

A 'Leave of Absence' for Mr. Nixon?

Most discussions of the Watergate issue focus on two dramatic outcomes: either impeachment or resignation. As far as I know, public discussion has not focused at all on a possible third way of resolving the existing difficulty — an indefinite "leave of absence" which a President can take on his own initiative under the 25th amendment to the Constitution. This outcome might perhaps be slightly more palatable to Mr. Nixon, and somewhat less difficult to attain, while still resulting in a change of leadership.

The difficulties inherent in an impeachment are, after all, not to be underestimated. Apart from the emotionally and politically divisive process of impeachment itself, the chances of obtaining conviction are still uncertain. It takes only one-third of the senators plus one to block conviction, yet such an "acquittal" would leave the country with a politically and morally discredited President. An impeachment followed by a conviction would result in a presidential change, but only as the consequence of a politically bitter and probably prolonged conflict.

A resignation by the President is the other outcome most often mentioned. The President has pledged not to resign, and his determination, at least at this stage, should not be doubted. After all, he is fighting both for his personal well-being as well as for his place in history, in addition to the constitutional issues that he himself has most frequently cited. The President knows that upon his resignation, as a private citizen, he becomes accessible to a large number of subpoenas and perhaps even to more painful litigation. A resignation thus makes him personally vulnerable, something which he understandably is determined to avoid.

One should also not dismiss the sincerity of his concern with his place in history. President Nixon, like any other President, is aware of the fact that he is now a historical figure, and it is only human that he should be concerned with how history will judge him. A resignation, coming in the wake of the Agnew affair, despite protestations of innocence, could imply to many an admission of guilt. That, coupled with exposure to the personal liability resulting from resignation, makes for a weighty argument on behalf of fight to the bitter end.

It is, therefore, noteworthy that the U.S. Constitution provides a conceivable third way out of the dilemmas mentioned above. The possible solution is to be found in Article XXV, and finally ratified on February 10, 1967. Contained in that Article is a

provision making it possible for the President to become an inactive President, and for the Vice President to become, according to the words of the Constitution "an Acting President," with an explicitly capital A. The wording of the paragraph is as follows :

Whenever the President submits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

To be sure, the original intent of that amendment was to provide for a legitimate and orderly transferral of power in case of a medical disability.

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However, the Constitutional Article itself makes no mention of the medical aspect. In the present circumstances, it is difficult to imagine anyone objecting, or raising a constitutional challenge, should the President himself declare that he is "unable to discharge the powers and duties of his office" because of the controversies, the legal charges, and the constitutional ambiguities surrounding him. On the contrary, the general national, congressional, as well as partisan, response (especially from the Republican candidates for office running in November 1974) would most probably be one of great relief. There would be a national rallying around Acting President Ford, and a sense of gratitude to President Nixon for having taken advantage of this constitutional device.

Moreover, President Nixon could take comfort in the fact that the same article provides for his eventual resumption of office, similarly upon the submission of a written statement to the effect that the disability has been terminated. One would hope, of course, that the President would choose not to exercise that option during the remaining years of his term of office. Moreover, and this is equally important, the same constitutional amendment provides for a procedure for contesting such an effort to return to office if the Acting President and the chief officers

of the government felt that the President remained "unable to discharge the powers and duties of his office."

In the words of the constitutional provision, "the Acting President and the majority of either the principal officers of the executive department or of such other body as Congress may by law provide" could then "transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives a written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within 48 hours for that purpose if not in session. If the Congress, within 21 days after receipt of the latter written declaration, or, if Congress is not in session, within 21 days after Congress is required to assemble, determines by two-third vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office." Again, the latter provision was designed to deal with a possible medical disability, but that restriction would have been mitigated by the precedent established by the President himself in vacating his office temporarily for considerations other than medical.

Additional personal advantages for the President in such an arrangement would be that he would retain the immunities of his office while he is an inactive President, and that he would avoid making even an implied judgment on his own presidency by resignation, leaving it to history to determine whether he was or was not guilty of the charges either currently being aired or yet to be made against him. A crucial element in that eventual historical judgment might well be national gratitude for having so constructively resolved the present impasse.