to President Nixon, said that the Federal Government is very expert at collecting revenues and very poor at dispersing services.

Charles Schultze was director of the Bureau of the Budget under President Johnson and said that only the Federal Government could take care of national defense and put a man on the moon. As far as education, pollution, manpower, poverty, welfare, health and urban renewal are concerned, only the states can handle these problems.

I publicly admit that as a liberal Democrat that not all the answers are in Washington; in fact, as I get older, I realize more and more that very few of the solutions to our problems are to be found in the nation's capitol.

Someone has said that if we did not have the states as administrative divisions, we would have to create them.

Our legislature cannot handle a budget of several hundred million dollars a year with the shackles of the present constitution. My proposal would provide a modern, streamlined and efficient form of government for Montana.

Because it is different, it has been called by the editor of one daily newspaper, "a return to Toryism." Another editorial writer has defined it as an "alien political culture."

This form of government that is so alien to our shores was responsible in 1215 for the Magna Carta. I have here in my hand part one, volume one—all of you lawyers know what it is. It's the Revised Codes of Montana. The first document in this book is not the Constitution of the United States or even the Declaration of Independence. Rather the first document in this volume of our laws starts out, "John, by the grace of God, King of England, Lord of Ireland." And it goes on to say, "We also have granted to all of the free men of our kingdom, for us and for our heirs forever, all the underwritten liberties to be had and holden by them and their heirs, of us and our heirs forever."

The Declaration of Independence is the next document in our laws and the first three reasons why we went to war with Great Britain almost two centuries ago was because the king had the veto power over our legislatures.

Each province of our Canadian cousins on our northern border has never used any other form of government. President Wilson favored it. Seventy-five percent of the presidents of the American Political Science Association since that time have also favored it. So did the conservative William Howard Taft.

This "return to Toryism" is exactly the form of government we are using in this great hall. This "alien" form of government is the type of government we are using to write a new constitution for Montana. Moreover, if the colonies had revolted only some ten years later, we would now have this type of government in the Congress of the United States and the president of the United States would always be of the majority party of the Congress.

Professor Walgren in his article on the legislature, which I'm sure all of you read, you will recall, said that lobbyists and incumbent senators favored the present bicameral or two-house legislature.

Elimination of one house will reduce the effectiveness of lobbyists who would only have two chances to kill a bill rather than one.

However, my proposal would do away—mind you—would do away with the greatest weapon of the lobbyist—the gubernatorial veto.

We have elected our own president and our own leadership and our president cannot hide out in a governor's palace. He is responsive to us; he is part of us. Imagine for a moment, if after we finished our document, that we would take it over to that other chamber, across the hall, and they would tear it apart with

scissors and pastepot, hold hearings and rewrite the whole thing. That is abhorrent to us but, imagine further with me if you will, that not only after we wrote it, that our president could veto it and we had to pass every provision with two-thirds majority. The way we've been voting, we'd be here for a long time to try to get those two-thirds majority.

The eyes of our state are on you now and you are governing yourselves with the best possible form of government. You are rightfully proud of the job you are doing. Our CON CON system is the best form of government. I urge you not to be selfish; share our system with the people of Montana.

To the yeah-buts, those who agree with me and say, "yes, Kelleher, it's a good system but . . ." To the yeah-buts, I can only say, have confidence in the people of Montana. Our people come from the best school system in the United States. Our children are so bright that in national tests our scores go off the top of the charts.

Our people want a change. In 1968, by a majority of over forty thousand, they said they did not like the present system; they refused to give the present bicameral chambers an extension from sixty days to eighty days.

When the legislature went back to the people and said, "All right, people, do you want to rewrite the whole business and start a whole new ball game," the people of this state by a two to one majority said, "Yes, we want a whole new ball game."

A one-house legislature is a baby's step in the right direction and I support it. It will save money; it will give better representation to rural areas; it will reduce the influence of lobbyists; it will be more accountable and more representative of the will of the people. However, it will not stop the feuding and the buck-passing between the legislature and the government.

In one year, Mr. Babcock, you will recall, vetoed twenty bills. I'm not going into the merits of whether he was right or wrong. That's not my business as a delegate, but can you imagine the innumerable hours of time in committee, of research, of government heads of the state of Montana that came over here to testify, and all of that time was wasted?

Finally, if you give the governor a majority, you will have taken a giant step and I ask you to take that giant step and, in conclusion, I say that our legislature would be so powerful that we'll be able to annex the state of North Dakota. Thank you, Mr. Chairman. (Laughter and Applause.)

Chairman GRAYBILL. Discussion is on Mr. Kelleher's substitute amendment—substitute motion.

EXTRACT FROM RECORDS OF CONSTITUTIONAL CONVENTION OF MONTANA—1972—
ON THE VETO POWER

Chairman GRAYBILL. Mr. Kelleher.

Delegate KELLEHER. Yes, sir.

Chairman GRAYBILL. Mr. Kelleher, you have an amendment. Do you care to have it read at this time?

Delegate KELLEHER. Yes, sir.

Clerk HANSEN [Reading]. Mr. Chairman. I move to amend section ten, veto power, by deleting the subsections one, two, three, four and five beginning at line fourteen through thirty on page eight of the Executive Committee Proposal, and lines one through eighteen on page nine, and inserting in lieu thereof the following language: quote, the governor may veto items in the appropriation bill for his office, end quote. Signed, Kelleher.

Chairman GRAYBILL. The effect of Mr. Kelleher's proposed amendment is to delete the veto power, except for the governor's right to veto items in the appropriation bill for his office.

Mr. Kelleher.

Delegate KELLEHER. Mr. Chairman and fellow delegates. The veto power, in the early days of our constitutional history in the United States, was given to the president to be used to veto bills which were unconstitutional. We still have this power, of course, in the supreme court and we have it in the state supreme court. The veto power goes way back to the Romans and we got it from Montesquieu, who got it from the British and, as I told you the other day, he was a great admirer of the monarchical system. He did not care for the republican system—

Chairman GRAYBILL. Stay on the subject now, Mr. Kelleher.

Delegate KELLEHER. I'm staying on veto power and I want to get rid of the veto power, and I want to show what's wrong with the veto power, Mr. Chairman, and I want to show where the veto power came from.

Chairman GRAYBILL. Okay.

Delegate KELLEHER. And I cannot show what's wrong with the veto power unless I show where it came from, Mr. Chairman. Montesquieu said, as you know, that a republican form of government, which is the form of government we have under Article Four—paragraph four—of the Federal Constitution, is like to a body without a head. The last time it was used in British was in 1707 by Queen Anne and it has not been used since 1707 by the British. At the time of our Revolution, only Massachusetts and New York had the veto power. Massachusetts had a single veto power and New York had a veto power combining the power of the governor and a justice of the supreme court. The reason for that was a document was to be cut down only if it were unconstitutional. Now, then, Thomas Jefferson never even used the veto power and Thomas Jefferson said it should only be used when a document is unconstitutional. I submit that we do that through our supreme court. John Quincy Adams never used the veto power. It was only with the time of that wild Democrat, Andy Jackson, that they started to use it for reasons of expediency, rather than when a law was unconstitutional. North Carolina today, ladies and gentlemen, does not have a veto power and is one of the most progressive states in the southern part of the United States. I would like to read, if I may, a very short paragraph from Robert Lewis who was a former congressman—he's deceased now—written in 1935—former congressman from the state of Massachusetts and scholar on state legislatures.

"There can be no doubt that where the governor and a majority of the legislature are of opposite parties, bills are sometimes passed with the deliberate purpose of embarrassment compelling the governor to choose between signing, say an extravagant appropriation in which he does not believe, and losing some measure of popularity. On the other hand, governors unhampered by scruples, without fine sense of duty, have used the veto with the deliberate purpose of making political capital by the appeal to popular sympathy. When one man sets up his opinion against that of two or three hundred in the legislature, the masses are almost sure to approve his position because he is the underdog. The sort of message that kind of a governor finds it easy to write, gets wide reading and hasty applause. The arguments of the authors of the bill, who may know a hundred times more about it than the governor knows, and who may be the men of the soundest judgment and loftiest purpose, are ignored. The legislature is a sure loser in the unequal contest. The honors go to the virile, aggressive man of dominating personality who was willing to climb at the expense of fair play in the public welfare."

The veto power, Mr. Chairman and fellow delegates, is a vicious, powerful weapon. It is the most powerful weapon in the arsenal of the lobbyist. Charles I lost his head, literally, over the veto power at the time of the Long Parliament. Now, I'm no Oliver Cromwell, and I'm not suggesting that we do away with the governor's head; I just want to get rid of his veto power.

Lastly, remember when Larry Margolis was here and spoke to us from that podium? He said two sentences that I'll never forget. "The legislature is not representative of the people. The legislature IS the people." And before you put any limit in this constitution on the authority of the people of this state, you better have a very, very serious reason for doing so. There's no veto power on us. It's our own wise judgement. That's the only veto power on us. This body, in my opinion, is being very conservative, very mature, in its judgment and in its deliberations. I ask what right does an uncrowned king have to thwart the will of the people and I ask you to eliminate the veto power of the governor, except for control over his own appropriations. This may not be necessary, I admit, because if the money is appropriated for him, he doesn't necessarily have to spend it. Otherwise, I would urge you most strongly to exclude completely the veto power of the governor. I would like to have a roll call vote on my motion when it's voted, and I'd like to have five seconds please. (Seconds rise.)

Chairman GRAYBILL. The question now arises on Mr. Kelleher's motion to amend section ten.



VICTORIA

January 15th, 1974.

Mr. Robert L. Kelleher,
Attorney at Law,
2108 Grand Avenue,
Billings, Montana, 59102.

Dear Mr. Kelleher:

Thank you for your letter of December 10th, 1973.
Please excuse the delay in getting off this reply.

I have given a great deal of consideration to your request and I was sorely tempted to accept it. Although I recognize that yours is a voice crying in the wilderness, it is my candid opinion that the Parliamentary system is a far more effective way of having direct democracy developed. Had the United States adopted the Parliamentary system, perhaps some of their present problems would not exist.

You are aware, obviously, of the fact that the Parliamentary system de-emphasizes personality and focuses more on policies and responsibilities of and by political parties to those policies rather than relying on the whims and the power of one man or woman as the case may be.

Since I am so strongly committed to the Parliamentary system, and have some personal experience of the problems you are having in the United States in regard to the existing political mechanisms, I was sorely tempted to accept your offer and present my point of view, if that in any way could assist you in obtaining your goal. However, the combination of the limit of my time and the enormity of the task that you face has caused me to regrettably inform you that I will be unable to accept your kind invitation.

If ever you visit this part of the Pacific Northwest please do not hesitate to drop in and say 'hello'.

