

8-21-1975

Memorandum for the President on 25th Amendment Provisions

Bobbie Greene Kilberg

Office of White House Counsel

Follow this and additional works at: http://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials



Part of the [Law Commons](#)

Recommended Citation

Greene Kilberg, Bobbie and Office of White House Counsel, "Memorandum for the President on 25th Amendment Provisions" (1975). *Executive Branch Materials*. 1.
http://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/1

This Book is brought to you for free and open access by the Twenty-Fifth Amendment Archive at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Executive Branch Materials by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE WHITE HOUSE
WASHINGTON

August 21, 1975

MEMORANDUM FOR: THE PRESIDENT
THROUGH: RODERICK M. HILLS
FROM: BOBBIE GREENE KILBERG ^{BGK}
SUBJECT: 25th Amendment

25th Amendment Provisions

The 25th Amendment provides for Presidential succession in the case of removal, resignation, or death of a President and stipulates the procedures for determining both the existence of Presidential incapacity and the termination of that state of incapacity.

Section 1 of the Amendment specifies that in the case of the death or resignation of the President or his removal from office, the Vice President shall become President. Section 2 states that if there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who would take office upon being confirmed by a majority vote of both houses of Congress.

Section 3 provides for a Presidential declaration of incapacity. Under this Section, the President transmits a written statement to the President pro tempore of the Senate and the Speaker of the House of Representatives declaring that he is unable to discharge the powers and duties of his office. Upon that action, the Vice President becomes Acting President, discharging the powers and duties of the office of the President, until such time as the President transmits to the President pro tempore of the Senate and the Speaker of the House a written declaration that he has regained his ability to execute the responsibilities of his office. The President then resumes the powers and duties of his office.



Section 4 provides for a situation in which the President either is unable or unwilling to declare his own incapacity. In such a case, the Vice President and a majority of the Secretaries of the Executive Departments, or such other body as Congress may by law provide,^{1/} can transmit to the President pro tempore of the Senate and the Speaker of the House their written declaration that the President is unable to discharge the powers and duties of his office. Upon this occurrence, the Vice President immediately assumes the powers and duties of the office as Acting President. The President can regain his authority by transmitting a written declaration to the President pro tempore and the Speaker of the House that no incapacity exists. He then resumes his powers and duties unless the Vice President and a majority of the Executive Department Secretaries transmit within four days to the President pro tempore of the Senate and the Speaker of the House their written declaration that the President remains unable to discharge the responsibilities of his office. In that event, the Congress must decide the issue, with the requirement that it assemble within 48 hours for that purpose if it is not in session. A decision must be reached within 21 days after receipt of the written declaration or the date of assembly when Congress is not in session. If Congress determines by a two-thirds 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 those duties as Acting President. If the Congress does not vote by two-thirds of each house, the President shall resume the powers and duties of his office.

Implementation of the 25th Amendment

The 25th Amendment was ratified on February 10, 1967. Its provisions have been utilized twice, once upon your nomination and confirmation as Vice President and once upon your succession to the Presidency upon President Nixon's resignation. Despite the fact that the 25th Amendment was in effect during the last two years of Lyndon Johnson's Presidency, there is no record of his modifying the written agreement on incapacity between himself and Vice President Humphrey to reflect the provisions of the Amendment.

^{1/} The Congress has not provided by legislation for any other system.

As a result of President Eisenhower's heart attack in 1955 and his ileitis attack during the start of his second term, the President and Vice President Nixon reached an agreement on the temporary devolution of Presidential authority in the event of an inability rendering the President incapable of exercising the powers and duties of his office. This agreement was in effect during President Eisenhower's stroke in 1957, and its existence was not made publicly known until a written agreement was released in March, 1958.

Following the Eisenhower example, President Kennedy and Vice President Johnson signed an incapacity agreement which was publicly released in August, 1961. President Johnson and Speaker of the House McCormick signed an agreement in December, 1963, and President Johnson and Vice President Humphrey signed an agreement in January, 1965. The Johnson/McCormick agreement was not made public, and the Johnson/Humphrey agreement was not publicly released until the President's gall bladder operation in October, 1965. All the written agreements, attached at Tab A, were identical. President Kennedy, however, in his accompanying press release, specifically stated that he and the Vice President had agreed on the wisdom of Cabinet concurrence in and Attorney General legal support for the incapacity judgment.

