12-23-1963

Lyndon B. Johnson-John W. McCormack Letter Agreement

Lyndon B. Johnson

Norbert A. Schlei

United States. Department of Justice. Office of Legal Counsel

United States. President (1963-1969: Johnson)

EXECUTIVE
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THE WHITE HOUSE

WASHINGTON

December 23, 1963

Dear Mr. Speaker: John W. McCormack

Confirming our oral agreement regarding the procedures to be followed in the event of my inability to exercise the powers and duties of the Presidency, I am reducing the agreement to writing and would appreciate your signing the original of this letter and returning it to me for safekeeping in the Presidential files. Enclosed for your use is a signed duplicate original. The terms of the agreement are as follows:

1. In the event of inability, the President would -- if possible -- so inform the Speaker of the House, and the Speaker of the House would serve as Acting President, exercising the powers and duties of the Office until the inability had ended.

2. In the event of an inability which would prevent the President from communicating with the Speaker of the House, the Speaker of the House, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

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Mrs Tevito's sig

4. After being informed by the President of his inability or, in the event of an inability which would prevent the President from communicating with the Speaker of the House, after the latter satisfies himself that such inability exists, the Speaker of the House will resign as Speaker and as Representative in Congress before undertaking to act as President.

Sincerely,

Lyndon B. Johnson

Honorable John W. McCormack
Speaker of the House of Representatives
Washington, D. C.

Agreed: John W. McCormack Date: 12/13/63.

ASSISTANT ATTORNEY GENERAL

Department of Justice

Washington

DEC 4 1963

MEMORANDUM

Re: Agreement Between the President and the Speaker of the House as to Procedures in the Event of Presidential Inability.

The question has been asked whether President Johnson and Speaker of the House McCormack may enter into an understanding on presidential inability similar to the agreements entered into by President Eisenhower and Vice President Nixon on March 3, 1958, 1/ and by the late President Kennedy and then Vice President Johnson on August 10, 1961. 2/ For the reasons set forth hereafter, it is concluded that such an agreement would be consistent with the Constitution and the Presidential Succession Act of 1947 (3 U.S.C. 19), which is set out in full in Appendix 1 hereto.

However, the provisions of the Act require any officer after the Vice President in the line of succession to resign from his office before undertaking to act as President. 3/ The Speaker must resign both "as Speaker and as Representative in Congress" (3 U.S.C. 19(a)(2)). The President pro tempore of the Senate must resign both as such President "and as Senator" (3 U.S.C. 19(b)). Consequently, in the event that the President's inability appears to be of a temporary nature, the Speaker may well hesitate to undertake to act as President. 4/ If he is willing to commit himself in advance to resigning and acting as President, regardless of

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1/ Public Papers of the President, Dwight D. Eisenhower, 1958, p. 196.

2/ Public Papers of the President, John F. Kennedy, 1961, p. 561.

3/ The resignation of a cabinet member in the line of succession is effectuated by taking the oath of office as Acting President. 3 U.S.C. 19(d)(3).

4/ In response to the suggestion that it would be unfair to require the Speaker or the President pro tempore to resign in such circumstances, Senator Wherry, floor

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the expected duration of any Presidential inability to act, an agreement between the President and the Speaker can be made in language identical with the Eisenhower-Nixon and Kennedy-Johnson agreements except for an additional provision to the effect that the Speaker will resign in the event that a Presidential inability to act occurs. Such a proposed memorandum of understanding between the President and the Speaker is attached hereto as Appendix 2.

If the Speaker is unwilling so to commit himself, it may be appropriate to consider entering into a more elaborate agreement between the President, the Speaker, the President

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4/ (Cont'd)
manager of the bill, made two somewhat contradictory arguments. First he contended that any future Speaker will have been put on notice that, as part of the responsibilities of office, he "may be called upon in time of emergency, even for a temporary period, to act as President, and that in order to qualify it will be necessary for him to resign." In the same vein the Senator added:

> ". . .[W]hen any officer of the United States, particularly an elective one, is called upon during an emergency to act as President, there should be no hesitation or doubt on his part as to his duty.
>
> "The honor of being President of the United States, even for a temporary period, is sufficient, but, in addition, there is the duty that everyone holds to serve his country in time of emergency wherever he is called to serve." 93 Cong. Rec. 7711-7712.

