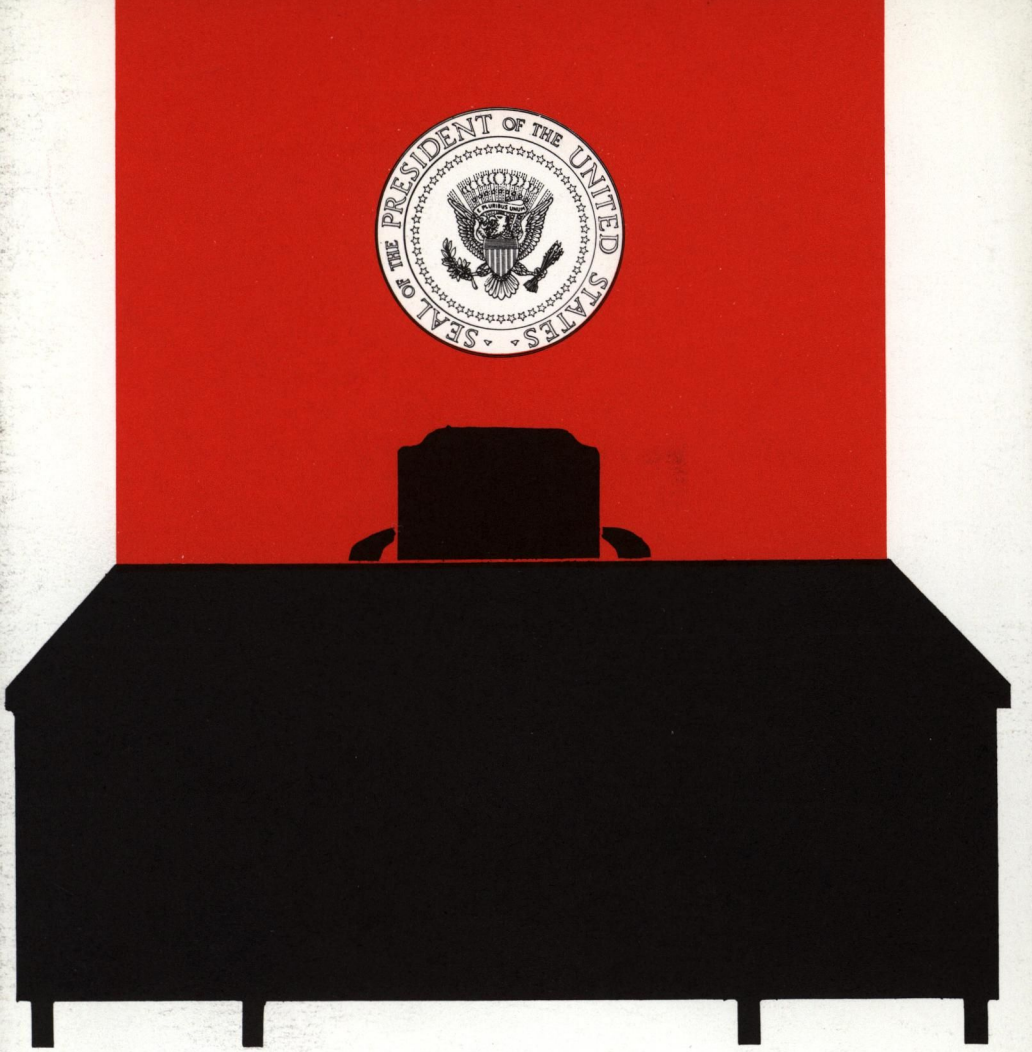

a Country without a MAN

A STUDY OF PRESIDENTIAL DISABILITY

prepared and distributed by
the Virginia Commission on Constitutional Government

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FOREWORD

This paper was originally prepared for members of the Virginia Commission on Constitutional Government to better acquaint them with the problems surrounding the subject of presidential disability, and the related problem of Vice-Presidential vacancies.

At the December meeting the Commission decided that general distribution should be made of this study in order to call attention to the urgent need for such legislation, and to publicize the recent action of the Virginia General Assembly calling for ratification of a constitutional amendment dealing with presidential disability.

We believe you will find the paper of timely interest.

JAMES J. KILPATRICK
Chairman of Publications

Richmond
January, 1965

"My God . . . the President is paralyzed."

These few words, spoken on October 2, 1919, marked the beginning of a two-year period when the government of the United States, for all practical purposes, was run by a woman. The woman was, of course, Edith Bolling Wilson, who, following President Wilson's cerebral thrombosis became the first *de facto* President of the United States.

