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# Contingency Plans: Death or Disability of the President

Office of White House Counsel

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**CONTINGENCY PLANS --**

**Death or Disability of the President**

Prepared by the Office of  
the Counsel to the President  
The White House  
March 16, 1993

CONTINGENCY PLANS --

Death or Disability of the President

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\* This section is contained only in the copies of this document retained by the Office of the Counsel to the President.



## DEATH OF THE PRESIDENT

1. Upon the death of the President, the Vice President shall become President. U.S. Const. art. II, § 1, cl. 5; U.S. Const. amend. XXV, § 1. See Appendices 1 & 3.
2. The Vice President should take the oath for the Office of President prescribed by the U.S. Constitution, art. II, § 1, cl. 7, as follows:

"I [, Albert Gore, Jr.,] do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

### Appendix 2.

3. The oath may be administered by any "individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." 5 U.S.C. § 2903(c). See Appendix 6. If the Vice President is away from the country, he simply can swear the oath in the presence of a witness.
4. The Secretary of the Treasury immediately should direct the Secret Service to provide protection to the Speaker of the House of Representatives, and other appropriate individuals, pursuant to 18 U.S.C. § 3056(a).
5. At any time after he takes the oath of Office, President Gore may select and nominate a Vice President who shall take office upon confirmation by a majority of both Houses of Congress. U.S. Const. amend. XXV, § 2.



## TEMPORARY DISABILITY OF THE PRESIDENT

### Threshold Considerations

At any time that the President is, or is about to become, temporarily unable to discharge the powers and duties of his office, consideration must be given to whether or not it is prudent or necessary to transfer temporarily full Presidential authority to the Vice President, pursuant to the 25th Amendment. See Appendix 3. This may be accomplished in two ways:

(1) Pursuant to Section 3 of the 25th Amendment, the President voluntarily may transfer authority. Procedures for such a transfer are outlined at Tab C of this document.

(2) Pursuant to Section 4 of the 25th Amendment, the Vice President and a majority of the Cabinet may transfer authority without the President's consent or even over his objections. Procedures for such a transfer are outlined at Tab D of this document.

The first questions that must be asked in any situation where use of the 25th Amendment is contemplated are as follows:

(1) Is the President conscious and capable of understanding and giving his assent to the temporary transfer of authority to the Vice President;

(2) Is there sufficient time before the President becomes unconscious or unable to understand -- e.g., before he undergoes general anesthesia -- to obtain the President's signature or assent to a written declaration of inability as outlined at Tab C of this Document?

If the answer to either of these questions is "no," Section 3 may not be used. Consideration should turn immediately to the use of Section 4.

If the answer to both of the above questions is "yes" such that Section 3 may be used, a Section 3 transfer of authority is much preferable to a Section 4 transfer. A Section 3 transfer of executive power is a voluntary act by the President that can be countermanded immediately by the President; therefore, it is less legally ambiguous than the Section 4 procedure to restore power to the President.

The decision whether or not to invoke the provisions of the 25th Amendment can, of course, only be made in the context of the circumstances that exist at the time that the President becomes, or is anticipated to become, temporarily disabled. However, certain generalizations can be made and, if time permits, the following paragraphs should be considered:

A. Delegation of Authority. The question of whether or not the procedures of the 25th Amendment should be invoked may well be answered by examining the non-delegable powers and duties of the President. Constitutionally and by statute the President has broad authority to delegate functions vested in him by law. 3 U.S.C. § 301. See Appendix 5. Use of the 25th Amendment procedures might be avoided by delegation of Presidential authority when it is anticipated -- e.g., in the case of elective surgery -- that the President would be unable to discharge the duties of his office for a relatively short period of time. On the other hand, the Constitution and certain statutes impose limits on the President's power to confer his authority on subordinate officials. If, during a period of Presidential inability to discharge the duties of his office, an action must be taken that only can be taken by the President or the Acting President, then obviously one of the 25th Amendment procedures must be invoked. The non-delegable functions of the President are:

1. The power to nominate and appoint the officers of the United States to the extent provided in Article II, § 2, cl. 2 of the Constitution.
2. The power to approve or return legislation pursuant to Art. I, § 7, cl. 2 and 3 of the Constitution, and the power to call Congress into special session or to adjourn it according to Art. II, § 3.
3. The power to make treaties by and with the advice and consent of the Senate. Art. II, § 2, cl. 2. (It should be noted, however, that the power to negotiate treaties and the power to enter into Executive agreements may be delegated. 7 Op. A.G. 443 (1853).)
4. The power to grant pardons.
5. The power to remove purely Executive Presidential appointees.
6. The power to issue Executive orders and proclamations. (The President can, however, delegate the power to issue many orders which cover substantially the same subject matter as Executive orders and proclamations as long as they are not so labeled.)
7. The powers of the President as Commander-in-Chief of the armed forces as provided in Art. II, § 2, cl. 1 of the Constitution. Although the President cannot delegate his ultimate Constitutional responsibilities as Commander-in-Chief, he may make arrangements with his civilian and military subordinates to ensure that the chain of command will function swiftly and effectively in time of crises.



B. Section 3 vs. Section 4. Of the two 25th Amendment procedures by which the Vice President temporarily can assume the powers and duties of the Office of President, the Section 3 procedure is eminently preferable to the Section 4 procedure. Not only would the transfer of authority to the Vice President be justly perceived as a voluntary and conscious decision by the President, but the mechanism by which the President reassumes his authority under Section 3 is very simple.

If the Section 4 procedure is invoked, the President reassumes his powers and duties upon transmittal of his written declaration that no inability continues to exist unless the Vice President and a majority of the Cabinet transmit, within four days, their written declaration to the contrary. The answer to the question of who governs during this four-day period is uncertain, though the more persuasive legal arguments would leave authority in the Vice President until the four-day period had elapsed. See discussion in Appendix 14 at p. 5 and Appendix 15 at p. 4.

Accordingly, any time that it is anticipated that the President will undergo a period of general anesthesia, during which time a decision may have to be made which only can be made by the President, or the Vice President as Acting President, serious consideration should be given to the use of Section 3 of the 25th Amendment.

C. Inability to Govern. Both Section 3 and Section 4 of the 25th Amendment involve a determination that the President is "unable to discharge the powers and duties of his office." The legislative history of the 25th Amendment clearly envisions that this inability to govern might stem from either physical or mental disabilities of the President. The question arises, however, as to whether the incapacity of the President must necessarily be physical or mental or can it result from outside events. For example, what if the President is kidnapped, known to be alive, but held incommunicado? Or what if the President is simply missing as a result of an Air Force One mishap? The legislative history gives no guidance in such situations.

Even in situations less farfetched, once one gets beyond a comatose state, or perhaps massive paralysis, defining inability might prove to be extremely difficult and likely to depend, to a large extent, on the surrounding circumstances. A discussion of prior Presidential disabilities may be found at Appendix 13. Perhaps the best guidance, however, can be found in the House Report which accompanied the 25th Amendment:

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "Constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against

usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of Constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level.