Yours very truly,

David Barrett,
Premier.

Canadian — American Seminar: NON-VIOLENT REVOLUTION & MORALITY

Petro Hall - Eastern Montana College
24-25 May, 1974 - Billings
Frag Admission

GREAT FALLS TRIBUNE Nov. 8, 1973



Frank Adams

BILLINGS — "My feeling is that if we had a parliament none of this would have even come up."

Yep, that's Bob Kelleher speaking. And it's Watergate he's talking about.

Kelleher was the Constitutional convention delegate who tried to get a one-house parliament for Montana. He is still trying.

Why wouldn't we have had a Watergate and the ensuing impeachment drive if we had a parliament instead of the present congressional-presidential setup?

"First of all, whoever was president or prime minister — whatever name you want to give him — would have a majority of the Congress. And he would be the leader of the majority. You wouldn't have a Democratic Congress trying to impeach a Republican president."

IMPEACHMENT NOT NECESSARY

But even more basic than that, says Kelleher, there is no impeachment in a parliament. "The majority could change their own leadership at will. They'd just say, 'Mr. Prime Minister, we want you to step down.' It would be done gracefully after perhaps an afternoon's debate. And the PM would either call for new elections and turn out the whole party or return to his seat in parliament and the minister of foreign affairs would become PM. It's that simple."

CAN'T BUY ELECTIONS

But the financial pressures that helped created Watergate would not exist in the first place, under a parliament, says Kelleher. That's because the prime minister would only have to carry his own congressional district rather than the whole nation. Thus Nixon, if he were prime minister, would have been elected to parliament from his California congressional district and then elected PM by his fellow Republicans in parliament, assuming that they were the majority party. "He doesn't need to go out and collect 68 million bucks or whatever Nixon's people tried to collect," says Kelleher.

And similarly with a state parliament: the governor would only have to run in his home legislative district. "Tom Judge

spent \$250,000 in Montana. That's ridiculous. It's utterly ridiculous. And I can say it because he's a member of my party.

VOTE ISSUES, NOT THE CANDIDATE

Another thing about the parliament, especially the British system, says Kelleher. "They don't have any of this nonsense: 'I vote for the man, not the party.' That's the height of stupidity. In England you vote for the party. I don't care if the guy's got blue eyes or curly hair or the best TV appearance. You vote for the platform. It's issues oriented rather than personality oriented. That's the heart of the whole damned thing."

KINGDOM OF THE U.S.

But don't you think Americans want a king? "No I don't. I think they're tired of a king now. I think they're sophisticated enough that they know they can govern themselves. And I think Watergate is going to turn out to be one of the Greatest blessings that's ever happened on the American political scene. Watergate is 98 per cent good and 2 per cent bad."

Kelleher visited the British parliament last year. "We walked within feet of the PM. One of our fellows said we couldn't get this close to our president. And a bobby looked down and said, 'right-toh.' But we don't shoot our PM's, eyether."

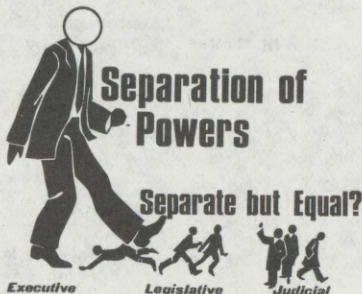
On the positive side, says Kelleher, all the ministers in the parliamentary cabinet have as many votes as the prime minister. They come from as solid an electoral base as he does. "The PM is nothing but a first among equals. When the minister of war says 'damn it, I don't want you putting those destroyers in the Mediterranean, you're going to irritate the Arabs,' the PM has to listen to him. But can you imagine the secretary of defense talking to president Nixon like that? He's got his resignation in his hip pocket.

"The man is downgraded in a parliament. We've got to cutism just like the Soviet Union under Stalin. Isn't that strange? And they call this a democracy!"

PARLIAMENT HALF FEMALE

Kelleher says he's finding growing support for a one-house parliament for Montana, or at least a one-house legislature. And he's doing his bit to further the idea through lecture engagements. "We should abolish the Senate, but call the new members senators so the Senate doesn't feel that it lost out. I want in the worst way to turn that Senate into a big hearing room."

Kelleher's idea about a one-house legislature is to have one man and one woman come from each of the 50 senatorial districts.



Parliamentary Idea Still Alive

By FRANK ADAMS
Tribune Capitol Bureau

HELENA — Robert Kelleher, D-Billings, feels that the seeds for a parliament for Montana have been sown despite the disappointing vote it received in the Constitutional Convention. It's not that the people aren't ready for it now. Kelleher says he's had people writing him from all over the state expressing their support. "In fact," he says, "there was nobody at this convention that really disagreed with me. Their only real objection was the 'yeah, buts' — 'yeah, but the people wouldn't buy it.' I am convinced that our people would have bought it. They're not dumb dumbs. Under the parliamentary system, the governor would be the leader of the majority in the legislature. "A man could be elected governor and he wouldn't have to spend a quarter of a million dollars. He just has to carry his own district.



Kelleher

"What becomes important under the parliamentary system are issues. That's what's so sweet about it — you're for a sales tax or you're against a sales tax . . . you want more money for the state universities, you want less money for the universities . . . you want more money for roads, you want less money for roads.

"The programs mean something, whereas now all too often we vote for a governor because he has blue eyes or curly hair. And personalities should not have that much to do with electing the chief executive officer."

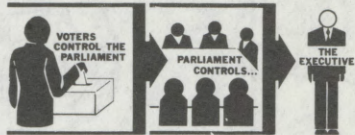
A parliament also eliminates "that veto," says Kelleher, "and a veto is a vicious weapon. It's the weapon of a tyrant." He says the British, whose parliament he has been studying, haven't used a veto since 1707. "There's no veto power under the parliamentary system, but in exchange the governor has a guaranteed majority. And if I had my druthers, I'd much rather have a guaranteed majority by the governor than the veto power."

Anyway, he says, "when a man becomes governor of Montana, does the Holy Ghost, like at Pentecost, descend upon him and make him wiser than the 100 members we're going to have in the unicameral legislature? These senators have examined this thing and listened to witnesses and chewed on it and regurgitated and they know practically everything there is to know about this bill. What makes the governor so all-wise?"

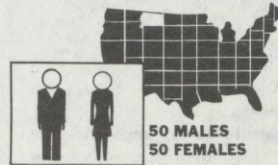
1972 CAMPAIGN CONTRIBUTIONS

NIXON	\$37,600,000
McGOVERN	\$13,000,000
GOV. TOM JUDGE	\$250,000
PRIME MINISTER HEATH	\$2,520

PARLIAMENT



50 LAW-MAKING DISTRICTS



REGISTERED VOTERS WHO VOTED

1964	62%
1968	60%
1972	55%

[From the Missoulian, Mar. 6, 1975]

PARLIAMENTARY SYSTEM SUGGESTED FOR AMERICA

(By Steve Shirley)

A switch to parliamentary government and abolition of the open primary election were suggested Wednesday night by a panel of political scientists discussing executive power and means to improve government.

The forum topic, "The American Presidency: Monarchy Revisited?" was discussed by University of Montana professors Richard Chapman, Ellis Waldron, Robert Eagle, Thomas Payne, Peter Koehn, Leo Lott and members of the audience.

Payne suggested that executive power should be strengthened, rather than weakened, by adopting a parliamentary form of government.

"The governmental system under which we now operate was designed . . . in a far different kind of world than in which we now live," he said.

The founding fathers of the nation meant to fragment power, but more power concentrated in the executive is needed so people can realize their "policy expectations," Payne argued.

He added that the powers given the president "are not commensurate with the responsibilities we expect him to assume."

Under a parliamentary system, the executive would not only have more power to deal with problems, Payne said, but leaders would be more thoroughly screened before they took power and political parties would have more importance.

Koehn agreed that the president must be strong, saying the president has to have the power to keep control over bureaucracy.

The problem of presidential power, he said, has been a "malapplication of presidential power rather than too much presidential power."

Koehn suggested two reforms to help the presidency.

First, he would make the presidency a four-year term for the first time in office, but allow an incumbent to serve only two year terms as president. The president, he said, could serve an unlimited number of terms. Koehn said this reform would eliminate the lame-duck president.

Some of his colleagues challenged the proposal, arguing the president would campaign continuously for office.

Koehn's other proposal was for a "national executive council" composed of broad range of political ideologists who would be required to consult with the president before any important decision. Such a council is needed, he said, because the president presently can shield himself from diversified information.

Talking about congressional supervision of presidential power, Eagle listed a number of powers legislators have to check the president, such as rejecting his legislation, refusing his nominees for appointive office, the power of purse strings and impeachment.

He acknowledged, however, that Congress often is slow to use these powers.

"There is the power there in Congress to check a president if the congressmen will use it," Eagle said.

Following questions from the audience of more than 100 persons, both Payne and Waldron argued for presidential nominating conventions rather than primaries and the scrapping of laws regulating campaigns.

"This business of legislating against campaign contributions is like legislating against sex," Waldron said.

He suggested that presidential nominating conventions be held in August, with campaigning limited to two months before the convention. He added that the media should be required to give free advertising to the candidates.

STATEMENT OF ROBERT M. BARTELL, PUBLIC RELATIONS CONSULTANT,
WASHINGTON, D.C.

SUBMITTED TO SENATE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS ON 25TH
AMENDMENT—FEBRUARY 24, 1975

Mr. Chairman and Members of the Committee: LIBERTY LOBBY appreciates this opportunity to present the views of its more than 20,000-member Board of

Policy, and also the approximately quarter million readers of its monthly legislative report, *Liberty Letter*.

LIBERTY LOBBY is an institution of American citizens, often called the people's lobby, who have joined together to promote their patriotic and constitutional convictions for good government. LIBERTY LOBBY's position is different from those of special interest pressure groups, and approaches these issues solely for the best interests of all the people in our country.

In addition to our publications, our daily radio program, "This is LIBERTY LOBBY," reaches a potential audience of millions on more than 200 outlets from coast to coast.

As a result of this wide, representative contact with citizens across the country, LIBERTY LOBBY is in a position to transmit the feelings of a large cross section of the American people who have no vested interests other than the welfare of the Nation as a whole.

* * * * *

The 25th Amendment, with the backing of powerful forces in this country, was ratified into law in 1967. Since then, to the surprise of many Americans, it has resulted in our anomalous and unprecedented situation today: a President and a Vice President not elected by the people.

It is obvious to some, including members of the current legislature, that perhaps a second, longer look should be taken at this deceptive, misleading and obtuse amendment.

It appears that the 25th Amendment directly conflicts with the 12th Amendment, which states that "The Electors shall meet in their respective states and vote by ballot for President and Vice President. . . ." We did this for 190 years although the 12th Amendment was not adopted until 1804.