However, Senator Wherry also said that if the President suffered from merely a temporary disability the Speaker would probably not resign. "* * * [N]o doubt if the occasion did present itself, it would be in the case of permanent disability or death." Id. 7775. "* * * [T]he result would be that at least in the judgment of the Speaker * * * there would be no doubt about the permanent disability of the person then in Office." Id. 7779.

pro tempore of the Senate and at least the next officer in the line of succession, the Secretary of State, to provide that the latter will act as President in the event of the occurrence of what appears to be only a temporary disability of the President. Before discussing the content of such an agreement, I will discuss briefly the constitutionality and background of the Presidential Succession Act and agreements such as those under consideration.

I

Article II, section 1, clause 6 of the Constitution reads as follows:

> "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of 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."

Pursuant to this provision, Congress enacted the Presidential Succession Act of July 18, 1947 (P.L. 199, 80th Cong., 1st Sess., 3 U.S.C. 19). 5/ When this proposal was before the

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5/ The Presidential Succession Act was enacted by Congress in 1947 in response to a plea by President Truman that the Speaker of the House of Representatives should be first in the order of succession in case of the removal, death, resignation, or inability to act, of both the President and Vice President. President Truman expressed the belief that the Speaker is elected not only in his own district, but also is elected as presiding officer of the House by votes of the representatives of all the people of the country, and therefore "his selection, next to that of the President and Vice President, can most accurately be said to stem from the

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Congress, the then Acting Attorney General, Douglas W. McGregor, expressed the opinion that it was constitutional, and the House Committee on the Judiciary concurred in this conclusion. House Rept. No. 817, 80th Cong., 1st Sess., p. 4 (1947). Apparently Congress in enacting this proposal into law accepted those views as a proper construction of Article II, section 1, clause 6 of the Constitution. Those views seem to me to be clearly correct. 6/

5/ (Cont'd)
people themselves." H. Rept. No. 817, 80th Cong., 1st Sess., p. 3 (1947). In preferring the Speaker as first in line after the Vice President, President Truman gave as reasons that a new House is elected every two years, always at the same time as the President and Vice President, and is usually in agreement politically with the Chief Executive. Id. Therefore it was likely that the views of the Speaker of the House would be in sympathy with the views of a majority of the people. 93 Cong. Rec. 8623, July 10, 1947.

6/ The constitutional problem emphasized during the consideration of the 1947 proposal was whether the Speaker of the House and the President pro tempore were "Officers" within the meaning of Article II, section 1, clause 6 of the Constitution. In concluding that these members of the Congress were such "Officers," the Acting Attorney General and the House Judiciary Committee relied heavily on Lamar v. United States, 241 U.S. 102, 112-113 (1916), and the fact that the succession law of 1792 designated the President pro tempore and the Speaker of the House as successors to the Presidency. "This law [of 1792] represents a construction of Article II by an early Congress, whose views of the Constitution have long been regarded as authoritative, and reflects a long-continued acquiescence in such a construction." H. Rept. 817, supra, p. 4.

The purpose of the Eisenhower-Nixon and Kennedy-Johnson agreements was to preserve continuity of government in the event of Presidential inability by reaching an understanding between the President and the Vice President as to the interpretation and application of Article II, section 1, clause 6 of the Constitution. The agreements, which were identically phrased, were intended to lay at rest three ambiguities in the relationship of the President and the Vice President which had in the past caused Vice Presidents to hesitate to exercise the powers of the President in spite of the latter's actual inability to act. The first of these is whether, upon the occurrence of Presidential inability, the "Office" of the Presidency "devolves" upon the Vice President -- with the consequence that the disabled President becomes permanently ousted -- or whether only "the Powers and Duties" of the office devolve upon the Vice President and return to the President upon the termination of the disability. The second is who has authority to determine whether inability exists, and the third is who determines whether the inability has terminated.

Both the present Attorney General and his two immediate predecessors have reached the conclusions that (1) in the event of Presidential inability the Vice President succeeds only to the former's "Powers and Duties" and that upon the termination of the inability these again vest in the President; (2) that if the President is unable to make the judgment himself, the Vice President is the sole judge of the President's inability; and (3) the President alone has authority to determine when his inability is over. 40 Op. Atty. Gen. No. 5, August 2, 1961.

