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# Vice Presidential Vacancies: Congressional Procedures in the Ford and Rockefeller Nominations

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# CRS Report for Congress

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## **Vice Presidential Vacancies: Congressional Procedures in the Ford and Rockefeller Nominations**

**August 21, 1998**

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# Vice Presidential Vacancies: Congressional Procedures in the Ford and Rockefeller Nominations

## Summary

Although the Constitution provides that the Vice President succeeds the President in cases of removal, death, resignation, or disability, it makes no provision for filling vacancies in the vice presidency. On sixteen occasions between 1789 and 1967, the vice presidency was vacant. In eight instances, the Vice President replaced a President who had died; in seven, the Vice President died in office; and in one case, the incumbent resigned. During these sometimes lengthy periods, the office remained vacant, and some other officer served as first in line to the President. Between 1792 and 1886, the President Pro Tempore of the Senate and the Speaker of the House were next in line to succeed the President after the Vice President; between 1886 and 1947, the persons to succeed were the Secretary of State and other cabinet officers in the order in which their departments were created. The Presidential Succession Act of 1947 placed the Speaker and President Pro Tempore in first and second place, followed by the Cabinet, as before.

In the post-World War II era, these arrangements were increasingly regarded as inadequate, particularly in light of America's great-power status and the growth of world tensions as the Cold War evolved. Most observers believed the nation needed a Vice President fully prepared to assume the demands of the presidency at all times. The assassination of President John Kennedy in 1963 provided a dramatic catalyst for change, helping stimulate congressional approval of an amendment that, among other provisions, empowers the President to nominate a Vice President whenever the office is vacant, subject to approval by a majority of both houses of Congress. The 25<sup>th</sup> Amendment became operational in 1967.

Within a decade, Congress considered two nominees for the vice presidency. Both occurred at least indirectly because of the Watergate affair. In 1973, Vice President Spiro Agnew resigned as part of a plea bargain to avoid prosecution on political corruption charges, and President Richard Nixon nominated House Republican Leader Gerald Ford to succeed him. Congressional precedents established included the essentially bi-partisan nature of the confirmation process, full utilization of the Federal Bureau of Investigation in investigating the nominee's public life and record, and committee assignment to the Committee on Rules and Administration in the Senate and the Committee on the Judiciary in the House. Ford was confirmed by overwhelming margins in both houses. Less than a year later, Nixon himself resigned when it became obvious he would be impeached for his actions in the Watergate affair. Ford succeeded to the presidency without incident and nominated Nelson Rockefeller for Vice President. Although the Rockefeller nomination was more controversial, due to the former Governor's extremely complex finances and certain questionable political practices, he was also confirmed in both houses by comfortable majorities.

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# Vice Presidential Vacancies: Congressional Procedures in the Ford and Rockefeller Nominations

## Introduction

Throughout most of the nation's history, there were no constitutional provisions to fill vacancies in the office of Vice President of the United States. If a Vice President died, resigned, or succeeded to the presidency, the office remained vacant until the next election. The 25<sup>th</sup> Amendment to the Constitution, ratified in 1967, sought to remedy this situation, as well as provide for instances in which the President was disabled. Conceived in the wake of President John F. Kennedy's 1963 assassination, the amendment addressed several constitutional contingencies related to presidential succession and disability not anticipated by the founders. Perhaps chief among these was Section 2, which empowers the President to appoint a Vice President whenever the office becomes vacant, subject to confirmation by a majority vote by both houses of Congress.

Less than a decade later, the 93<sup>rd</sup> Congress was called on to discharge its constitutional duty under the amendment when the office of Vice President became vacant twice in the course of 10 months. The first vacancy resulted from the resignation of Vice President Spiro T. Agnew in 1973, and was followed by the nomination and confirmation of Representative Gerald R. Ford as Vice President. Less than a year later, Ford himself succeeded to the presidency following President Richard M. Nixon's resignation, after which his own vice-presidential nominee, former New York Governor Nelson A. Rockefeller, was confirmed by Congress and sworn in, late in 1974.

Confronted with an entirely novel constitutional and political situation, Congress established ground-breaking procedures in its consideration of these two nominations, processes that could serve as precedent for future implementation of section two of the 25<sup>th</sup> Amendment in the event the vice presidency becomes vacant for any reason. This report examines constitutional and legislative provisions concerning vacancies in the vice presidency in historical context. It also reviews congressional precedents and actions on the two occasions Congress has considered and confirmed nominees for Vice President.

## Context: Presidential and Vice Presidential Succession from 1789 to 1967

For the first 178 years of government under the Constitution, presidential and vice presidential succession was provided for in the nation's fundamental charter, subsequent constitutional amendments, and statute.

### Constitutional Provisions

The constitution, in Article II, Section 1, Clause 6, requires 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 Constitutional Provisions 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.

As with many sections of the Constitution, this clause left certain points unstated. Although it provided for cases in which either the presidency or both the presidency and vice presidency were vacant, it did not address situations in which only the vice presidency was vacant, nor did it provide a mechanism for filling vice presidential vacancies.<sup>1</sup> While Article I, Section 3 authorized the Senate to elect a President Pro Tempore “in the Absence of the Vice President, or when he shall exercise the Office of President of the United States,” presidential succession scholar John Feerick has noted that the President Pro Tempore was *only* to preside over the Senate, was not a replacement for the Vice President, and had no place in the order of presidential succession.<sup>2</sup> The founders thus made no constitutional provision for filling vacancies in the vice presidency. Consequently, whenever the Vice President acceded to the

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<sup>1</sup> According to many scholars, this may be due to the fact that the founders envisioned the Vice President as only a potential *acting* President, who acceded to the powers of the Presidency temporarily when that office was vacant, and would serve only until a special election was arranged by Congress. For a discussion of this point of view, see: Ruth C. Silva, *Presidential Succession* (New York: Greenwood Press, 1968, c. 1951), pp. 4-51. By this reasoning, there was no need to replace a Vice President under these circumstances, since he would return to his original duties once the presidential vacancy was filled. The first test of this theory came in 1841, when William Henry Harrison died and was succeeded by his Vice President, John Tyler. Tyler took the presidential oath, and considered himself to have acceded not only to the *powers and duties*, but also the *position* of President of the United States. After considerable debate, both houses of Congress implicitly recognized Tyler's decision by referring to him as “the *President* (emphasis added) of the United States” (*Congressional Globe*, vol. X, May 31, June 1, 1841, pp. 3-5). This question was definitively addressed in the 25<sup>th</sup> Amendment, which is discussed later in this report.

<sup>2</sup> John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham U. Press, 1965), pp. 49-53.

presidency during this long period in American history, the vice presidency remained vacant until the subsequent presidential election.

## **Succession Acts of 1792, 1881, and 1947**

The Second Congress exercised its authority to provide for Presidential inability or vacancy in the Succession Act of 1792 (1 Stat. 240). Congress examined several options, but settled on placing the President Pro Tempore of the Senate and the Speaker of the House first and second, respectively, in the line of succession following the Vice President. They were to serve only temporarily, however, since the act also provided for a special election for President to fill the vacancy, provided it fell before the first Wednesday in September in the last full year of a President's term of office.<sup>3</sup>

President James A. Garfield's death by assassination led directly to a revised succession act. Shot on July 2, 1881, Garfield lingered for 79 days before succumbing to his wounds on September 19. Although Vice President Chester A. Arthur took office without incident, the fact that the offices of both Speaker of the House and President Pro Tempore of the Senate were vacant at the time revealed flaws in the 1792 act.<sup>4</sup> In response to concern about the potential for a leadership vacuum, Congress passed the Succession Act of 1886 (24 Stat.1) in order to insure the line of succession. This legislation transferred succession after the Vice President to the Cabinet officers in the chronological order in which their departments had been created, provided they had been duly confirmed by the Senate, and were not under impeachment by the House. By vesting succession after the Vice President in Cabinet members, the act eliminated the special election provision and made it more likely that potential presidential successors would be of the same political party as the former incumbent.

The Presidential Succession Act of 1947 (61 Stat. 380) established the order of succession after the vice presidency as it still applies. Having just succeeded to office on the death of Franklin D. Roosevelt, President Harry Truman in 1945 proposed that Congress revise the order of succession, placing the Speaker of the House and the President Pro Tempore of the Senate in line behind the Vice President. Truman argued that it was more appropriate and democratic to have popularly elected officials first in line to succeed, rather than appointed Cabinet officers. Although his proposal also provided for special elections to fill any simultaneous vacancy in the presidency and vice presidency, Congress passed only its succession aspects. Under the act, the Speaker succeeded in the event of vacancies in both the presidency and vice presidency, after resigning the speakership and his House seat. If there were no

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<sup>3</sup> This timing is explained by the fact that presidential terms ended on March 4 when the Succession Act was passed in 1792. Moreover, the act provided only for election of the President, since electors cast two non-distinguished votes for President during this period (prior to ratification of the 12<sup>th</sup> Amendment, which specified separate electoral votes for President and Vice President), while the electoral vote runner-up was elected Vice President.

