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PRESIDENTIAL SUCCESSION

The purpose of this memorandum is to set forth and discuss the constitutional and statutory provisions which govern succession to the Presidency. The subject is divided into two parts; succession of the Vice President to the Presidency or to act as President, and succession of an officer to act as President in the absence of a President and Vice President. In those instances where some of the controversial aspects of these problems have recently been considered in detail, reference is made to the memorandum where a more thorough discussion may be found.

I. Succession of Vice President to Presidency or to act as President.

Succession of the Vice President is governed by the Constitution. Article II, Section 1, Clause 6 of the Constitution, commonly referred to as the "Succession Clause," provides in part:

> "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 . . . ."

This provision of the Constitution is applicable should any of the contingencies mentioned occur at a time when there is a President in office. In the case of death, removal or resignation of a President, no serious problem is presented since there would be a vacancy in the Presidential office and the fact that the contingency had occurred would be a matter of public record. Death would be readily determined and removal from office would occur only after impeachment by a two-thirds vote of the Senate with the Chief Justice of the United States presiding. Const. Art. I, Section 3, Clause 6; Art. II, Section 4. And Congress has provided that the only evidence of resignation of the office of President "shall be an instrument in writing, declaring the same, and subscribed by the person * * * resigning * * * and delivered into the office of the Secretary of State." Act of June 25, 1948, 62 Stat. 672, 3 U.S.C. § 20. 1/

Seven Vice Presidents have succeeded to the Presidency by virtue of the death of Presidents. By usage, the Vice President becomes President, although, as discussed in the memorandum on Presidential Inability, dated October 20, 1955, it is highly doubtful that the founding fathers anticipated

1/ Since the Constitution is silent as to what constitutes acceptance of a resignation or at what point it becomes irrevocable, it is conceivable that a situation might arise leaving the proper occupant of the President's office in doubt.

that result. [2] While there has never been a case of removal or resignation of a President, the question whether the Vice President would become President or merely act as President for the remainder of the term would be of little moment since there would be little likelihood of any challenge to his authority to act.

The fourth contingency, inability of the President to discharge the powers and duties of his office, presents a number of serious problems. What constitutes inability, who determines when it exists and in what capacity and for how long would the Vice President exercise the powers and duties of the President's office are questions which are discussed in detail in the memorandum of October 20, 1955, referred to *supra*. For present purposes it is enough to note that this Office concluded that in the event of inability, the Vice President would not become President but would only act as President until the removal of the inability or until the end of the term, whichever occurred first.

Although they are not strictly succession provisions, both the Twelfth and Twentieth Amendments to the Constitution should be considered since they provide that the Vice President will either act as or become President where the Presidential

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2/ See also, Silva - *Presidential Succession*, chapters I and II.

candidate fails for differing reasons to become President. The Twelfth Amendment provides that if the House of Representatives fails to choose a President whenever the right of choice devolves upon it, that is, where the electoral vote gives no candidate a majority, then the Vice President shall act as President as in the case of death or other constitutional disability of the President. Under this provision it is clear that the Constitution contemplates that the Vice President would act as President and not become President.

The Twentieth Amendment treats with the situation where the President elect dies, fails to qualify, or is not chosen. The term President elect applies after the electoral college has cast its vote for the President, which is the first Monday after the second Wednesday in December, until the time fixed for the beginning of the term of the President, which is January 20th. [3/] If the President elect dies, the Vice President becomes President. However, if the President

3/ 3 U.S.C. 7; 20th Amendment. It has been said that the President elect becomes President when the electoral votes are counted on January 6th (See the Twelfth Amendment; Article II, Section 1, Clause 8; Corwin, The President, Office and Powers, p. 72). However, the Twentieth Amendment clearly uses the term President elect to apply until "the time fixed for the beginning" of the term and this construction avoids any question of there being two Presidents or the problem of the status of the Vice President in the unlikely event of Presidential inability occurring between the 6th and 20th of January. See the discussion in the memorandum dated April 11, 1956, entitled "Death or disability of President designate or President elect after election and prior to commencement of new term."

is not chosen or fails to qualify, then the Vice President elect acts as President until a President shall have qualified.