When there is no Vice President the first question is not present in the relationship between the President and the officer chosen by Congress to act in the event of the President's inability. Article II, section 1, clause 6 clearly provides that such "Officer shall then act as

President" only "until the Disability be removed, or a President shall be elected." Similarly, the Succession Act provides that the officer acting as President shall do so "only until the removal of the disability of one of such individuals [the President or the Vice President]." 3 U.S.C. 19(c)(2). However, neither the Constitution nor the Succession Act specifies who shall determine when a Presidential inability begins and ends. Accordingly, it seems entirely appropriate, until the matter is clarified by constitutional amendment or otherwise, for an agreement dealing with these questions to be entered into between the President and the Speaker of the House or any other officer in the line of succession.

Clearly, nothing in the Constitution or the Succession Act requires a different interpretation as to who shall determine the existence or termination of inability when the Speaker is involved rather than the Vice President. Therefore, except for the reference to the Speaker rather than to the Vice President, an understanding embodying such a commitment by the Speaker could incorporate all of the terms and use language identical to that contained in the Eisenhower-Nixon and Kennedy-Johnson agreements. The proposed agreement which is appended hereto does so.

There is, in my opinion, an additional reason why such an agreement would be appropriate and desirable at the present time. Under the Succession Act, the Speaker of the House is in a different position from that of the Vice President under the Constitution. The Vice President automatically succeeds to the Presidency in the event of the death of the incumbent or to the latter's powers upon the occurrence of inability. As the preceding discussion has indicated, the Speaker may act as President only "upon his resignation as Speaker and as Representative in Congress." Nothing in the Act compels him to resign. Thus, whether he assumes the responsibilities of the Presidency depends upon

his own exercise of choice -- a choice which in some circumstances he may regard as involving a substantial sacrifice upon his part. It is important that both the President and the Nation be assured of the continued existence of executive direction of the Government. If the Speaker will resign and act as President even in the event of temporary inability, it is important that the officers next in line of succession know this. If he will not undertake to do so, it may be appropriate to enter into a different type of agreement involving others in the line of succession. Otherwise, those next in line will be placed in a difficult position with respect to the action they should take if the Speaker, upon the occurrence of Presidential inability, hesitates to act or to make his position clear.7/ For these reasons there has been added to the proposed agreement a provision in which the Speaker agrees to resign as such before undertaking to act as President.

II

It is apparent that the proposed agreement would have unfortunate effects in the event of a Presidential inability of very short duration. The Speaker would be obliged, in order to act as President during such a period, to resign not only as Speaker but as a Member of Congress. In the case of the President pro tempore, resignation from the

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7/ A solution to this problem would not be supplied by 3 U.S.C. 20, which provides that the "only evidence of a refusal to accept . . . the office of President . . . shall be an instrument in writing . . . delivered into the office of the Secretary of State." As noted above, in the case of Presidential inability it is the "powers and duties" of the Presidency which are involved rather than the office itself, and the person who succeeds to those powers and duties becomes "Acting President" rather than "President." See 3 U.S.C. 19.

Senate would be required. Whether this situation can as a practical matter be improved by agreement, in view of the number of personalities that would necessarily be involved and the inherent complexities of the problem, is doubtful. The urgency of the problem is perhaps not as great as it might be in view of the fact that the Nation will be without a Vice President for only a comparatively short period of time. However, I have nevertheless felt obliged to explore from a legal standpoint the possibility of an agreement that would deal more satisfactorily with the problem of a Presidential disability of short duration.

The objectives of such an agreement would seem to be as follows:

(1) To provide an Acting President who, unlike the Speaker and President pro tempore, could serve for a short period without being obliged to resign from an office to which he could return only by reelection. Presumably the Secretary of State, the highest non-elective official in the line of succession, would be the appropriate officer to serve this function.

(2) To insure that the Speaker or, if appropriate, the President pro tempore of the Senate, could assume the powers and duties of the Presidency in the event that the President's inability should endure for longer than expected and require that his powers be exercised by another officer for more than a brief period.

While the practical difficulties presented are substantial, I can perceive no insurmountable legal obstacle to an agreement that would achieve these objectives.