The principal difference between the aforementioned agreements and the 25th Amendment is that the agreements made no provision for resolving a dispute between the President and Vice President on the question of incapacity. Rather, as one would expect in any voluntary agreement signed by a President, control over determination of the existence of incapacity rested solely with the President, as long as he could communicate, and control over termination of the incapacity rested solely with the President, even if it was the Vice President who had declared the existence of the incapacity due to the President's inability to communicate at that time.

The pre-25th Amendment agreements were written in order to circumvent Constitutional ambiguity and thus overcome Vice Presidential reluctance to exercise the Presidential power necessary to preserve continuity in executive leadership. There were a number of inadequacies with relying solely on the operation of a personal agreement between a President and Vice President: (1) it only applied to the terms of office of the signatories; (2) it did not carry the force of law and could be challenged; and (3) it

authorized the Vice President to act without the protection of unequivocal Constitutional authority. This uncertainty and the very serious implication of a Vice Presidential assumption of Presidential power were the focus of arguments in favor of a Constitutional amendment.

Since the ratification of the 25th Amendment, there is no record of written agreements between a President and Vice President. None can be found for President Nixon and Vice President Agnew. According to Bill Casselman, there was a verbal agreement on incapacity and succession between you and President Nixon, but it was not committed to writing. There also is no written agreement between you and Vice President Rockefeller.

Issues

There are a number of issues which can be of concern in relation to the 25th Amendment:

(1) Under Section 3, when a President voluntarily declares his own inability to govern, he alone has the power to declare that the inability no longer exists. There is no recourse under the Amendment for the Vice President, the Cabinet Secretaries, or the Congress to block his resumption of power by disagreeing with the termination of that inability.

(2) Under Section 4, when a President is either unable or unwilling to declare his own incapacity, what standards must the Vice President and a majority of the Cabinet Secretaries use to make their determination that the President is unable to discharge the powers and duties of his office? The legislative history of the Amendment does not provide guidance in this area.

(3) Must the incapacity of the President be physical or mental or can it result from outside events, e. g. , a mechanical inability to communicate? The legislative history is not clear on this point. The issue of disability which is neither mental nor physical was only mentioned in passing a few times during the Committee hearings and was never focused on. However, there is nothing to preclude a President and Vice President from voluntarily entering into a written agreement which would include provisions for dealing with a non-mental and non-physical disability.

(4) Under Section 4, Congress has 21 days in which to make a determination on the continuation or termination of Presidential incapacity, if the President did not himself declare the original incapacity and the Vice President and a majority of the Cabinet Secretaries disagree with the President's declaration of an end to his incapacity. Who governs during this period? The legislative history of the Amendment indicates that the Vice President continues to exercise the powers and duties of the office of the President during the 4-day period for transmittal of an objection to resumption of power by the President and during the 21-day period in which Congress must act. However, during both those periods of time, it would be very difficult to avoid a feeling of serious uncertainty and this atmosphere could be debilitating to the exercise of executive leadership.

(5) Under Section 4, if the Congress votes that the Presidential incapacity is continuing, may the President ask for another vote at any time by resubmitting his written declaration that no inability exists? According to the legislative history, the answer would seem to be in the affirmative.

(6) Under Section 4, the Amendment requires a majority vote of the Congress for Vice Presidential confirmation; the vote of the Vice President and a majority of the Cabinet Secretaries to declare Presidential incapacity when the President is unable or unwilling to declare his own incapacity; and the vote of the Vice President and a majority of the Cabinet Secretaries, together with a two-thirds vote of the Congress, to prevent the President, on the grounds of continuing incapacity, from resuming the powers and duties of his office.

Are these votes to be based on the body's total membership or only on those present and voting, a quorum being present? In voting on your confirmation as Vice President, the Congress interpreted a majority vote as requiring a simple majority of those present and voting. In his 1965 testimony before both the House Judiciary Committee and the Senate Judiciary Committee, Subcommittee on Constitutional Amendments, Attorney General Nicholas deB. Katzenbach stated that the votes required by the Amendment were based on those present and voting, a quorum being present. He asserted that this interpretation was consistent with long standing precedent. Both the House and Senate Committee Reports support that view. In specific reference to the two-thirds vote of Congress required under Section 4, both Reports

note that this vote is in conformity with the Constitutional provision on impeachments. That provision provides for a two-thirds vote in the Senate of those members present. Given the legislative history and legal precedents, a challenge to this interpretation would have very little, if any, chance of prevailing.