See Appendix 17 at p. 13.

D. Transfer of Authority on July 13, 1985. On July 13, 1985, as former President Ronald W. Reagan was about to go under general anesthesia in connection with surgery to remove a portion of his large intestine, he signed the attached letters. The letters were drafted in such a fashion as to preserve to former President Reagan and future Presidents maximum flexibility in responding to possible brief periods of inability. As noted, the legislative history of the 25th Amendment does not provide a definitive answer to the question whether the drafters intended it to apply to brief periods of inability. Indeed, most of the legislative history discussed considerably more extended examples of Presidential inability, such as President Wilson's illness. The letters signed by then President Reagan indicate his belief that the 25th Amendment was not intended to cover brief periods of inability of the sort encountered on July 13, 1985, in the sense that a transfer of authority was not required or clearly contemplated by the drafters of the Amendment.

The procedures of Section 3 are available at the complete discretion of the President. While a transfer of authority may not have been required or clearly contemplated by the drafters in instances such as former President Reagan's surgery, his Counsel determined that a transfer of authority was appropriate to eliminate any doubts concerning the continuation of the powers of the Presidency. There was some criticism of this procedure in the media, with some critics contending that Section 3 clearly was applicable and should have been clearly invoked. As noted, however, because it is unclear that Section 3 was intended to cover the July 13 situation (surgery), and a simple statement invoking the Amendment under such circumstances would have created a precedent that might have presented problems in the future when Presidents were confronted with similar incapacities but vastly different circumstances, Reagan's Administration elected to follow the above-described procedure. This procedure ensured that there was no lapse in the continuity of Presidential authority, with no doubt as to who was "in charge," while not binding future Presidents in any way. Some seven hours after former President Reagan transferred authority, he signed the attached letters reassuming the powers and duties of the Office.

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. Speaker:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

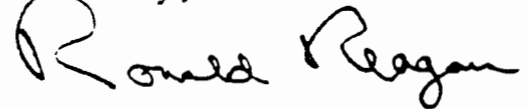
After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all,

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is written in a cursive, flowing style with a large initial "R".

The Honorable Thomas P. O'Neill, Jr.  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. President:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all,

Sincerely,

A handwritten signature in dark ink, reading "Ronald Reagan". The signature is written in a cursive style with a large, prominent "R" at the beginning.

The Honorable Strom Thurmond  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. Speaker:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

The Honorable Thomas P. O'Neill, Jr.  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. President:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

The Honorable Strom Thurmond  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510

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## TEMPORARY DISABILITY OF THE PRESIDENT

### SECTION 3 PROCEDURE

#### The Vice President Becomes Acting President Pursuant to the United States Constitution, Amendment XXV, § 3

If the President is willing and able to do so, he may provide for the temporary assumption of the powers and duties of his office by the Vice President by "transmit[ting] 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. . . ."

Appendix 3.

The following procedure should be used:

- (1) Written Declaration. The President's declaration of disability must be written. If possible, the letters should be typed on Presidential stationery. If circumstances demand, however, the letters may be handwritten on any type of paper.
- (2) Form. The written declaration should consist of two short letters framed in the Constitutional terminology and addressed, respectively, to the President pro tempore of the Senate and the Speaker of the House. Appropriate letters are attached at Appendix 7.
- (3) Signature. The letters should be signed personally by the President if possible, but a reliable manifestation of his understanding and assent would suffice. In cases of any doubt regarding his capacity to understand and assent, the procedure under Section 4 of the 25th Amendment should be used.
- (4) Transmittal. Transmittal of the letters to the President pro tempore and the Speaker is the operative event to effect the transfer of authority to the Vice President. Transfer of authority to the Vice President takes effect immediately when the letters are sent (or placed in the hands of a messenger); it is not delayed until the letters are received by the addressees. Accordingly, there is no need to have the President pro tempore and the Speaker stand ready, at the White House or elsewhere, to receive the letters. See Appendix 12 at p. 3, n. 4.

Documentation of when, where and to whom the letters are sent and receipt of delivery would be prudent.



Transmittal should be made not only to the offices of the addressees, but also to each personally.

(5) Oath. The Vice President is not required to take a new oath. See Appendix 12 at p.1, n. 1.

(6) Status of the Vice President. Pursuant to the above procedure, the Vice President assumes all the Constitutional and statutory powers and duties of the President. He does not, however, become President. Instead, he becomes "Acting President" and should use that designation for all official purposes. In addition, he would continue to exercise the duties of Vice President while he serves as Acting President, although he would apparently lose his title as President of the Senate. See Appendix 12 at p.1, n.1; and p.2 at n. 2.



## TEMPORARY DISABILITY OF THE PRESIDENT

### SECTION 4 PROCEDURE

#### The Vice President Becomes Acting President Pursuant to the United States Constitution, Amendment XXV, § 4

If the President is unable or unwilling to transmit a declaration of his inability to perform his duties, the Vice President and "a majority of the principal officers of the executive departments . . . [may] transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office . . ." Appendix 3. In such an event, the Vice President immediately shall assume the powers and duties of the office as Acting President.

The following procedure should be used:

(1) Consensus of the Cabinet. The Vice President and a "majority of the principal officers of the executive departments of such other body as Congress may by law provide" must agree that the President is unable to discharge his duties. Congress has not designated any "other body" to exercise this authority and the legislative history indicates that the term "principal officers of the executive departments" is intended to mean the Cabinet. Appendix 12 at p.2.

"The Cabinet" traditionally consists of the heads of the fourteen executive departments; however, to avoid any doubt regarding the sufficiency of any given declaration, it would be best to obtain the assent of all executive branch officials with Cabinet rank. Unanimity would be desirable, but if time is of the essence, a simple majority is all that is required.

There is ambiguity as to whether or not "acting" heads of Cabinet departments should participate in the decision. Most of the legislative history and a leading commentator, however, suggest that "acting" heads should participate. See Appendix 12 at p.2, n. 3, and Appendix 16 at p.5.

(2) Written Declaration. The declaration of the President's disability by the Vice President and Cabinet must be written. A single declaration would be preferable, but not necessary. If circumstances require, counterpart declarations would be an adequate alternative. See Appendix 12 at p.3, n. 4.

(3) Form. The written declaration should consist of two short letters framed in the Constitutional language and addressed to the President pro tempore of the Senate and the Speaker of the House. Appropriate letters are attached at Appendix 9.

(4) Signatures. The letters need not be personally signed by the Vice President and a majority of the Cabinet. Clearly, however, their assent to the declaration must be established in a reliable fashion and they must direct that their names be added to the letters. See Appendix 12 at p.3, n. 4. Moreover, as discussed in paragraph 2 above, the Vice President and Cabinet heads may send separate letters if necessary.