Such an agreement would involve as parties the President, the Speaker of the House, the President pro tempore of the Senate, and the Secretary of State. The agreement would provide that if the President advised the other parties

to the agreement that his inability was likely to endure for a considerable period or, in the event that he were unable so to advise them, the Speaker determined that this was so, the same steps would be followed as provided in the attached agreement, i.e., the Speaker would resign and act as President. If there were no Speaker, the President pro tempore would resign and act as President. 3 U.S.C. 19(c) provides that once the Speaker or the President pro tempore resigns to act as President he cannot be replaced by a newly elected and qualified Speaker. He continues to act until the expiration of the current Presidential term or until the termination of the disability of the President or the Vice President.

The agreement would also provide, however, that if the President advised the other parties to the agreement that his disability was apt to endure for less than a specified period -- perhaps fifteen days or less -- or, in the event that he was unable to advise them, the individual eligible to succeed him (either the Speaker of the House or, if there were none, the President pro tempore) should determine that this was so, neither the Speaker nor the President pro tempore would resign. Rather, they would continue in office and the Secretary of State would act as President. The agreement could provide that the Secretary would act as President for the period of disability or for a specified period after which, if the President's disability continued, the Speaker or President pro tempore would resign and act as President. As in the prior understandings, the parties would agree under all circumstances to accept the President's judgment as to whether his disability has terminated.

The only noteworthy legal problem presented by such an agreement relates to the termination of the Secretary's service in a situation where the President's disability first appears to be temporary, so that the Secretary of

State undertakes to act, but thereafter appears to be permanent or endures for a considerable period of time. Although the answer would not be entirely clear in the absence of some determinative provision in the agreement, it appears that in these circumstances either the Speaker or the President pro tempore, simply by resigning from office, could displace the Secretary as Acting President.

In this connection it should be noted that there is a significant difference between 3 U.S.C. 19(c), which deals with retention of the Acting Presidency by the Speaker and the President pro tempore, and 3 U.S.C. 19(d)(2), which deals with the retention of the office by a cabinet member. The former provision states clearly that the Speaker or President pro tempore, once he undertakes to act, shall continue to do so until the President's disability is removed or the term ends. The latter provision, in contrast, states that a cabinet member shall not continue to act as President "after a qualified and prior-entitled individual [other than another cabinet member] is able to act." It would seem clear that upon resigning from his office in Congress an otherwise qualified Speaker or President pro tempore "is able to act." Conceivably it could be argued that, in context, "able to act" refers only to physical inability. However, in view of the legislative history indicating a clear understanding that the Congressional officers in the line of succession would not be obliged to serve if they did not choose to resign, and in view of the contrastingly clear language of 3 U.S.C. 19(c), I am satisfied that the less limiting interpretation is the correct one.

In any event, the understanding could resolve the problem. For example, it could provide that after it becomes clear that the President's disability is permanent or after a stated period of time has elapsed, the Secretary of State would resign as Acting President unless requested not to do so by the Speaker and President pro tempore. If

the Secretary resigned, it would then be clear beyond argument under the provisions of the Succession Act that the Speaker could succeed him as Acting President. 3 U.S.C. 19(a)(2). The understanding could obligate him to do so. Contrariwise, the agreement could provide that, in order to avoid having four individuals act as President during one term, neither the Speaker nor the President pro tempore would undertake to act as President once the initial determination were made that the President's disability was likely to be of short duration.

The foregoing description of a possible understanding underscores some of the complexities of the situation and possible steps which could be taken to meet them. Other means of meeting them can undoubtedly be developed, and we would, of course, be pleased to explore them further to whatever extent is desired.

Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

Attachments

APPENDIX 1

Presidential Succession Act
(3 U.S.C. 19)

§ 19. Vacancy in offices of both President and Vice President; officers eligible to act.

(a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that --

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the

inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office

of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

APPENDIX 2

"December ___, 1963

"The President and Speaker of the House John W. McCormack have this day agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1 of the Constitution, dealing with presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

"1. In the event of inability, the President would -- if possible -- so inform the Speaker of the House, and the Speaker of the House would serve as Acting President, exercising the powers and duties of the Office until the inability had ended.

"2. In the event of an inability which would prevent the President from communicating with the Speaker of the House, the Speaker of the House, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

"3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

"4. After being informed by the President of his inability or, in the event of an inability which would prevent the President from communicating with the Speaker of the House, after the latter satisfies himself that such inability exists, the Speaker of the House will resign as Speaker and as Representative in Congress before undertaking to act as President."