Of the many thousands of words written describing the Wilson era, the following passage perhaps sums up most succinctly the fate that befell the operation of government:

> "It was rather that the government staggered along as best it could while she ignored all minor things and many large ones. Vacant ambassadorships, vacancies on top government commissions, even forthcoming Cabinet vacancies did not matter to her. What mattered was that the President be protected from irritation, from people asking of him what he could no longer give; from Joe Tumulty; from the world. As it turned out, Edith Bolling Wilson's operation was a success. The patient lived." [1]

The government also survived, perhaps in a manner strange to the Constitution of the United States, but Americans did not have the time to question closely the strange ways of government in the roaring days of the postwar period.

What would be the fate of government in the United States in the 1960's if a similar presidential attack resulted in disability but not in death? Would a devoted First Lady, or an uncertain Vice-President, attempt to carry out the role of Chief Executive; or would government stagger along "as best it could" until the President regained his health, or was succeeded upon his death by the Vice-President?

And what if there were no Vice-President to assume the office of President? Would there be a dangerous vacuum in this nuclear age while Congress tried to decide upon a successor? Well thought out answers might someday be vital to the survival of

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[1] Smith, *When the Cheering Stopped* (Morrow & Co. 1964).

this country, and for this reason the following paper has been prepared.

INABILITY OF THE PRESIDENT

The presidential succession clause of the Constitution states:

> "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." [2]

What is the meaning of the words "the same," italicized above? Do they mean that the "powers and duties" of the Presidency shall devolve on the Vice-President, or is it the "office" of the Presidency that shall devolve? Scholars who have probed the records of the Constitutional Convention of 1787 are in agreement that the word "same" was intended as a substitute for the words "powers and duties," and not "office." They are also in agreement that the ambiguity arose when a Committee of Style was formed to revise the wording of the articles agreed upon by the Convention.[3]

It was not until 1841 that the clause had its first test, a test that disregarded the Framers' presumed intent and set precedent for all future successions. In that year, William Henry Harrison, President for only one month, died. Vice-President John Tyler, despite the objections of former President Adams,[4] Secretary of

[2] U. S. Const., Art. 11, §1., cl. 5.

[3] See Feerick, "The Problem of Presidential Inability—Will Congress Ever Solve It?" 32 *Fordham L. Rev.* 73 (October 1963), and Silva, *Presidential Succession* (1951).

[4] Adams recorded in his diary that Tyler's assumption of the "office" of the Presidency was "a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice President, on the decease of the President, not the office, but the powers and duties of the same office."

State Daniel Webster, and various Congressmen,[5] assumed the office and title of President, took the oath, and gave an inaugural address. Tyler's precedent has been accepted on seven subsequent occasions when Vice-Presidents have become President through succession, and has assumed the force of law. And it is this precedent that creates the initial problem.

Tyler's precedent, as it relates to succession because of death, resignation, or removal from office, would appear to create no problems, even though it technically may be a violation of the Framers' intent. In case of death, resignation, or removal from office, the Vice-President, chosen by the people, is perhaps as well qualified to assume the "office" of the Presidency as any officer designated by Congress; in fact, he is probably better qualified because of his prior apprenticeship.

But what about the case of presidential disability? Would the Tyler precedent prevent a disabled President from resuming office even when the disability was removed, and confer upon the Vice-President, irrevocably, the office of the Presidency? History would indicate that it would, and the events surrounding the cases of presidential disability should be briefly examined.

There have been three cases of presidential disability in the history of the Presidency. President James Garfield, shot by the assassin Charles Giteau,[6] lived for eighty days before dying. His one act during this period was to sign an extradition paper. Garfield's Vice-President, Chester A. Arthur, refused to act as President. His reason: Under the Tyler precedent, the "office" devolves, and should Garfield, by some miracle, recover from his wound, Garfield would be ousted as President.[7]

[5] Representative McLeon of New York wanted the House to address Tyler as "Vice-President, now exercising the office of President." An even more specific form of address was suggested by Senators Allen and Tappan who thought that "Vice-President, on whom by the death of the late President, the powers and duties of the office of the President have devolved," was a catchy little title. Fortunately for the President's secretary, Congress decided against these suggestions and Tyler was accepted as President.

[6] July 2, 1881.

[7] Arthur's dilemma was resolved when Garfield died on September 19, 1881, and he became President.

The second case of presidential disability occurred when Woodrow Wilson was left paralyzed by a stroke.[8] Vice-President Thomas R. Marshall, whose niche in history is assured by his statement that "what this country needs is a good five-cent cigar," refused to act as President. His reason: Fear that his action would oust Wilson.[9]

Finally, Dwight D. Eisenhower's heart attack initiated the third case of presidential disability.[10] An attack of ileitis on June 8, 1956, and a "little stroke" on November 25, 1957, temporarily impaired Mr. Eisenhower's ability to perform the duties of his office. The management of government was carried on by a group composed of members of the Cabinet and White House staff. The Vice-President did not act as President. His reason seems obvious.