Presidential/Vice Presidential Written Agreement

A written agreement between you and Vice President Rockefeller might be beneficial for two reasons: (1) to clarify for your own operating procedures the ambiguities raised by some of the provisions of the 25th Amendment; and (2) if you should choose to release the agreement, to educate the public and foreign nations as to the procedures that will be followed to insure continuity of executive leadership during a period of Presidential incapacity. Such an agreement should list the procedures provided for in the Amendment, emphasizing the specific powers of the President, Vice President, Cabinet Secretaries and Congress in relation to incapacity, and should set standards for the Vice President and Cabinet Secretaries to follow pursuant to Section 4 in the event that the President is unable or unwilling to declare his own incapacity. In establishing such standards, the agreement would define, to the extent possible, what constitutes an incapacity. The agreements written prior to the 25th Amendment did not attempt to define incapacity, but they also did not provide for Vice Presidential disagreement with the President over the issue of incapacity. Since the ratification of the 25th Amendment allows for a Vice Presidential and Cabinet Secretarial challenge to the President, it is prudent in our opinion to provide a written Presidential/Vice Presidential agreement on the subject.

Recommendations

It is the recommendation of the Counsel's Office that you and Vice President Rockefeller sign a written agreement on incapacity.

Approve _____

Disapprove _____

Comment _____

If you approve the signing of a written agreement, the Counsel's Office recommends that the following be included in that agreement:

(1) Description of Section 3 of the 25th Amendment which provides that when the President has declared himself incapacitated, the Vice President discharges the duties and powers of the office of the President until such time as the President declares an end to his incapacity. It would be emphasized that in the case of a voluntary incapacity declaration by the President, the President alone has the authority to determine its end and his ability to resume the powers and duties of his office.

Approve _____

Disapprove _____

Comment _____

(2) Description of provisions in Section 4 of the Amendment for action by the Vice President and a majority of the Cabinet Secretaries in the event that the President either is unable or unwilling to declare his own incapacity; and, in such a case, for a challenge by the Vice President and a majority of the Cabinet Secretaries to the President's declaration that his incapacity is terminated and for a two-thirds vote by the Congress on that issue. It would be emphasized that the Vice President assumes the duties and powers of the office of the President immediately upon transmittal to the President pro tempore of the Senate and the Speaker of the House of a written declaration by the Vice President and a majority of the Cabinet Secretaries that the President is unable to discharge his powers and duties. It further would be emphasized that the Vice President would continue to execute all the powers and duties of the office of the President during both the transmittal period and the 21-day period provided for Congressional action.

Approve _____

Disapprove _____

Comment _____

(3) Statement that the President retains the legal right to resubmit at any time his written declaration that no incapacity exists.

Approve _____

Disapprove _____

Comment _____

(4) Establishment of the level of severity which physical or mental illness must attain in order to constitute an inability to govern. This standard and others related to it would define incapacity and would be written after discussions with Dr. Lukash, other medical experts, and the appropriate Presidential advisers.

Approve _____

Disapprove _____

Comment _____

(5) Statement that the definition of incapacity includes disabilities that are neither mental nor physical in nature and provision of a list of examples, such as a mechanical failure of communications with Air Force One for a period of "x" hours. The list would be developed in discussions with the appropriate Presidential advisers and technical experts.

Approve _____

Disapprove _____

Comment _____

It is the recommendation of the Counsel's Office that this written agreement not contain any statement about the method of counting Cabinet Secretarial and Congressional votes, i. e., whether it is based on total membership or on those present and voting, a quorum being present. This question was

settled with sufficient specificity in the legislative history of the Amendment. Its review in the agreement would serve no purpose and would be inappropriate, especially if it was viewed as an encroachment on Congressional procedures.

Approve _____

Disapprove _____

Comment _____

It is the recommendation of the Counsel's Office that you release to the public the written agreement on incapacity between you and Vice President Rockefeller. The release of the agreement would educate the public and foreign nations as to the procedures that would be followed to insure continuity of executive leadership during a period of Presidential incapacity and to insure the return of that leadership to the President at the termination of his incapacity. In doing so, it would help both you and the Vice President to act in a manner that preserved the public trust.

Approve _____

Disapprove _____

Comment _____

Attachments