The 25th Amendment says, in essence, that if the Vice President feels the President cannot serve, the Vice President shall become President. We believe there is a basic constitutional conflict here that should be resolved.

Art. II of the Constitution states that the Vice President shall become President in case of the removal of the President from office, and in the event both President and Vice President are removed from office for some reason, Congress may by law declare what Officer shall then act as President. Why then was the 25th Amendment needed at all?

Perhaps it was because of Sec. 4 of the 25th Amendment. This would allow the "principal officers of the executive department," and the Vice President and/or any other such body as the Congress may provide, to remove the President from office. The clause, "as Congress may by law provide," is the only one that makes sense, and it is spelled out in Art. II without the unnecessary interpolation of the 25th Amendment. What we consider to be particularly dangerous is the phrase, "principal officers of the executive department."

Does this mean the Cabinet? Does it mean the directors and chairmen of various departments and agencies directly the responsibility of the executive department, such as the Bureau of the Budget, the Office of Emergency Preparedness, etc.? Does it mean the executive chef of the White House kitchen? Does it mean the principal officers of the various departments under the direction of the Vice President? We do not expect an answer to this rhetorical question, for it is our view that the question is not answerable as the 25th Amendment is written.

LIBERTY LOBBY recommends that the 25th Amendment to the Constitution be repealed. If not repealed, then it should be amended to require that any Executive Orders issued by the Acting President be approved by a record vote of both houses of Congress. Further, we feel it should be amended to provide that if the Vice President assumes the office of President under the obtuse terms of the 25th Amendment, he shall hold this office only until the succession has been put to the people in the form of a general election, the terms of which apply to the Electoral Code. Our founding fathers did not intend, in our view, for any man to hold the highest elective office in the land without being chosen by the people.

In spite of the fact that the 25th Amendment was passed by the necessary three-fourths of the state legislatures, and by the required two-thirds vote of each house, it appears that no in-depth study was made of the conflicting constitutional questions. Vague and contradictory, it provides for an un-elected Chief Executive and an un-elected Vice President, blatantly unconstitutional in its concept.

We therefore recommend that Senator Pastore's bill, S.J. Res. 26, be approved after the revision indicated in our statement.

The longer America exists with this dangerous and unclear Amendment, the greater the peril. As our bicentennial approaches, let us return to the observation and respect of those great men who passed on to us the torch of liberty, flickering now, but still redeemable.

Thank you again for this opportunity to present our statement for the record.

A SPECIAL ELECTION TO FILL A PRESIDENTIAL VACANCY

(By Warren Christopher)

Coming across the country to speak to the leaders of this great Association has challenged me to choose a subject of national, rather than parochial interest. The topic I have chosen has been brought to mind by the fact that the President of the United States was selected by his predecessor and was never elected to either of our two highest national offices. It is a subject upon which lawyers around the country may have some valuable input and it is a good time for reflection. President Ford has himself suggested that we reconsider the method of Presidential succession, and thus he has made it possible for us all to do so with the least possible partisanship.

I

Specifically, I am urging today that the Constitution be amended to provide for a Special Presidential Election when the President resigns, dies, or is removed more than a year before the end of his term. Under this proposal, the Vice President would become an Acting President for 90 days until a new President could be elected.

Although no doubt controversial, this proposal is not entirely novel. I might say that I have been surprised in my brief review of the history of the Constitutional Convention to find that this proposal closely parallels suggestions by some of our Founding Fathers. Moreover, the idea has been advanced by Senator Kennedy and denounced by Scotty Reston. What surer evidence could be found of its legitimacy! While, as I say, the idea has been floated by others, I believe it is now time to consider the proposal in a systematic way, and I hope to give at least a small impetus to that process today.

Editor's Note: Mr. Christopher delivered this paper at the House of the Association in November. He is a former Law Clerk to Justice William O. Douglas; a former Deputy Attorney General of the United States; and is presently President of the Los Angeles County Bar Association.

There are several reasons that prompt my proposal. *First*, it seems to me that the people are uneasy and concerned that the awesome power of the Presidency is in the hands of a man whom they did not elect. I make no pretense of being Gallup or Harris, or even Sindlinger, but my strong sense is that the people wish they had been able to choose their President.

Last week's election brought home again the healthy cleansing effect that results from public debate followed by decision-making in the voting booths. To some extent I suppose this derives from the fact that we are a nation of sportsmen, and the elective process is analogous to the kind of hard battle which causes participants to put anxieties and animosities behind them for the time being. Consciously or subconsciously, as a people we need to have the cleansing and emancipating effect which comes only from a national election when there is a vacancy in the Presidency.

Second, it seems most unlikely, in any given situation, that the Vice President will be the best man to succeed to the Presidency. Arthur Schlesinger, in his witty piece in the May Atlantic Monthly, points out that a President chooses his running mate not because he is the second citizen of the Republic but because of intricate and generally mistaken calculations about what he or she will contribute at the polls. Congressman Jim O'Hara summarized it well when he observed that the President chooses his running mate not to succeed him, but to help him succeed. Even so, Schlesinger points out that the "balanced ticket" is a fraud on the public because the Vice President rarely balances the President and usually has almost no impact on him at all. And whatever strengths a man or woman brings to the Vice Presidency, they are probably diluted by the frustration and isolation of the office.

Third, a Special Presidential Election to solve the vacancy problem would follow the spirit of the reforms in the election process being undertaken in Con-

gress and the various state legislatures. The fundamental premise of the widespread and overdue campaign reform legislation is a recommitment to the democratic process. What better way to reinforce this commitment than to rely on the basic democratic process when a Presidential vacancy occurs.

Like Reston, I would not lightly tinker with the mechanism for Presidential succession embodied in the 25th Amendment. After all, the 25th Amendment was the recent product of an exceptional American Bar Association Committee, a conscientious house of delegates, a highly motivated Congress, and ultimately an almost unanimous majority of the state legislatures. Nevertheless, while the 25th Amendment has seen us through a difficult situation, in the process some defects have become apparent that were not, and probably could not have been, foreseen by its draftsmen. In addressing these defects, I am encouraged to advance this proposal because I have found, somewhat to my surprise, that it has support in the debates surrounding Article II of the Constitution.

II

In tracing this historical development, we find that little thought was given to the general subject of Presidential succession until the Founding Fathers met in Philadelphia in the spring and summer of 1787. Neither the Virginia nor New Jersey plans contained any reference to the subject when they were submitted to the Constitutional Convention. Indeed, succession was first broached by Alexander Hamilton on June 18, 1787 and was incorporated in the report of the Committee of Detail of August 6, 1787. The draft text provided that upon the death, resignation or removal of the President, ". . . the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen. . . ." The language was clear that only temporary service was anticipated. Later in 1787 the Vice President was substituted as the Presidential successor but the report did not alter the concept that only temporary service was expected.

Thereafter, James Madison pointed out that one of the intermediate drafts contained language that would have effectively prevented the filling of a vacancy by a Special Presidential Election. In response to this perceived defect, Madison specifically included draft language that provided that the Vice President carry on the duties of the President "until . . . a President shall be elected." (It will be recalled, of course, that the Framers originally provided that the candidate who received the second highest vote for President should become Vice President, and this procedure was followed until the 12th Amendment was adopted in 1804.)

There was opposition to Madison's amendment, but the Convention transmitted it to the Committee of Style without change. The Committee of Style changed the wording into the present form of Article II, Section 1, clause 6, which provides:

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

It is fair to say that the present version of the original draft does not unequivocally reflect the intent of Madison's revision, which contemplated a possible Special Presidential Election. Yet Madison's idea was accepted by the Constitutional Convention and the Committee of Style was neither authorized nor instructed to make any substantive change.

I do not mean to suggest that this brief recitation of the historical development of Article II, Section 1, clause 6 of our Constitution is complete or completely convincing. However, it does strike me as significant that more than one mention was made at the Constitutional Convention of both the limited role of the Vice President and the benefits of a Special Presidential Election. One comes away from reading some of the history of the Convention with the strong impression that the Vice President was not meant to become President, but only Acting President until the elective process could operate. One eminent Constitutional historian, the late Professor Charles Warren, has stated the view that ". . . the delegates probably contemplated that, in such case [the death of the President], the Vice President would only perform the duties of the President until a new election for President should be held: and that he would not *ipso facto* become president." As Senator Kennedy has said, the Founding Fathers knew as usual what they were doing.

In view of the apparent intent of the Framers that the Vice President should only be an Acting President, a question naturally arises: Why have all the vacancies in the office of President resulted in the automatic succession of the Vice President to the Presidency for the remainder of the term? The answer to this question constitutes an interesting although anomalous chapter in history, and I will sketch it only briefly.

Early legislation passed in 1792 provided for a Special Election, but only in the event both the Presidency and Vice Presidency were vacant. This situation has never existed in the history of the country although in recent months we have been perilously close to it. Thus there was simply no statutory guidance as to what should happen when the first vacancy in the office of the Presidency occurred. This came on April 4, 1841 upon the death of William Henry Harrison less than a month after his inauguration. John Tyler, then Vice President, assumed duties of the Presidency for the full three years and eleven months that remained of Harrison's term.

It is not entirely clear why or how this result was obtained. Presidential papers show that Mr. Tyler simply began signing documents as the "President of the United States." However, John Quincy Adams and some newspapers, notably the *New York Post*, viewed Tyler's exercise of the powers of the Presidency as inconsistent with the intent of the Framers. In short, they argued that Tyler possessed only temporarily all the powers of the Presidency but that he did not in fact succeed to the title. Yet no significant attack was mounted upon the legitimacy of President Tyler's status, and he finished out the term.

A few years later when President Zachary Taylor died, any disagreement over the succession issue apparently had subsided. Vice President Fillmore was advised of the President's death by the cabinet in a letter addressed to the "President of the United States." A similarly uncontested succession by Andrew Johnson after the assassination of President Lincoln all but cemented the practice. Thus, the anomalous Tyler ascendency became controlling precedent for the seven successive Presidential vacancies.

IV

Federal legislation providing for a Special Presidential Election was discussed in Congress on numerous occasions but never enacted. As indicated, the 1792 provisions called for a Special Election only when the Presidency and Vice Presidency were vacant. The Presidential Succession Act of 1886 eliminated the Special Election provision and substituted a cabinet member in place of the leaders of the House and Senate as successors to the President and Vice President. As we know, the succession was returned to the House and Senate leaders by the Presidential Succession Act of 1947.

There were several arguments that carried the day in 1886 when even the very limited Special Election provisions of the 1792 law were repealed. My belief is that these and other arguments against a special election are not compelling today, and I want to discuss some of them briefly.