<sup>4</sup> Vacancy in the speakership was due to the fact that the 46<sup>th</sup> Congress had expired on March 4, but the House did not convene in the 47<sup>th</sup> Congress until December 1, 1881, as was customary at the time. Vacancy in the office of the President Pro Tempore was the result of bitter partisan strife in a Senate closely divided between the parties.

Speaker, or if the Speaker did not qualify, the President Pro Tempore succeeded, provided that he, too, resigned his offices. If there were neither a Speaker nor a President Pro Tempore, or if they did not qualify constitutionally, then the Cabinet officers would succeed, under the same conditions as applied in the 1886 act.<sup>5</sup> The Presidential Succession Act of 1947 remains in force today, although the 25<sup>th</sup> Amendment renders recourse to the Speaker, the President Pro Tempore, or the Cabinet unlikely, except in the event of a catastrophe.

## The 20<sup>th</sup> Amendment

The 20<sup>th</sup> Amendment to the Constitution, ratified in 1933, is primarily remembered for changing the dates on which a new Congress begins and the President and Vice President are inaugurated. However, one of its provisions, Section 3, clarified a question of presidential succession by declaring that if the President-elect dies before being inaugurated, the Vice President-elect “shall become the President.”<sup>6</sup>

## Vice Presidential Succession and Vacancies Prior to the 25<sup>th</sup> Amendment

Between 1789 and 1967, the office of Vice President was vacant on no fewer than 16 occasions, nearly once every decade. Instances in which a Vice President succeeded to the chief executive office on the death of the incumbent President are indisputably the best known of these.<sup>7</sup> There have also been eight instances in which the office of Vice President was vacated for reasons other than presidential succession. In seven of these cases, the incumbent Vice President died of natural causes, while in the eighth, he resigned in a dispute with the President.<sup>8</sup> In all 16

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<sup>5</sup> Although superseded by the Speaker and President Pro Tempore by the Presidential Succession Act, the Cabinet officers retain their places in presidential succession in the following order: the secretaries of State, the Treasury, and Defense; the Attorney General; the secretaries of the Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veterans Affairs.

<sup>6</sup> The question of just *when* a person is considered President-elect, whether after the electors cast their votes in December, following the popular vote, or only after Congress has counted and certified the results the following January 6, was not specifically addressed by the Amendment. The balance of scholarly opinion, and the legislative record, however, indicate that there is a President-elect once the electoral votes have been cast.

<sup>7</sup> These successions were, in chronological order, 1841: John Tyler, on the death of William Henry Harrison; 1850: Millard Fillmore, on the death of Zachary Taylor; 1865: Andrew Johnson, on the assassination of Abraham Lincoln; 1881: Chester A. Arthur, on the assassination of James A. Garfield; 1901: Theodore Roosevelt, on the assassination of William McKinley; 1923: Calvin Coolidge, on the death of Warren G. Harding; 1945: Harry S. Truman, on the death of Franklin D. Roosevelt; and 1963: Lyndon B. Johnson, on the assassination of John F. Kennedy.

<sup>8</sup> These vacancies, due to death by natural causes, were, in chronological order: 1812, George Clinton; 1814, Elbridge Gerry; 1853, William R. King; 1875, Henry Wilson; 1885, Thomas A. Hendricks; 1899, Garret A. Hobart; and 1912, James S. Sherman. The single vice presidential resignation prior to ratification of the 25<sup>th</sup> Amendment was by John C. Calhoun,

(continued...)



cases, the vice presidency remained vacant until the next regularly scheduled presidential election, sometimes for lengthy periods. For example, John Tyler succeeded to most of the four-year term to which his predecessor, William Henry Harrison, had been elected (April 4, 1841-March 4, 1845), leaving the vice presidency vacant for 47 months. More recently, following Franklin D. Roosevelt's death, Harry Truman served the balance (April 12, 1945-Jan. 20, 1949) of what would have been Roosevelt's fourth term, resulting in a 45 month vice presidential vacancy.

## **The 25<sup>th</sup> Amendment: Conception, Passage, and Ratification**

Although proposals for revising presidential succession and disability procedures were regularly advanced during the post-World War II era, it is unlikely that any one of them would have come to fruition had it not been for the extraordinary events surrounding the 1963 assassination of President John F. Kennedy.

### **Context**

For most of the nation's history under the Constitution, Vice Presidents were traditionally regarded as politically inconsequential, chosen more to provide balance to the party ticket in a presidential election than for their abilities as potential successors to the presidency. American complacency over a presidential disability or vacancy was demonstrated by the long disability of President Woodrow Wilson. On October 2, 1919, Wilson suffered a stroke from which he never fully recovered during the 17 remaining months of his term. The gravity of his illness was concealed from the press and public, and access to the President was strictly controlled by his wife, his physician, and his secretary. Vice President Thomas Marshall remained completely unprepared for potential succession to the presidency throughout the period.<sup>9</sup>

Traditional attitudes toward the Vice President began to change out of necessity by the time Harry Truman took the oath in 1945. Prior to the Truman succession of 1945, the slower pace of transportation and communications, coupled with the relative security conferred on the United States by its insulating oceans, seemed to obviate the need for a “standby” successor ready to take office at a moment’s notice. Technological advances and the development of weapons of mass destruction made the world a much smaller and more dangerous place. Nor was the United States able to afford the luxury and safety of isolation; as the leading democratic power, it was, by default, the only nation capable of leading and defending the West as the Cold War developed in the late 1940s. In the opinion of most observers, the nation needed a Vice President fully prepared to meet the demands of the presidency whenever called to do so. This necessity was recognized by Presidents Eisenhower and Kennedy, both

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<sup>8</sup> (...continued)  
in 1832.

<sup>9</sup> Arthur S. Link, “Woodrow Wilson,” in *The Presidents: A Reference History* (New York: Scribner’s, 1996), pp. 384-385; Feerick, *From Failing Hands*, pp. 162-180.

of whom gave their Vice Presidents a far greater role in their Administrations than had previously been customary. Richard M. Nixon and Lyndon B. Johnson regularly attended cabinet meetings, were assigned various independent and official duties, and participated in the policy process at the highest levels.

Between World War II and President Kennedy's death in 1963, however, attention had been focused more on presidential disability than on succession, an interest stimulated by three instances in which President Dwight D. Eisenhower was incapacitated by illness or surgery for varying periods of time. In one case, the President was hospitalized between September 24 and November 11, 1955, following a heart attack. In 1956, he underwent surgery to remove a benign intestinal obstruction; and finally, on November 25, 1957, he suffered a mild stroke, but returned to work in less than a week.<sup>10</sup> While many observers expressed concern over these events, informal procedures worked out between President Eisenhower and Vice President Nixon appeared to cover most contingencies, and no legislative action occurred. President Kennedy and Vice President Johnson also made similar contingency plans, providing for temporary transfer of power and responsibilities in the event of disability on the part of the chief executive.

## **The Kennedy Assassination: Catalyst for Change**

It took the shocking death of President Kennedy, however, to create an awareness of, and consensus for, the need for swift congressional action to remedy the now-apparent deficiencies in succession and disability arrangements. The leisurely discussion of changes in these provisions was dramatically interrupted by his assassination on November 22, 1963.

Not only was the President's death an intensely traumatic event for the American people, it also aroused deep concern over succession arrangements provided (or not provided, in the case of Vice Presidents) in the Constitution and law. Few doubted that Vice President Johnson was well qualified to assume the presidency; he had served in Congress for 24 years, latterly as an effective Senate Majority Leader, and exemplified the newly revitalized vice presidency. On the other hand, it was recalled that in 1955 he had suffered a severe heart attack, requiring six weeks of hospitalization and three months of restricted activity.<sup>11</sup> Of similar concern were the facts that House Speaker John W. McCormack, next in line of succession after President Johnson, was 71 years old, and Senate President Pro Tempore Carl T. Hayden, who followed the Speaker, was 86 years old and visibly frail.<sup>12</sup>

The primary anxiety about the vice presidential vacancy following President Kennedy's death, however, was due as much to concern over the uncertain international political climate as it was to the health of his potential successors.

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<sup>10</sup> John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications* (New York: Fordham U. Press, 1992, c. 1976), pp. 17-23.

<sup>11</sup> Doris Kearns, *Lyndon Johnson and the American Dream* (New York: Harper, 1976), pp. 124-127.

<sup>12</sup> Feerick, *From Failing Hands*, p. 264.

