94th Congress
1st Session

COMMITTEE PRINT

A REVIEW OF THE IMPLEMENTATION OF SECTION 2 OF THE 25TH AMENDMENT

REPORT

OF THE

SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

Senator BIRCH BAYH, *Chairman*

TO THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 1975

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
57-525 WASHINGTON : 1975

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FOREWORD

The Subcommittee on Constitutional Amendments has carefully reviewed the first implementation of Section 2 of the 25th Amendment. The following report sets forth the Subcommittee's conclusions as a result of this review.

SUMMARY

The Twenty-Fifth Amendment was added to the Constitution in 1967 to solve two problems which had repeatedly plagued the Nation since its creation. One was to provide a mechanism for the determination of a case of presidential inability and a procedure for the assumption of executive powers and duties by the Vice President during the period of such an inability. Another was to provide a method by which vacancies in the Vice Presidency could be filled. At the time of the adoption of the Twenty-Fifth Amendment, no one predicted the extraordinary circumstances under which it first would be applied. In October 1973, after the resignation of Vice President Spiro T. Agnew, President Richard M. Nixon employed Section 2 of the Amendment to nominate Gerald R. Ford as the new Vice President. In August 1974, Gerald Ford assumed the Presidency upon President Nixon's resignation and himself nominated a Vice President under Section 2. This procedure, which resulted in the elevation of two persons to the highest positions in government without a vote of the people became an object of public attention.

The Senate Judiciary Committee, through its Subcommittee on Constitutional Amendments, determined to analyze the operation of the Amendment and to examine the proposals for its modification which had been advanced. No criticism of President Ford and Vice President Rockefeller was intended by this inquiry. Rather it was felt that a review of the Amendment which had proven so important was considered to be in the national interest.

The subcommittee held hearings on February 25, February 26, and March 11, 1975, and received testimony from ten witnesses and written statements from two others.[1] While a few of the witnesses voiced criticisms of the Amendment and suggested various changes, a substantial majority of them expressed strong support for the Amendment and praised its operation during the recent political crises. The views advanced in support of the Amendment and the proposals for change are discussed hereafter.

After reviewing all the testimony and reflecting upon the first applications of Section 2 of the Twenty-Fifth Amendment, the Subcommittee has concluded that the Amendment operated exceedingly well under the extraordinary circumstances of 1973 and 1974 and that no modification is warranted.

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[1] Oral testimony was taken from the following: Senators John O. Pastore of Rhode Island; William D. Hathaway of Maine; Robert Griffin of Michigan; and Representative Peter W. Rodino, Jr. of New Jersey; Hon. Antonin Scalia, Assistant Attorney General, Department of Justice; Professor Arthur Schlesinger, Jr.; City College of New York; Professor James MacGregor Burns, Williams College; Dean George E. Reedy, Department of Journalism, Marquette University; Professor Paul A. Freund, Harvard University Law School; and John D. Feerick, Esq., representing the American Bar Association. Written statements from Senator Howard Cannon of Nevada and Professor Charles Alan Wright of the University of Texas Law School were included in the Record.

SUPPORTING VIEWS AND CONSIDERATIONS

One of the strongest arguments in favor of Section 2 lies in the observation of how well it functioned to replace with new executive leadership an Administration that had lost the confidence of the American people. Although the controversy attending Watergate and its related scandals was intense, there was no serious question about the power of President Nixon to nominate a Vice President after the Agnew resignation. There was widespread agreement that the procedure was appropriate and that once approved by the Congress, the new Vice President had as legitimate a claim to the office as any popularly-elected Vice President. Similarly, when this Vice President was called upon to succeed to the Presidency the next year, the public reaction was one of considerable relief and gratitude that a credible successor was available. The Amendment permitted an orderly transition and the American people readily accepted President Ford as a legitimate occupant of the Presidency. From a practical viewpoint, therefore, the Amendment worked exceptionally well.

Prior to the adoption of the Amendment in 1967, whenever a Vice Presidential vacancy occurred, the successor to the President for the remainder of his term was the Speaker of the House of Representatives.[2] Since the Speaker could be, and frequently was, of the opposite political party from the President, a Presidential vacancy could abruptly shift the Presidency in mid-term from one political party to another and produce a sudden change in executive policy. Section 2 lessened the risk of such an upheaval by allowing the President, in the event of a Vice Presidential vacancy, to nominate a replacement Vice President of his own party and political persuasion. In effect, the Amendment helps insure that the popular mandate from the previous election will be continued throughout the regular four year term. More rapid changes in policy would tend to promote instability as well as prevent a fair appraisal and evaluation of the policies of the political party that had won the previous election.

