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VICE PRESIDENTIAL SUCCESSION: A CRITICISM OF THE BAYH-CELLAR PLAN

GEORGE D. HAIMBAUGH, JR.*

A. Introduction

Section 2: 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.¹

The above provision for vice presidential succession is contained in a proposed amendment to the United States Constitution which is being sponsored in the Congress by Senator Birch Bayh, Jr., of Indiana and Representative Emanuel Celler of New York. It is argued that this constitutional change is urgently needed, that the presidential initiative is necessary to insure continuity of executive policy, and that the requirement of congressional ratification will secure a proper voice to the representatives of the people. This article seeks to demonstrate the unreality of these arguments by an examination of present law, political history and traditional constitutional doctrine.

B. The Myth of Urgency

The matter of vice-presidential succession is presented by the proponents of the Bayh-Celler plan as an urgent one. There is ritual restatement of the statistics:² As a result of the resignation of one Vice President, the deaths of seven and the succession to the Presidency of eight others, the office of Vice President has been vacant on sixteen different occasions or for thirty-nine out

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1. This provision is the second section of a proposed amendment which has been introduced in the 89th Congress by Senator Bayh as Senate Joint Resolution 1 and by Representative Celler as House Joint Resolution 1. Other sections which deal with cases where the President is unable to discharge the powers and duties of his office are beyond the scope of this article. See 111 CONG. REC. 3168 (daily ed. Feb. 19, 1965).

2. See for example, "Message from the President on Succession to the Presidency and Vice Presidency, and Presidential Inability," 111 CONG. REC. 1511 (daily ed. Jan. 28, 1965); Birch Bayh, Jr., "Our Greatest National Danger," *Look*, April 7, 1964, pp. 74, 76; *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess., on S.J. Res. 13, S.J. Res. 28, S.J. Res. 35, S.J. Res. 84, S.J. Res. 138, S.J. Res. 139, S.J. Res. 140, S.J. Res. 143, S.J. Res. 147 at 1-2, 58, 78, 95 etc., (1964) [hereinafter cited as *Hearings*].

of 176 years of national existence under the Constitution. The dangers thus conjured up, however, fade away when existing constitutional and legal provisions are recalled. Article II, section 1 of the Constitution grants Congress the power to provide by law "for the case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what officer shall then act as President. . . ." Congress exercised this authority in 1792 and since that time there has always been at least half a dozen officers in the line of succession to the Presidency. Today, the Presidential Succession Act of 1886 as amended in 1947³ fixes the order of succession, when there is no Vice President, as follows: Speaker of the House of Representatives, President pro tempore of the Senate, the Secretaries of State, Treasury, and Defense, Attorney General, Postmaster General, the Secretaries of Interior, Agriculture, Commerce, Labor and Health, Education and Welfare.⁴

Arguments in favor of the Bayh-Celler plan for vice presidential succession also include a ritual reference to the dangers of the thermonuclear age. For example, President Lyndon B. Johnson, in a recent message to Congress urging it to approve and pass on to the states the Bayh-Celler proposed amendment, called attention to the "lack of constitutional provision assuring continuity in the office of the vice president." He added that it was not necessary "to conjure up the nightmare of nuclear holocaust" to identify such an omission as a "chasm of chaos."⁵ It is true that modern weapons make possible an attack on Washington in which Congressional leaders and the Cabinet might all perish simultaneously. But provision for presidential succession in such an eventuality may be made under the present Constitution. A simple act of Congress could extend the line of succession to include officers whose work is outside Washington. In case of such a disaster, the succession could pass, for example, to the United States Ambassador to the United Nations followed by the United States Ambassador to the North Atlantic Treaty Organization and the Chief Judges of the ten numbered United States Courts of Appeals in the numerical order of the circuits in which they sit.

But in these times, the President says, such *orders* of succession are no substitute for an *office* of succession.⁶ "Can the Speaker—

3. 3 U.S.C.A. § 19 (1948).

4. See also, Amendment XX, section 4.

5. Message, *supra* note 2, at 1510.

6. *Id.* at 1511.

any Speaker," Senator Bayh asks, "possibly run the large and diverse House of Representatives and, simultaneously, prepare properly for the Presidency?"⁷ If the voters are sometimes willing to entrust the Presidency to a man who has not been Vice President—to a Senator, a NATO commander, a Governor of New York or New Jersey or a Springfield lawyer, for example, would they have such qualms about seeing the office go to a Speaker of the House of Representatives who had been attending meetings of the Cabinet and the National Security Council? Is the Vice Presidency so surely the better apprenticeship for the Presidency? John Nance Garner who held both offices described the Speakership as a "potent office regardless of who is President,"⁸ and the Vice Presidency as not being worth a "pitcher of warm spit."⁹ Other men who held or were to hold the office of Vice President have given similar descriptions of it. To Theodore Roosevelt, the vice presidency was a burial,¹⁰ to Thomas R. Marshall it was a cataleptic state,¹¹ to Alben Barkley four years of enforced silence¹² and to Hubert Humphrey a job "in which you stand around waiting for someone to catch cold."¹³ And John C. Calhoun's resignation from the Vice Presidency to become a Senator was, of course, an action that spoke louder than words.