II. Succession of officer to act as President in the absence of a President and Vice President.

The question of succession where there is neither a President nor Vice President is governed by the Constitution under provisions which require Congressional implementation. Article II, Section 1, Clause 6 of the Constitution provides in part:

> "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 Twentieth Amendment provides in part:

> "Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified." 4/

The Act of June 25, 1948, 62 Stat. 672, 3 U.S.C. § 19 implements these constitutional provisions. It provides that

4/ This Amendment also authorizes Congress to make provision for the case when the election is thrown into either the House or Senate, and one of the persons from whom the choice must be made dies. Congress, however, has never implemented this provision.

if by reason of death, resignation, removal, inability, or failure to qualify, there is neither a President nor Vice President, then the Speaker of the House of Representatives, upon resigning as Speaker and Representative, shall act as President. [5] If there is no Speaker, or if he fails to qualify, then the President pro tempore of the Senate, upon resigning as President pro tempore and as Senator, shall act as President. These individuals act until the end of the term except in two cases. If the individual acts because a President elect or Vice President elect fails to qualify, he serves only until one of them qualifies. If he acts because of inability of the President or Vice President, he serves only until the inability of one of them is removed.

If, by reason of death, resignation, removal, or failure to qualify, there is no President pro tempore, then the Secretary of State acts as President if he is not under disability. If he is, remaining Cabinet officers follow in order. [6] The statute provides that taking of the Presidential oath constitutes a resignation from the Cabinet office "by virtue of the holding of which he qualifies to act as President."

5/ The same rule applies where there is only an acting President.

6/ Treasury, Defense, Attorney General, Postmaster General, Interior, Agriculture, Commerce and Labor.

The right of a Cabinet officer to act continues until the end of the term unless a person higher in the order of succession qualifies except that the subsequent qualification or removal of inability of a Cabinet officer higher in the order of succession does not terminate the service of a lower ranking Cabinet officer. In all cases the acting President must possess the constitutional qualifications for the office of President and a Cabinet officer must have been appointed, by and with the advice and consent of the Senate and not be under impeachment.

The 1947 Act is the third succession statute. The first, enacted by the Second Congress in 1792, provided that the President pro tempore of the Senate, or if there was no President pro tempore or he was unable to serve, then the Speaker of the House was to act as President until the disability ceased or until a President was elected. 1 Stat. 240-241; RS (1878) §§ 146-150. Section 10 of the Act further provided for a special election of a President when there was neither a President nor Vice President except in the case where the succession occurred close to the end of the normal 4-year term.

Several attempts to change the 1792 Act failed, but in 1886 the Act was amended to provide for succession of the Cabinet officers in the order of the establishment of their respective departments. Act of January 19, 1886, 24 Stat. 1. The acting President was to serve only until the disability of the President or Vice President was removed or until a President should be elected. He was required to possess the constitutional qualifications for the Presidential office, not be under impeachment, and to convene the Congress within twenty days if it was not in session, presumably so Congress might decide whether to call a special election.

The constitutionality of the Succession Acts of 1792 and 1947 have been the subject of much debate and numerous articles. On the other hand, no serious challenge has been made to the constitutionality of the Act of 1886. The doubts as to constitutionality of the Act of 1947 are herein discussed in some detail so tnat in the unlikely event that a situation should arise where there was neither a President nor a Vice President these arguments will be readily available. While the doubts are fairly substantial we are not prepared to conclude at this time that corrective legislation should be sought, particularly in view of the unlikelihood of favorable Congressional action.

Article II, Section 1, Clause 6 of the Constitution provides that Congress may declare, when there is neither a President nor Vice President, "what Officer shall then act as President." [emphasis added] In designating the Speaker of the House, or alternatively the President pro tempore of the Senate, to act as President, the question has been raised whether either of these individuals is an "Officer" in the constitutional sense.

The records of the Constitutional Convention would indicate that the term "Officer" in the succession clause was intended to mean "officer of the United States." In all but the last draft the words "officer of the United States" were used and it was only in the Committee on Style, which, it has been said, had no authority to make substantive changes, that the words "of the United States" were deleted. 7/ Indeed, one of the objections raised to an early draft which was not adopted was "that the legislature was restrained in the temporary appointment to 'officers' of the U.S.; [They wished to be at liberty to appoint others then such]" 8/ Bracketed material in original.

