Three Crucial Questions Are Inseparably Linked

The Dilemma of Succession

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THE SHOCK and numbness of the President's death are receding but unrest over the problems of succession remains. The constitutional and political structure governing the passing of power has shown some cracks or, at any rate, some strains, not to mention confusion. The most pressing of these problems are: the method of nominating the Vice President, the Succession Act of 1947, and what constitutes Presidential "disability." Although looked at and treated separately, both constitutionally and politically, they are inseperably linked. Any solution of the legal questions involving "disability" and succession must cope with the political question of nominating a Vice President.

The tasteless jokes about the Vice Presidency—references, for example, to Mr. Throttlebottom, the dubious Vice President in "Of Thee I Sing" whose principal job is to sit in the park and feed peanuts to the pigeons—will not quite do. Although salty John N. Garner, advised Lyndon Johnson that the Vice Presidency was not worth a pitcher of warm spit, and although President Kennedy related to Governor Marvin Griffin of Georgia that if he had been successful in getting twenty-two more votes to win the Vice Presidency in 1956 "my political career would have been over," the real key to the office was the observation of John Adams: "I am Vice President of the United States. In this I am nothing. But I may be everything."

The Vice Presidency can be said to have emerged from oblivion. This is true not only because the Vice President can succeed to the Presidency—as eight have in our history—but also because the Vice President is sorely needed by the President to lessen the strain of the toughest job in the world. Since 1949, under Truman, when Congress made the Vice President a statutory member of the National Security Council, right up to the Kennedy Administration, the Vice President has played an increasing role in the formation of policy. The success of this development paid off in the smoothness with which President Johnson assumed office, a contrast with the confusion when Truman became President in 1945. Mr. Truman, who did not learn about the existence of the Atomic Bomb until some time after taking the oath of office, described his accession to the press this way: "I don't know if any of you fellows ever had a load of hay or a bull fall on him. . . . But last night the whole weight of the moon and stars fell on me." Moreover, it was a man-killing job to be suddenly called to digest some thirty-thousand words daily in order to catch up with the past.

IT IS NECESSARY, then, that the nominating convention select two candidates of Presidential caliber not only to strengthen the ticket but also to strengthen the nation. The rapid march of events demands a twentieth century kind of Vice President who is trained and capable. But along with this challenge on the political level Congress must, in addition, more realistically grapple with the problem of Presidential succession.

The Succession Act of 1947 places the Speaker of the House next in line following the Vice President and after the Speaker the President of the Senate *pro tem.* A previous law, which lasted over eighty years, vested succession in the Secretary of State and the Cabinet departments in the order created. Largely because of President Truman's fear that an incumbent could virtually name a successor, Congress changed it. This change is hardly an improvement and recalls Lucius Cary's remark: "When it is not necessary to change, it is necessary not to change."

The case is as strong for the Secretary of State to succeed the Vice President as it is weak for the Speaker to do so. First, the Secretary of State assures continuity of policy and of administration not alone in domestic affairs but also in foreign affairs that loom so large in the national interest. He is already known to the people and the leaders of the world in a way the Speaker, whatever his legislative expertise, cannot hope to be. Second, his office is continental and executive and while he is not an elected official, the Secretary of State is confirmed by the Senate. This charge overlooks the fact, too, that the Presidential nominee in selecting a running mate already selects his successor as Franklin Roosevelt selected Truman who, in turn, selected Barkley. Third, among Cabinet officials the Secretary of State is the first among equals, a leadership recognized by both Congress and the public at large. As such, he is a powerful voice in foreign affairs. Lastly, Secretaries of State, in

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general, have been a good ten years younger, and hence more politically attractive than Speakers, if one compares the Speakers and Secretaries of this century.

The case against the present succession law of 1947 is both political and constitutional. There is weakness in one and confusion in the other. The Speaker is elected and the Secretary is not—but is this not simply a surface argument? Is the Speaker more responsible and more democratic merely because, as in the instance of Speaker McCormack from the Ninth District of Massachusetts, he was elected by 105,000 voters? It is doubtful that the Speaker elected without any relationship to possible succession—and largely in terms of seniority and longevity—can compare, in any fair test of national popularity and confidence, with the Secretary of State.

It is quite possible, moreover, that the voters could elect one administration and inherit another, since during eight of the last sixteen years the succession of the Speaker would have put into control of the White House the party which lost the previous Presidential election. While Truman was in office in 1947-1949, there was a Republican Speaker, Joseph W. Martin, Jr., and during six of President Eisenhower's eight years, the Speaker was a Democrat. The first succession act of 1792 was much like the present law, the only difference being the President *pro tem* preceded the Speaker in the line of succession. If something had happened to Arthur when Garfield died in 1881, the law would have proved worthless for with Congress not in session, there was no President *pro tem* until October 10 and no Speaker until December 5. As Lindsay Rogers has revealed, a similar situation occurred in Cleveland's Administration when Vice President Thomas A. Hendricks died.

Finally, there is constitutional speculation that the Succession Act of 1947 might be unsound for in designating what "officer" shall serve in the case of the "inability" of the President and Vice President, Congress has exceeded its powers. Members of the Congress are not "officers," only persons holding commissions in the executive or judicial departments. Further, Congressmen are subject to expulsion but not to impeachment as was decided in the case involving Senator William Blount in 1798.

Senator Keating has accepted this view, for in his proposed amendment to the Constitution he has substituted the word "person" for "officer." Still another interesting constitutional twister involves the status of the Speaker if he were to resign in order to act as President. The Constitution reads: "No person holding any office under the United States shall be a member of either House during his continuance in office." But how can a resigned Speaker be an "officer" if he no longer has his seat?