Senator Birch Bayh, chairman of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, sought to frame the debate in remarks delivered on the Senate floor less than three weeks after the assassination:

Now is the time to act—while the question of Presidential succession is uppermost in our minds, and we have just completed a smooth and calm transition. If we do not act in this time of sober and reasoned reflection, when shall we act? When will we be as close to the issue as we are today? Hopefully, never. But because history is unpredictable, we must provide for the unsought moments of national crisis.... The accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we change our system to provide for not only a President but a Vice President at all times. The modern concept of the Vice Presidency is that of a man standing in the “wings”—even if reluctantly—ready at all times to take the burden. He must know the job of the President. He must keep current on all national and international developments. He must, in fact, be something of an “assistant President,” such as Vice President Johnson was....<sup>13</sup>

With these words, Senator Bayh introduced S.J.Res. 139 in the 88<sup>th</sup> Congress on December 12, 1963. Section 1 of the resolution, offered as an amendment to the Constitution, provided that the Vice President would “become” President upon acceding to the office, thus eliminating lingering constitutional questions as to his status. Section 2 authorized the President to nominate a Vice President any time the office was vacant, subject to confirmation by a majority vote of both houses of Congress. Sections 3 and 4 provided for cases of Presidential disability in which the Vice President would serve as Acting President, provided procedures by which the President could resume his duties, and provided a mechanism for resolving disputes about disability.

Five alternative proposals were offered during the same session: reconvening the electoral college to fill vice presidential vacancies; election of a replacement Vice President by a joint session of Congress; creation of a dual vice presidency to guarantee succession; congressional election of a replacement from the President’s Cabinet, or election by Congress from a list of five nominees proposed by the President.<sup>14</sup>

Extensive hearings were held on the various proposals between January and March 1964. Senator Bayh’s S.J.Res. 139 was reported favorably by the Subcommittee on Constitutional Amendments on May 27 and by the full Committee on the Judiciary on August 13. The Senate passed the amendment by an overwhelming margin (65-0) on September 29, 1964.<sup>15</sup>

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<sup>13</sup> Sen. Birch Bayh, “Presidential Succession,” remarks in the Senate, *Congressional Record*, vol. 109, Dec. 12, 1963, pp. 24420-24421.

<sup>14</sup> “Presidential Inability and Vice Presidential Vacancies,” *Congressional Quarterly Almanac*, 88<sup>th</sup> Congress, 2<sup>nd</sup> Session, 1964, vol. no. 20 (Washington: Congressional Quarterly Service, 1964), pp. 405-411.

<sup>15</sup> *Ibid.*, p. 410.

The House declined to act on any succession amendment for the balance of the 88<sup>th</sup> Congress, however, possibly out of respect for Speaker McCormack. According to some sources, there was concern among the House leadership that such action could have been construed as an insult to, or a vote of no confidence in, the Speaker.<sup>16</sup>

## Action in the 89<sup>th</sup> Congress

The election in 1964 and the subsequent inauguration of President Johnson and Vice President Hubert H. Humphrey restored the normal line of succession, and cleared the way for action in both houses on the proposed amendment. Introduced as S.J.Res. 1 by Chairman Bayh, and as H.J.Res. 1 by House Judiciary Committee Chairman Emanuel Celler when the 89<sup>th</sup> Congress convened in 1965, both resolutions were identical to S.J.Res. 139, as passed in the Senate the previous autumn. President Johnson issued a strong endorsement in his January 28 Special Message on Presidential Disability and Related Matters:

Indelible personal experience has impressed upon me the indisputable logic and imperative necessity of assuring that the Second Office of our system shall, like the First Office, be at all times occupied by an incumbent who is able and who is ready to assume the powers and duties of the Chief Executive and Commander-in-Chief.... Once only an appendage, the Office of the Vice President is an integral part of the chain of command and its occupancy on a full-time basis is imperative.<sup>17</sup>

The measure, which enjoyed broad bipartisan support, received swift attention and action in both houses. S.J.Res. 1, introduced on January 6, 1965, was reported by the Subcommittee on Constitutional Amendments on February 1 and by the full Judiciary Committee on February 10. Two technical amendments were adopted on the Senate floor when the resolution was debated on February 19, while several others, including two substitutes, were overwhelmingly rejected. The primary objection, voiced by Senator Everett M. Dirksen, centered around concern that the resolution's detailed procedures for resolving presidential disability disputes were both untested and unnecessarily cumbersome, and would be better incorporated in statutory law authorized by the amendment, rather than in the body of the amendment itself.<sup>18</sup> The full Senate, however, adopted the resolution by a vote of 72 to 0 the same day.<sup>19</sup>

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<sup>16</sup> Feerick, *The Twenty-Fifth Amendment*, p. 83; *Congressional Quarterly Almanac, 1964*, p. 405.

<sup>17</sup> U.S. President (L.B. Johnson), "Special Message to the Congress on Presidential Disability and Related Matters," *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965* (Washington: GPO, 1966), vol. 1, p. 102.

<sup>18</sup> "Constitutional Amendment on Presidency," *Congressional Quarterly Almanac, 89<sup>th</sup> Congress, 1<sup>st</sup> Session, 1965*, vol. 21 (Washington: Congressional Quarterly Service, 1966), p. 578.

<sup>19</sup> *Ibid.*

The House began consideration of H.J.Res. 1 with four days of hearings before the full Committee on the Judiciary between February 9 and 16, 1965. Once again, debate centered on mechanisms in Sections 3 and 4 by which a President could be declared to be disabled, and on subsequent disputes that might arise as to whether the disability was over. The Judiciary Committee reported its own version of the amendment, incorporating changes indicated by these concerns, on March 24. On April 13, the House passed its amended version of the resolution by a vote of 368 to 29, and voted to substitute it for the Senate version. Conferees required another two months to resolve differences between the House and Senate versions, with the House approving the conference report by voice vote on June 30, and the Senate on July 6 by a vote of 68 to 5.<sup>20</sup>

Section 2 of the proposed amendment reads as follows:

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.<sup>21</sup>

## Ratification

The proposed amendment was transmitted to the General Services Administration for circulation to the states on July 7, 1965. Although there was widespread acceptance of the need for such an amendment, the state legislatures were not able to move rapidly, since many had adjourned for the year by the time the proposal was transmitted to them.<sup>22</sup> Nebraska, the first state to act, ratified on July 12, just five days after transmission; the constitutional requirement of ratification by three-fourths of the states was attained on February 10, 1967, when Nevada became the 38<sup>th</sup> state to approve. This 584-day period was slightly less than the mean ratification period of 617 days for all amendments, but longer than the 546-day mean for amendments ratified in the 20<sup>th</sup> century.<sup>23</sup>

As President Johnson noted at White House ceremonies marking ratification of the 25<sup>th</sup> Amendment:

Twice in our history we have had serious and prolonged disabilities in the Presidency.... Sixteen times in the history of the Republic the Office of Vice President—the Office created to provide continuity in the Executive—itself has been vacant. Once, perhaps, we could pay the price of inaction. But today in this crisis-ridden era there is no margin for delay, no possible justification for ever permitting a

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<sup>20</sup> Ibid., pp. 580-581.

<sup>21</sup> U.S. Constitution, Amendment 25, Section 2.

<sup>22</sup> Most state legislatures are limited in their session times to periods generally falling between January and April each year, while others meet only every other year. Consequently, they were unable to consider ratification prior to early 1966 or 1967.

<sup>23</sup> U.S. Library of Congress, Congressional Research Service, *Ratification of Amendments to the U.S. Constitution*, by (name redacted), CRS Report 95-316 GOV (Washington: March 1, 1995), p. 5.

vacuum in our national leadership. Now, at last, through the 25<sup>th</sup> amendment, we have the means of responding to these crises of responsibility.<sup>24</sup>

## **Congress Implements Section 2 of the 25<sup>th</sup> Amendment: Vice Presidential Succession in 1973 and 1974**

Congress first implemented Section 2 of the 25<sup>th</sup> Amendment in 1973, under circumstances no less dramatic than those that led to the proposal and ratification of the amendment itself. Moreover, less than a year later Congress considered a second nomination to fill another vice presidential vacancy. Section 2 had generated almost no controversy during the amendment's approval process in Congress: the general thrust of debate indicated that Members assumed it would most likely be invoked following the death of a President or Vice President. Instead, both implementations occurred in the midst of, and were major episodes in, the Watergate affair, one of the greatest constitutional crises in American history.

### **Watergate**

The Watergate affair began on June 17, 1972, when agents of President Richard M. Nixon's reelection committee were apprehended while placing phone taps in the offices of the Democratic National Committee, housed in the Watergate complex in Washington. Although some reporters and politicians claimed that the President or his campaign staff had been involved, the charges had no effect on Nixon's successful reelection effort that autumn. The Watergate intruders, who were convicted in early 1973, eventually bowed to pressure from presiding Judge John J. Sirica, admitting that the reelection committee and White House staff had been involved in the political espionage plan. Meanwhile, *The Washington Post* had published stories asserting that both reelection committee staff and White House officials had known of the burglary in advance, and, moreover, had subsequently orchestrated efforts to conceal their involvement.