First, it has been argued that a President is required by the Constitution to be elected to a full four-year term, whenever elected, and that a midterm Special Election might end the concurrence of Presidential and Congressional elections. It seems to me, however, that the better argument, based upon the debates surrounding Article II, is that a Special Election for an unexpired term was contemplated by the Framers. In short, a Special Election, as contemplated by the language of Article II, Section 1, clause 6, would be following, not departing from, the spirit of the Founding Fathers.

Second, it has been urged that we already have more than enough elections and that frequency of elections should not be increased. This may be a good general principle, but it seems to me that the importance of having a popularly elected President should outweigh this general consideration whenever the Presidency is vacant.

Third, it can be argued that Special Elections are unduly disruptive and create unnecessary turmoil. Again, the general observation is probably true, but with all the uncertainty and instability of the past months, I doubt that the alternative of a Special Election would have been more disruptive. Moreover, I would again stress that the healthy cleansing effect of an election for the highest office would outweigh the delay and disruption involved.

Finally, there would no doubt be a question whether 90 days is long enough to prepare and hold a national election. For all the complexities, I think that

a shorter campaign would be a blessing. The National Committees of the parties could produce a nomination within 30 to 45 days. The campaigns themselves, aided by federal funding, could produce a national consensus within 30 to 45 days. Don't we all recall that every recent campaign has started repeating itself after the first 30 days, if not sooner.

V

There will, of course, be other arguments advanced against a Special Election and I don't by any means want to imply that I have addressed them all. I would for a moment, however, like to discuss the impact of the proposal for a Special Election on the office of Vice President. I suspect there will be the suggestion that the Vice Presidency would be reduced substantially in importance and attractiveness. Yet, to my mind, the limitation of the Vice President's role in case of a vacancy to that of a potential "Acting President" would be a beneficial change.

The special election proposal would have the advantage of clearly defining the function of the Vice President in the event of a vacancy. In such a situation, he would be an Acting President for 90 days or, if the Presidential vacancy occurred within one year of a quadrennial election, he would be Acting President for the remainder of the term. This would stabilize the nature of the office. It would take the inherently ghoulish gambler's attractiveness out of it that now exists by virtue of the possibility that a Vice President may become President by operation of the 25th Amendment. I do not go so far as to urge abolition of the office of the Vice President, though some wise men have, but I do think it would be desirable to remove him from the demeaning game of American roulette.

If changed and stabilized in this way, the office of the Vice President could be modified to make it meaningful and attractive on its own terms. In short, once the uncertain "all or nothing" aspect of the current Vice Presidency is removed, it could be redefined into a more functional office even if it were less attractive at the national nominating conventions. This, combined with an increased reliance on the democratic process to solve the succession problem, would in my view constitute an improvement in the Executive Branch of government.

CONCLUSION

As I have said, the proposal for a Special Election to fill a Presidential vacancy is bound to be controversial. Nevertheless, it would, in my view, correct a serious flaw in our system. In any event, against the backdrop of current history, it invites the most critical evaluation by the nation's most constructive critics. I know that your Association and its distinguished leadership can be counted on to take the lead in such a process.

UNITED STATES DISTRICT COURT,
DISTRICT OF ARIZONA,
Phoenix, Ariz., March 10, 1975.

HON. BIRCH BAYH, JR.,
Senator from Indiana,
U.S. Senate, Washington, D.C.

DEAR BIRCH: Through the *Washington Letter* of the American Bar Association's Governmental Relations Office, I note that hearings are contemplated on revisions to the Twenty-fifth Amendment to the Constitution.

Within the past few weeks I received a call from your Administrative Assistant requesting my thoughts on the application of the Twenty-fifth Amendment to the events which have transpired over the last year or so.

As a guess I would suggest that none of us who had part in the formulation of the Twenty-fifth Amendment foresaw a resignation of a Vice President and a resignation of a President within a year. While we may not have foreseen these events, nevertheless, it seems to me that the application of the Twenty-fifth Amendment to the events as they transpired looked exceptionally well.

The only criticism in the application would be in the direction of Congress, and not in the Amendment, itself. It is my personal belief that the delay in the approval or rejection of the appointment of the second vice presidential nominee was over-long.

Fortunately no crisis developed as a result of, in my opinion, the inordinate delay.

Good or bad, that delay could not be attributed to the Amendment, itself, but rather to the wisdom, or lack of it, of the Congress, and that is, I suppose, how the system is supposed to work.

I do not approve of Senator Pastore's suggestion with respect to a special election. Necessarily a special election would require an inordinate expenditure of time in a period of national emergencies, and this was precisely what the Twenty-fifth Amendment was designed to avoid. Mr. James Reston's comment on Senator Pastore's proposal seems altogether appropriate. Reston said, "No doubt Pastore's proposal would be logical and democratic, but as H. L. Mencken once remarked, 'for every human problem there is a solution that is simple, neat, and wrong.'"

If we put politics aside for a moment and look solely to the welfare of the nation and the continuity of its leadership, I hope we have the overall intelligence to leave the Twenty-fifth Amendment alone, and let it perform its function as it was designed to do, and which time and circumstance has proven it is capable of doing.

With kind personal regards, and whatever the outcome, good luck in your endeavors, I am,

Sincerely,

WALTER E. CRAIG.

HARVARD LAW SCHOOL,
Cambridge, Mass., March 11, 1975.

EDITOR, THE NEW YORK TIMES,
229 West 43d Street,
New York, N.Y.

DEAR SIR: YOUR editorial of March 4, after noting that the recently enacted 25th Amendment has operated, when called into play by the forced resignation of an elected President whose elected Vice-President had earlier been forced to resign, to give us a President and a Vice-President neither of whom was elected by the people. It could also operate, within the next two years, to give us another nonelected President and Vice-President. You raise the question whether this indicates that the 25th Amendment should be revised. I believe that Section 2 of the 25th Amendment should be repealed and that we should return to the method of succession originally contemplated by the Framers of the Constitution. They believed that the ultimate selection of a successor in the event of a double vacancy should be vested in the electorate.

They therefore provided, in Art. II, Sec. 1, cl. 5 of the original Constitution, that Congress might by law provide for the case where both the office of President and the office of Vice-President were vacant by "declaring what Officer shall then act as President . . . until . . . a President shall be elected." This provision was substituted by the Constitutional Convention for an earlier proposal that the officer designated by Congress should act as President "until the time of electing a President shall arrive"—a proposal to which James Madison objected because "it would prevent a supply of the vacancy by an intermediate election of the President" (2 Madison's Journal of the Federal Convention 676-677). The Framers also provided in Section 2 of the same Article for the selection of Presidential Electors by the States, but added that "no Senator or Representative, or person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." In Section 3 they entrusted to Congress only the determination on the time of choosing the Electors and the time when they should cast their votes.

Thus, as Hamilton explained in the Federalist No. 68, "It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular juncture." Thus, "an immediate act of the American people" was to be exerted in the choice of Presidential Electors to select the President and the Constitution "excluded from eligibility to this trust all those who from situation might be suspected of to great devotion to the President in office. No Senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors." And, "as the Vice-President may occasionally become a substitute for the Presi-

dent, . . . all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other."

The Second Congress, whose number included Madison and many other delegates to the Constitutional Convention, exercised the power given it by the Constitution by enacting the Succession Act of 1792 (1 Stat. 239). That Act provided that in the event of a vacancy in the office of President and Vice-President the President pro tempore of the Senate, or if that office was also vacant, the Speaker of the House should act as President until "a President shall be elected." It provided also for a special election in any instance where the double vacancy occurred more than six months before the expiration of the current term. This Act was replaced by the Succession Act of 1886 (24 Stat. 1), which provided a longer list of alternates to act as President, in the event of a double vacancy, until "a President shall be elected." While it made no provision for a special election it did provide that, if Congress was not in session when the designated successor took office, he should convene the Congress, presumably so that it could provide for such an election.

Not until the Succession Act of 1947 (61 Stat. 380) replaced the Act of 1886 did Congress resort to the practice, of doubtful wisdom and doubtful constitutionality, of prescribing a list of alternates to act as President, in the event of a double vacancy, "until the expiration of the then current Presidential term."

An error was made in 1967 when we adopted the 25th Amendment, Section 2 of which authorized the President and a majority of both Houses of Congress to fill a vacancy in the office of Vice-President with a person who may then succeed to the office of the President. Recent events have demonstrated how that provision can be successfully employed even by a badly discredited President to appoint a Vice-President who could never have been elected to the office. Even more recent events have demonstrated how such a nominee can become a successor President and then employ the 25th Amendment to designate as *his* successor a man who, despite great efforts and resources, was never able to capture even a nomination for the office.

We would be well advised to return to the original system. If the office of an elected Vice-President becomes vacant, let it remain vacant—on 16 occasions covering a period of 37 years we have survived a vacancy in that office. Against the contingency of a double vacancy, let Congress designate an officer to serve as acting President until a special election can be promptly called to elect a new President and Vice-President. Perhaps it would be wise, as we repeal Section 2 of the 25th Amendment, to adopt another constitutional Amendment making this procedure explicit.

Sincerely,

VERN COUNTRYMAN,
Professor of Law.

THE WHITE HOUSE—REMARKS OF THE PRESIDENT AND QUESTION AND ANSWER
SESSION AT THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI,
DEL WEBB TOWNE HOUSE

The PRESIDENT. There is a second matter I will discuss briefly before this distinguished society, whose members I know have a strong sense of history in the making as well as an insatiable interest in good government, both of which I applaud. That is the vacancy in the office of the Vice President.

I supposed I can properly claim to be the world's champion or world's expert on the subject of filling the Vice Presidency under the Twenty-Fifth Amendment. When I suddenly found myself nominated for this position on October 12, 1973, I did some research on the debate in the House and the Senate on this important constitutional amendment which was proposed by the Congress in 1965 and ratified by the legislatures of 47 States in 1967. Frankly, I was curious as to what I might have said on the subject, particularly Section 2, which deals with vacancies in the office of the Vice President.

The fact is, I found I had not said anything in the debate except to vote "aye", and the main subject of the debate was the matter of dealing with Presidential successions in the event of a President's disability or inability to discharge the duties of his office.

The replacement of a Vice President was incidental to this, but it seems fair to infer that the Framers, like the Founding Fathers, considered that office to be essential to the conduct of the Federal Government, and the orderly succession of Executive power in any emergency.

It is implicit in the adoption of the Twenty-Fifth Amendment as part of the Constitution that a prolonged vacancy in the second office of the land is undesirable as public policy, and that such vacancies should be filled as promptly as careful consideration by the President and the Congress will permit.

In my case, despite one of the most exhaustive investigations ever undertaken of anybody not on the FBI's Ten Most Wanted List, the Congress moved expeditiously and confirmed me within eight weeks of my nomination, although I do have to admit it, it seemed a little longer than that eight weeks to me.

