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John D. Feerick to Lowell R. Beck

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April 13, 1964

SPECIAL DELIVERY

Lowell R. Beck
Assistant Director
Washington Office
American Bar Association
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Lowell:

Thank you for your letter of April 10, 1964.
I have considered the first question raised by Mr.
Huggins and my reaction to it is as follows:

Point (5) of the consensus, I believe, was intended to cover two situations: (1) where the President dies, resigns or is removed and the Vice-President succeeds to the Presidency, thus leaving a vacancy in the Vice-Presidency, and (2) where the Vice-President dies, resigns or is removed at a time when the President is not under an inability. This Point was included because it was thought desirable to have a Vice-President at all possible times. The President was given the power to nominate a Vice-President in order to insure that he would have a Vice-President with whom he could work.

If an amendment were to provide that "when a vacancy occurs in the office of the Vice-President the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting

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in joint session, shall then become Vice-President for the unexpired term" (as Section 2 of Senator Bayh's proposal in effect does), it seems that, as you suggest, a Speaker who was acting as President would be able to nominate a new Vice-President since he would be entrusted with all the powers and duties of the Presidency, one of which would be to nominate a person to fill the vacancy in the Vice-Presidency. However, I think no such power should be given a Speaker (or anyone else acting as President when a President is disabled). First, to give such a power would defeat an important purpose of Point (5) by permitting a situation where the President recovers from an inability to find that he has a Vice-President with whom he cannot work, or, even, a Vice-President of the opposite political party (which is possible if the Congress [and therefore the Speaker] were of the other party). Second, it would result in the anomalous situation of the Speaker being required to nominate a person who, upon confirmation by Congress, would supplant him as acting President since one of the constitutional duties of the new Vice-President would be to act as President when the President is disabled. (Interestingly, the present succession law provides that the Speaker is to act for the rest of the presidential term except in cases of failure to qualify or inability, in which cases he acts until a President or Vice-President qualifies or recovers from an inability. Query: Would not the present succession law conflict with the Constitution as it would prevent the Speaker from being supplanted by a new Vice-President in a case of inability?)

As a practical matter, the Speaker probably would not nominate a person unless, of course, the Constitution required that he do so within a specified period of time, e.g., 30 days, as under Sections 1 and 2 of the Bayh proposal. And, if he were so required, perhaps he would nominate himself.

Personally, I would suggest inserting a subdivision, in the section of any bill concerning the filling of a vacancy in the Vice-Presidency, which provides as follows: "This Section shall not apply when the President is unable to discharge the powers and duties of his office." Although such a subdivision would leave us without a Vice-President in the case posed by Mr. Huggins, we would have the line of

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succession as insurance that there would always be someone available to act as President.

In a case where the President is disabled and the Vice-President is acting as President, the Vice-President would certainly keep the Speaker abreast of what was going on. Thus, if the Speaker were called upon to act as President because of the Vice-President's death, he would very likely be in a better position to act as President than a person who is then nominated by him for Vice-President (really for acting President since that person would supplant him) which person would have to take over the helm of government immediately and without any preparation at a time of crisis. In general, I think the People's confidence in the government would be badly shaken were this to happen.

As for the second question posed by Mr. Huggins, my comments can be found at page 495 of the recent Fordham Law Review article and in the forthcoming article for the American Bar Association Journal. Also in point, I believe, is a recent letter I sent to the Chairman of the Committee on Federal Legislation of the Association of the Bar of the City of New York, a copy of which is enclosed.

If you should want additional comments from me or if I can be of assistance in any way, please do not hesitate to let me know.

With warmest personal regards,

Sincerely,

John D. Feerick

Enclosure
JDF:lp