7/ II Ferrand, The Records of the Federal Convention of 1787, 532, 535, 573, 598-599.
8/ Ibid., p. 535.

If, as this history shows, the successor was intended to be an "officer of the United States," then the constitutionality of the present statute is subject to serious doubt, for none of the commentaries on the Constitution defines "officer of the United States" to include members of Congress. 9/

On the other hand, if resort is not made to this history, all that the Constitution requires is that the successor shall be an "officer". Moreover, a distinction may be drawn between members generally who may not be considered officers and the presiding officers of Congress designated by the statute. The Constitution creates the positions of presiding officers. Article I, Section 3, Clause 5 provides that "The Senate shall chuse their other Officers, and also a President pro tempore," and Article I, Section 2, Clause 5 provides that "The House of Representatives shall chuse their speaker and other Officers." Thus it may be said that both the Speaker and the President pro tempore are officers and qualified to act if the term is not given a narrow construction.

Other provisions of the Constitution, however, throw doubt on the question whether members of Congress or even the presiding officer are "officers" in the constitutional sense. Article II, Section 2, Clause 2 provides that the President

9/ See, e.g., Story, Commentaries on the Constitution of the United States (5th ed.), Vol. I, pp. 577-78; Tucker, The Constitution of the United States (1899), Vol. I, p. 414. Additional authorities are collected in Silva, Presidential Succession (1951), p. 136, fn. 103.

"shall Commission all the Officers of the United States;" Congressmen are not so commissioned. Article I, Section 6, Clause 2 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." 10/ And quite clearly Congressmen are considered in a separate category from officers in the provision restricting them from serving as electors since Article II, Section 1, provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector" [emphasis added]. 11/

The dismissal of impeachment proceedings against Senator Blount in 1799 has been generally accepted as a ruling that Congressmen are not officers in the constitutional sense. 12/ In a motion to dismiss for want of jurisdiction, the argument was forcefully presented that a Senator was not an officer and hence could not be impeached. Moreover, the Courts have defined an officer of the United States as a person appointed by the President with the advice and consent of the Senate, by the President alone, by the courts, or by a department head. United States v. Germaine, 99 U.S. 508; United States v. Smith, 124 U.S. 525. 13/ The case of Lamar v. United States, 240 U.S. 60, and 241 U.S. 103, is frequently cited in support of the contention

10/ While the Constitution does not require that either the Speaker or the President pro tempore be members of Congress, in practice they have always been members.

11/ See also, Fourteenth Amendment, Section 3.

12/ Silva, op. cit. p. 133-134.

13/ The Attorney General has reached the same conclusion, 17 Op. A.G. 419.

that members of Congress are officers. It was there held that they were officers within the meaning of Section 32 of the Criminal Code (now 18 U.S.C. §911, the impersonation statute). However, both Justice Holmes and Justice White, writing for the majority in the two decisions, carefully pointed out that no constitutional question was involved. 14/

Support for the proposition that the presiding legislative officers are constitutionally qualified to act as President is found in the Act of 1792, the first Succession Act, which provided for the succession first of the President pro tempore of the Senate, and then of the Speaker of the House. This action by the Second Congress, many of the members of which were members of the Constitutional Convention, is certainly entitled to considerable weight. 15/

14/ The recent decision of United States v. Bramblett, 348 U.S. 503, held only that the Disbursing Office of the House of Representatives was a department or agency within the meaning of 18 U.S.C. §1001 and, accordingly, sheds no light on the problem.

15/ For example, this was the principal reliance of Acting Attorney General McGregor, who supplied Congress with a brief in support of the constitutionality of President Truman's proposal; see H. Rept. 817, 80th Cong., 1st Sess. The brief also drew a distinction between the presiding officers and Congressmen generally. On the other hand, Senator Hatch submitted two lengthy briefs against the constitutionality of the proposal, see 91 Cong. Rec. 8272-8274; 93 Cong. Rec. 8621 *et seq*. He points out in reply that it was an act of the First Congress that was declared unconstitutional in *Marbury* v. *Madison*, 1 Cranch 137; that the ultimate selection of the President pro tempore rather than of the Secretary of State, as recommended by the House, was motivated in large part by Hamilton's antipathy to Jefferson, then Secretary of State. And finally, that doubt