When I suddenly found myself President on August 9, 1974, and the Nation again without a Vice President, I made it my first or highest priority, aside from the Cyprus crisis, which I walked into, to search out and to select the most capable and qualified person I could find for that high office.

I finished the task in 11 days and sent to the Senate and to the House the name of Nelson Rockefeller of New York. That was almost three months ago, and while I recognize the need of the Congress to take the month off for campaigning—I did it 13 times myself—I believe that the time has come for them to fish or cut bait in this matter.

I have been assured by Speaker Albert and by Senator Mansfield, the Majority Leader of the Senate, that they will make every effort to bring the nomination to a final floor vote before the 93rd Congress adjourns sine die probably in late December.

I am delighted to have their cooperation because I believe it is what the Constitution mandates and what the American people want from their Representatives. I am as convinced as ever that Governor Rockefeller is the right man for the job, and I am anxious to have him as a working partner in our Federal Government.

For the future, however, I will propose to the next Congress a re-examination of the Twenty-Fifth Amendment which has been tested twice in as many years to see if the provisions of Section 2 cannot be tightened up, either by constitutional amendment, or by public law.

There should be, in my judgment, a specific deadline for the President to nominate and for the Congress to confirm a Vice President. If this reasonable period passes without affirmative action, the Congress would then be required to promptly begin confirmation hearings on another nominee.

It has been suggested to me—and I underline suggested—that if, because of a partisan deadlock between the President and the Congress, the Congress fails to act within the deadline, the next constitutional successor, presently the Speaker of the House of Representatives, should be required to actually assume the Office of the [Vice] President. Although I am not prepared to advocate such a step, I must say there is really no way, despite secret briefings and all that, that anyone can even partially be prepared to take over the duties of the Presidency on a moment's notice without all the participation in the Executive process that a President can extend to his Vice President.

In this dangerous age, as the Twenty-Fifth Amendment attests, we need a Vice President at all times, and I speak as one who ought to know.

STATEMENT TO THE SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS BY LOUIS J. CAPOZI, GRADUATE ASSISTANT, ST. JOHN'S UNIVERSITY

Two years after they were returned to office with a tremendous popular mandate, the President and Vice-President of the United States had resigned their offices because of gross misconduct. For the first time in 200 years, the government of the United States fell and Americans consigned themselves to a perpetuation of their democracy. The two transitions which occurred in 1973 and 1974 respectively were smoothed by the very effective 25th Amendment to the Constitution.

The Amendment constitutionalizes a precedent established in 1841 by Vice-President John Tyler who succeeded to the office of the Presidency upon the death of William Henry Harrison. In case of the removal, death, resignation, or inability of the President, the Founding Fathers expected the Vice-President to be Acting President succeeding to the powers and duties of the office rather than to the office. Once the Vice-President has succeeded to the Presidency, the Amendment also provides that the office of Vice-President not remain vacant for the extended periods of time as was common prior to 1967. Therefore, it is highly unlikely that the succession will go beyond the Vice-President and thus reduces the possibility of a Speaker of the House of Representatives or a President Pro-tem of the Senate of opposite political philosophy succeeding to the Presidency.

The last two sections of the Amendment provide for workable machinery in case of Presidential inability or disability. Woodrow Wilson's stroke, Franklin Roosevelt's deteriorating health, Dwight Eisenhower's and Lyndon Johnson's heart attacks made it imperative for the orderly transfer of temporary power to the Vice-President.

The 25th Amendment works, and fortunately for our country it works well. It is not an infallible piece of constitutional law. In revising the 25th Amendment, some scholars suggest that the office of Vice-President be abolished. The office is significant because the Vice-President may be called upon at any moment to either succeed to the office or temporarily assume its powers and duties. It is an office that was filled by men of such high caliber as John Adams, Thomas Jefferson, John C. Calhoun, Martin Van Buren, Theodore Roosevelt, Thomas R. Marshall, Calvin Coolidge, Charles Gates Dawes, John Nance Garner, Henry A. Wallace, and Harry S. Truman. I rise in support of the Vice-Presidency with these words written by Professor Irving G. Williams, a specialist in the history and men of the office:

There is nothing wrong with the vice presidency that honorable, talented men cannot overcome. The office can no longer be depreciated; more and more the electorate will demand in the office top-flight individuals who are capable of growth.¹

One glaring flaw on the 25th Amendment occurred on August 9, 1974. For the first time in American History, the American People have in the White House a President who never stood for popular election to either of the two highest offices in the land. Of course the original framers of the Amendment could not foresee that such an unprecedented situation of a Presidential and Vice-Presidential resignation could occur within the same term. In fact, Congressman Aedanus Burke of South Carolina was told in 1791, that the chance of change in both the Presidency and Vice-Presidency within the same term would occur once in 840 years. Mr. Ford is our President though not elected. What is the remedy? I would propose that if a Section 2 Vice-President succeeded to the office of President, an immediate special election should occur within 90 days after succession. The Presidential candidates of the opposite parties would be named by the National Committees within 10 days. Once the new President was popularly elected, he would proceed to immediately implement Section 2 of the Amendment. In this way, the great essentials of our representative form of government as envisioned by our Founding Fathers would be preserved.

THE RIGHT OF THE PEOPLE TO ELECT THEIR PRESIDENT AND VICE PRESIDENT MUST
BE AFFIRMED

Mr. HUMPHREY. Mr. President, I have joined my distinguished colleague, the Senator from Rhode Island (Mr. PASTORE) in sponsoring Senate Joint Resolution 26, a joint resolution proposing a modification of the 25th amendment to the U.S. Constitution.

I believe this legislation—to provide for a special election for the Office of President and Vice President when an individual who has been appointed Vice President under the 25th amendment succeeds to the Presidency—is a much needed and timely measure. It warrants bipartisan support. Enactment of this resolution will correct a serious constitutional flaw, to insure that the ultimate goal of our Nation's democratic process—representation of the people—will be met.

It could be said that the 25th amendment to the Constitution as it now stands is entirely adequate. People who will argue this, point to Mr. Ford and Mr. Rockefeller and state that it works, that responsible men are brought into office upon confirmation by a majority vote of both Houses of Congresses, under the 25th amendment. I do agree, good men are selected.

However, this reasoning does not address the basic requirement of democratic government. The foundation of American Government is representation of the people.

¹ Irving G. Williams, "The American Vice Presidency," *Current History* (June, 1974): 274.

The 25th amendment calls for the President to appoint a Vice President, should that office become vacant, for confirmation by Congress. If the President cannot complete his term, the appointed Vice President becomes President. The result is that neither this President, nor the Vice President whom he subsequently appoints and Congress confirms, is in office as a result of a popular election.

Although this is a workable procedure as demonstrated by recent events, I believe that it can be improved. The people must be able to exercise their constitutional right to choose the President and the Vice President, if the incumbents of these high offices are unable to fulfill their elected term 12 months or more before the next general election.

Mr. President, this resolution allows the 25th amendment to continue to operate and fits within the present electoral system. I strongly believe this measure should be acted upon by Congress without delay. The effective exercise of the franchise by our citizens is of absolutely crucial importance in assuring the strength of American democracy. The trust and confidence of the people in their Government begins at the ballot box where they are given a direct voice in the choice of their national leadership. Government by proxy—where the electorate is dependent upon the judgment of its representatives in the selection of a President and Vice President—is a serious, weak point in our democratic system that must be corrected with all possible speed.

APPENDIX

Calendar No. 1317

88TH CONGRESS }
2d Session

SENATE }

REPORT
No. 1382PRESIDENTIAL INABILITY AND VACANCIES IN THE
OFFICE OF THE VICE PRESIDENT

AUGUST 13, 1964.—Ordered to be printed

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

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. J. Res. 139]

The Committee on the Judiciary, to which was referred the resolution (S. J. Res. 139), 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, reports favorably thereon, with amendments, and recommends that the resolution, as amended, do pass.

AMENDMENTS

On page 1, line 7, following the word "States" strike the colon and add the following:

within seven years from the date of its submission by the Congress:

Strike all of SEC. 1, SEC. 2, SEC. 3, SEC. 4, SEC. 5, SEC. 6, and SEC. 7 and insert in lieu thereof the following:

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 that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

SEC. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

PURPOSE OF THE AMENDMENTS

To substitute perfecting language that was acquired by the reception of testimony from expert witnesses in the field of constitutional law and from discussion of the problem by members of the subcommittee.

PURPOSE

The purpose of the proposed Senate joint resolution is to provide for continuity in the office of the Chief Executive in the event that the President becomes unable to exercise the powers and duties of the Office, and further, to provide for the filling of vacancies in the Office of the Vice President whenever such vacancies occur.

STATEMENT

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 have become 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 chuse 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 of 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 has President Johnson with Speaker John McCormack. 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 Deputy 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 NEED FOR CHANGE

The death of President Kennedy and the accession of President Johnson has 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 succession 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 139 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, 4, and 5 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.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion and their 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 fact-finding 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 4 to 3 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.

Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the Congress of his written declaration that no inability existed. However, should the Vice President and a majority of the heads 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 Congress within 2 days. Once the declaration of the President stating no inability exists and the declaration of the Vice President and a majority of the heads of the executive departments stating that inability exists, have been transmitted to the Congress, 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 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 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.

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 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 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 recent 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 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.

CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It concisely clarifies the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The Subcommittee on Constitutional Amendments approved this proposal after hearing testimony and receiving written statements from many distinguished students on the subject. The subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 139, with amendments, and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

INDIVIDUAL VIEWS OF MR. HRUSKA

The problem of Presidential inability and succession has long been neglected and ignored. It is for this reason that I welcome the opportunity to consider the joint resolution now presented to the Senate.

In the opinion of most legal scholars and writers who have given this problem careful study, the solution lies in a constitutional amendment. Considering the gravity of this issue and the ramifications of the solution, it is imperative that in any proposal advanced the paramount constitutional principle in our governmental framework is preserved. That is the doctrine of separation of powers.

One cannot predict the political crisis in which the Presidential powers may hang in balance. A review of the cases involving a disabled President reveals the anxiety and confusion which can prevail. It is also helpful to review the one case involving the impeachment clause of the Constitution. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers when Congress is called upon to consider where to place the mantle of the Presidential powers.

For these reasons our examination of proposed solutions should carefully weigh the wisdom of adopting a method which does not explicitly adhere to the principle of separation of powers. The exact procedure prescribed, if clear and direct, is not my concern. Nor am I wedded to any particular language. It is only the principle which pervades the Constitution which I strongly feel should be respected by any amendment.