But since the order of succession was prescribed in 1947, President Johnson has told Congress, "the office of the Vice-Presidency has undergone the most significant transformation in history. . . . Once only an appendage, the office of Vice President is an integral part of the chain of command and its occupancy on a fulltime basis is imperative."¹⁴ That the Vice Presidency has become a full-time "chain of command" job is belied by the months of foreign travel which both Mr. Johnson and his predecessor, Richard Nixon, accomplished while holding that office. Lyndon Johnson, for example, made numerous trips

7. *Hearings*, *supra* note 2, at 2.

8. BASCOM N. TIMMONS, *GARNER OF TEXAS* 168 (1948).

9. THEODORE WHITE, *THE MAKING OF THE PRESIDENT* 211 (1961).

10. Bayh, *op. cit. supra* note 2, at 74. Sen. Platt of New York referred to Roosevelt's inauguration as Vice President as T.R.'s taking the veil.

11. DWIGHT MACDONALD, *HENRY WALLACE: THE MAN AND THE MYTH* 63 (1948). "The Vice-President of the United States," Tom Marshall once observed, "is like a man in a cataleptic state: he cannot speak; he cannot move; he suffers no pain; and yet he is perfectly conscious of everything that is going on about him." *Ibid.*

12. Bayh, *op. cit. supra* note 2, at 74.

13. *TIME*, September 4, 1964, p. 21.

14. Message, *supra* note 2, at 1511.

abroad traveling in thirty-three countries on five continents during the less than three years that he was Vice President.¹⁵ While the subject of vice presidential succession was being considered in 1964 by the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, the following perceptive view of the proper place of the Vice President in our constitutional system was presented by the Pulitzer Prize winning historian, Sydney Hyman:

I know, for example, that a Vice President now sits on the National Security Council, in the Cabinet, presides over both in the absence of the President, and takes good will trips. But to say all of this is to say nothing intelligible. A chair also sits. A metronome also presides. A bird also takes good will trips.

The real test of what has happened to the Vice Presidency is to ask whether the Vice President who sits, presides, takes trips, or even is put in charge of an executive commission or agency, is in a position to make the yes or no decision in any great matter of State, without leave of the President.

The simple truth is that no Vice President, not Mr. Nixon, nor Mr. Johnson in his time, has been able to do that, or would even dare to do that. Nor should he ever be permitted to, in any maner except in a clear case covered by any Presidential disability laws that have yet to be framed.

. . . .

The Vice President, in our system of government, is, and should remain the equivalent of England's constitutional Monarch. Apart from the functions specifically vested in him as the President of the Senate, the only additional rights he is entitled to, is the right to warn the President, to inform the President, to be informed by the President—all of which comes down to nothing more than the rights of consultation.¹⁶

15. MOONEY, *THE LYNDON JOHNSON STORY* 165-170 (1964).

16. *Hearings*, *supra* note 2, at 181. Mr. Hyman is the author of "THE AMERICAN PRESIDENT, BECKONING FRONTIERS, and ROOSEVELT AND HOPKINS." See also the statement of Clinton Rossiter, Professor of American Institutions, Cornell University, at p. 228 in which he pointed out to Senator Bayh that the jobs that a Vice President can perform are "jobs that don't have to be done as we are demonstrating at the moment when we don't have a Vice President of the United States."

C. Continuity or Victory?

The President must have a voice in the selection of a Vice President . . . It would assure a reasonable continuity of Executive policy, should the Vice President become President.

And it is in keeping with the tradition whereby a party's presidential candidate generally has great influence and, at the very least, a veto concerning his vice presidential running mate.—Senator Birch Bayh, Jr.¹⁷

The above testimony of Senator Birch Bayh of Indiana before the Subcommittee on Constitutional Amendments of which he is chairman, is a typical statement of one of the principal arguments on behalf of the Bayh-Celler plan for vice presidential succession. Thus the constitutional power of initiative in the filling of a vacancy in the office of Vice President is being sought for the President on the gratuitous assumption that he will use such power for the purpose of assuring continuity of his policies in the event that he, the President, should die, become disabled or be impeached and removed from office. It would seem that the Senator's apparent desire to follow the traditions of national political conventions would prompt him to leave the nominating initiative with the Congress since the candidate's customary "great influence" is exerted at the convention without any formal—much less constitutional—authority. There is, in fact, such aptness to his convention analogy that a review of the history of Twentieth Century national political conventions at which successful tickets have been chosen would seem to be in order. The inquiry with regard to each such convention will be: Was the candidate for Vice President picked for the purpose of insuring continuity of the policies of the presidential nominee should the latter not serve out his term, or was he selected in order to strengthen the ticket?