A number of suggestions have been advanced to clarify this ambiguous law. (1) Both the Speaker and the *pro tem* could step down because of their advanced ages and thus take a good deal of heat from the problem. This settles nothing, for the law has a built-in impediment of fuzziness. (2) Declining to resign in case of "disability" and signing a document to that effect, the Speaker and *pro tem* could pave the way for the Secretary of State to succeed. A practical consequence of refusing to serve would be to resuscitate the Succession Act of 1866, which placed the Secretary first in line after the Vice President. Such a move would have to be agreed to by the House for without its approval it could revolt, dismiss the Speaker and elect a new one not bound by such a document. (3) Repeal the Succession Act of 1947 for that of 1866. (4) Immediately on the death of the President a joint Congress, each member having one vote, should elect another Vice President from the Cabinet or from Congress.

This is the heart of Senator Javits' proposed amendment. The merit of this suggestion, he feels, is that it has all the elements of a popular election but none of the delays inherent in a special election and it approximates the power Congress now has to break deadlocks in the electoral college. This view is unpersuasive, first, because it would violate the doctrine of separation of powers and, second, conceivably the Congress, motivated more by politics than by the national interest, could designate as successor a cabinet official in whom the President had no confidence. (5) On the death of the President have an immediate election to fill the Vice Presidency. However democratic this plan appears it is seemingly insurmountable, too expensive, too complicated and the wrong time for a talent search. (6) Elect two Vice Presidents, as Senator Keating suggests in his proposed amendment. One, the Executive Vice President, with no constitutional duties except to succeed to the Presidency and the other, a Legislative Vice President to preside over the Senate.

The virtue of this last plan, says Senator Keating, is that we would be assured that in the second Vice President, like the President, we would have an official nationally elected. However, would a nominating convention select three candidates of Presidential caliber when, with notable exceptions, Johnson being one, it

has had difficulty naming two? Furthermore, how does one convince a topflight politician to occupy an office that contains no constitutional duties—and, no doubt, no constitutional power? Such an Executive Vice President would not only be "His Superfluous Excellency" but he would fit the description of the office uttered by Woodrow Wilson's Vice President, Thomas R. Marshall, as like a man in a cataleptic fit who "is conscious of all that goes on but has no part in it."

FINALLY, what about the third problem in this troika of constitutional dilemmas, namely, the meaning of "disability?" The Constitution reads:

"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."

Removal (as in the case of impeachment), death and resignation are clear enough. But what is the constitutional significance of "inability to discharge the powers and duties of said office"? Further, when the Vice President succeeds a dead President, does he succeed to the "office" or merely the "powers and duties"? John Tyler, who succeded William H. Harrison in 1841, set the precedent which has been followed ever since. He immediately called himself President. Whatever the intent of the Constitutional Fathers as to the meaning of this term, Congress subsequently adopted Tyler's view, impeached President Johnson in 1868 as "President of the United States" and initiated the Twenty-second Amendment which settles the matter.

The by-product of the Tyler precedent is that it makes no provision for an "Acting President" in case of temporary or permanent (short of death) "disability." Presidents have felt that they might not retrieve the office if relinquished even temporarily. Who can guess the constitutional crisis that would have developed if the bullet which killed John F. Kennedy had caused a brain injury instead or that President Eisenhower's illness had become worse instead of better and he had lapsed into a coma?

A little more than a year after his illness, President Eisenhower sent Congress a proposed constitutional amendment spelling out the procedure to be followed in case of "disability." It was ignored by Speaker Sam Rayburn and Republican leaders showed little enthusiasm for it. Believing that this constitutional gap, nevertheless, should be filled, Eisenhower entered into a private but "clear understanding" with Vice President Nixon about what to do in the event of "disability." This plan provided (1) that the President in case of "disability" could designate Nixon to act as President; (2) if Eisenhower were unable to communicate his "disability" then Vice President Nixon would act as President following "appropriate consultation"; and (3) the President would determine when his "disability" had ended and thus regain the "powers and duties" of his office.

This "clear understanding" served as a basis of a similar one between President Kennedy and Vice President Johnson and, in turn, between President Johnson and Speaker McCormack. These agreements, obviously, have no constitutional force, as Richard Nixon records in *Six Crises* and "are only as good as the will of the parties to keep them." That they are merely private understandings, moreover, is indicated by Congress in that no provision was made to keep the original documents, or in depositing them with the Secretary of State or of having them published in the *Federal Register*—a strange, unexplained negligence on the part of Congress when, as has been noted, trivial proclamations such as National Forest Products Week are preserved.

In the absence of a constitutional amendment permitting Congress to create machinery to determine "disability" it is unlikely Congress can do so as the Constitution now stands. Congressional power in this area relates only to cases when the President and Vice President are unable to serve. Thus, while Congress can deal with "succession" it cannot cope with "disability."

Nor could the Supreme Court be utilized to determine "disability." It is most reluctant to judge a coordinate branch of the Government, it could not increase its original jurisdiction in this area, and no federal court can on its own motion examine the actions of another branch. The Chief Justice is dead set against it as he wrote to Senator Keating: "It has been the belief of all of us that because of the separation of powers in our government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on a commission . . ."

No legal arrangement is fool-proof and rogue-proof. Yet some arrangement for a disabled President is needed. In this cold-war age the Republic cannot risk being without a functioning Chief Executive. An imperfect answer is inevitable, perhaps, but Congress can no longer afford to postpone a solution. It cannot allow a sniper, as Walter Lippmann pointed out, to change the Government by a single bullet if the Speaker represents the minority party; nor can it allow a constitutional vacuum when a President is unable to discharge his office. Nor can the nominating convention select anyone for Vice President who is less than top caliber. His selection requires the same interest, carefulness, and urgency that is now manifested in selecting a Presidential nominee. In the light of November 22, the conventions and the Congress are on trial.