A second complicating factor, in addition to the precedent set by President Tyler, lies in the determination of disability. Who is to say when a President is unable to carry out the duties of his office? If the President is conscious and coherent, and on good terms with the Vice-President, a problem might not arise. But what if he lies for days in a coma, or goes insane, or distrusts the Vice-President? Or suppose there is no Vice-President?

An informal agreement, entered into between President Eisenhower and Vice-President Nixon in March, 1958, made a serious attempt to define the contingencies in which the Vice-President would serve as Acting President.[11] A similar agreement subsequently was adopted by President Kennedy and Vice-President Johnson, and, after Mr. Kennedy's assassination, by President Johnson and Speaker McCormack. Mr. Johnson told his press conference of November 28, 1964, that he would make the same agreement with Mr. Humphrey early in 1965.

[8] October 2, 1919.

[9] Wilson's partial recovery and the inauguration of Warren Harding on March 4, 1921, ended this second disability crisis.

[10] September 24, 1955.

[11] The agreement provides:

(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.

Unfortunately, such agreements have serious handicaps as a permanent solution to the problem of presidential disability.[12]

The need for a clarification of the presidential succession clause is great. What others have proposed is discussed below.

A SOLUTION

On September 29, 1964, the United States Senate agreed for the first time "on an approach to the vexing problem of how to determine when a President is disabled and should turn over his duties, at least temporarily, to the Vice-President." [13] The provisions of the proposed constitutional amendment, Senate Joint Resolution 139, approved by a vote of 65-0, are reprinted below:

"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

[12] The major defects of this informal agreement are:

(1) It has no force of law;

(2) If the Tyler precedent allows the "office" of Vice-President to devolve in cases of death, a logical interpretation must make it devolve in cases of inability as well;

(3) The success of the agreement depends entirely upon the good will of the President and Vice-President, and

(4) The recent agreement between President Johnson and the Speaker of the House, if it had become operative, would have required the Speaker, under the present succession law, to resign as Speaker and as a Member of Congress, even if he were to act for only a day.

[13] *The Washington Post,* September 29, 1964.

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."

The adjournment of Congress for election year campaigning prevented the House from acting on the amendment, but the Senate resolution, sponsored by Senator Birch Bayh (D. Ind.), doubtless will serve as the basis for action by the Eighty-ninth Congress. Its merits and defects are outlined below:

Pro

(a) Section one would affirm the historical precedent by which a Vice-President succeeds to the office of President upon the death of a President, and, at the same time would eliminate any ambiguity in the present language of Article II, section 1, clause 5, by separating the provisions relating to inability, from those relating to death, resignation, or removal from office.

(b) Section three would give constitutional sanction to the terms of the informal agreement between the President and Vice-President, initiated by President Eisenhower, and would allow the President to declare, in writing, his disability. The proposed language spells out clearly that, in such an event, it is not the "office" that devolves upon the Vice-President but only the "powers and duties" of that office.

(c) Section four, an extremely important section in a time of national emergency, would insure that the nation would have a Chief Executive able to meet any contingency in the event a President refused to declare himself unable to discharge his duties, or was physically or mentally unable to do so.

(d) A constitutional amendment is to be preferred over a mere legislative solution, although there are scholars who believe that the problem can be solved under the existing provisions of the Constitution by legislation.[14]

(e) The proposed amendment, spelling out with specific details a method for deciding disability, will probably be more acceptable to the State legislatures than a provision giving Congress the power to adopt and re-adopt methods as it sees fit, for determining disability.

Con

(a) Critics of the Bayh resolution believe that the very specificity of the proposed amendment would invite prolonged discussion in the State legislatures, and thus delay or defeat ratification.

(b) Rigid procedures should not be frozen into the Constitution, and any amendment passed should give Congress

[14] Corwin, *The President, Offices and Powers, 1787-1957* (1957).

only a general power to deal with the question of disability.

(c) A constitutional amendment is unnecessary, as legislation approving the informal agreements first adopted by President Eisenhower is not open to constitutional challenge.

(d) There is no basis for assuming that a general power granted to Congress to determine cases of disability would be abused, for Congress has always had the power to remove the President by impeachment.

RECOMMENDATION

A resolution identical to Senate Joint Resolution 139, as it relates to presidential disability, should be passed by the Eighty-ninth Congress, and ratified by the States. The Virginia General Assembly, on December 3, 1964, recognizing the urgent need for such a resolution, memorialized the Congress of the United States to pass such a resolution.