1900—Theodore Roosevelt, wrote Hanna biographer Thomas Beer, was forced on the Administration by Finance and Westerners. Although President McKinley felt little political affinity with the New York Governor, he prudently accepted him as a running-mate so as not to offend either the Westerners who

17. *Hearings*, *supra* note 2, at 4. The "continuity" argument was made by many who testified at the committee hearings as well as by several participants in the Senate debate. See 111 Cong. Rec., February 19, 1965, especially the remarks of Sen. Ervin at p. 3173 and of Sen. Fong at p. 3180.

wanted the Rough Rider on the ticket or the Wall Streeters who sought thus to unseat him in Albany.¹⁸

1904—Charles Warren Fairbank's place on the Republican national ticket of that year is generally ascribed to a conservatism which balanced Roosevelt's progressivism and to residence in Indiana, a state the chronically doubtful political nature of which had made it "the home of vice presidents."¹⁹

1908—The selection of Congressman James Schoolcraft Sherman of New York state brought personal and private disappointment to William Howard Taft who would have preferred to run with "some westerner who has shown himself conservative and at the same time represents the progressive movement."²⁰ The ticket was deemed to be well balanced, however, with the addition of Sherman whose nomination was described by Alice Roosevelt Longworth in her reminiscences of that Chicago convention as "a bone allowed the reactionaries."²¹

1912—In Baltimore the Democrats nominated Governor Thomas Riley Marshall of Indiana whose progressivism was more

18. THOMAS BEER, HANNA 223-228 (1929); Frederic Logan Paxson, "Theodore Roosevelt," XIV DICTIONARY OF AMERICAN BIOGRAPHY 137 (1935); HAROLD L. ICKES, THE AUTOBIOGRAPHY OF A CURMUDGEON 43-47 (1943); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 332-333 (1913).

19. John D. Hicks, "Charles W. Fairbanks," VI DICTIONARY OF AMERICAN BIOGRAPHY 248 (1931); 9 ENCYCLOPEDIA BRITANNICA 35 (1963); CLAUDE G. BOWERS, BEVERIDGE AND THE PROGRESSIVE ERA 210 (1932). Other Hoosiers nominated for the Vice Presidency were George W. Julian who ran on the Free Soil Party ticket with John P. Hale in 1852, Schuyler Colfax with Ulysses S. Grant in 1868, Thomas A. Hendricks with Samuel Tilden in 1876, William H. English with Winfield Scott Hancock in 1880 and with Grover Cleveland in 1884, and Thomas R. Marshall with Woodrow Wilson in 1912 and 1916. The Republican ticket was headed by Benjamin Harrison, an Indianian, in 1888 and 1892 and by Wendell Willkie, a native Hoosier, in 1940.

On the opening day of the Republican National Convention in Chicago, correspondent Louis Brownlow telegraphed his paper, the *Nashville Banner*:

"The choice of a candidate for Vice-President—the only thing graciously left to the delegates by the imperious and imperial Roosevelt—is not of enough importance to stir emotions and when questions are asked the reply is generally, 'Fairbanks, I suppose—if he will have it.'"

This passage is quoted in Brownlow's autobiography, *A PASSION FOR POLITICS*, volume I, 357 (1958).

20. HENRY F. PRINGLE, I THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 354-5 (1939).

21. ALICE ROOSEVELT LONGWORTH, CROWDED HOURS 151 (1933). See also J. HAMPTON MOORE, ROOSEVELT AND THE OLD GUARD, 217 (1925); Edward Conrad Smith "James Schoolcraft Sherman," XVII DICTIONARY OF AMERICAN BIOGRAPHY 83 (1936).

like Taft's than Wilson's.²² A Wilson biographer tells how it happened:

[Burleson] telephoned Wilson that Underwood had refused the nomination and that the convention was leaning toward Thomas R. Marshall. "But, Burleson," Wilson protested, "he is a very small caliber man." Burleson agreed, but argued that since Marshall was from the Midwest and from a doubtful state, his candidacy would supplement Wilson's. "All right, go ahead," Wilson agreed. He did not know that McCombs had traded the vice-presidential nomination to Indiana in return for her votes! McCombs accordingly delivered the nomination to Marshall.²³

1916—Incumbents re-nominated and re-elected.

1920—Governor Calvin Coolidge of Massachusetts was nominated at Chicago when it became obvious that the Senate leaders who had planned and won the nomination of Warren G. Harding intended to have their way with regard to the vice presidential nomination too. "Then," in the words of a Kansas delegate William Allen White, "the revolt of the mob came quickly and with amazing directness . . . The Convention leaders were appalled but powerless. The thing came out of the air like lightning. The resulting ballot gave 674 for Coolidge with the Convention bosses able to assemble only 146 for Lenroot."²⁴

1924—President Coolidge wanted to share the ticket with Borah of Idaho but the party leaders gave him Dawes of Illinois.²⁵ William Allen White described it this way:

Charles G. Dawes was nominated by Congressional leaders, the men who nominated Harding. It is interesting to note

22. An OUTLOOK report on the Democratic nominees stated that Marshall's "attitude toward governmental powers, the authority of the Executive, the relation of the courts to the people, the direct primary and the like, has been expressed in terms similar to those used by President Taft; in other words his "Progressivism" is of the cautious sort." THE OUTLOOK, July 13, 1912, p. 559; see also pp. 522-3 and 558 of the same issue. After his nomination, Marshall described himself as a "Progressive with the brakes on." THE LITERARY DIGEST, July 13, 1912, p. 45.

23. ARTHUR S. LINK, WILSON: ROAD TO THE WHITE HOUSE 462-3 (1947). See also Mary H. Drout, "Thomas R. Marshall," THE INDEPENDENT, July 11, 1912, p. 79.

24. WILLIAM ALLEN WHITE, A PURITAN IN BABYLON: THE STORY OF CALVIN COOLIDGE 214 (1938). See also Allen Nevins, "Calvin Coolidge," XXI DICTIONARY OF AMERICAN BIOGRAPHY 195 (1944); EDWARD ELWELL WHITING, PRESIDENT COOLIDGE A CONTEMPORARY ESTIMATE 173-180 (1923).