(5) Transmittal. Transmittal of the letters to the President pro tempore and the Speaker is the operative event to effect the transfer of authority to the Vice President. Transfer of authority to the Vice President takes effect immediately when the letters are sent (or placed in a messenger's hands); it is not delayed until the letters are received by the addressees. Accordingly, there is no need to have the President pro tempore and Speaker to stand ready, at the White House or elsewhere, to receive the letters.

Documentation of when, where and to whom the letters are sent and receipt of delivery would be prudent. This would be especially true if separate letters are sent by the Vice President and the Cabinet members. If separate letters are sent, transfer of authority to the Vice President would not take effect until the Vice President and a majority of the Cabinet had transmitted letters. See Appendix 12 at p.3, n. 4.

In any event, letters should be sent not only to the offices of the addressees, but also to each personally.

(6) Oath. The Vice President is not required to take a new oath. See Appendix 12 at p.1, n. 1.

(7) Status of the Vice President. Pursuant to the above procedure, the Vice President assumes all the Constitutional and statutory powers and duties of the President. He does not, however, become President. Instead, he becomes "Acting President" and should use that designation for all official purposes. In addition, he would continue to exercise the duties of Vice President while he serves as Acting President, although he would lose his title as President of the Senate. Appendix 12 at p.1, n. 1; and p.2 at n. 2.



## TEMPORARY DISABILITY OF THE PRESIDENT

### Resumption of Authority by the President

Section 3. If the President temporarily transfers his authority to the Vice President pursuant to Section 3 of the 25th Amendment, he resumes his authority by transmitting, to the President pro tempore of the Senate and the Speaker of the House of Representatives, his written declaration that he again is able to discharge the powers and duties of his office. The procedure for transmitting this written declaration would be the same as for the initial transfer of authority to the Vice President as discussed at Tab C of this document. Appropriate letters are attached at Appendix 8.

As with the initial transfer of authority, transmittal of the President's declaration is the operative event, and the President resumes his full powers and duties immediately upon transmittal.

Section 4. In order to resume the full powers and duties of his office after the Vice President has become Acting President pursuant to Section 4 of the 25th Amendment, the President again must transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability continues to exist. Again, this written declaration must be in writing and personally signed by the President. Appropriate letters are attached at Appendix 10.

Unlike the other written declarations, however, it is unclear under Section 4 whether or not transmittal alone is sufficient to restore the full authority of the Presidency in the President. See discussions in Appendix 14 at p.5 and Appendix 15 at p.4.

Section 4 of the 25th Amendment states that the President shall resume the powers and duties of his office "unless" the Vice President and a majority of the Cabinet "transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office." Such an action by the Vice President and a majority of the Cabinet would trigger a 21-day (somewhat longer if Congress is not in session) period during which Congress can, by a two-thirds vote, uphold the Vice President and Cabinet. Should such Congressional action not be forthcoming, the President then would resume his office.

Putting aside the prospect of a disagreement between the President and the Vice President and a majority of the Cabinet as to the President's ability to govern, a situation which also

would raise difficult questions,<sup>1</sup> the question remains as to who governs during the four-day period following the President's declaration that he again is able to perform the duties of his office. One could read the constitutional language to provide either for an immediate but defeasible resumption of authority by the President or to provide for resumption of authority only after the four-day period has elapsed. The legislative history tends to support the latter interpretation. Even so, it would be very difficult to avoid projecting a sense of uncertainty to the American public and foreign governments not familiar with the nuances of the 25th Amendment should the Vice President continue to act as President after the President has declared himself able to govern.

The uncertainty could be diffused by having the Vice President and, if possible, an unanimous Cabinet declare that they have no intention of challenging the President's declaration, but that the Vice President will continue as Acting President pursuant to the Constitution, although he will make no major decisions without first obtaining the approval of the President. Such a statement would have no force in law since clearly the Vice President and a majority of the Cabinet could challenge the President's declaration any time during the four-day period, and there is no requirement that the Acting President consult in any way with the President, though obviously in such a situation the perception of harmony would be invaluable.

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<sup>1</sup> Discussion of procedural problems that would be encountered in such a situation may be found in the memoranda attached at Appendices 12, 14 and 16.





## DEATH OF BOTH THE PRESIDENT AND THE VICE PRESIDENT

1. Upon the deaths of both the President and the Vice President, the Speaker of the House of Representatives shall "act as President." U.S. Const. art. II § 1, cl. 5; 3 U.S.C. § 19(a)(1). See Appendices 1 & 4.
2. The Speaker should take the following oath:

"I[, Thomas S. Foley,] do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help my God."

See Appendix 6.
3. The oath may be administered by any "individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." 5 U.S.C. § 2903(c). See Appendix 6. If the Speaker is away from the country, he simply can swear the oath in the presence of a witness.
4. The taking of the above oath by the Speaker will be held to constitute his resignation as Speaker and as a member of Congress, which is a prerequisite to his assuming the powers and duties of the office of President. 3 U.S.C. § 19(a)(1) & (d)(3).
5. The Speaker does not become President; instead, he becomes "Acting President" for the remainder of the current Presidential term. 3 U.S.C. § 19.
6. The Speaker, as Acting President, will be compensated at the rate of pay provided by law for the President 3 U.S.C. § 19(f).
7. If, upon the deaths of both the President and the Vice President, there is no Speaker of the House, the Acting President would be the President pro tempore of the Senate [Robert C. Byrd] or the appropriate Cabinet officer as provided by 3 U.S.C. § 19(b) & (c).



## VARIOUS OTHER SUCCESSION QUESTIONS

Other possible situations in which Presidential succession questions would arise include the following:

1. Temporary disability of both the President and the Vice President simultaneously;
2. Temporary disability of the President and death of the Vice President;
3. Death of the President and temporary disability of the Vice President;
4. Temporary disability of the President and subsequent disability of the Acting President;
5. Temporary disability of the President and subsequent death of the Acting President.

All five situations raise the same basic question: how to proceed if both the President and the Vice President are unable to function. The answer to this question goes beyond the scope of the 25th Amendment.

Article 2, § 1, cl. 5 of the Constitution states that "Congress may by Law, provide for the Case of Removal, Death, Resignation or Inability, both of the President and the Vice President, declaring what Officer shall then act as President . . .". Pursuant to this section of the Constitution, Congress, in 1948, passed the Succession to the Presidency Act, codified at 3 U.S.C. § 19, which provides that "[i]f, by reason of . . . inability . . . 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 shall . . . act as President . . . until the removal of the disability of one of such individuals."

The answer to the question of who would govern in each of the situations listed above would appear to be, therefore, that the Speaker of the House would "act as President." There are serious difficulties, however, with this seemingly simple answer in that the Act articulates no procedures for the determination of "inability".

In the first two situations enumerated above, a determination of Presidential inability to govern would clearly be necessary before the Speaker could act as President. Whatever procedure is used to make this determination, since the Vice President by reason of his own inability or death could not participate in the decision, the Act necessarily contemplates a determination of Presidential inability that is at odds with the 25th Amendment procedure.