With regard to Senate Joint Resolution 139, my preference would be to leave the matter of providing a method to subsequent legislation, so long as it is limited to a determination within the executive branch, and not lock in any specified plan in constitutional terms. It is therefore of considerable concern to me that Senate Joint Resolution 139 not only sets forth a particular method in an amendment but goes further to provide a procedure whereby Congress can be thrust into a controversy better left in the domain of the Executive.

ROMAN L. HRUSKA.

INDIVIDUAL VIEWS OF MR. KEATING

I heartily join in reporting favorably, with the amendments approved by the committee, this proposed constitutional amendment to the full Senate.

It is a great forward step, in my judgment, toward the final adoption of a workable solution of these twin problems, the problems of succession and inability which from the adoption of the Constitution have loomed as the most serious single threat to the stability and continuity of the American Presidency as an institution.

Yet much remains to be done. There is the task of shepherding this measure, or some version of it, through both Houses of the Congress by the required two-thirds vote in each; and then, for ratification by the States, through the required three-fourths of the State legislatures.

The process of amending the Constitution poses an additional dimension to the problem. It is not enough that we devise a solution which on its merits appears to be workable. More is required. The solution which we adopt here in the Senate must also be acceptable elsewhere. It must be acceptable to at least two-thirds of our colleagues in the House, many of whom have their own deeply held convictions, as evidenced in various bills and resolutions, as to how the problem should be handled. It must be acceptable also to as many members of 50 State legislatures as will make possible its approval in at least three-fourths of them. At bottom, of course, this means that the solution must be acceptable to the American people, who through their understanding of what needs to be done and their expression of confidence in what is being proposed, will ultimately decide the day in the Halls of Congress and in the State houses of the Nation.

It is not enough, therefore, that Senate Joint Resolution 139, as it is reported to the Senate, is a good solution and one that I myself can thoroughly and conscientiously support. What is involved, in addition, is the extent to which it will muster the support of others, so that these efforts will not be in vain. This is a weighty practical consideration. As many who have been concerned with these issues over the years have said, it is ever so much more important to reach an attainable solution than to strive for perfection at the considerable risk of bogging down in disagreement as to precise detail.

It is this reason, among others, which impels me to offer certain substitute language to this resolution which, if adopted, would in my judgment considerably enhance the chances of ultimate success as well as providing an equally workable and in some respects, superior plan.

These changes, which I shall describe and explain below, would leave unaffected in their entirety sections 1 and 2 of the proposed constitutional amendment. Both of these sections, one confirming the so-called Tyler precedent and extending it to cases of resignation and impeachment as well as death, the other providing for filling a vacancy in the Office of Vice President by Presidential nomination with confirmation by majority vote of both Houses of Congress, have my unqualified and wholehearted endorsement.

Sections 3, 4, and 5, on the other hand, which would enshrine quite detailed procedures on Presidential inability into the Constitution, give me serious pause. In my judgment, it would be preferable to simply provide by constitutional amendment that Congress shall have the authority to establish inability procedures by ordinary legislation. This would avoid freezing any particular method into the Constitution itself, make it easier to change the method if unforeseen defects are revealed by the actual operation of any congressionally prescribed plan, and most important, so simplify the amendment as to make it more readily understood and, hopefully, more likely of final congressional approval and ratification in the States.

I therefore intend to offer an amendment to Senate Joint Resolution 139, which would strike present sections 3, 4, and 5, and insert instead the following new sections 3, 4, and 5:

SEC. 3. In case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed.

SEC. 4. 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 be President, or in the case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in the case of inability, until the inability shall be earlier removed.

SEC. 5. The Congress may prescribe by law the method by which the commencement and termination of any inability shall be determined.

These three sections which I am proposing to substitute are identical to the last three sentences of Senate Joint Resolution 35, sponsored by the late Senator Kefauver and myself. Senate Joint Resolution 35 had earlier been approved by the Subcommittee on Constitutional Amendments and at this moment is still pending on the agenda of the parent Judiciary Committee.

Section 3 as I propose to amend it would make it clear that it is not the "office" but the "powers and duties of the office" of the President which devolve on the Vice President in cases of Presidential inability. By establishing the title of Acting President, the proposal would further clarify the status of the Vice President during the period when he is discharging the powers and duties of a disabled President. In addition, it would make clear that the President may reassume the powers and duties of his office when his inability has ended. In all these respects, section 3 as I offer it would be identical to section 3 of Senate Joint Resolution 139, except that no specific provision would be made for a Presidential declaration of his own inability which would temporarily displace him from the exercise of his powers and duties. Rather, under this proposal, the method by which the commencement of any period of inability is to be determined would be left for Congress to decide by ordinary legislation, as explained below.

The section 4 that I propose would clarify the authority of Congress to legislate on the subject of Presidential succession, both in cases of removal, death, and resignation, and also in cases of inability. It would permit Congress to declare "what officer shall be President" where both the President and Vice President have been eliminated by removal, death, or resignation. Then, if neither the President nor the Vice President is able to discharge the powers and duties of the Presidency due to their inability, the Congress would also be enabled to declare what officer shall—

act as President * * * until a President shall be elected,
or * * * until the inability shall be removed.

Finally, the section 5 that I will offer would authorize Congress to prescribe by law "the method by which the commencement and termination of any inability shall be determined." This provision

is at the heart of the amendments I propose, and represents my chief point of difference with Senate Joint Resolution 139 as reported.

Past efforts to frame a constitutional amendment on inability have endeavored, like Senate Joint Resolution 139, to set out in detail the procedure to determine commencement and termination of a period of Presidential inability. At one time, I myself favored the inability commission approach, and even at this late date there are quite a number of bills and resolutions in Congress to set up a commission. These proposals have varied greatly in detail as to the membership of such a commission, but most of them provide for either Cabinet, congressional, judicial, or medical representation, or a combination of one or more of these. Every such proposal, however, has become bogged down in argument as to whether, for example, Cabinet members who presumptively owe their primary loyalty to the President would overcome reluctance to take action adverse to him; or whether the service of legislators or judges on a commission would violate the spirit of the separation of powers doctrine; or whether doctors can be expected to participate wisely in the formulation of what is, at bottom, a political decision.

At long last, and after much debate, Senator Kefauver and I, simply as two Senators who had long sought a practical solution to this problem, agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best form among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it. Senate Joint Resolution 35 was introduced to carry out the consensus we had reached.

The language of Senate Joint Resolution 35 stemmed initially from the New York Bar Association, and presently has the support of its committee on constitutional law. Its basic provisions were also favorably recommended by the American Bar Association's Committee on Jurisprudence and Law Reform in 1960, and in 1962 the American Bar Association reaffirmed its endorsement of what is now Senate Joint Resolution 35. At that time, the Association of the Bar of the City of New York endorsed it, too. As recently as June of 1963, the then president-elect nominee of the American Bar Association testified in behalf of the association before the Constitutional Amendments Subcommittee in support of Senate Joint Resolution 35. Finally, the Deputy Attorney General, speaking for the Department of Justice, who testified in 1963 and who has reaffirmed his earlier testimony this year as still reflecting the Department's views, is in favor of the approach of Senate Joint Resolution 35. In short, at one time or another, Senate Joint Resolution 35 has had the approval of all of the bar associations which had devoted years of careful study and consideration to this problem. And while neither President Kennedy nor President Johnson chose to take a personal stand on any particular proposal, it may be fairly said that the Justice Department's continued endorsement of Senate Joint Resolution 35 is closely tantamount to an administration position.

As I understand it, the principal objection to the approach taken by Senate Joint Resolution 35 has been that it would give Congress a "blank check" in the area of presidential inability, and that State legislators especially would balk at a "blank check" constitutional amendment. Apart from the fact that the Constitution in major part is full of "blank check" provisions—the enumerated powers of Congress under article I provide the most noteworthy example—and that, moreover, the States have previously ratified "blank check" amendments such as, for example, the income tax amendment, and the prohibition amendment which left all enforcement details to Congress, the short answer is that Congress here would not be left free to do whatever it wishes. Here is what the Deputy Attorney General, speaking for the Justice Department, had to say on that point:

One objection may be that this provision is a blank check which, if abused, could upset the balance of power between the legislative and executive branches, and place the President at the mercy of a hostile Congress. I think this danger is quite remote, and at all events not great enough to outweigh the advantages of conferring this authority upon the Congress which represents the national electorate over more complex constitutional provisions. If the methods adopted by Congress for dealing with the problem do not meet the standards of the separation of powers or otherwise satisfy the President, he may veto the bill, and his veto could be overridden only by two-thirds of each House. Moreover, if Congress enacts a measure which is approved by the President, and thereafter attempts to amend or repeal it, its action will also be subject to approval or veto by the President. It seems unlikely, therefore, that any bill would ever be enacted into law which was not acceptable to the President, and which did not afford adequate protection to the people and to the office of President (1964 hearings, p. 201).

It should be added to this, of course, that the President's approval is not required for a proposed constitutional amendment to go to the States for ratification. In my judgment, it is very important, both as a matter of substance and symbolically, that the Presidency as an institution place its imprimatur upon whatever concrete procedures on presidential inability are ultimately decided upon. Establishing inability procedures by ordinary statute, as would be authorized by my proposed section 5, would permit the President, in behalf of himself and the office he occupies, to participate in the process of setting up proper inability procedures.

I cannot too enthusiastically join in the fine analysis of the Deputy Attorney General as to the other overriding advantages of the flexible approach embodied in Senate Joint Resolution 35. The Deputy Attorney General has stated:

* * * The wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The chances are that sup-

plemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future * * * where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35 makes this possible.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, *we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures.* We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35, * * *. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding. [Emphasis supplied.] (1964 hearings, p. 203.)

And finally, I repeat that the simpler amendment, so capable of being readily understood by the people and by their representatives in the State legislatures, is in the tradition of constitution-making. The States have ratified a whole series of amendments giving Congress the power to enforce them "by appropriate legislation," including the 13th amendment prohibiting slavery; the 14th amendment's due process, equal protection and other civil rights clauses; the 15th amendment's voting guarantees; the 16th amendment's broad grant of income-taxing authority; the 18th or prohibition amendment; the 19th or women's suffrage amendment; and the 23d or District of Columbia vote amendment. There is absolutely no reason why State legislators should not wish to grant similar broad powers to Congress here where, unlike as in many previous amendments, no fundamental clash is involved between the respective powers of the Federal and State governments and the matter merely goes to the mechanics, although very important mechanics to be sure, of coping with potential emergencies in the office of Chief Executive of the Federal Government.

So that there may be no basis for misunderstanding, I intend to offer my proposed amendments not out of intransigent opposition to Senate Joint Resolution 139 but out of a firm belief that the Senate should be afforded an opportunity to exercise its best political judgment in choosing between two reasonable alternatives. Most if not all of us are well enough acquainted with our respective State legislatures to form a rough "guesstimate" as to which alternative will fare better in the process of submitting an amendment to the States for ratification. And all of us, I am sure, have our firm notions as to the nature of constitution-making and how best to frame a provision which the American people may have to live with for a long time.