25. WASHINGTON MERRY-GO-ROUND (published anonymously) 255 (1931).

that when a majority in a Republican convention, or at least when amalgamated minorities, have nominated a Presidential candidate, almost invariably they have turned the nomination of Vice President over to some unexpected and often unorganized minority. It is the way of politics.²⁶

1928—The choice of Senator Charles Curtis of Kansas was a move to dissipate farm discontent which had been engendered by the nomination for the Presidency of Secretary of Commerce Herbert Hoover, a member of the Coolidge administration which had successfully opposed the McNary-Haugen farm parity bill.²⁷ Also, in the words of Senator Walter Edge of New Jersey, a Hoover delegate at the Kansas City convention, "Curtis was selected because he was very 'regular' in his party affiliation and was thereby supposed to offset any disadvantages arising from Hoover's 'irregularity.'"²⁸

1932—The naming at Chicago of Speaker of the House of Representatives John Nance Garner is described in the political recollections of James A. Farley, the Roosevelt field marshal:

Pat Harrison called Rayburn at my request . . . I said we needed the Lone Star State to win; that the alternative was a victory-sapping deadlock, and that we could swing the vice-presidential nomination to Garner . . . Sam merely said, "We'll see what can be done." That was good enough for me. . .²⁹

1936—Incumbents renominated and re-elected.

1940—The President's surprising³⁰ insistence on having Secretary of Agriculture Henry Agard Wallace of Iowa, "a pure

26. WHITE, *op. cit. supra* note 24, at 305.

27. LITERARY DIGEST, June 23, 1928, p. 3-4; TIME, June 18, 1928, p. 9 and June 25, 1928, p. 10, 14-15. See also JOSEPH W. MARTIN, JR., MY FIRST FIFTY YEARS IN POLITICS 147-8 (1960).

28. WALTER E. EDGE, A JERSEYMAN'S JOURNAL 145 (1948). Edge added, "I had felt . . . that Hoover's record would attract many independent voters, and I was amused as I recalled the occasion when President-elect Harding had asked my advice on naming Hoover to a Cabinet post. Within eight years, we had definitely made Hoover a Republican."

29. JAMES A. FARLEY, JIM FARLEY'S STORY: THE ROOSEVELT YEARS 23 (1948). See also BASCOM N. TIMMONS, GARNER OF TEXAS: A PERSONAL HISTORY 159-168 (1948); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 134-138 (1956); FRANK GRAHAM, AL SMITH: AMERICAN, 217 (1945); EDWARD J. FLYNN, YOU'RE THE BOSS 104-5 (1947); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER 304-311 (1957).

30. JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 428 (1956). "Until now he had not announced his choice, partly because he had

liberal,"³¹ named as his running-mate in Chicago in mid-July may be best understood in the light of two events of the preceding month—namely, the fall of France and the nomination in Philadelphia of Wendell Willkie and Charles McNary by the Republicans who thus presented their most liberal ticket in many years.³² Citing the war in Europe in justification of his disregard of the no-third-term tradition, Roosevelt planned to hold himself above the campaign and, as Commander-in-Chief,³³ to occupy himself with re-armament and production. Wallace was expected to appeal to labor³⁴ and to help the ticket in the isolationist farm belt.³⁵

hoped that Hull would accept, partly because his own draft movement was stronger the longer he held the vice-presidential prize open as bait. The night of his nomination Roosevelt began notifying Hopkins and other party leaders that his choice was Wallace." *Ibid.* See also SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 212-3 (1952): "That evening [the night of his nomination, July 17, 1940], for the first time, the President definitely stated that he favored Wallace."

31. Term used by Roosevelt in a letter sent to George Norris in July 1940. See REXFORD G. TUGWELL, *THE DEMOCRATIC ROOSEVELT: A BIOGRAPHY OF FRANKLIN D. ROOSEVELT* 533 (1957).

32. Frances Perkins wrote, "Wendell Willkie, I think, was more disturbing to Roosevelt as a rival than anyone who ran against him." He recognized that the elements which forced Willkie's nomination were not old-line Republicans but people with some progressive ideas, who, under other circumstances, might have been converted to the Roosevelt cause." FRANCES PERKINS, *THE ROOSEVELT I KNEW* 116 (1946). In the months preceding Willkie's unexpected death, Roosevelt had been in touch with him concerning the possibility of forming a new "liberal" party. Judge Rosenman describes the part he played in the negotiations in his book *WORKING WITH ROOSEVELT* in Chapter XXIV; See also BURNS, *op. cit. supra* note 30, at 466-70; TIMMONS, JESSIE H. JONES 276 (1956); and GRACE TULLY, *F.D.R. MY BOSS* 279 (1949).

33. In his acceptance speech, Roosevelt said, "Lying awake, as I have, on many nights, I have asked myself whether I have the right, as Commander in Chief of the Army and Navy, to call on men and women to serve their country or train themselves to serve, and, at the same time, decline to serve my country in my own capacity, if I am called upon to do so by the people of my country." See, JAMES F. BYRNES, *ALL IN ONE LIFETIME* 118 (1958). And see TUGWELL, *op. cit. supra* note 31, at 534: "Speaking in political terms, Franklin had now the most satisfactory enemy of all his career [i.e. Hitler]. Very early in the campaign he made a "non-political" appearance at the Norfolk Navy Yard in company with Secretary Knox. He was, it could be inferred, appearing as Commander-in-Chief of the armed forces. What civilian competitor could match that position?"