On February 7, 1973, the Senate voted to establish a Select Committee on Presidential Campaign Activities, under Senators Sam J. Ervin, Jr. and Howard Baker, to investigate the growing allegations of a coverup by the White House staff. The committee opened its televised hearings on May 17, and subsequently called most of the President's closest advisors to testify. At the same time, on May 18, Attorney General Elliot L. Richardson appointed a special prosecutor, Archibald Cox, to investigate the affair for the Justice Department.

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<sup>24</sup> U.S. President (L.B. Johnson), "Remarks at Ceremony Marking the Ratification of the Presidential Inability (25<sup>th</sup>) Amendment to the Constitution," *Public Papers of the Presidents of the United States, Lyndon B. Johnson*, 1967 (Washington: GPO, 1967), vol. 1, pp. 217-218.

Throughout the late spring and summer of 1973, the nation was stunned by succeeding revelations before Senator Ervin's "Watergate" committee. Perhaps most damaging to President Nixon were allegations made by his dismissed counsel, John Dean, who asserted that the President had participated in the coverup from the very beginning. The subsequent revelation by former presidential assistant Alexander Butterfield that most of the President's conversations had been recorded focused investigators' demands on tapes that, if revealed, would either incriminate or exonerate the President. Invoking executive privilege, President Nixon refused a request from Cox to deliver certain tapes in early October, leaving the nation on the brink of an historic constitutional crisis.

## **Vice President Agnew Resigns<sup>25</sup>**

As the extraordinary events of Watergate unfolded in 1973, an unrelated federal investigation of political corruption in Baltimore County, Maryland, was being conducted by the United States Attorney for Maryland. In June, the investigation uncovered evidence that Vice President Spiro T. Agnew had engaged in a pattern of corrupt activities while serving as Baltimore County executive and Governor of Maryland in the 1960s. On August 1, the Vice President was informed he was being investigated. Five days later, Attorney General Richardson alerted the President to the investigation. By September, a grand jury was reviewing evidence against Agnew, who maintained his innocence, while criticizing the investigation on the grounds that the investigation staff had intentionally disclosed information damaging to his case. He also asserted that an incumbent Vice President could not be indicted. As Agnew's various defense arguments failed or were rejected, he entered into negotiations with both the Justice Department and President Nixon's counsel, in which he ultimately agreed to resign and plead "no contest" to a single count of tax evasion, in return for a \$10,000 fine and three years of unsupervised probation. Agnew resigned the vice presidency on October 10, 1973.

Throughout the period of Agnew's legal troubles, there was increasing anxiety over the possibility that conduct of the United States government could be crippled because both the President and Vice President might be the objects of impeachment or legal proceedings for an extended period. Anxieties increased after war broke out between Israel and Egypt and Syria on October 6. Although the Nixon Administration responded decisively and vigorously, many high-level officials were fully aware of the potential consequences of conducting the nation's affairs in the midst of a constitutional crisis. As Feerick wrote of Attorney General Richardson's reaction:

On July 3 this information (evidence of Agnew's corrupt practices) was brought to the attention of Attorney General Elliott Richardson. Richardson is said to have remarked that "the continuing

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<sup>25</sup> This account relies substantially on: Richard M. Cohen and Jules Witcover, *A Heartbeat Away: The Investigation and Resignation of Vice President Spiro T. Agnew* (New York: Viking Press, 1974) and "Agnew: Second Vice President to Resign," in *Congressional Quarterly Almanac, 93<sup>rd</sup> Congress, 1<sup>st</sup> session, 1973*, vol. 29 (Washington: Congressional Quarterly, 1974), pp. 1054-1058.

capacity of the nation to govern itself” was at stake, and referred to the fact that Agnew was a heartbeat away from the presidency. “The President’s plane could go down tomorrow,” he said. “There could be an assassin’s bullet. He could die tomorrow....” Richardson seems to have realized that the nation could not bear possible simultaneous criminal prosecutions of both the President and the Vice President, and therefore, he sought Agnew’s resignation in the national interest, knowing that a procedure existed for selecting a new and untarnished Vice President.<sup>26</sup>

Agnew’s October 10 resignation eased the immediacy of these concerns, demonstrated the value of Section 2 of the 25<sup>th</sup> Amendment for many observers, and cleared the way for its first implementation.

## The Ford Nomination

President Nixon moved quickly to nominate a replacement for Agnew under the provisions of the 25<sup>th</sup> Amendment. According to his own account, the President favored former Texas Governor John B. Connally, while he also considered New York Governor Nelson A. Rockefeller, California Governor Ronald W. Reagan, and House Republican leader Gerald R. Ford as potential nominees. He hoped to choose a forceful candidate who would be a vigorous President if called on to fill the office.<sup>27</sup> On the other hand, Senate Majority Leader Mike Mansfield and other senior Democrats urged him to make a less political choice, some less partisan figure, who could serve as a “caretaker” until the 1976 elections. According to Nixon and other sources, they cautioned him that Democrats would be less inclined to approve the nomination of a figure perceived to be a strong candidate for the presidency in that year.<sup>28</sup> This attitude was not shared by all Democrats, however. Senator Bayh, father of the 25<sup>th</sup> Amendment, declared that it did not contemplate a caretaker President, and that the approval process “has to be out of the partisan arena.”<sup>29</sup>

Nixon’s final decision was, again by his own description, a compromise between these competing views. Discarding Connally because of Democratic opposition, and Reagan and Rockefeller because of their additional potential to split the Republican Party along ideological lines, he settled on Representative Ford, who he believed was acceptable to both houses of Congress, and would also serve as an active chief executive, if necessary, rather than as a caretaker.<sup>30</sup> Ford’s nomination was announced at a White House ceremony held on October 12, 1973, just two days after Agnew’s departure. President Nixon officially transmitted the nomination to Congress the following day. Gerald R. Ford of Michigan was a 24-year veteran of the

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<sup>26</sup> Feerick, *The Twenty-fifth Amendment*, pp. 119, 126.

<sup>27</sup> Richard M. Nixon, *RN: The Memoirs of Richard Nixon* (New York: Grosset and Dunlap, 1978), p. 925.

<sup>28</sup> *Ibid.*; also, Feerick, *The Twenty-Fifth Amendment*, pp. 130-132.

<sup>29</sup> Mary Russell, “Caretaker Not Aim of 25<sup>th</sup> Amendment, Framer Says,” *Washington Post*, Oct. 12, 1973, p. A 10.

<sup>30</sup> Nixon, *RN*, pp. 926-927.



House of Representatives, having served continuously since 1948. In 1965, he had succeeded Representative Charles Halleck as House Republican Leader, a post he held until his resignation to assume the vice presidency.

## Confirmation

Representative Ford's nomination presented Congress with several important decisions concerning the confirmation process. Leaders and Members of both the House and Senate realized that they were breaking new ground and that their actions would be precedent-setting. Major decisions included committee referral, investigation of the nominee, hearings, and floor action.

### Political and International Context.

Congress's consideration of the Ford nomination did not occur in peaceful surroundings. The period from Agnew's resignation to Gerald Ford's installation as Vice President was dominated not only by the confirmation process, but also by two highly charged and dramatic developments in domestic and international affairs: continuing conflict over the Watergate affair, and war in the Middle East.

At home, Watergate continued to unfold as Special Prosecutor Cox's request for relevant taped presidential conversations was sustained by the U.S. Court of Appeals for the District of Columbia Circuit on October 12. After Cox rejected both a compromise offered by President Nixon and a presidential directive that he (Cox) make no further attempts to obtain tapes or other documents, the President ordered Attorney General Richardson to dismiss the prosecutor. Richardson refused, claiming this would jeopardize the prosecutor's independence, and subsequently resigned. Deputy Attorney General William D. Ruckelshaus also refused the directive, and was dismissed before he could offer his resignation. Solicitor General Robert Bork was elevated to Acting Attorney General, and carried out the order to dismiss Cox. Unfavorable public reaction, often characterized as a "firestorm," led the President to reverse himself on October 23, when he announced he would deliver the tapes cited, and appoint a new special prosecutor to continue the investigation. Meanwhile, however, no fewer than 16 resolutions of impeachment were introduced in the House of Representatives.<sup>31</sup>

An explosion of violence in the Middle East also contributed to the tense atmosphere that surrounded Congress's consideration of the Ford nomination. On October 6, 1973, Syrian and Egyptian armed forces launched successful surprise attacks on Israeli forces holding occupied territory in the Golan Heights (Syria) and the Sinai Peninsula (Egypt). President Nixon ordered a massive airlift to resupply the struggling Israelis, and ordered a world-wide alert of U.S. armed forces when the possibility of Soviet intervention arose. In a collateral development, on October 20-21, Arab oil-exporters retaliated against U.S. support for Israel by ordering an embargo of petroleum shipments to the United States. This action eventually led to widespread shortages of gasoline and heating oil in the U.S. Finally, after nearly three

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<sup>31</sup> Theodore H. White, *Breach of Faith, the Fall of Richard Nixon* (New York: Atheneum, 1975), pp. 250-275.

weeks of dangerously heightened international tensions, the Israelis turned back the attacks, and a temporary cease-fire was negotiated on October 24, followed by a more permanent arrangement on November 11.