The situations listed at 3, 4 and 5 above are less problematic since the determination of Presidential inability would have been made pursuant to the 25th Amendment, or no such determination would be necessary because the President is dead. Nevertheless, a determination of Vice Presidential inability would be necessary, and again, the Succession to the Presidency Act gives absolutely no guidance as to what procedure should be used to determine Vice Presidential inability.

In the third situation, another question arises pertaining to the status of the disabled Vice President after the death of the President. If the Vice President is unable to recite and understand the oath, does he nevertheless become President by operation of law?

Article II, § 1, cl. 5 of the Constitution states that upon the death of the President, the powers and duties of his office "shall devolve" upon the Vice President. Section 1 of the 25th Amendment states that, upon the death of President, the Vice President "shall become President." On the other hand, Article II, § 1, cl. 7 of the Constitution states that the President must take the oath prescribed therein before "he enters on the Execution of his Office."

An argument can be made, therefore, that the Vice President does become President, but until he takes the oath he cannot exercise Presidential authority. For succession purposes, however, this would mean that in the situation listed at 3 above, determination of Presidential disability would be necessary and would, therefore, raise the same possibilities of conflict with the 25th Amendment as would situations 1 and 2.

Only in the last situation enumerated above -- death of the Vice President after he had become Acting President pursuant to the 25th Amendment -- can the Act be implemented with any degree of certainty. In that situation, the Speaker of the House would become Acting President pursuant to the procedures outlined at Tab F of this document.

As to the first four situations, however, no guidance can be given with any legal certainty. The goal in all four situations would be to have the Speaker act as President. One way in which this goal might be obtained would be to implement procedures which parallel the 25th Amendment. The determination of Presidential and Vice Presidential inability should be made by the Speaker of the House and the Cabinet. They should then transmit their written declaration of inability to the President pro tempore of the Senate and the Majority Leader, and perhaps Minority Leader, of the House. That having been done, the Speaker would become Acting President pursuant to the procedures in 3 U.S.C. § 19.



CONTINGENCY PLANS --

Death or Disability of the President

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**Article II, section 1, clause 5:**

**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.**



Art. II, section 1, clause 7:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."



Amendment XXV:

**Section 1.** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

**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.

**Section 3.** Whenever the President transmits 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.

**Section 4.** Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by 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 the same as Acting President; otherwise, the President shall resume the powers and duties of his office.



(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, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education. \*

(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.

\* Pursuant to Pub.L. 100-S27 (1988) Amendment, the Secretary of Veteran Affairs is concluded as the last agency head in line authority for the Office of the President.





## CHAPTER 4—DELEGATION OF FUNCTIONS

### Sec.

- 301. General authorization to delegate functions; publication of delegations.
- 302. Scope of delegation of functions.
- 303. Definitions.

### Historical Note

Chapter added by Act Oct. 31, 1951, c. 655, § 10, 65 Stat. 712.

**Similar Provisions; Repeal; Saving Clause.** Similar provisions were contained in former chapter 4, comprising former sections 301 to 303 of this title, which was set out here but which was not a part of this title.

Former sections 301 to 303 were derived from Act Aug. 8, 1950, c. 646, §§ 1 to 3, 64 Stat. 419, and were repealed by section 56(j) of Act Oct. 31, 1951. Subsec. (f) of section 56 provided that the repeal should not affect any rights or liabilities existing under such repealed sections on the effective date of such repeal (Oct. 31, 1951).

### § 301. General authorization to delegate functions; publication of delegations

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided*, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

(Added Oct. 31, 1951, c. 655, § 10, 65 Stat. 712.)

### Historical Note

**Transfer of Functions.** All functions vested by law (including reorganization plan) in the Bureau of the Budget or the Director of the Bureau of the Budget were transferred to the President of the United States by section 101 of 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085. Section 102 of 1970 Reorg. Plan. No. 2, redesignated the Bureau of the Budget as the Office of Management and Budget and the Director of the Bureau of the Budget as Director of the

Office of Management and Budget. See Reorganization Plan No. 2 of 1970, set out in Appendix 1 to Title 5, Government Organization and Employees.

**Similar Provisions; Repeal; Saving Clause.** For similar provisions contained in prior law, and saving clause in connection therewith, see note preceding this section.

**Legislative History.** For legislative history and purpose of Act Oct. 31, 1951, see 1951 U.S. Code Cong. Service, p. 2578.

## EXECUTIVE ORDER NO. 10250

June 5, 1951, 16 F.R. 5385, as amended by Ex.Ord. No. 10732, Oct. 10, 1957, 22 F.R. 8135; Ex.Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973

### DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

1. The Secretary of the Interior is hereby designated and empowered to perform the following-described functions of the President without the approval, ratification, or other action of the President:

(a) The authority vested in the President by section 1 of the act of July 10, 1935, ch. 375, 49 Stat. 477 [see sections 19e to 19n of Title 16], to appoint members of the National Park Trust Fund Board.

(b) The authority vested in the President by section 2059 of the Revised Statutes [section 62 of Title 25] to discontinue any Indian agency, or transfer the same, from the place or tribe designated by law to such other place or tribe as the public service may require.

(c) The authority vested in the President by section 6 of the act of May 17, 1882, ch. 163, 22 Stat. 88, as amended [section 63 of Title 25], to consolidate two or more Indian agencies into one, to consolidate one or more Indian tribes, and to abolish such agencies as are thereby rendered unnecessary.

(d) The authority vested in the President by the act of March 1, 1907, ch. 2285, 34 Stat. 1016 [section 140 of Title 25], to divert appropriations made for certain purposes to other uses for the benefit of the several Indian tribes: *Provided*, that the Secretary of the Interior shall make to the Congress reports required in connection with action taken by him under this provision.

(e) The authority vested in the President by section 5 of the act of February 8, 1887, ch. 119, 24 Stat. 389, as amended [section 348 of Title 25], by the act of December 24, 1942, ch. 814, 56 Stat. 1081, [section 348a of Title 25], by the act of June 21, 1906, ch. 3504, 34 Stat. 326 [section 391 of Title 25], and by section 3 of the act of January 12, 1891, 26 Stat. 712, as amended by section 3 of the act of March 2, 1917, ch. 146, 39 Stat. 976, to extend trust periods on land patents issued to Indians and to continue restrictions on alienation.

(f) The authority vested in the President by section 4705(b) of the Internal Revenue Code of 1954 [former section 4705(b) of Title 26] to authorize certain persons in the Virgin Islands to obtain certain drugs for legitimate medical purposes without regard to order forms, and by section 4762(b) of such Code [former section 4762 of Title 26] to provide for the registration of and the imposition of

special and transfer taxes upon persons in the Virgin Islands who import, manufacture, produce, compound, sell, deal in, dispense, prescribe, administer, or give away marihuana: *Provided*, that the Secretary of the Interior shall perform the functions referred to in this subsection in consultation with the Department of the Treasury.