In the recent political crises, Section 2 permitted both Vice President Agnew and President Nixon to resign without entrusting their offices to a member of the opposition party. Agnew was able to resign realizing that Nixon could replace him with a Republican of similar philosophy who could succeed to the Presidency if that were required without vitiating the 1972 election mandate. When President Nixon considered resignation, he was not threatened by the specter of abandoning the White House to a political opponent but was assured that the Republican Party under Gerald Ford would have the opportunity to continue his policies. Likewise the Congress could not be charged with political motives in its impeachment inquiry, since a Republican and not a Democrat would succeed to the Presidency upon impeachment and conviction. In his testimony before the Subcommittee, Representative Peter Rodino observed that "without section 2 of the 25th Amendment, the nation might not have endured nearly so well the ordeal of its recent Constitutional crisis." Chairman Rodino said that the Amendment "permitted the Constitutional

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[2] This had been true since 1947. From 1792 to 1886, the President pro tempore of the Senate was the immediate successor after the Vice President. The Secretary of State occupied that position between 1886 and 1947.

process to proceed in such a way that the American people could have confidence that no one sought partisan advantage."

There was general agreement that without the 25th Amendment it would have been much more difficult for President Nixon to resign thus forcing the country through a prolonged and divisive impeachment trial. In addition the character of the entire investigative process of the House Judiciary Committee investigation might well have been changed, increasing political motivation and decreasing the objective pursuit of what was in the national interest.

Some have argued that the elevation to the Presidency of a Vice President chosen under the procedure of the Twenty-Fifth Amendment violates the basic elective nature of our system. However, it must be observed that a Presidential candidate traditionally has exercised a large role in the nomination of his running mate and that both have run and been considered by the electorate as a team. Under the Section 2 procedure, as demonstrated by the confirmation proceedings of Gerald Ford and Nelson Rockefeller, a Vice Presidential nominee is subject to a thorough investigation and intense scrutiny of both Houses of Congress. His examination is as complete, if not greater, than that given Vice Presidential candidates in the regular election process. Certainly both Vice Presidents Ford and Rockefeller were given an extensive examination. By requiring confirmation by both the Senate and House of Representatives, the Amendment elevates a Vice Presidential nomination onto a high plane and permits full involvement of the members of Congress as surrogates of the people. In giving a decisive role to the 535 members of Congress, the Amendment brings the procedure for replacing a Vice President closer to the people than any other procedure except a popular election by the people.

PROPOSALS FOR CHANGE

1. *Special Election Procedure*

Senator John O. Pastore testified in support of S.J. Res. 26, which would provide for a special election for both President and Vice President when a person who has been selected as Vice President under the Twenty-Fifth Amendment succeeds to the Presidency with more than a year remaining in the unexpired term of the previous President. In such a situation S.J. Res. 26 provides that the Vice President chosen under the Twenty-Fifth Amendment would act as President and the Speaker of the House would act as Vice President until a special election could be held and the victors sworn into office. According to its proponents, this special election procedure would preserve a basic premise of government, namely, that the Presidency is an elective office and that a national election is essential to sustain a rule by the people. Most of the witnesses who testified, however, questioned the wisdom of substituting the emotionalism and possible divisiveness of a national election for an orderly transition period in a time of national uncertainty following the death, resignation, or removal of a President.[3]

It was pointed out that the national interest would not be well served by having a caretaker pending the outcome of a special election.

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[3] The Presidency has been vacant nine times as a result of eight Presidential deaths and one resignation. Seven Vice Presidents have died in office and two have resigned.

It also was pointed out that the timing of a special election could present practical difficulties if what is now almost a year long process from state primaries to inauguration were telescoped into a shorter time frame. Indeed, it was urged that if the national committees of our political parties were permitted to select the party nominees in lieu of the normal nominating procedures, the extent of popular participation in the choice would be subject to serious question.

Finally, it was pointed out that the Watergate episode was a unique phenomena in 200 years of American history. Hopefully, it will not be repeated. The deaths of Presidents Roosevelt and Kennedy, tragic as they were, were much more characteristic examples of the historical transfer of presidential power in the United States. During such times the country required confidence and unity, not the divisiveness and uncertainty of a political election campaign.

2. Special Election to Fill Dual Vacancies

While expressing praise for the operation of Section 2 of the Amendment, Senator William Hathaway testified in support of a complementary proposal, S. 2678, which would provide for a special election for the offices of President and Vice President when both became vacant. The proposal also would apply in a situation in which the Presidency becomes vacant at a time when Congress is considering a Vice Presidential nomination made under Section 2. The bill would alter the current statute on presidential succession to provide for a special election within ninety days of dual vacancies, with the highest ranking member of the President's party in the House of Representatives serving as President until the election is held. Senator Hathaway stated that when the Speaker of the House is of a different party from the President, Congress is influenced by political considerations in judging the Vice Presidential nominee. The Speaker's position as successor as well as leader of the House which must confirm Vice Presidential nominees, he reasoned, creates a conflict of interest which could be cured if the Speaker were removed from the line of succession and a special election procedure were adopted.