### **Committee Referral.**

Discussions over which committee(s) would be assigned the prospective nomination of a new Vice President began even before Agnew announced his resignation. One early proposal called for a special joint committee of Members from both houses, an idea apparently favored by Senate Majority Leader Mansfield and House Speaker Carl Albert.<sup>32</sup> Both leaders believed a joint committee and joint hearings would “avoid duplication and accommodate expedition.”<sup>33</sup> According to contemporary press accounts, however, the Speaker soon abandoned this idea, bowing to opinion voiced by many Representatives, who expressed concern that House Members might be overshadowed in the hearings by the nationally-known Senators who would almost certainly make up the Senate delegation to a joint committee.<sup>34</sup>

Having decided against the joint committee/hearings option, House leadership moved quickly to assign its part in the confirmation process to the full Judiciary Committee, chaired by Representative Peter W. Rodino, Jr.<sup>35</sup> The Senate, on the other hand, continued to discuss a variety of suggestions to consider the nomination. These were summarized on the floor by Majority Leader Mansfield, and included the following proposals:

- ! referral to the Committee of the Whole;
- ! creation of a special committee, free-standing, or as a subcommittee of the Committee of the Whole;
- ! creation of a committee composed of members of the Committee on the Judiciary and the Committee on Rules and Administration, selected by the bipartisan leadership; and
- ! routine referral to the Committee on Rules and Administration, either as regularly constituted, or expanded by additional members chosen by the leadership.<sup>36</sup>

An examination of Senate Rules indicated that, under normal circumstances, all “proposed legislation, messages, petitions, memorials, and other matters relating ... to the election of the President, Vice President ... Federal elections generally; [and] Presidential succession” would be referred to the Committee on Rules and

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<sup>32</sup> Feerick, *The Twenty-Fifth Amendment*, p. 133.

<sup>33</sup> Sen. Mike Mansfield, “The Vice Presidency,” remarks in the Senate, *Congressional Record*, vol. 119, Oct. 12, 1973, p. 33994.

<sup>34</sup> Richard L. Lyons and Spencer Rich, “Hill Vows Thorough Probe of Successor,” *Washington Post*, Oct. 12, 1973, pp. A1, A15.

<sup>35</sup> “Nixon, Congress Seek Accord on Agnew Replacement,” *Congressional Quarterly Weekly Report*, vol. 31, Oct. 13, 1973, p. 2695.

<sup>36</sup> Mansfield, “The Vice Presidency,” p. 33994.

Administration [Rule XXV, section (p)]. Further, Rule XXXVIII stated that, “When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees...”<sup>37</sup>

Meeting October 12, the Senate Democratic Policy Committee considered various referral options, as well as the apparent requirements of Senate Rules, and concluded that the Rules Committee would be the appropriate vehicle for confirmation proceedings. Some Members argued for an *ad hoc* expansion of the Rules Committee, claiming that the gravity of the situation required a temporary enlargement of the nine-Member committee. The conference subsequently voted to support referral to the Rules Committee and its temporary expansion by six Members: three selected by the Majority Leader and three by the Minority Leader, with the Majority Leader being one of the additional Members.<sup>38</sup> Majority Leader Mansfield and other senior Senators, however, indicated their preference for referral to the Rules Committee without expansion, a position which had also been adopted unanimously by the Republican Conference.

Other Senators insisted that the nomination demanded action beyond the status quo. Senator Edward Kennedy, for instance, argued that the situation confronting the Senate was completely without precedent, and that, therefore, “the Standing Rules are not dispositive of the issue, and the Senate is entitled to write as if on a blank slate.”<sup>39</sup> According to one account, the political orientation of the various committees was at issue: “liberal” Senators were alleged to prefer referral to the Judiciary Committee because it included “a significant number of senators of a liberal persuasion,” while “conservatives” were alleged to have supported the more “conservative” Rules Committee.<sup>40</sup> Discussion of these questions continued inconclusively on the Senate floor for the balance of the day, and a decision was promised for Saturday, October 13. By that time, however, the Ford nomination had been announced, and its obvious popularity led to withdrawal of alternative proposals in the Senate, assuring assignment of the nomination to the Rules Committee, under the chairmanship of Senator Howard W. Cannon, in accord with the Senate’s Standing Rules.<sup>41</sup>

### **Background Review of the Nominee.**

Although the nomination of Gerald Ford for Vice President was a popular choice among Members of Congress, the leadership of both houses was quick to pledge an exhaustive investigation of the nominee’s background and public life. The Federal

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<sup>37</sup> U.S. Congress, Senate, *Senate Manual Containing the Standing Rules, Orders, Laws and Resolutions Affecting the Business of the United States Senate*, S. Doc. 92-1, 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., prepared by Gordon F. Harrison and John P. Coder (Washington: GPO, 1971), Rule XXV, section (p), pp. 38-39, Rule XXXVIII, p. 57.

<sup>38</sup> Mansfield, “The Vice Presidency,” p. 33994.

<sup>39</sup> Sen. Hugh Scott, “The Vice Presidency,” *Congressional Record*, vol. 119, Oct. 12, 1973, p. 34002.

<sup>40</sup> Feerick, *The Twenty-Fifth Amendment*, p. 133.

<sup>41</sup> Sen. Mike Mansfield and Sen. Lawton Chiles, “Nomination of Gerald Ford to Be Vice President of the United States,” *Congressional Record*, vol. 119, Oct. 13, 1973, p. 34047.

Bureau of Investigation (FBI) reportedly dispatched 350 agents from 33 field offices to compile data on Ford's life and activities. More than 1,000 interviews were conducted, and 1,700 pages of "raw data" were provided to the Senate Rules and House Judiciary Committees.<sup>42</sup> The American and Michigan Bar Associations were asked to review all records concerning the nominee's practice of law since he had been admitted to the bar. Ford's tax records for the years 1965 through 1972 were minutely examined and made available to the committees, while those for an additional five years from 1960 to 1965 were also reviewed. The candidate also provided a complete financial statement detailing his assets and liabilities. In addition, at the request of both committees, a Congressional Research Service task force conducted a comprehensive review of Ford's congressional career, including information on and an analysis of his public statements, floor and committee activities, voting record, bills introduced and co-sponsored, interest group ratings of the nominee, etc. The task force also compiled public information on his life outside Congress, including contemporary press accounts of his various activities during his career. The committees, therefore, had an exceptionally complete picture of Gerald Ford, both as a citizen and as a Member of Congress.

### **Hearings.**

In their first major decision concerning confirmation hearings, joint bipartisan leadership of the House and Senate agreed to schedule consecutive hearings, beginning with the Senate Committee on Rules and Administration, and followed by the House Judiciary Committee.

The Rules Committee took the first round of hearings, beginning November 1, 1973. In its planning sessions, the committee made additional decisions:

- ! The chairman was authorized to issue subpoenas to summon witnesses to testify at hearings.
- ! The hearings would be covered on a pooled basis by the three major commercial television networks and "gavel-to-gavel" by the Public Broadcasting Service.
- ! Committee staff would be augmented as necessary by staff from "other legislative entities;" each Member could also designate an additional staff person, from either personal staff, or committee staff, as his representative at the committee.
- ! FBI files containing "raw" data collected on the nominee would be available only to the chairman and ranking minority member. They would review the files and bring any questionable activities to the attention of other committee members. (This restriction was insisted on by the Justice Department and the FBI.)
- ! Only committee Members and the most senior minority and majority staff members would have access to other confidential information, such as tax

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<sup>42</sup> Feerick, *The Twenty-Fifth Amendment*, pp. 135,136; "Congress Approved Ford Nomination for Vice President," *Congressional Quarterly Almanac, 1973* (Washington: Congressional Quarterly, 1974) p. 1062.

returns. Access to other staff members would be determined by the chairman and the ranking minority member.