(g) The authority vested in the President by section 2343 of the Revised Statutes [section 46 of Title 30] to establish additional land districts and to appoint necessary officers under existing laws when deemed necessary for the public convenience in executing certain provisions of law with respect to mineral lands and mining.

(h) The authority vested in the President by section 2252 of the Revised Statutes as affected by section 403 of Reorganization Plan No. 3 of 1946, 60 Stat. 1100 [section 121 of Title 43], to order the discontinuance of any land office and the transfer of any of its business and archives to any other land office within the same State or Territory.

(i) The authority vested in the President by section 2250 of the Revised Statutes [section 125 of Title 43] to discontinue a land office in a land district under certain circumstances and to annex the same to some other adjoining land district.

(j) The authority vested in the President by section 2251 of the Revised Statutes [section 126 of Title 43] to change the location of the land offices in the several land districts established by law and to relocate the same from time to time at such point in the district as may be deemed expedient.

(k) The authority vested in the President by section 2253 of the Revised Statutes [section 127 of Title 43] to change and re-establish the boundaries of land districts.

(l) The authority vested in the President by section 2 of the act of March 2, 1917, ch. 145, 39 Stat. 951, as amended [section 737 of Title 48], to approve the payment out of the Treasury for other purposes of money derived from any tax levied or assessed for a special purpose in Puerto Rico.

(m) The authority vested in the President by section 7 of the act of March 2, 1917, ch. 145, 39 Stat. 954; as amended [section 748 of Title 48], to convey to the people of Puerto Rico lands, buildings, or interests in lands, or other property owned by the United States,

and to accept lands, buildings, or other interests or property by legislative grant from Puerto Rico.

(n) The authority vested in the President by section 3(b) of the Act of March 3, 1925, ch. 426, 43 Stat. 1111, as amended [see section 167d of Title 50], to approve regulations governing the production and sale of helium for medical, scientific, and commercial use.

(o) The authority vested in the President by section 6 of the act of April 26, 1906, ch. 1876, 34 Stat. 139, to remove from office the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe or the governor of the Chickasaw tribe, to declare any such office vacant, and to fill any vacancy in any such office arising from removal, disability, or death of the incumbent.

(p) The authority vested in the President by section 28 of the act of April 26, 1906, ch. 1876, 34 Stat. 148, to approve acts, ordinances, or resolutions of the tribal council or legislature of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations, and to approve contracts, involving the payment or expenditure of money or affecting property belonging to any of the said tribes or nations, made by them or any of them or by any officer thereof.

(q) [Superseded by section 3 of Ex.Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, set out as a note under section 715j of Title 15, Commerce and Trade].

(r) The authority vested in the President by section 55 of the act of April 30, 1900, 31 Stat. 150, as amended [section 562 of Title 48] and by section 4 of the act of August 24, 1954, 68 Stat. 785, as amended [former section 562o of Title 48], to approve the issuance of bonds or other instruments of indebtedness by the Territory of Hawaii.

2. The Secretary of the Interior is hereby designated and empowered to perform, without the approval, ratification, or other action of the President, the following functions which have heretofore, under the respective

provisions of law cited, required the approval, ratification, or other action of the President in connection with their performance by the Secretary of the Interior:

(a) The authority vested in the Secretary of the Interior by section 1 of the act of June 6, 1942, ch. 330, 56 Stat. 326 [section 459r of Title 16], to convey or lease to the States or to the political subdivisions thereof any or all of certain recreational demonstration projects and lands and equipment comprised within such projects or any parts of such projects; and to transfer to other Federal agencies any of the said recreational demonstration areas that may be of use to such agencies.

(b) The authority vested in the Secretary of the Interior by section 3 of the act of July 3, 1918, ch. 128, 40 Stat. 755, as amended, and as affected by section 4(f) of Reorganization Plan No. II, effective July 1, 1939, 53 Stat. 1433 [section 704 of Title 16], to promulgate regulations permitting and governing the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any migratory bird included in the terms of certain conventions, or any part, nest, or egg thereof.

3. As used in this order, the term "functions" embraces duties, powers, responsibilities, authority, or discretion, and the term "perform" may be construed to mean "exercise".

4. All actions heretofore taken by the President in respect of the matters affected by this order and in force at the time of the issuance of this order, including regulations prescribed by the President in respect of such matters, shall, except as they may be inconsistent with the provisions of this order, remain in effect until modified or revoked pursuant to the authority conferred by this order.

5. The Secretary of the Interior is hereby authorized to redelegate to the Under Secretary of the Interior any of the authority delegated to the Secretary of the Interior by section 1 of this order.

#### EXECUTIVE ORDER NO. 10289

Sept. 17, 1951, 16 F.R. 9499, as amended by Ex.Ord. No. 10583, Dec. 20, 1954, 19 F.R. 8725; Ex.Ord. No. 10882, July 18, 1960, 25 F.R. 6869; Ex.Ord. No. 11110, June 4, 1963, 28 F.R. 5605; Ex.Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003

#### DELEGATION OF FUNCTIONS TO SECRETARY OF THE TREASURY

1. The Secretary of the Treasury is hereby designated and empowered to perform the following-described functions of the President

without the approval, ratification, or other action of the President:

(a) The authority vested in the President by section 1 of the act of August 1, 1914, c. 223, 38 Stat. 609, 623, as amended [section 2 of Title 19], (1) to rearrange, by consolidation or otherwise, the several customs-collection districts, (2) to discontinue ports of entry by abolishing the same and establishing others in their stead, and (3) to change from time to time the location of the headquarters in any customs-collection district as the needs of the service may require.

(b) The authority vested in the President by section 1 of the Anti-Smuggling Act of August 5, 1935, c. 438, 49 Stat. 517 [section 1701 of Title 19], (1) to find and declare that at any place or within any area on the high seas adjacent to but outside customs waters any vessel or vessels hover or are being kept off the coast of the United States and that, by virtue of the presence of any such vessel or vessels at such place or within such area, the unlawful introduction or removal into or from the United States of any merchandise or person is being, or may be, occasioned, promoted, or threatened, (2) to find and declare that certain waters on the high seas are in such proximity to such vessel or vessels that such unlawful introduction or removal of merchandise or persons may be carried on by or to or from such vessel or vessels, and (3) to find and declare that, within any customs-enforcement area, the circumstances no longer exist which gave rise to the declaration of such area as a customs-enforcement area.

(c) The authority vested in the President by section 2 of the act of August 18, 1914, c. 256, 38 Stat. 699 [section 82 of Title 46], to suspend the provisions of law requiring survey, inspection, and measurement of foreign-built vessels admitted to American registry.

(d) The authority vested in the President by section 5 of the act of May 28, 1908, c. 212, 35 Stat. 425, as amended [section 104 of Title 46], to determine (as a prerequisite to the extension of reciprocal privileges by the Commissioner of Customs) that yachts used and employed exclusively as pleasure vessels and belonging to any resident of the United States are allowed to arrive at and depart from any foreign port and to cruise in the waters of such port without entering or clearing at the custom-house thereof and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes, or charges for cruising licenses.