3. Selection of Vice Presidents by Section 2 Mechanism

Senator Robert Griffin testified before the Subcommittee in support of S.J. Res. 160, a new constitutional amendment which would change the traditional method of selecting Vice Presidential nominees. Following the presidential election, the President-elect would nominate a person for Vice President who would then be subject to confirmation by the new Congress. Thus, under S.J. Res. 160 every Vice President would be subject to the same intensive scrutiny and investigation which has focused on 25th Amendment Vice Presidents. Senator Griffin viewed the Section 2 procedure as having worked so well in 1973 and 1974 that it should be expanded to fill the office of the Vice President at all times.

Several witnesses expressed concern that by requiring congressional confirmation of the Vice Presidential nominee who runs with the Presidential nominee, this proposal would distract the new President and Congress from their other responsibilities and would delay the organization of every new administration and the implementation of its programs. Also such a procedure would leave the new President unsupported until a Vice President were confirmed and if the President

became disabled during the interim period, difficult problems would arise. Finally, several witnesses said that the present convention selection was preferable because the political considerations surrounding the choice received greater attention. Most importantly the people of the country have the opportunity of placing their stamp of approval on the Vice President in the general election.

4. Abolition of the Vice Presidency

Historian Arthur Schlesinger, Jr., appeared before the Subcommittee to advocate the abolition of the Vice Presidency as an office which is at its best superfluous and mischievous at its worst. He argued that the office effectively frustrates capable men. To provide for succession without a Vice President, Schlesinger proposed that a special election be held within ninety days of any presidential vacancy, with a member of the Cabinet serving as the interim President.

Other witnesses were unwilling to condemn the Vice Presidency as a useless office or to admit that a special election would provide an orderly transition following a presidential vacancy. In support of the Vice Presidency, Professor James MacGregor Burns stated:

> * * * the Vice President, 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 I would say knowing that with other positions where they are rather restricted, political and policy scopes, the Vice President is in a better position than any other officer in government to takeover if he is a man of quality, personal quality.

CLARIFICATIONS OF THE AMENDMENT

Several witnesses who testified before the Subcommittee sought clarification of certain areas of the Amendment. The effect of a vacancy in the Presidency while Congress was considering a pending Vice Presidential nomination under the Twenty-Fifth Amendment was one such area. The views of various witnesses were probed concerning this question. The Subcommittee concluded that in such a event, the Speaker of the House would become President by virtue of the Succession Act of 1947 and would have the power to continue to support the pending Vice Presidential nomination or to withdraw it and nominate another person for Vice President.

The suggestion that time limits be imposed on the congressional consideration of Vice Presidential nominees was opposed by a number of witnesses on the ground that the extent of inquiry into the qualifications of any particular nominee should depend upon his individual situation. A time limit might preclude the Congress from thorough investigation and careful scrutiny required by the Amendment. Representative Rodino testified:

> 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 rush judgment.

Another area of discussion was whether the Congress should hold joint hearings on the confirmation of Vice Presidential nominees. The American Bar Association, which played a significant role in the development of the Twenty-Fifth Amendment, favored a joint hearings as an efficient way to avoid duplication of investigation and testimony. Senator Robert Griffin said that joint hearings would

probably expedite a confirmation but that in some situations separate hearings would be better. Representative Rodino felt that each House had its own responsibility and, therefore, expressed contrary views as to the desirability of joint hearings.

Another question raised during the hearings concerned the provision of Section 4 of the Amendment permitting "the principle officers of the executive departments" to act with the Vice President to declare a presidential inability. The effect of a Cabinet vacancy at such time was explored. It was pointed out that the legislative history contains various expressions about this possibility. It was generally agreed that, by virtue of Section 4's grant of power to Congress, this question could be answered definitively by statute.

CONCLUSION

The hearings to review the first implementations of the Twenty-Fifth Amendment revealed widespread satisfaction with the operation of the Amendment and little support for any specific alternative to Section 2. Although a few witnesses expressed views favoring change, there was an absence of agreement among them as to the type of change and serious objections were raised to each of the varying proposals. It seemed clear to the Subcommittee that the Twenty-Fifth Amendment, which has been applied twice in its short existence, successfully met its first, and perhaps most difficult, tests.

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