- ! Representative Ford would be the first witness, to be followed by Senators and Representatives, and other interested parties.<sup>43</sup>

Senate hearings opened on November 1, with the nominee as the first witness. Committee members pursued two lines of inquiry. In the first, the committee sought to ascertain the nominee's viewpoint on vital questions of governance, especially those concerning the Watergate affair. He was questioned on executive privilege, separation of powers, presidential impoundment of appropriated funds, the independence of the special prosecutor, general cooperation between the executive and legislative branches, his views on the presidential pardoning power, and his own future plans for the presidency. Interrogation of the nominee resumed at the next hearings session, held on November 5, after which a bipartisan group of Representatives offered statements on Ford's qualifications to hold office. At this session, Senator Bayh, widely regarded as "father" of the 25<sup>th</sup> Amendment, asked that Congress lay aside political differences and Watergate-related concerns and conduct the confirmation process in a non-partisan manner.<sup>44</sup>

On November 7, the committee convened in executive session to examine questions raised concerning Ford's personal honesty that had emerged from charges made by lobbyist Robert Winter-Berger in his 1972 book *The Washington Payoff*. Winter-Berger alleged that Ford had:

- ! engaged in influence peddling, including accepting payments to influence government contracts and State Department appointments;
- ! laundered campaign contributions to various Republican groups and organizations;
- ! accepted cash gifts from Winter-Berger to pay medical bills for Mrs. Betty Ford's illness;
- ! been under regular treatment for depression by a New York psychiatrist.<sup>45</sup>

Under close interrogation, Winter-Berger was unable to provide any evidence to substantiate his claims, which contained numerous inconsistencies. Moreover, a number of persons identified by Winter-Berger as being able to corroborate his charges were summoned before the committee, where they uniformly denied his

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<sup>43</sup> U.S. Congress, Senate Committee on Rules and Administration, *Nomination of Gerald R. Ford of Michigan To Be Vice President of the United States*, report, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., S. Exec. Rept. 93-26 (Washington: GPO, 1973), pp. 1-7. (Hereafter referred to as *Senate Report on Ford Nomination*.)

<sup>44</sup> U.S. Congress Senate Committee on Government Operations, *Nomination of Gerald R. Ford To Be Vice President of the United States*, hearings, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., Nov. 1, 5, 7, and 14, 1973 (Washington: GPO, 1973), pp. 144-148. (Hereafter referred to as *Senate Hearings on Ford Nomination*.)

<sup>45</sup> *Ibid.*, pp. 207-208.

allegations under oath. The committee subsequently voted to make public the testimony given at the executive session.<sup>46</sup>

The final public session of Senate hearings was held on November 14, at which time a panel consisting largely of critics of the Ford nomination appeared. Ford was criticized as being unfit to serve, due to his legislative record, lack of experience in foreign affairs, and his admittedly conservative political philosophy. One witness suggested that Congress defer action on the vice presidential nomination until the question of President Nixon's future was settled, while another called for a special election to fill the vice presidency.<sup>47</sup> The final witness urged delay on the grounds that Vice President Agnew had been driven from office by a conspiracy most likely orchestrated in the White House.<sup>48</sup>

On November 20, the Rules and Administration Committee voted unanimously to report the Ford nomination favorably to the full Senate. The committee concluded that the FBI investigation had not revealed any violations of law or irregularities in Ford's personal or political financial affairs. The committee further ruled that other allegations against him, particularly those brought by Winter-Berger, were found to have been unsubstantiated.<sup>49</sup>

The House Judiciary Committee began its hearings on November 15, immediately following the last public session of Senate hearings. Committee Chairman Peter Rodino tentatively set November 21 as the deadline for completion of hearings, but eventually scheduled an additional session for November 26 in order to accommodate committee members and witnesses. It was noted at the time that the size of the 38-member committee rendered questioning a cumbersome and time consuming process, requiring "hours to complete a single round of questions."<sup>50</sup> There was also a dispute over committee access to FBI information on the nominee ("raw data"); the Department of Justice originally insisted that it should be available only to the chairman and the ranking minority member of the committee, but this restriction was unacceptable to the committee. After two weeks of negotiations, the files' availability was extended to an additional three committee members from each political party.<sup>51</sup> These designees were to review the files and report any questionable findings to the full committee. This particular decision was criticized by several committee members, who asserted that all members should have access to the files.<sup>52</sup>

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<sup>46</sup> *Senate Report on Ford Nomination*, p. 30.

<sup>47</sup> *Senate Hearings on Ford Nomination*, pp. 290-297.

<sup>48</sup> *Ibid.*, pp. 352-357.

<sup>49</sup> *Senate Report on Ford Nomination*, p. 97.

<sup>50</sup> "Congress Approved Ford Nomination for Vice President," *Congressional Quarterly Almanac*, 1973, p. 1060.

<sup>51</sup> U.S. Congress, House Committee on the Judiciary, *Nomination of Gerald R. Ford To Be the Vice President of the United States*, hearings, 93<sup>rd</sup> Congress, 1<sup>st</sup> session, Nov. 15-26, 1973, Serial no. 16 (Washington: GPO, 1973), pp. 90-97.

<sup>52</sup> Feerick, *The Twenty-Fifth Amendment*, p. 143.

Procedures closely followed those adopted in the Senate, with Representative Ford being questioned for four hours and 15 minutes the first day of hearings, and six hours and 38 minutes the following day, November 16.<sup>53</sup> Ford returned for further testimony, totaling an additional eight hours, on November 21 and 26. Once again, Ford was closely questioned on his public record, particularly his views on civil rights legislation, human rights in general, and areas of law associated with the ongoing Watergate crisis. The Winter-Berger allegations were also revisited, with the committee arriving at conclusions similar to those made by the Senate Rules Committee. House Judiciary Committee members also critically examined the nominee's role in efforts to impeach Associate Supreme Court Justice William O. Douglas in 1970, as well as his activities as a member of the Warren Commission that investigated the assassination of President Kennedy.<sup>54</sup>

One objection raised by opponents of the Ford nomination concerned the constitutional prohibition against appointment of a Senator or Representative to any civil office which for which the "emolument" had been increased during his term of office in Congress.<sup>55</sup> It was asserted that the passage of Public Law 93-136, which increased retirement benefits for many federal employees, including the Vice President, was a disqualifying constitutional impediment to the nomination, since Ford had been a Member of the House of Representatives when President Nixon approved the legislation on October 24, 1973. Other Members rejected this assertion, relying on legislative counsel's opinion that the Vice President was not a "civil officer," as defined by the Constitution.<sup>56</sup>

After completing hearings on November 26, the Judiciary Committee voted to report the nomination favorably to the House on November 29. In contrast with the Senate, the decision was not unanimous, with eight members voting against a favorable report, and one voting "present." The majority report cited many of the same reasons mentioned in the Senate report, while opponents suggested that the nominee's record on civil and human rights, his lack of executive or foreign policy experience, and his role in the Douglas impeachment attempt engendered their opposition. Dissenting members also suggested that the committee should acknowledge the fact that public opinion concerning the Nixon Administration had changed dramatically since the President's reelection in 1972, and that the nominee, therefore, need not share Nixon's party affiliation or outlook. They urged that

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<sup>53</sup> U.S. Congress, House Committee on the Judiciary, *Confirmation of Gerald R. Ford as Vice President of the United States*, report to accompany H.Res. 735, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., H. Rept. 93-695 (Washington: GPO, 1973), p. 2. (Hereafter referred to as *House Report on Ford Nomination*.)

<sup>54</sup> *Ibid.*, pp. 9-11.

<sup>55</sup> Article I, Section 6, Clause 2: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."

<sup>56</sup> *House Report on Ford Nomination*, pp. 40-41.

Congress take no action on the nomination until the ultimate outcome of Watergate-related court and impeachment activities was reached.<sup>57</sup>

### **Floor Action.**

Consideration of the Ford nomination swiftly followed the hearings and investigation process. The Senate's debate began November 26, the same day the House Judiciary Committee favorably reported the nomination.<sup>58</sup> The Senate debate consisted largely of statements of praise for, and confidence in, the nominee; his honesty, decency, sincerity, and candor during the hearings were frequently cited, along with his record of service in World War II and during a 24-year career in the House of Representatives. Members also noted his willingness to compromise during his career in the House of Representatives, without at the same time abandoning his principles. Many remarked that they fully expected Ford to assume the presidency within the near future.

Some Democratic Senators noted political and philosophical differences with the nominee. They stated that Ford would not have been *their* choice for Vice President, but conceded that, barring unfitness to serve on the part of the nominee, Congress should confirm the President's choice for Vice President when the 25<sup>th</sup> Amendment was invoked. One opponent noted the alleged Article I, Section 6 constitutional impediment cited earlier in this report, but again, this was rebutted with legislative counsel's opinion that the Vice President was not a "civil officer," as intended in the Constitution.<sup>59</sup> The main thrust of opposition centered around the Watergate affair. It was asserted that the 25<sup>th</sup> Amendment was inappropriate to the situation, one in which the Vice President had resigned while under criminal investigation, and the President himself might well be subject to impeachment and removal from office. As Senator William Hathaway noted, an appointed Vice President who succeeded to the presidency under these circumstances:

...would be the one appointed by the very leader deposed by the people. Such a result seems contrary to the principles of our entire legal and political tradition. Further, a President thus installed would, for the first time in our history, not be one elected by the people. This is inconsistent with the underlying principle of democratic government: that sovereignty and legitimacy derive only from the people themselves.<sup>60</sup>

Notwithstanding these arguments, it was apparent throughout the debate that the Ford nomination enjoyed powerful bipartisan support and was assured of passage. The final vote to confirm the nomination was an overwhelming 92 to 3. Ford

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<sup>57</sup> *Ibid.*, pp. 27-70.