34. BURNS, *op. cit. supra* note 30, at 428; BYRNES, *op. cit. supra* note 33, at 124: "...the President told me that Hopkins had been conferring with labor leaders, especially Philip Murray of the CIO and William Green of the AF of L, and had reported that they all favored Wallace's nomination for Vice President."

35. BURNS, *op. cit. supra* note 30, at 428. "[Wallace] would appeal in the farm states, where isolationist feeling was strong." *Ibid.* BYRNES, *op. cit. supra* note 33, at 124; FARLEY, *op. cit. supra* note 29, at 294; FLYNN, *op. cit. supra* note 29, at 157: "He had been a good administrator of the Department of Agriculture and had brought to the President a certain strength among the farmers. This was important in 1940, because, by that time, the President was

1944—"Franklin must have figured," Rexford Tugwell has written, "that more was to be gained than lost when Truman was substituted for Wallace . . . His [Roosevelt's] approach to politics had always been strategic."³⁶

1948—Senator Alben Barkley was nominated at Philadelphia after four Southern states had walked out over the adoption of a civil rights plank stronger than that recommended by the majority of the platform committee. "The Senator," a national news magazine reported, "has been delicately treading a tight rope on the civil-rights question. As Democratic leader of the Senate, he could not oppose the President's program. As a Kentuckian, well liked in the South, he could not conveniently endorse it. So he said nothing. That left him "available" as a man both the New Dealers and much of the south could support."³⁷

1952—California Senator Richard M. Nixon's youth, familiarity with domestic issues and Republican Party regularity com-

beginning to lose his popularity in the country districts." ROSENMAN, *op. cit. supra* note 30, at 206: "Wallace had made a good record as Secretary of Agriculture, and it was assumed that politically he would help in the farm states."

36. See FLYNN, *op. cit. supra* note 29, at 180: "The President asked me to make certain inquiries. It was most important for us to hold such states as New York, Pennsylvania, Illinois, New Jersey, and California. In the trip I made over the country I formed the opinion that we would not carry those states if we nominated Wallace, notwithstanding the fact that the PAC was very strong in those states and was favorable to Wallace. . . . In a subsequent meeting with the President I told him of my conclusion that Wallace would be a serious handicap to him on the ticket. The problem was to find a man who would hurt him the least . . . We went over every man in the Senate to see who would be available, and Truman was the only one who fitted." See also GEORGE E. ALLEN, Chapter 10 ("The Conspiracy of the Pure in Heart"), PRESIDENTS WHO HAVE KNOWN ME 118-136 (1950); BYRNES, *op. cit. supra* note 33, Chapter 13 ("Clear It with Sidney") at 216-237; and ROSENMAN, *op. cit. supra* note 30, at 440-452 in which Judge Rosenman tells how he was dispatched by the President to tell Vice President Wallace "that I'd like to have him as my running mate, but I simply cannot risk creating a permanent split in the party by making the same kind of fight for him that I did at the convention four years ago."

During the Democratic National Convention in Chicago National Chairman Robert Hannegan made public a letter which he had received from the President and which read as follows:

Dear Bob:

You have written me about Harry Truman and Bill Douglas. I should of course, be very glad to run with either of them and believe that either one of them would bring real strength to the ticket.

Always sincerely,
Franklin Roosevelt

37. U.S. NEWS & WORLD REPORT, July 23, 1948, p. 42-3. See HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 191 (1956): "I had long respected him as one of the ablest debaters on the floor of the Senate. He was a hard-working, honest politician and one of the most popular men in the Democratic party. As a thoroughly acceptable candidate to the South, Barkley made an ideal partner to run with me in 1948."

plemented General Eisenhower's age, international experience and high service under two Democratic Presidents. But, more importantly, Nixon was "regarded as an ideal 'bridge' between the seriously divided Eisenhower and Taft wings of the party."³⁸

1956—Incumbents re-nominated and re-elected.

1960—Senator Lyndon B. Johnson of Texas was, in the words of Richard Nixon, "the best available bridge for Kennedy between the Northern liberals and the Southern conservatives."³⁹

1964—Senator Hubert Humphrey of Minnesota was described in the *Time* coverage of the Atlantic City Democratic convention as one who would "balance the ticket almost to perfection—Northern Hubert with his pure liberalism and appeal to labor, along with Southwesterner Lyndon with his more conservative bent and appeal to the business community."⁴⁰

A survey of the selection of men for the second place on winning national tickets during this century should thus suffice to demonstrate that the influence which a presidential candidate is able to bring to bear on the selection of his running mate is used basically not in the interest of continuity of policy but in the interest of victory at the polls. And when it is remembered that in this century every President who has survived his first term

38. EARL MAZO, *RICHARD NIXON: A POLITICAL AND PERSONAL PORTRAIT* 92 (1959). See also *U.S. NEWS & WORLD REPORT*, July 18, 1952, p. 36; SHERMAN ADAMS, *FIRST HAND REPORT* 34-36 (1961); MERLO J. PUSEY, *EISENHOWER: THE PRESIDENT* 23 (1956); MAZO, *op. cit. supra* at 89.