In addition to the question whether either the Speaker or the President pro tempore are "officers" in the constitutional sense and thereby eligible to act as President, the 1947 Act contains another constitutional problem. It provides that the legislative officers must resign from Congress in order to act as President. The Constitution provides that an "Officer" shall act as President. Yet if he is compelled to resign it can be argued that the constitutional basis for acting may be gone for it is by virtue of their holding "office" that they are eligible to act as President. As Senator Dawes of Massachusetts observed in 1883 (14 Cong. Rec. 955):

> ". . . Everybody agrees that this devolution of power upon this official is not upon the person but upon him ex officio . . . . He cannot, therefore, abandon the office which he held, by virtue of which the statute clothes him temporarily with the exercise of executive authority, because thereby he ousts himself from the position in which he can exercise that executive authority."

Earlier, James Madison, in discussing the Act of 1792, had said

> ". . . Either they [the designated legislative officers] will retain their Legislative stations, and then incompatible functions will

15/ continued.
as to the constitutionality of the Act of 1792 was perhaps the principal reason for its repeal and substitution of the Secretary of State as first in line in the Act of 1886 (24 Stat. 1). See also Kollenbach, The New Presidential Succession Act, 41 Am. Pol. Sci. R. 931, 937; Silva, op. cit. p. 133.

be blended; or the incompatibility will supersede those stations, and then those being the substratum or the adventitious functions, these must fail also. The Constitution says, Congress may declare what officers, &c., which seems to make it not an appointment or a translation, but an annexation of one office or trust to another office." 16/

The apparent explanation for the resignation provision was a belief that the officer would "become President" and therefore would not have to retain the qualifying office. 17/ But such a conclusion, having its genesis in Vice Presidential succession upon death of the President, is inconsistent with the constitutional provision that the officer which Congress may designate shall "act as President" and "act . . . until the disability be removed, or a President shall be elected."

It should be observed, however, that the foregoing constitutional problems are inapplicable to cases where there is neither a President elect nor Vice President elect. Succession in these circumstances is governed by the Twentieth Amendment which uses the word "person" rather than "officer" in describing the qualifications of a successor. 18/

16/ Madison, Letters and other Writings of (1865) Vol. I, p. 549 [underscoring in original]. Accord, Corwin, United States News, July 13, 1945.

17/ See The Statement of Senator Wherry, 93 Cong. Rec. 7771-2.

18/ While no explanation for the change in terminology has been found, the use of the word "person" would lend color to the argument that the word "officer" should not be narrowly construed in order to avoid an inconsistency.

It may be observed that, except for the resignation requirement, the foregoing arguments both for and against the validity of having legislative officers in line of succession have been voiced intermittently since the Constitution was adopted and even during the debates upon it. The weight of authority seems to support the position that there is serious doubt as to the validity of the present succession law which places the Speaker of the House first in line. On the other hand, the law so provided from 1792 until 1886, and upon the plea of President Truman that the succession of the Speaker would be more democratic than having a non-elected official succeed, the law was changed to again so provide in 1947. In conclusion, it would seem doubtful, should a tragedy occur whereby there was neither a President nor Vice President, that any public official would, for personal or other reasons, attempt to engender a conflict over succession to the detriment of the nation. However, because the constitutionality of the present law is debatable, it is interesting to note the solution which the eminent constitutional authority, Professor Corwin proposes:

> "For vacancies occurring in the second half of a presidential term the Act of 1886 was adequate. For vacancies occurring in the

first half of the term Congress should provide for a regular presidential election at the time of the mid-term Congressional election. This arrangement would preserve intact the assumption of the Constitution that the terms of a new President, a new House of Representatives, and one third of the Senate should start together; and it would at the same time reduce to its proper dimensions the question of what officer shall act as President when both President and Vice-President are lacking." 19/

As he further elaborates in The President, Office and Powers (p. 71):

> "that such a measure would be constitutional seems to be self-evident, there being no restriction upon the power of Congress to set the date of a presidential election other than that such a date shall be the same 'throughout the United States;' but, of course, Congress cannot shorten the presidential term, which is definitely stipulated to be 'four years'." 20/

19/ Corwin, The Presidency Today, p. 119.

20/ Article II, Section 1, Clause 6 provides for an election, and the Succession Act of 1792 contained an election provision.