<sup>58</sup> Senate debate on the nomination may be found at "Executive Session—Nomination of Gerald R. Ford To Be Vice President of the United States," *Congressional Record*, vol. 119, Nov. 26-27, 1973, pp. 37960-37969, 38212-38225. (Hereafter referred to as *Senate Debate on Ford Nomination*.)

<sup>59</sup> *Ibid.*, p. 38218.

<sup>60</sup> *Ibid.*, p. 37961.



received unanimous support from the 40 Republican Senators present and voting, while his margin among Democrats was 52 to 3.<sup>61</sup>

House of Representatives debate on the Ford nomination took place on December 6. As the House is not normally called on to consider nominations, it used a resolution (H.Res. 735) as the vehicle for approval of the nomination. The Senate, by contrast, traditionally votes simply to confirm or reject nominations placed before it. The rule adopted for its consideration, H.Res. 738, called for the House to consider the nomination in the Committee of the Whole House on the State of the Union. It limited debate to a total of six hours, equally divided and controlled by the chairman and ranking minority member of the Judiciary Committee. After debate, the committee rose and reported the resolution to the House for final consideration.<sup>62</sup> Most of the debate followed a course similar to that in the Senate: statements of sometimes fulgent praise for Ford by his supporters; expressions of admiration for the man, but not his politics, followed by declarations of support or opposition; and some outright disapproval of both the nomination and the nominee. African American and Hispanic Members, in particular, criticized the nomination, citing their interpretation of Ford's record on civil and human rights legislation and an alleged insensitivity to the plight of poorer Americans.<sup>63</sup> The persistent and apparently organized efforts of Ford's detractors gave the House deliberations somewhat more of the quality of debate than was the case in the Senate.

Some highlights of the House debate included the emoluments question, which was raised and definitively addressed by Judiciary Committee Chairman Rodino, who cited reports by both the Justice Department and the Congressional Research Service that concluded the prohibition imposed by the Constitution did not apply to the Ford nomination.<sup>64</sup> Another point frequently emphasized by both supporters and opponents was their expectation that the Vice President would soon succeed to the presidency, and that Congress was, in reality, actually electing a President. As Representative Jerome Waldie noted:

Now each of us will be voting for a President of the United States. One might suggest that we are voting for a man whose title is Vice President of the United States, and that is true, but the only function of the Vice President is in fact to succeed to the Presidency, so we really are voting for the President of the United States.<sup>65</sup>

One Member suggested that the House debate was actually anticlimactic, in light of the fact that a joint session of Congress had been scheduled that same evening for

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<sup>61</sup> Ibid., p. 38225.

<sup>62</sup> House of Representatives debate on the Ford nomination may be found at "Confirming Nomination of Gerald R. Ford To Be Vice President of the United States," *Congressional Record*, vol. 119, Dec. 6, 1973, pp. 39807-39899.

<sup>63</sup> Ibid., pp. 39834-39835, 39876-39877, 39882-39883.

<sup>64</sup> Ibid., pp. 39813-39817.

<sup>65</sup> Ibid., p. 39820.

Ford's swearing-in ceremony, and that network television time had been reserved for the event.<sup>66</sup>

The House subsequently voted overwhelmingly to confirm the Ford nomination, approving the Vice President by a vote of 387 to 35.<sup>67</sup> Ford received unanimous support from Republican Representatives present and voting, as well as the votes of 201 Democratic Members. A contemporary analysis of the vote noted that Ford's margin among "Southern Democrats" was an overwhelming 80 to 2; "northern Democrats," while less enthusiastic, supported confirmation by a comfortable margin of 121 to 33. Ford's opponents were drawn almost exclusively from what has been characterized as the "liberal" wing of the House Democrats, and included 11 of 15 African American Representatives present and voting.<sup>68</sup>

Ford was sworn in at a joint session of Congress held shortly after the House added its approval to that of the Senate in confirming him as Vice President of the United States.<sup>69</sup>

## The Rockefeller Nomination

Gerald Ford served barely eight months as Vice President before Richard Nixon's resignation catapulted him into the presidency on August 9, 1974. As many Senators and Representatives had predicted, Nixon resigned in the wake of continuing revelations of criminal misconduct during the Watergate coverup. It was in these circumstances, scarcely less dramatic than those leading to Ford's confirmation, that Congress considered yet another nomination for the vice presidency, that of Nelson A. Rockefeller, former Governor of New York, and a scion of one of America's richest families. Although Congress followed most of the precedents established for the Ford nomination, the process was complicated by the fact that Rockefeller's personal finances were extraordinarily complex, and required a lengthy investigation.

### Context.<sup>70</sup>

President Richard Nixon fought a losing battle to save his presidency during the first seven months of 1974. He was threatened on several fronts. Special Prosecutor Leon Jaworski, who had replaced the dismissed Archibald Cox on November 1, 1973, continued to press for the release of additional tapes of Nixon's conversations concerning Watergate. After the President, citing executive privilege, refused to

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<sup>66</sup> Ibid., p. 38935.

<sup>67</sup> Ibid., p. 39899.

<sup>68</sup> Three African American Members did not vote, while one voted to confirm the Ford nomination. *Congressional Quarterly Almanac, 1973*, vote 468, pp. 146-147-H.

<sup>69</sup> "Joint Meeting of the House and Senate for Swearing-In of Gerald R. Ford of Michigan as Vice President of the United States," "Address of the Vice President of the United States," *Congressional Record*, vol. 119, Dec. 6, 1973, pp. 39925-39926.

<sup>70</sup> This section relies substantially on: *Watergate: Chronology of a Crisis* (Washington: Congressional Quarterly, 1975).

comply, Jaworski obtained a subpoena requiring their release. Nixon first asked Judge John Sirica to overturn the subpoena, and, after his refusal on May 20, 1974, appealed the decision. Meanwhile, on March 1, 1974, Judge Sirica's original Watergate grand jury issued a report citing the President as an unindicted co-conspirator in the coverup. This report was subsequently referred to the House Judiciary Committee, which had initiated an impeachment inquiry, with hearings that opened on May 9, 1974. In addition to Watergate, the committee also investigated various allegations of campaign funding and personal financial irregularities leveled against the President.

In July, Nixon received several politically fatal blows. On July 24, the Supreme Court ruled unanimously that the President must obey Sirica's order to provide the special prosecutor with the tapes he requested. Shortly afterward, on August 3, the House Judiciary Committee voted to recommend Nixon's impeachment on three counts (obstruction of justice, abuse of power, and contempt of Congress), and floor debate was scheduled to begin August 19. The first tapes were turned over to Jaworski on July 30, but on August 5 the President stunned the nation by releasing transcripts of three crucial White House meetings indicating that he had participated in the Watergate coverup as early as June 23, 1972. Remaining support for Nixon evaporated, and senior Republican congressional leaders urged him to resign, which he did, effective August 9. Gerald Ford was sworn in as President the same day.

### **Nomination and Confirmation.**

On August 20, 1974, President Ford nominated Nelson A. Rockefeller to be Vice President. Rockefeller had served in a number of appointive federal positions in both Democratic and Republican Administrations beginning in 1940. Between periods of public service, he held various jobs in the private sector, including Rockefeller family interests. In 1958, he was elected to the first of four terms as Governor of New York, a post he occupied until his resignation on December 18, 1973. He had also been an unsuccessful candidate for the Republican presidential nomination in 1964 and 1968. Ford's choice of Rockefeller initially received wide bipartisan praise from Senators and Representatives. Rockefeller was hailed for his more than 30 years of public service, in particular his extensive executive experience as Governor of New York for 15 years.