39. RICHARD M. NIXON, *SIX CRISES* 313 (1962). Conf., *NEWSWEEK*, July 25, 1960, p. 21: "As one of its own, Johnson could save the South for the Democrats by calming fears over civil rights and any furor over Kennedy's Catholicism. As it looks now the ticket should keep the South." See also BOOTH MOONEY, *THE LYNDON JOHNSON STORY* 159 (1964): "[Kennedy] could count electoral votes as well as anyone else, better than most, and his count showed him that he needed assurance that he could carry the South in the November election..." And see THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 208 (1961) in which White relates how Kennedy, on the morning after his nomination in Los Angeles, arranged to meet Lyndon Johnson and how press secretary Salinger and tactician Kenneth O'Donnell were then "put to work on the simple arithmetic of electoral votes: add the votes of New England to the votes of the Solid South, and how many more would be needed to carry the election?"

40. *TIME*, September 4, 1964, p. 21. Similarly, *NEWSWEEK*, September 7, 1964, p. 19, lists the contents of Humphrey's "kit bag of ticket-balancing credentials: a Northern address, a liberal reputation, an intellectual bent, special popularity in the possibly critical Middle West." And see *U.S. NEWS & WORLD REPORT*, March 23, 1964, p. 43-44. The *NEWSWEEK* story also reported the following at p. 19: "I don't know what all the fuss is about," the President [Johnson] told staffer Kenneth O'Donnell at the crest of the wave of Vice Presidential dope stories. "I ain't gonna die in office." . . . John Kennedy had told the same thing to the same staffer at almost the same point in time four years ago."

has been a candidate for re-election, it is reasonable to expect that if a Vice President-just-become-President is empowered to nominate a new Vice President, his motivations will not differ from those of a presidential candidate and that he too will be thinking in terms of a ticket-strengthening running-mate. The argument that the President must have the initiative in a procedure for mid-term vice presidential succession in order that he can insure the continuity of his executive policies is a fallacy for the simple reason that such a power would not be used for such a purpose.

D. Congressional Abnegation

. . . Congress is a body entrusted with making fateful decisions at crucial times. It is Congress that declares war on behalf of us all. The Congress may elect or remove Presidents in certain circumstances. Certainly, the Congress is the proper body—with its hand on the pulse of public opinion—to elect a Vice President upon the nomination of a President.—Senator Birch Bayh, Jr.⁴¹

The above apostrophe to the importance of Congress is the seductive flattery which precedes the kiss of death. Although the confirmation power of Congress is played up, it is the nominating role of the President that almost certainly would be the dominant one. Congress is being asked to transmit to the states the proposal of a highly unusual constitutional doctrine which, if ratified by them, would transfer to the President most of Congress' say in the matter of vice presidential succession.

The Bayh-Celler plan's provision for nomination by the President would wipe out the reform effected at the instigation of President Harry S. Truman by the Presidential Succession Act of 1947⁴² which replaced the Secretary of State with the Speaker of the House as first in the line of succession to the Presidency in the event of vacancies in both that office and the vice presidency. President Truman believed that this arrangement would be a more democratic one because, whereas the Secretary of State is nominated by the President, the Speaker is elected to Congress by the people of his district and to the Speakership by the biennially elected representatives of the people of each of the Con-

41. *Hearings*, *supra* note 2, at 4.

42. 3 U.S.C.A. § 19 (1948).

gressional districts.⁴³ The theory that the initiative in the selection of the next-in-line to the Presidency should remain with the representatives of the people was eloquently stated with reference to the convention process by Adlai Stevenson. Addressing the Democratic National Convention of 1956, he said:

. . . the selection of the Vice Presidential nominee should be made through the free processes of this convention so that the Democratic Party's candidate for this office may join me before the nation—not as one man's selection—but as one chosen by our great party, even as I have been chosen. . . . The choice will be yours. The profit will be the nations.^{43a}

The Bayh-Celler plan's provision for nomination by the President would be a break not only with the spirit of the Truman plan but contrary to the constitutional doctrine almost universally observed among representative governments. In parliamentary regimes which account for the largest number of governments throughout the world, initiative for the selection of a prime minister's successor lies generally with members of the lower chamber. In presidential regimes there may or may not be constitutional provision for a vice president but presidents are not granted constitutional power to nominate an officer who is their next in line of succession. Even in the presidential regimes of French-speaking black Africa—Ivory Coast, Dahomey, Niger, Guinea, Mauritania, Togo and the Central African Republic—which changed constitutions in 1960 in favor of their own versions of Gaullist *presidentialisme* for the purpose of granting a preponderance of governmental power to the executive, presidents are not given the constitutional power to nominate their potential successors.⁴⁴

43. *Hearings*, *supra* note 2, at 58, 257.

43a. The New York Times, August 17, 1956, p. 7. Attention is also called to the view of another Democratic standard bearer. In a well publicized letter to Senator Samuel Jackson of Indiana, permanent Chairman of the Democratic National Convention of 1944, President Franklin D. Roosevelt (after damning Vice President Wallace with faint praise and announcing that, if he were a delegate, he would vote for Wallace for Vice President) wrote "...I do not wish to appear in any way as dictating to the convention. Obviously the convention must do the deciding. And it should—and I am sure it will—give great consideration to the pros and cons of its choice." ROSENMAN, *op. cit. supra* note 30, at 449.