(e) The authority vested in the President by section 2 of the act of March 24, 1908, c. 96, 35 Stat. 46 [section 134 of Title 46], to name the hospital ships to which section 1 of the said act shall apply and to indicate the

time when the exemptions thereby provided for shall begin and end.

(f) The authority vested in the President by section 4228 of the Revised Statutes, as amended (46 U.S.C. 141), (1) to declare that—upon satisfactory proof being given by the government of any foreign nation that no discriminating duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country—the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, so far as respects the vessels of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country, and (2) to suspend in part the operation of section 4219 of the Revised Statutes, as amended (46 U.S.C. 121), and section IV, J, subsection 1 of the act of October 3, 1913, c. 16, 38 Stat. 195, as amended (46 U.S.C. 146), so that foreign vessels from a country imposing partial discriminating tonnage duties upon American vessels, or partial discriminating import duties upon American merchandise, may enjoy in our ports the identical privileges which the same class of American vessels and merchandise may enjoy in such country: Provided, that prior to the issuance of an order of the Secretary of the Treasury suspending and discontinuing (wholly or in part) discriminating tonnage duties, imposts, and import duties within the United States, the Department of State shall obtain and furnish to the Secretary of the Treasury the proof required by the said section 4228, as amended, as the basis for that order.

(g) The authority vested in the President by section 3639 of the Revised Statutes, as amended [section 521 of Title 31], to regulate and increase the sums for which bonds are, or may be, required by law, but only to the extent that such section affects collectors of customs, comptrollers of customs, and surveyors of customs (and the successors thereof under section 1 of the act of July 5, 1932, c. 430, 47 Stat. 580, 584 [former section 5a of Title 19]).

(h) The authority vested in the President by section 3650 of the Internal Revenue Code [now covered by section 7621 of Title 26], to establish convenient collection districts (for the purpose of assessing, levying, and collecting the taxes provided by the internal revenue

laws), and from time to time to alter such districts.

(i) The authority which is now vested in the President by section 2564(b) of the Internal Revenue Code [section 2564(b) of Title 26 (I.R.C.1939)], and which on and after January 1, 1955, will be vested in the President by section 4735(b) of the Internal Revenue Code of 1954 [section 4735(b) of Title 26 (I.R.C. 1954)], to issue, in accordance with the provisions of the said section 2564(b) or 4735(b), as the case may be, orders providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away narcotic drugs.

(j) The authority vested in the President by paragraph (b) of section 43 of the Act of May 12, 1933, as amended (31 U.S.C. 821(b)) [31 U.S.C.A. § 5301(a) and (b)], to issue silver certificates against any silver bullion, silver, or standard silver dollars in the Treasury not then held for redemption of any outstanding silver certificates, to prescribe the denominations of such silver certificates, and to coin standard silver dollars and subsidiary silver currency for their redemption.

2. The Secretary of the Treasury is hereby designated and empowered to perform without the approval, ratification, or other action of the President the following functions which have heretofore, under the respective provisions of law cited, required the approval of the President in connection with their performance by the Secretary of the Treasury:

(a) The authority vested in the Secretary of the Treasury by section 6 of the act of July 8, 1937, c. 444, 50 Stat. 480 [section 728 of Title 40], to make rules and regulations necessary for the execution of the functions vested in the Secretary of the Treasury by the said act, as amended.

(b), (c) [Revoked by Ex.Ord. No. 11110, June 4, 1963, 28 F.R. 5605.]

(d) [Revoked by Ex.Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003.]

(e) The authority vested in the Secretary of the Treasury by section 1 of Title II of the act of June 15, 1917, c. 30, 40 Stat. 220 [section 191 of Title 50], to make rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the

territorial waters of the United States, exclusive of the territory and waters of the Canal Zone.

(f) The authority vested in the Secretary of the Treasury by section 6 of the act of June 19, 1934, c. 674, 48 Stat. 1178 [section 316b of Title 31], to investigate, regulate, or prohibit, by means of licenses or otherwise, the acquisition, importation, exportation, or transportation of silver and of contracts and other arrangements made with respect thereto, and to require the filing of reports in connection therewith.

3. (a) The Secretary of the Treasury and the Postmaster General are hereby designated and empowered jointly to prescribe without the approval of the President regulations, under section 1 of the act of July 8, 1937, c. 444, 50 Stat. 479 [section 721 of Title 40], governing the shipment of valuables by the executive departments, independent establishments, agencies, wholly-owned corporations, officers, and employees of the United States.

(b) The Postmaster General [now United States Postal Service] is hereby designated and empowered to exercise without the approval, ratification, or other action of the President the authority vested in the President by section 504(b) of Title 18 of the United States Code to approve regulations issued by the Secretary of the Treasury under the authority of the said section 504(b) (relating to the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of postage stamps for philatelic purposes), and to approve any amendment or repeal of any of such regulations by the Secretary of the Treasury.

4. As used in this order, the term "functions" embraces duties, powers, responsibilities, authority, or discretion, and the term "perform" may be construed to mean "exercise".

5. All actions heretofore taken by the President in respect of the matters affected by this order and in force at the time of the issuance of this order, including regulations prescribed by the President in respect of such matters, shall, except as they may be inconsistent with the provisions of this order, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

## EXECUTIVE ORDER NO. 10530

May 10, 1954, 19 F.R. 2709, as amended by Ex.Ord. No. 10573, Oct. 26, 1954, 19 F.R. 6899; Ex.Ord. No. 10682, Oct. 22, 1956, 21 F.R. 8129; Ex.Ord. No. 10759, March 17, 1958, 23 F.R. 1803; Ex.Ord. No. 10790, Nov. 20, 1958, 23 F.R. 9051; Ex.Ord. No. 10836, Sept. 8, 1959, 24 F.R. 7269; Ex.Ord. No. 10852, Nov. 27, 1959, 24 F.R. 9565; Ex.Ord. No. 10889, Oct. 5, 1960, 25 F.R. 9633; Ex.Ord. No. 10903, Jan. 9, 1961, 26 F.R. 217; Ex.Ord. No. 10960, Aug. 21, 1961, 26 F.R. 7823; Ex.Ord. No. 10970, Oct. 27, 1961, 26 F.R. 10149; Ex.Ord. No. 11012, Mar. 27, 1962, 27 F.R. 2983; Ex.Ord. No. 11116, Aug. 5, 1963, 28 F.R. 8075; Ex.Ord. No. 11164, Aug. 1, 1964, 29 F.R. 11257; Ex.Ord. No. 11184, Oct. 13, 1964, 29 F.R. 14155; Ex.Ord. No. 11196, Feb. 2, 1965, 30 F.R. 1171; Ex.Ord. No. 11222, May 8, 1965, 30 F.R. 6469; Ex.Ord. No. 11228, June 14, 1965, 30 F.R. 7739; Ex.Ord. No. 11230, § 2(1), (3), (5) to (14), June 28, 1965, 30 F.R. 8447; Ex.Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055.