The specificity of such an amendment, setting forth as it does an automatic method for determining disability, is the chief advantage of the proposed legislation. If the problem is left solely to legislative solution, the political probabilities are that it will not be solved; it is like an operation that always can be postponed. In such an event, the actual emergency would find the nation unprepared. On the other hand, if the problem is solved by constitutional amendment, the remedy is complete; the necessity of hasty action in an emotional hour would thus be avoided.

VICE-PRESIDENTIAL VACANCIES

"It is a melancholy exercise in history to look down a list of American Vice-Presidents. With a few conspicuous exceptions, the Republic's roll call discloses a string of second-rate men. They held office for a long span of years in which the vice-presidency was in truth a second-rate job; and they sufficed." [15]

[15] Editorial, *The Richmond News Leader,* October 6, 1964.

The basic constitutional duties of the Vice-President are to preside over the Senate and to discharge the powers and duties of the President in case of his death, resignation, removal, or inability. And, as critics have noted, for a hundred years or more, few top-notch men could be found who were willing to give up positions of power and influence to assume the office of the Vice-Presidency, an office largely ceremonial.

The importance of the Vice-Presidency has grown steadily in the twentieth century, and the holder of the office has become an informed and important member of the Government.

For this reason, attention should be given to the establishment of a procedure by which a vacancy in this office can be filled. In the past, all attempts to insure a stable line of succession have been to insure a line of succession beyond the Vice-Presidency.[16] There have been three such succession laws:

(1) 1 Stat. 239 (1792) provided that, after the Vice-President, the line of succession would consist of the President pro tempore of the Senate and the Speaker of the House of Representatives.

(2) 24 Stat. 1 (1886) removed the President pro tempore and Speaker from the line of succession and replaced them with heads of the executive departments.

(3) 3 U.S.C. §19 (1958) was enacted because of President Truman's belief that the Act of 1886 was undemocratic in that the line of succession did not begin with elective officials. The Act of 1947 established the following line of succession: Speaker, President pro tempore, Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, and, Secretary of Labor.

The need for a Vice-President at all times is pointed up by the fact that for almost 37 out of 175 years, the Vice-Presidency

[16] The Constitution gives Congress the power to "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. . . ."

has been vacant.[17] Eight Vice-Presidents have succeeded to the Presidency upon the death of the incumbent, seven Vice-Presidents have died in office, and one Vice-President resigned. The office was vacant throughout 1964.

PROPOSALS

Senate Joint Resolution 139 provides that:

> "Whenever there is a vacancy in the office of Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority vote of both Houses of Congress."

Other proposals would leave the selection of a Vice-President to Congress alone, or provide for election by the Electoral College. The major defect in the first of these proposals is that if the President were from a minority party, Congress could select a Vice-President from the other party; the subsequent death of the President would defeat the will of the people in choosing the party they wanted to supply the Chief Executive. The main objection to the latter proposal is that the Electoral College is not equipped to conduct hearings on the qualifications of a nominee submitted by the President, and is too cumbersome to act quickly in emergencies.

The merits of the proposed Bayh amendment are:

(a) The selection by the President of a Vice-Presidential nominee follows the recent practice of nominating conventions.

(b) Confirmation by Congress, the people's representatives, would create public confidence in the selection.

(c) The existing line of succession is extremely unsatisfactory. It is unfair to the Speaker of the House of Representatives to require him to tender his resignation as Speaker and as a member of Congress to assume office for only a short period of time.

[17] See Feerick, "The Vice-Presidency and the Problems of Presidential Succession and Inability," 32 *Fordham L. Rev.* 457 (1964).

The following arguments have been made against the proposal:

(a) The President should be under no obligation to submit his appointee for Vice-President for congressional confirmation.

(b) If confirmation is advisable, it would be sufficient if made by the Senate, as in the case of Cabinet Officers.

(c) The popularly elected body of the people, the Electoral College, is the proper body to fill vacancies in the Vice-Presidency.

(d) An elective officer should be next in line for the Presidency, after the Vice-President, and

(e) Vacancies in the office of Vice-President have not created any serious problem. (This "trust to luck" approach is not worth commenting upon).

RECOMMENDATION

A resolution containing language identical to that found in the section of S. J. Res. 139 dealing with filling the office of Vice-President should also be enacted by the Eighty-ninth Congress and ratified by the States. In urging the passage of such a resolution, the Virginia General Assembly has given its approval to this section.

Its adoption, by Congress, would insure maximum public confidence in the appointee to the office. It would be wise however, to spell out whether the two Houses of Congress are to meet independently of one another in voting on the confirmation, or, as the section implies, in joint session with a majority of the total membership required for confirmation.

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