44. DMITRI G. LAVROFF, *LES CONSTITUTIONS AFRICAINES, L'AFRIQUE NOIRE FRANCOPHONE ET MADAGASCAR* 23-29 (Paris, 1961), and J. Y. BRINTON, *CONSTITUTIONS OF THE NEW AFRICAN STATES: A CRITICAL STUDY* 84-86 (Alexandria, 1962).

The Bayh-Celler plan for vice presidential succession was formulated in the face of repeated predictions that to place the nominating initiative in the hands of the President would be virtually to grant him the power to appoint a Vice President. For example:

Senator Birch Bayh of Indiana. I have more faith in the Congress acting in an emergency in the white heat of publicity, with the American people looking on. The last thing Congress would dare to do would be to become involved in a purely political move.

Senator Ross Bass of Tennessee. The election of the President is just as political as anything can be, under our American system . . . Under our system, it must be that way.⁴⁵

Senator Frank Church of Idaho. This [the mere role of ratification] is frequently the role assigned to a legislative body in a country where legislatures do not really have important powers. I cannot conceive of a situation, though one might possibly occur, it is hard to conceive of a situation where the Congress would not almost automatically ratify a Presidential choice, for to do otherwise would be to repudiate a President who has just assumed office . . . Therefore, if the role assigned to the Congress is merely that of ratification, we give to it nothing more than a formality in the kind of situation that you and I could foresee. It is difficult to foresee a situation where this would be otherwise.⁴⁶

Senator A. S. Mike Monroney of Oklahoma. I question one bit of philosophy in the selection of the successor by the

Among the more traditional, tri-partite, check-and-balance presidential systems of the American continents, some countries not only deny a President the formal authority to nominate a successor but have also acted to prevent activity to that end on his part in favor of his close relatives or in-laws. This is accomplished by making such members of the family of an incumbent President ineligible to hold the offices of President (in Bolivia, Costa Rica, Honduras, Peru, El Salvador and Nicaragua) and Vice President (in Bolivia, Costa Rica, Honduras, and Peru). In 1923 the United States announced its "most hearty accord" with the Central American Treaty signed that year in Washington which prohibited the recognition of revolutionary governments which might come to power in Costa Rica, El Salvador, Guatamala, Honduras or Nicaragua or the elected successors to such regimes if headed by an "ascendant, descendant or brother" of one of the leaders of the predecessor revolutionary regime. 1 HACKWORTH'S DIGEST OF INTERNATIONAL LAW 188-190 (1940).

45. 111 CONG. REC. 3193 (daily ed. Feb. 19, 1965).

46. *Hearings*, *supra* note 2, at 81.

nomination of one man, placing in the Supreme line of authority over 180 million Americans one man chosen absolutely by the President by sending the nomination to Congress, and saying, "This is my man. I choose him for my successor."

I feel that this was one of the reasons why Congress wanted to get away from the Cabinet members in designating the line of succession; and get away from having the President or the Vice President choose his successor.⁴⁷

Senator Jacob K. Javits of New York. [W]ith the initiative placed with the President, the Congress would undoubtedly be reluctant in such a crisis to exercise more than the most perfunctory consent process. This would amount to no more than appointment by the President of his successor, the very reason on which President Truman based his request for the 1947 change in the then-existing succession law, under which the Secretary of State appointed by the President would have been the successor.⁴⁸

Senator Kenneth B. Keating of New York. If, as is likely, the President has just assumed office as a former Vice President succeeding a deceased President, congressional confirmation is likely to be meaningless at best and divisive at worst. Meaningless, if the country is in its usual mood of rallying behind the new President, and giving him his way during more or less of a "honeymoon" period, in which case confirmation would be expected as a matter of rote. Or divisive, if the presidential nomination of a potential successor is looked upon by his opposition as an opportunity to make real trouble from the start.⁴⁹

Richard M. Nixon, former Vice President of the United States. Now when a President dies, I would say that the feeling in the country, the immense emotional impact at the death of a President, certainly by assassination and even by normal causes, is such that his successor would probably get broad support even from an opposition Congress.⁵⁰

James C. Kirby, Jr., Associate Professor of Law, Vanderbilt University. If it [Congress] rejected a succession of nom-

47. 110 CONG. REC. 22277 (daily ed. Sept. 28, 1964).

48. *Hearings*, *supra* note 2, at 53.

49. *Hearings*, *id.*, at 28-29.

50. *Hearings*, *id.*, at 249.

inees, it would soon be apparent to an outraged public that individual Members of this congressional majority party were obstructing efficient government by causing a continuation of the vacancy in the Vice Presidency. We could depend upon public opinion to correct this.⁵¹

Clinton Rossiter, Professor of American Institutions, Cornell University. I am assuming for this point that politics, petty politics would be pretty well laid aside but in addition remember that the onus then is placed on the Congress, they can confirm under the system that you and I have agreed on, the President's nomination, but they can't then reject and then put someone else in.