### DELEGATION OF MISCELLANEOUS FUNCTIONS

#### PART I. DIRECTOR OF THE BUREAU OF THE BUDGET

[Superseded by Ex.Ord. No. 11230, § 2(1), (3), (5) to (14), June 28, 1965, 30 F.R. 8447]

#### PART II. THE OFFICE OF PERSON- NEL MANAGEMENT

[Superseded by Ex.Ord. No. 11228, § 3(1), (2), (5), June 14, 1965, 30 F.R. 7739]

#### PART III. THE HOUSING AND HOME FINANCE ADMINISTRATOR

[Superseded by Ex.Ord. No. 11196, Feb. 2, 1965, 30 F.R. 1171]

#### PART IV. THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 5. (a) The Federal Communications Commission is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, all authority vested in the President by the act of May 27, 1921, ch. 12, 42 Stat. 8 [sections 34 to 39 of Title 47], including the authority to issue, withhold, or revoke licenses to land or operate submarine cables in the United States: Provided, That no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary. The Commission is authorized and directed to receive all applications for the said licenses.

(b) Executive Order No. 3513 of July 9, 1921, as amended by Executive Order No. 6779 of June 30, 1934, is hereby revoked.

#### PART V. THE ATTORNEY GENERAL AND THE ADMINISTRATOR OF GENERAL SERVICES

Sec. 6. The Attorney General and the Administrator of General Services are hereby designated and empowered jointly to perform the following-described functions without the approval, ratification, or other action of the President:

(a) The authority vested in the President by section 5(a) of the act of July 26, 1935, ch. 417, 49 Stat. 501, as amended [section 1505(a) of Title 44], to determine from time to time the documents or classes of documents having general applicability and legal effect.

(b) The authority vested in the President by sections 6, 11(a), and 11(f) of said act, as amended [sections 1506 and 1510(a), (f) of Title 44], to approve (or disapprove), respectively, (1) regulations, prescribed by the Administrative Committee of the Federal Register, for carrying out the provisions of that act (including the regulations referred to in section 5(b) of the act [section 1505(b) of Title 44], authorizing publication in the FEDERAL REGISTER of certain documents or classes of documents), (2) actions of the Administrative Committee of the Federal Register requiring, from time to time, the preparation and publication in special or supplemental editions of the FEDERAL REGISTER of complete codifications of the documents, described in the said section 11(a) [section 1510(a) of Title 44], of each agency of the Government, and (3) regulations, prescribed by the Administrative Committee of the Federal Register, for carrying out the provisions

of section 11 of the said act [section 1510 of Title 44], as amended.

#### PART VI. GENERAL PROVISIONS

Sec. 7. All actions heretofore taken by the President in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President in respect of such matters, shall, except

as they may be inconsistent with the provisions of this order, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

Sec. 8. As used in this order, the term "functions" embraces duties, powers, responsibilities, authority, or discretion, and the term "perform" may be construed to mean "exercise."

### EXECUTIVE ORDER NO. 10621

July 1, 1955, 20 F.R. 4759, as amended by Ex.Ord. No. 11294, Aug. 4, 1966, 31 F.R. 10601; Ex.Ord. No. 12396, Dec. 9, 1982, 47 F.R. 55897

#### DELEGATION OF FUNCTIONS TO SECRETARY OF DEFENSE

Section 1. The Secretary of Defense, and, as designated by the said Secretary for this purpose, any of the Secretaries, Under Secretaries, and Assistant Secretaries of the military departments, are hereby designated and empowered to perform the following-described functions of the President without the approval, ratification, or other action of the President:

(a) The authority vested in the President by the act of March 3, 1901, c. 852, 31 Stat. 1107, 1133 [see sections 5941 and 7291 of Title 10, Armed Forces], to establish and modify, as the needs of the service may require, a classification of vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons.

(b) The authority vested in the President by the act of August 22, 1912, c. 335, 37 Stat. 328, 331 [see sections 509 and 1171 of Title 10, Armed Forces], to approve regulations of the Secretary of the Navy under which any enlisted man may be discharged within three months before the expiration of the term of his enlistment, and under which an enlisted man may voluntarily extend the term of his enlistment.

(c) The authority vested in the President by the act of May 22, 1928, c. 688, 45 Stat. 712 [see section 6152 of Title 10, Armed Forces] to approve regulations governing the advancement of public funds to naval personnel when required to meet expenses of officers and men detailed on emergency shore duty.

(d) The authority vested in the President by the act of June 22, 1938, c. 567, 52 Stat. 839, as amended [see sections 5083, 5133, 5148, 5201 of Title 10], section 201(a) of the act of August 25, 1941, c. 409, 55 Stat. 680 [see sections 5063, 5064 of Title 10], section 3 of the act of December 28, 1945, c. 604, 59 Stat. 666, as amended [see section 5138 of

Title 10], section 2 of the act of August 1, 1946, c. 727, 60 Stat. 779 [see section 5150 of Title 10], and section 7(a) of the act of March 5, 1948, c. 98, 62 Stat. 68 [see Department of Defense Reorganization Order set out as a note under former section 5111 of Title 10], to authorize, in his discretion, for any officer of the Regular Navy or Marine Corps who retires while serving as Chief of Naval Operations, as Chief of a Bureau of the Navy Department, as Judge Advocate General of the Navy, as Commandant of the Marine Corps, as Director of Budgets and Reports, as Chief of the Dental Division, as Chief of Naval Research, or as Chief of Naval Material, or while serving in a lower rank if he has previously served in any of such offices two and one-half years or more, retirement in the highest grade or rank in which he so served and with retired pay based on that rank.

(e) The authority vested in the President by the act of June 15, 1940, c. 374, 54 Stat. 400, to prescribe from time to time the number of warrant and commissioned warrant officers for the Marine Corps.

(f) The authority vested in the President by the act of June 24, 1941, c. 231, 55 Stat. 260 [see section 7306 of Title 10, Armed Forces], to approve the use for experimental purposes of vessels of the United States Navy stricken from the Navy Register pursuant to the act of August 5, 1882, 22 Stat. 296, as amended [see section 7304 of Title 10, Armed Forces].

(g), (h) [Revoked by Ex.Ord. No. 12396, Dec. 9, 1982, 47 F.R. 55897].

(i) The authority vested in the President by section 302 of the act of June 22, 1944, c. 268, 58 Stat. 287 [see section 1554 of Title 10], to approve or disapprove the proceedings and decisions of boards of review established under that section by the Secretary of the Army, the Secretary of the Air Force, or the



Secretary of the Navy, and to issue orders in such cases.

(j) to (n) [Revoked by Ex.Ord. No. 12396, Dec. 9, 1982, 47 F.R. 55897].