Although the Rockefeller nomination came to be more contentious than Ford's, and consumed more than four months, it broke little new ground with respect to precedent-setting congressional action: confirmation procedures adopted by the Senate and House closely followed those set the year before. The nomination was once again referred to the Senate Committee on Rules and Administration and the House Committee on the Judiciary. The FBI again conducted an exhaustive investigation of the nominee's life and activities, while the Congressional Research Service provided a compilation and analysis of his public record. The nominee submitted a comprehensive financial statement and provided his tax returns for seven years to committee staff. In the House, one major change in procedure included a wider dissemination of FBI "raw files" on the nominee: these were made available to all committee members, in response to criticism of their limited availability in the Ford

confirmation process.<sup>71</sup> In addition, for the Rockefeller confirmation, the staff of the Joint Committee on Internal Revenue Taxation was detailed to assist Judiciary Committee staff in evaluating the nominee's personal financial statements.<sup>72</sup>

Several factors contributed to making the Rockefeller nomination process lengthier and, in some ways, more emotionally charged than Ford's had been. The first was President Ford's extension of a blanket pardon to Richard Nixon on September 8. Although his reason for issuing the pardon was to forestall a "prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office,"<sup>73</sup> it generated just such a debate, arousing strident criticism from foes of the resigned President. Some observers suggested that Ford had violated an implicit promise given during his confirmation hearings that he would probably not issue a pardon under such circumstances. Although criticism divided largely, though not exclusively, along party lines, many suggested that Ford's "honeymoon" with the American people had been brought to an end by his action.<sup>74</sup>

A second factor delaying the confirmation process was the 1974 congressional elections, in which 33 of 38 members of the House Judiciary Committee and two members of the Senate Rules and Administration Committee faced reelection.<sup>75</sup> Between the press of end-of-session legislative responsibilities and reelection campaigning, the Rules Committee was forced to divide its hearings into two widely separated periods. The first included three sessions held between September 23 and 26, followed by an additional three held between November 13 and 15. The House Judiciary Committee postponed its hearings until after the elections; these were held in seven sessions, on November 21 and 22, 25 and 26, and December 2 to 4.

The most serious complicating factors, however, were Rockefeller's extraordinarily complex personal finances and questions related to his political activities during his long tenure as Governor of New York. In the case of personal wealth, the nominee provided both his personal tax returns for the previous seven years and an estimate of his net worth. Rockefeller's advisors had apparently underestimated his net worth in his initial financial disclosures, however. When discovered, these omissions led to fuller a examination, which resulted in substantial upward revisions of the nominee's net worth, from \$ 62.5 million to \$ 218 million,

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<sup>71</sup> U.S. Congress, House Committee on the Judiciary, *Confirmation of Nelson A. Rockefeller as Vice President of the United States*, report to accompany H.Res. 1511, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., H. Rept. 93-1609 (Washington: GPO, 1974), p. 2. (Hereafter referred to as *House Report on Rockefeller Nomination*.)

<sup>72</sup> *Ibid.*, p. 10.

<sup>73</sup> U.S. President (Ford), "Proclamation 4311, Granting Pardon to Richard Nixon," *Public Papers of the President of the United States: Gerald R. Ford, 1974* (Washington: GPO, 1975), p. 104.

<sup>74</sup> "The Impeachment Inquiry," in *Congressional Quarterly Almanac, 93<sup>rd</sup> Congress, 2<sup>nd</sup> session, 1974*, vol. 30 (Washington: Congressional Quarterly, 1975), pp. 898-901.

<sup>75</sup> In addition, five members of the House Judiciary Committee were retiring.

and an assessment of additional personal tax payments for certain years.<sup>76</sup> Secondly, the investigation revealed a series of personal loans and gifts made over the years by Governor Rockefeller to various friends, political associates, and subordinates. Many of the loans were repaid only in part, or not at all. Although legal opinions presented to the committees found nothing in the loans or gifts to be illegal, the question was raised as to:

... whether or not Governor Rockefeller's loans and gifts were made for purposes other than as represented by Governor Rockefeller and the recipients. Were they made as gestures of affection and friendship or were they made to achieve a gain by Governor Rockefeller, or as a reward to the recipients for services rendered?<sup>77</sup>

In the final analysis, both committees indicated their concern over the nominee's practice of extending gifts and loans, but, barring any demonstrated legal impropriety, gave him the benefit of the doubt.<sup>78</sup> Both committees were equally troubled by revelations that Rockefeller family interests had underwritten a controversial campaign biography highly critical of former Supreme Court Associate Justice Arthur J. Goldberg, Nelson Rockefeller's opponent in the 1970 gubernatorial election. Both committees concluded that the nominee had exercised poor judgment in tacitly approving the book's publication, and Rockefeller himself publicly apologized to Goldberg. Finally, both committees expressed concern over the amounts contributed by the nominee and his family to his own campaigns for Governor and President.<sup>79</sup>

Hearings in the Senate Rules and House Judiciary Committees involved sometimes pointed questioning of the nominee, and were generally characterized by less deference and collegiality than the Ford hearings. Governor Rockefeller testified on five occasions for a total of over 23 hours before the Rules Committee, and on three occasions for over 17 hours before the Judiciary Committee. Notwithstanding substantial opposition from a number of witnesses and Democratic Members, the nomination was reported favorably in the Rules Committee with a unanimous vote of 9 to 0 on November 22. In Judiciary, the margin to report favorably was 26 to 12, with all opposition coming from Democratic members. The bipartisan spirit was, however, demonstrated by the nine Democrats who joined committee Republicans in providing the majority to report favorably on December 12.

As was the case with the Ford nomination, floor debate on the confirmation of Nelson Rockefeller to be Vice President was somewhat anti-climactic. Most of the substantive points in favor of, or opposition to, the nominee had been thoroughly

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<sup>76</sup> Feerick, *The Twenty-fifth Amendment*, p. 168.; U.S. Congress, Senate Committee on Rules and Administration, *Nomination of Nelson A. Rockefeller of New York To Be Vice President of the United States*, report, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., S. Exec. Rept 93-34 (Washington: GPO, 1974), pp. 24-31. (Hereafter referred to as *Senate Report on Rockefeller Nomination*..)

<sup>77</sup> *Ibid.*, p. 148.

<sup>78</sup> *Senate Report on Rockefeller Nomination*, pp. 148-149; *House Report on Rockefeller Nomination*, p. 9.

<sup>79</sup> *Senate Report on Rockefeller Nomination*, p. 181; *House Report on Rockefeller Nomination*, p. 7.

examined in the hearings process and were largely disposed of in the Rules and Judiciary Committee reports.

The Senate's confirmation debate, scheduled for a single hour, was held on December 10, and ended with a favorable vote of 90 to 7.<sup>80</sup> Fifty-three Democrats and 37 Republicans supported the nomination, while three Democrats and four Republicans opposed it. One Republican who voted "present" explained that he had done so because he had received a contribution from the nominee in his election campaign. According to a vote analysis, Democrats who opposed the nomination were generally identified as "liberals"; the Republicans who voted against it, however, were characterized as among the most conservative Senators.<sup>81</sup>

The House adopted rules similar to those used in the Ford confirmation debate: the rule for consideration, H.Res. 1519, provided six hours of debate, divided evenly between, and controlled by, the chairman and ranking minority member of the Judiciary Committee. Rockefeller's margin of approval in the House (H.Res. 1511 was the vehicle for approval of the nomination) was a comfortable 287 to 128, but the result reflected the greater opposition the nominee experienced during the hearings process and the floor debate.<sup>82</sup> According to a contemporary analysis of the vote, Rockefeller, notwithstanding his reputation as a "moderate" or even "liberal" Republican, enjoyed a much smaller margin of support among "Northern Democrats" than had the more conservative Ford, winning their vote by a narrow margin of 78 to 74. He carried "Southern Democrats" by a margin of 56 to 25, and his fellow Republicans by 153 to 29. African American Representatives split evenly, seven voting to approve, and seven to reject, the nomination, while one Black Member did not vote. Republican opponents tended to be part of the more "conservative" branch of the GOP in the House.<sup>83</sup>

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<sup>80</sup> Senate debate may be found at "Executive Session—Nomination of Nelson A. Rockefeller To Be Vice President of the United States," *Congressional Record*, vol. 120, Dec. 10, 1974, pp. 38918-38936.

<sup>81</sup> *Congressional Quarterly Almanac*, 1974, p. 76-S.

<sup>82</sup> House debate may be found at "Confirming Nelson A. Rockefeller as Vice President of the United States," *Congressional Record*, vol. 120, Dec. 19, 1974, pp. 41419-41517.

<sup>83</sup> *Congressional Quarterly Almanac*, 1974, pp. 162-H, 163-H.

## Conclusion

The founders' failure to provide a succession procedure for occasions when the vice presidency is vacant caused little concern for nearly 150 years of government under the Constitution. On 16 occasions between 1789 and 1967, the office became vacant, due to either the Vice President's accession to the presidency, or his death or resignation. These vacancies were considered an acceptable risk in an era characterized by a smaller, less responsible federal government, and the relative insulation of the United States from world crises. They ceased to be acceptable when the United States acquired great power status in an unstable world, and the presidency assumed vastly increased responsibilities. Notwithstanding these changes, it required the impetus of John Kennedy's tragic assassination to bring to fruition a constitutional amendment remedying the original document's oversight. Only six and seven years later, Congress was called on to perform its constitutional duty in considering two vice presidential nominations in successive years, under circumstances that have almost universally been described as a constitutional crisis. In both cases, it acted deliberately, yet swiftly, and without excessive partisan rancor, to examine and vote on the President's nominee for Vice President. In both cases, it also established precedents which would be useful, but not prescriptive, in any future implementation of Section Two of the 25<sup>th</sup> Amendment.

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