Senator Bayh. There would be—

Mr. Rossiter. Simply the vacancy would continue and the burden would be on Congress for continuing this vacancy, do you see what I mean?⁵²

Lest we forget the nature of the "intense emotional impact" deriving from the potent compound of one President's funeral and his successor's political honeymoon, the following late November 1963 items are presented from a leading newspaper on each coast:

(1) From Herb Caen's columns in the *San Francisco Chronicle*:

BLACK FRIDAY

. . . And so you cried . . . You cried for every stupid joke you had ever listened to about him, and you cried for the fatuous faces of the people who had told them. You cried for the Nation, and the despoilers of it, for the haters and the witch-hunters, the violent, the misbegotten, the deluded. You cried because all the people around you were crying, in their impotence, their frustration, their blind grief.—November 24, 1963.

THE LONGEST WEEKEND

. . . Gray Skies, and the constant gray and black of the TV screen. For the first time, in these unprecedented hours, there was Total Television. You were irresistibly drawn to

51. *Hearings*, *id.*, at 42.

52. *Hearings*, *id.*, at 226.

the screen . . . You were immersed in a fantasy world of honor guards standing at attention in the rain . . . For hour after hour, through the marvel of electronics, we saw the President as though for the first time. His life, compressed onto the small screen, passed before our eyes, and we marveled at his spirit, his warmth, his humor, his brilliance . . . We drew strength from him . . . But the lump in the throat refused to be drowned.—November 25, 1963.

LET US BEGIN

. . . On Friday the Bingo game went on as usual in a local church, and a woman enthused to her best friend the next morning, "I won \$25.00." Her friend replied, "I never want to speak to you again."

. . . It will be hard to shake the memory of the four Senators discussing the new administration before the cameras Sunday, laughing inately, cracking jokes, acting like ward politicians at the lowest level.—November 26, 1963.

(2) From the *Washington Post*

FLAGS FLYING AT HALF STAFF FOR MONTH—November 23, 1963.
PRESS STOPPED ON LASKY BOOK ABOUT KENNEDY

Victor Lasky, author of "JFK: The Man and the Myth," said, "I've cancelled out of everything. As far as I'm concerned Kennedy is no longer subject to criticism on my part." —November 23, 1965.

ONE ON THE AISLE by Richard L. Coe . . .

Yesterday's dastardly crime lay in the atmosphere, unthinking, selfish, wasteful. Around us, every day, we all have heard the talk, small and mean, which created the poisonous air . . . Will this tragedy teach us anything to expiate our meanness . . .?—November 23, 1963.

THE NATION LIVES

. . . All tributes have been tendered except that final tribute that John Fitzgerald Kennedy would have coveted most—the tribute of a people and a government going forward with the tasks he had so far advanced . . .

The people, having made their proper obeisance at catafalque and bier, at altar and temple, now must turn to the

less ceremonial reverence they can pay to a departed leader . . . in commitment to the noble purposes and ideals that were the object of John Fitzgerald Kennedy's lifelong devotion.—November 26, 1963.

TEXTS OF REMARKS GIVEN AT ROTUNDA . . .

Chief Justice Earl Warren. Is it too much to hope that the martyrdom of our beloved President might even soften the hearts of those who would themselves recoil from assassination, but who do not shrink from spreading the venom which kindles thoughts of it in others?—November 25, 1963.

MOURNERS FILL CITY'S CHURCHES TO OVERFLOWING

The Very Reverend Francis B. Sayre, Jr., Dean of the Washington Cathedral. Surely we all do repent that shallow and divisive contentiousness which bred an atmosphere in which some ignorant sharpshooter would one day execute our careless threats.

The Reverend Edward Hughes Pruden of the First Baptist Church. Those with a hand on the trigger include whoever encourages blind and irresponsible partisanship.—November 25, 1963.

At such a time do we need a weaker Congress?

E. Conclusion

The arguments that the Bayh-Celler plan for vice presidential succession is urgently needed do not seem to be justified when it is remembered that:

1) Presidential succession does not depend upon the office of Vice President being filled. Acting pursuant to Article II, section 1 of the United States Constitution, Congress first provided for presidential succession in 1792 and there are, under present legislation, twelve officers in the line of succession after the Vice President.

2) The possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger. Under Article II Congress now has the power to extend the line of succession to include high ranking officials who work outside the Washington area.

3) The contention that the next-in-line to the Presidency must serve as Vice President because that office provides the best ap-

prenticeship for the Presidency is a dubious one in view of the fact that his activities in the executive branch cannot be of a policy-making nature lest the authority of the President be fragmentized.

The argument that the power to nominate a Vice President would be used by a President for the purpose of assuring continuity of executive policies does not square with American political history which demonstrates that a man seeking election or re-election to the Presidency wants a teammate who can strengthen the ticket with groups not too enthusiastic about the presidential nominee.

The argument that the requirement of Congressional confirmation of the President's nomination is a guarantee of an important role for the representatives of the people in the process of vice presidential succession is another weak argument. The President would, in any event, have opportunities for consultation with members of Congress. The addition of a constitutional power to nominate a Vice President would, under the circumstances of the tragic termination of one presidential administration and the honeymoon atmosphere attending the advent of another, tend to reduce the role of Congress in the matter to little more than a formality.

For these reasons it would be undesirable to have the Bayh-Celler plan for Vice Presidential succession incorporated into the Constitution of the United States.