If the amendments I intend to offer are approved by a majority of the Senate, other members of the Subcommittee on Constitutional Amendments, we have agreed, will be prepared to endorse the new sections and work for their approval in the States. On the other hand, if my amendments are not approved here, I shall fully and

unreservedly vote for Senate Joint Resolution 139 as it presently stands and do all within my power to finally bring about its adoption as a solution to this most important and fundamental problem of American Government.

KENNETH B. KEATING.

89TH CONGRESS }
1st Session }

SENATE }

REPORT
No. 66PRESIDENTIAL INABILITY AND VACANCIES IN THE
OFFICE OF THE VICE PRESIDENT

FEBRUARY 10, 1965.—Ordered to be printed

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

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. J. Res. 1]

The Committee on the Judiciary, to which was referred the resolution (S.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, reports favorably thereon with amendments and recommends that the resolution as amended be agreed to.

AMENDMENTS

On page 2, in line 14, strike "If the President declares in writing" and insert in lieu thereof: "Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration".

On page 2, strike the entire text of section 4, and insert in lieu thereof the following:

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 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.

On page 3, in lines 1 and 2, strike the word "Congress" and insert in lieu thereof the following:

President of the Senate and the Speaker of the House of Representatives

On page 3, in line 5, strike the word "heads" and insert in lieu thereof the following: "principal officers".

On page 3, in line 9, strike the words "will immediately" and insert in lieu thereof "shall immediately proceed to".

PURPOSE OF AMENDMENTS

The text of Senate Joint Resolution 1, as introduced, requires, under certain contingencies, for a written declaration to be made by the President, under section 3, and by the Vice President and principal officers of the executive departments under section 4, and by the President, the Vice President and principal officers of the executive departments under section 5. It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.

The committee is concerned about the possibility that such written declaration might be transmitted during a period in which Congress was not in session. In this event the committee feels that transmittal of such written declaration to the presiding officers of both Houses, the President of the Senate and the Speaker of the House of Representatives, would be sufficient transmittal under the terms of this amendment.

It is the opinion of the committee that, under the language of section 5, Congress is empowered to reconvene in special session to consider any disability question arising under this section. Furthermore, under the language of this section, the President of the Senate and the Speaker of the House of Representatives would be required to call a special session of the Congress to consider the question of presidential inability whenever the President's ability to perform the powers and duties of his office are questioned under the terms of section 5. However, nothing contained in this proposed amendment should be construed to limit the power of the President from exercising his existing constitutional authority to call for a special session of the Congress.

It is further understood by the committee that should the President of the Senate and the Speaker of the House of Representatives not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment.

It is the judgment of the committee that the language "principal officers of the executive departments" more adequately conveys the intended meaning of sections 4 and 5, that only those members of the President's official Cabinet were to participate in any decision of disability referred to under these sections. This language finds precedent under article II, section 2, clause 1, of the Constitution. The pertinent language there reads as follows:

he may require the Opinion, in writing, of the principal Officer in each of the executive Departments,

In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise:

(1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented?

(2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?

Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.

However, the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination. The language, as amended, reads as follows:

Thereupon Congress shall immediately proceed to decide the issue.

It was the opinion of the committee that the words "Thereupon", "shall", and "immediately" were sufficiently strong to indicate the necessity for prompt action.

Precedence for the use of the word "immediately" and the interpretation thereof may be found in the use of this same word, "immediately" in the 12th amendment to the Constitution. In the 12th amendment, in the event no candidate for President receives a majority of the electoral votes, the House of Representatives "shall choose immediately,". The committee was of the opinion that the same sense of urgency attendant to the use of the word "immediately" in the 12th amendment when Congress was in fact deciding who would be the President of the United States should be attendant in proceedings in which the Congress was deciding whether the President of the United States should be removed from his office because of his inability to perform the powers and duties thereof.

The committee is concerned that congressional action under the terms of section 5 should be taken under the greatest sense of urgency. However, because of the complexities involved in determining different types of disability, it is felt unwise to prescribe any specific time limitation to congressional deliberation thereupon. Indeed, the committee feels that Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.

The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section 5 would be pursued under rules prescribed, or to be prescribed, by the Congress itself.

PURPOSE OF THE RESOLUTION AS AMENDED

The purpose of Senate Joint Resolution 1, as amended, is to provide for continuity in the office of the Chief Executive [in the event that the President becomes unable to exercise the powers and duties of the office] and further, to provide for the filling of vacancies in the office of the Vice President whenever such vacancies may occur.

STATEMENT

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 chuse 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 of 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 NEED FOR CHANGE

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 policy-making 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 succession 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, 4, and 5 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.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

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 4 to 3 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.

Section 5 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 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 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.

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 had 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 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.

CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It seeks to concisely clarify the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The committee approved this proposal after its subcommittee heard testimony and received written statements from many distinguished students on the subject. Last year the subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, and for the fact that 76 Senators have sponsored Senate Joint Resolution 1, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 1 and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

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

The committee amendments to the Senate 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 italics, provisions in which no change is proposed are shown in roman.

"Article—

SEC. 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 Præsident 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, 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] *Whenever the Vice President, [with the written concurrence of] and a majority of the [heads] principal officers of the executive departments or such other body as Congress may by law provide, transmit[s] to the [Congress his] President 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. *Whenever the President transmits to the [Congress] President 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] principal officers of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress [will] shall immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

INDIVIDUAL VIEWS OF
SENATOR EVERETT MCKINLEY DIRKSEN

When the Congress considers amendments to the Constitution, it deals not with the problems of today, or yesterday, or tomorrow, but in terms of the grand sweep of our Nation's history and future. The Constitution is the basic charter of our Government. It is appropriate to keep its function separate from the various laws we derive from it, laws that are designed to meet specific problems as they may arise. The Constitution must meet the test of time. It can do this only if it provides the means by which the Congress may meet the needs of the moment, not the solution to specific problems.

The questions of Presidential succession and Presidential inability are not new to the Senate. It has been wrestling with them for many years. Time and again it has tried its hand at contriving an amendment to the Constitution to deal with the problems. But each time when the Senate almost reaches a conclusion as to language for the amendment it becomes aware that its labors have been so narrowly directed to the problems arising out of particular events that it has failed to think and write in the broad fundamental concepts which are necessary to a constitutional amendment. And then, because it realizes the dangers of a job half done, it does nothing at all.

Congress cannot go along that way any further. It must deal with the problems of Presidential succession and Presidential inability by a constitutional amendment. It is necessary that the pertinent provision of the Constitution dealing with vacancy or inability, article II, section 1, that reads as follows:

In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and the 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.

be amended to clarify whether the devolution is of the Office of the President or only of his powers and duties. Presumably it is the former in the case of death or resignation and the latter in case of inability. Be that as it may, it has been the uncertainty of construction of this language that in the past has prevented Vice Presidents from assuming authority during the periods of disability of various Presidents. Next, it is essential that the Constitution provide a means of dealing with the other matters encompassed in Senate Joint Resolution 1. But the amendment should not deal with details. They can be handled by statute and rightly should be.

This solution was well laid out before this committee last year and 2 years ago by the then Deputy Attorney General of the United States, Mr. Katzenbach. His entire statement in the 1963 hearings, incorporated again in the 1964 hearings, should be read by everyone who is considering this problem. Let me only emphasize his concluding thoughts:

Apart from the wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The changes are that supplemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future—not covered by Senate Joint Resolution 28¹—where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35¹ makes this possible; Senate Joint Resolution 28¹ does not.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures. We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35,¹ which treats the contingency of inability differently from situations such as death, removal, or resignation, which states that the Vice President in case of Presidential inability succeeds only to the powers and duties of the Office as Acting President and not to the Office itself, and which declares that the commencement and termination of any inability may be determined by such methods as Congress by law shall provide. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding.

Senate Joint Resolution 35, referred to by Mr. Katzenbach, now the Attorney General, and modified in accordance with his suggestions reads as follows:

Article—

In case of the removal of the President from office or of his death or resignation, the said office shall devolve on the Vice President, in case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed. 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 be President, or in case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in case of inability, until the inability shall be earlier removed. The commencement and termination of any inability may be determined by such method as Congress shall by law provide.

I, therefore, propose that we adopt as a constitutional amendment this proposal which not only bears the imprimatur of the two distinguished men who were then Members of the Senate, Senator Kefauver and Senator Keating, but which was so persuasively supported by the Attorney General. He has confirmed to me that he still holds those views. And in his testimony this year he said only that he would not insist on the preference he had expressed in the past.

But such a constitutional amendment would be only the beginning. We must then prepare specific legislation to establish the mechanics and the details of Presidential succession and inability. It could be in much the same language as that proposed by the Senator from Indiana for a constitutional amendment.

This course of action has one advantage above all others. It removes the fear that we may embed in the Constitution procedures which may not turn out to be workable. If they are in a statute we can change them. If they become a part of the Constitution, it would take another constitutional amendment to change them.

Indeed the events of the past few days have created a presumption and perhaps a conclusive presumption that a constitutional amendment in the form reported will be ill advised. In testimony before the Committee on the Judiciary of the other body, the Attorney General has given further indication of doubts he holds about the adequacy of the language of Senate Joint Resolution 1. Is section 3 permitting the President to declare his inability if he transmits a declaration in writing to the Senate and the House to be used when the President is having a tooth pulled? Is it to be used when he is out of the country on a visit to Mexico or to a NATO meeting, or perhaps when he is in the air at any time? If so, then we have imposed in the Constitution a very cumbersome procedure for him to take back his powers and duties. We have provided the same mechanics for an inability of a few minutes, or a few hours, as we have for long periods of illness.

Then, too, as has been suggested by those who have studied Senate Joint Resolution 1 in the form reported by the committee, there are many things which are not covered by the detailed language of this amendment which perhaps should be covered if we are going into such detail instead of adopting broad constitutional language which can be applied by statute to situations as they may arise. If one of the purposes of the amendment is to provide to the greatest extent possible for the filling of the Office of Vice President, have we done so? What happens if the President is disabled for many months and the Vice President assumes his powers and duties as Acting President? Can he appoint a Vice President, or must that Office remain empty? Surely there is as much chance that some ill may befall the mortal who is Acting President due to the disability of the President as there

would be if he succeeded to the Presidency upon the death of the President. By moving into this area with a constitutional amendment containing such specifics dealing with the one case we may have foreclosed ourselves from dealing by statute with other parts of the problem. On the other hand the broader language of Senate Joint Resolution 35, 88th Congress, would permit us to deal with this whole problem by statute.

And, let us never forget, that it is often argued that because situations of great variety and complexity may arise at any time in the conduct of our foreign relations and in the administration of the laws which we pass, we should not too tightly or too rigidly control the exercise of discretion by those who must deal with the problems. But by writing such specifics into the Constitution as are proposed by Senate Joint Resolution 1 as reported, we are even more tightly and more rigidly binding ourselves in dealing with the details of problems of Presidential succession and inability.

We should certainly heed the wisdom of the Attorney General when he testified on the merits of the various proposals last year and the year before. And we should give thought to the implications of all the assumptions the Attorney General felt constrained to make when he testified this year. Let us see what he said:

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with longstanding precedent (see, e.g., *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing that his inability has ended. The subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail.

The fact that we give heed and thought to these suggestions does not mean that we do nothing about the problem of presidential succession and disability. Indeed, we must do something. Let us do it with the sweep of history in our mind and pen rather than the shackles of specifics.

EVERETT MCKINLEY DIRKSEN.

INDIVIDUAL VIEWS OF SENATOR ROMAN L. HRUSKA

Agreements devised by the President and his Vice President in past administrations to cope with an inability crisis are not satisfactory solutions. Recent history has also made us very much aware of the need for filling the Office of Vice President when a vacancy arises.

It is abundantly clear that, rather than continue these informal agreements, the only sound approach is the adoption of a constitutional amendment.

The hearings, which have been held on this important subject in recent years and in which this Senator has had the opportunity to participate, have led me to prefer a different approach than the present one. As in other legislative matters, the finished product requires the refinement of individual preferences. In the spirit of this simple reality, I shall support the proposed amendment. It is my earnest hope that the Congress and the State legislatures will approve and ratify it promptly. There is, however, one amendment which I would urge, as discussed at a later point.

There are two major reasons for my acceptance of the proposed amendment.

The first is the urgent need for a solution. Differences of opinion in Congress have deprived us of a solution for far too long. It is time that these constitutional shortcomings be met.

Secondly, the proposed language approaches the product which would have resulted under the proposal which I had urged, so that this amendment is acceptable.

Nevertheless, it is in order to state the bases of my earlier preference and the preference of three Attorneys General.

The proposed amendment would distinguish the inability situation from the three other contingencies of permanent nature; death, resignation, and removal from office, and would recognize that, in the first instance, the Vice President becomes Acting President only.

At this point, we encounter the first major difference of opinion. Some would advocate spelling out the procedure for determining inability within the language of the proposed amendment. I disagree with the method of locking into the Constitution those procedures deemed appropriate today but which, in the light of greater knowledge and experience may be found wanting tomorrow.

The preferred course would be for the amendment to authorize the Congress to establish an appropriate procedure by law. This practice parallels the situation of Presidential succession, wherein the power is delineated by the Constitution but the detail is left for later determination.

I would also add one fundamental limitation to the process.

I refer to the doctrine of separation of powers. The maintenance of the three distinct branches of Government, coequal in character, has long been accepted as one of the most important safeguards for the preservation of the Republic.

The executive branch should determine the presence of and termination of the inability of the President. It is my view that a method which would involve neither the judicial nor the legislative branch of the Government would be the better course.

The determination of Presidential inability and its termination is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his Office.

Injecting Congress into the factual question of inability does create a secondary impeachment procedure, although limited, in which the conduct of the President would not be the test.

The impeachment trial of President Andrew Johnson affords a clear illustration of the dangers presented when Congress performs a judicial function. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers which exist when Congress is called upon to consider where to place the mantle of the presidential powers.

An additional compelling argument for restricting this authority to the executive branch is that this determination must be made with a minimum of delay. Although this objection has been alleviated in the present language, the executive branch is clearly best equipped to respond promptly as well as effectively in the face of such a crisis.

Obviously, such a decision must rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or other extraneous factors. Those possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.

We must be mindful that the President is chosen by the people of the entire Nation. It is their wish and their right that he serve as President for the term for which he was chosen. Every sensible and sympathetic construction favoring his continued performance of presidential duties should be accorded him. Indeed, were error to be committed, it should be in favor of his continuation in office or, were it interrupted by a disability, by his resumption of the office at the earliest possible moment upon recovery. The members of the executive branch are best situated to protect that interest.

What briefly has been developed is the basis of my view that Congress should not be injected into the decision-making process in cases of presidential inability or recovery.

Considerable reference has been made in the discussion of Senate Joint Resolution 1 to the 76 cosponsors of the proposed resolution. Cosponsorship of a proposal does not mean acceptance of detail and the exact text. I am certain that cosponsors do not consider themselves bound by a proposal as introduced. Cosponsorship does not indicate a desire to proceed without hearings, deliberation, and amendments in committee as well as on the floor of the Senate. Refinements made by the committee on this measure illustrate that whether a proposal has a single sponsor or 99 cosponsors, it must be examined in detail before it is considered by the Senate with a view to change by amendment or substitution.

The refinements that have been made on the original language of Senate Joint Resolution 1 will clarify the detailed procedure to be followed in a case of disability.

The role of Congress is narrow. It is as an appeal open to the President from the decision of the Vice President and the members of the Cabinet. It will be brought into the matter only in those limited circumstances where the Vice President, with a majority of the principal officers of the executive departments, and the President disagree on the question of inability. It is important to note that Congress will not have the power to initiate a challenge of the President's ability.

The procedure by which Congress shall act is properly left to later determination within rules of each branch thereof. A point of possible conflict is resolved in the understanding that Congress shall act as separate bodies and within their respective rules.

The language that " * * * Congress shall immediately proceed to decide the issue" leaves to Congress the determination of what, in light of the circumstances then existing, must be examined in deciding the issue. Thus, the matter will be examined on the evidence available. It is desirable that the matter be examined with a sympathetic eye toward the President who, after all, is the choice of the electorate.

It is apparent that Senate Joint Resolution 1 does have aspects which alleviate the dangers attendant to a crisis in presidential inability. Nevertheless, it is felt by this member of the committee that caution and restraint will be demanded should this inability measure be called into application.

A time does arrive, however, when we must fill the vacuum. The points which I have emphasized and previously insisted upon are important; but having a solution at this point is more than important, it is urgent. For this reason, I support Senate Joint Resolution 1 and urge its passage. I hope that it will be given expeditious approval by the other body and early ratification by the required number of States.

PROPOSED AMENDMENT

Section 5 gives the majority of the Cabinet and the Vice President only 2 days in which to challenge the President's declaration that his inability has terminated.

This is not enough time considering the gravity of the situation and the circumstances which might exist.

In the discharge of their duties, members of the Cabinet often travel widely. There are also long periods of time in which they may not have had an opportunity to observe and visit with the President so as to judge whether he has recovered sufficiently to resume his duties. Such periods of inaccessibility might even be longer, in the event of the President's illness.

The 2-day period should be extended to properly allow for these factors. I urge amendment of this point to provide additional time.

ROMAN L. HRUSKA.

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 of 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 chuse 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 size 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.

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

JUNE 30, 1965.—Ordered to be printed

Mr. CELLER, from the committee of conference, submitted the
following

CONFERENCE REPORT

[To accompany S.J. Res. 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the joint resolution (S.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 met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert 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 to them 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 either the principal officers of the executive departments or of 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 either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four 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, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his 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."

And the House agree to the same.

EMANUEL CELLER,
BYRON G. ROGERS,
JAMES C. CORMAN,
WILLIAM M. McCULLOCH,
RICHARD H. POFF,
Managers on the Part of the House.

BIRCH E. BAYH, Jr.,
JAMES O. EASTLAND,
SAM J. ERVIN, Jr.,
EVERETT M. DIRKSEN,
ROMAN L. HRUSKA,
Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S.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, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House passed House Joint Resolution 1 and then substituted the provisions it had adopted by striking out all after the enacting clause and inserting all of its provisions in Senate Joint Resolution 1. The Senate insisted upon its version and requested a conference; the House then agreed to the conference. The conference report recommends that the Senate recede from its disagreement to the House amendment and agree to the same with an amendment, the amendment being to insert in lieu of the matter inserted by the House amendment the matter agreed to by the conferees and that the House agree thereto.

In substance, the conference report contains substantially the language of the House amendment with a few exceptions.

Sections 1 and 2 of the proposed constitutional amendment were not in disagreement. However, in sections 3 and 4, the Senate provided that the transmittal of the notification of a President's inability be to the President of the Senate and the Speaker of the House of Representatives. The House version provided that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives. The conference report provides that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives.

In section 3, the Senate provided that after receipt of the President's written declaration of his inability that such powers and duties would then be discharged by the Vice President as Acting President. The House version provided the same provision except it added the clause "and until he transmits a written declaration to the contrary". The conference report adopts the House language with one minor change for purposes of clarification by adding the phrase "to them", meaning the President pro tempore of the Senate and the Speaker of the House.

The first paragraph of section 4, outside of adopting the language of the House designating the recipient of the letter of transmittal be the President pro tempore of the Senate and the Speaker of the House of Representatives, minor change in language was made for purposes of clarification.

In the Senate version there was a specific section; namely, section 5, dealing with the procedure that when the President sent to the Congress his written declaration that he was no longer disabled he could 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 the Congress might by law provide, transmit within 7 days to the designated officers of the Congress their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon, the Congress would immediately proceed to decide the issue. It further provided that if the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President would continue to discharge the same as Acting President; otherwise, the President would resume the powers and duties of his office.

The House version combined sections 4 and 5 into one section, now section 4. Under the House version, the Vice President had 2 days in which to decide whether or not to send a letter stating that he and a majority of the officers of the executive departments, or such other body as Congress may by law provide, that the President is unable to discharge the powers and duties of his office. The conference report provides that the period of time for the transmittal of the letter must be within 4 days.

The Senate provision did not provide for the convening of the Congress to decide this issue if it was not in session; the House provided that the Congress must convene for this specific purpose of deciding the issue within 48 hours after the receipt of the written declaration that the President is still disabled. The conference report adopts the language of the House.

The Senate provision placed no time limitation on the Congress for determining whether or not the President was still disabled. The House version provided that determination by the Congress must be made within 10 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. The conference report adopts the principle of limiting the period of time within which the Congress must determine the issue, and while the House original version was 10 days and the Senate version an unlimited period of time, the report requires a final determination within 21 days. The 21-day period, if the Congress is in session, runs from the date of receipt of the letter. It further provides that if the Congress is not in session the 21-day period runs from the time that the Congress convenes.

A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.

EMANUEL CELLER,
BYRON G. ROGERS,
JAMES C. CORMAN,
WILLIAM M. McCULLOCH,
RICHARD H. POFF,

Managers on the Part of the House.