(o) The authority vested in the President by section 3 of the Travel Expense Act of 1949, 63 Stat. 166, as amended (5 U.S.C. 836) [see sections 2105, 5701, 5702, 5707 of Title 5], to establish maximum rates of per diem allowances for civilian officers and employees of the Government to the extent that such authority pertains to travel status in localities in Alaska, Hawaii, the Commonwealth of Puerto Rico, the Canal Zone, and possessions of the United States.

**Sec. 2.** The Secretary of Defense, and, as designated by the said Secretary for this purpose, the Deputy Secretary of Defense and any of the Assistant Secretaries of Defense, are hereby designated and empowered to perform the following-described functions of the President without the approval, ratification, or other action of the President:

(a) The authority vested in the President by section 1547 of the Revised Statutes of the United States [see section 6011 of Title 10,

Armed Forces] to approve alterations made by the Secretary of the Navy in Navy Regulations.

(b) The authority vested in the President by section 1 of the act of April 9, 1906, c. 1370, 34 Stat. 104 [see section 6961 of Title 10, Armed Forces], to approve the dismissal by the Secretary of the Navy of a midshipman from the United States Naval Academy.

**Sec. 3.** All actions heretofore taken by the President with respect to the matters affected by this order and in force and effect at the time of the issuance of this order, including any regulations prescribed or approved by the President with respect to such matters, shall, except as they may be inconsistent with the provisions of this order, remain in force and effect until amended, modified, or revoked pursuant to the authority conferred by this order.

**Sec. 4.** As used in this order, the term "functions" includes duties, powers, responsibilities, authority, and discretion, and the term "perform" may be construed to mean "exercise".

## EXECUTIVE ORDER NO. 10637

Sept. 19, 1955, 20 F.R. 7025

### DELEGATION OF FUNCTIONS TO SECRETARY OF THE TREASURY

**Section 1.** The Secretary of the Treasury is hereby designated and empowered to perform the following-described functions without the approval, ratification, or other action of the President:

(a) The authority vested in the President by section 149 of title 14 of the United States Code, in his discretion, to detail officers and enlisted men of the Coast Guard to assist foreign governments in matters concerning which the Coast Guard may be of assistance.

(b) The authority vested in the President by section 229 of title 14 of the United States Code to revoke the commission of any officer on the active list of the Coast Guard who, at the date of such revocation, has had less than three years of continuous service as a commissioned officer in the Coast Guard, and to prescribe regulations relating to such revocations.

(c) The authority vested in the President by section 232 of title 14 of the United States Code, in his discretion, to retire from active service any commissioned officer of the Coast Guard, upon his own application, who has completed twenty years of active service in the Coast Guard, Navy, Army, Air Force, or

Marine Corps, or the Reserve Components thereof.

(d) The authority vested in the President by section 235 of title 14 of the United States Code [see section 251 et seq. of Title 14], to retire, to approve the retirement of, to place out of line of promotion, and to approve the placing out of line of promotion of, officers of the Coast Guard.

(e) The authority vested in the President by section 492 of title 14 of the United States Code to present a distinguished service medal (including incidental items) to any person who, while serving in any capacity with the Coast Guard, distinguishes himself by exceptionally meritorious service to the Government in a duty of great responsibility.

(f) The authority vested in the President by section 493 of title 14 of the United States Code to present the Coast Guard medal (including incidental items) to any person who, while serving in any capacity with the Coast Guard, distinguishes himself by heroism not involving actual conflict with an enemy.

(g) The authority vested in the President by section 494 of title 14 of the United States Code to award emblems, insignia, rosettes, and other devices, to the extent that such

authority relates to the awarding of such items to be worn with the distinguished service medal or the Coast Guard medal.

(h) The authority vested in the President by section 498 of title 14 of the United States Code to make posthumous awards of decorations and to designate representatives to receive such awards, to the extent that such authority relates to the awarding of the distinguished service medal or the Coast Guard medal, or ribbons, emblems, insignia, rosettes, or other devices corresponding thereto.

(i) The authority vested in the President by section 499 of title 14 of the United States Code to make rules, regulations, and orders to the extent that they shall relate to the authority described in sections 1(f), 1(g), and 1(h) above.

(j) The authority vested in the President by the first paragraph of section 806 of the act of September 8, 1916, ch. 463, 39 Stat. 799 [section 77 of Title 15], to direct the detention of any vessel, American or foreign, by withholding clearance or by formal notice forbidding departure; but such authority shall be exercised by the Secretary of the Treasury only upon a finding by the President that there is reasonable ground to believe that the vessel concerned is making or giving undue or unreasonable preference or advantage to any party, or is subjecting any party to undue or unreasonable prejudice, disadvantage, injury, or discrimination, as described in the said paragraph; and the authority so vested to revoke, modify, or renew any such direction.

(k) The authority vested in the President by the second paragraph of the said section 806 of the act of September 8, 1916 [section 77 of Title 15], to withhold clearance from one or more vessels of a belligerent country or government until such belligerent shall restore to American vessels and American citizens reciprocal liberty of commerce and equal facilities for trade, and the authority to direct that similar privileges and facilities, if any, enjoyed by vessels and citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent; but such authority shall not, in either instance, be exercised by the Secretary of the Treasury with respect to any vessel or citizen of such belligerent unless and until the President proclaims that the belligerent nation concerned is denying privileges and facilities to American vessels as described in the said paragraph.

(l) The authority vested in the President by section 963(a) of title 18 of the United States Code to detain, in accordance with the provi-

sions of such section, any armed vessel, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, and to determine, in each case, whether the proof required by such section is satisfactory.

(m) The authority vested in the President by section 967(a) of title 18 of the United States Code, during a war in which the United States is a neutral nation, to withhold clearance from or to any vessel, domestic or foreign, or, by service of formal notice upon the owner, master, or person in command or in charge of any domestic vessel not required to secure clearances, and to forbid its departure from port or from the United States, whenever there is reasonable cause to believe that such vessel is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations.

(n) The authority vested in the President by section 10(a) of the act of November 4, 1939, ch. 2, 54 Stat. 9 [section 450(a) of Title 22], to require the owner, master, or person in command of a vessel to give a bond to the United States, as prescribed by the said section 10(a).

(o) The authority vested in the President by section 10(b) of the act of November 4, 1939, ch. 2, 54 Stat. 9 [section 450(b) of Title 22], to prohibit the departure of a vessel from a port of the United States, in accordance with the provisions of the said section 10(b).

(p) The authority vested in the President by section 2 of the act of August 18, 1914, ch. 256, 38 Stat. 699 [section 236 of Title 46], to suspend, in his discretion, by order, so far and for such length of time as he may deem desirable, the provisions of law prescribing that all watch officers of vessels of the United States registered for foreign trade shall be citizens of the United States.

(q) The authority vested in the President by section 2 of the act of October 17, 1940, ch. 896, 54 Stat. 1201 [section 643b of Title 46], to extend, whenever in his judgment the national interest requires, the provisions of subsection (b) of section 4551. Revised Statutes, as amended [section 643(b) of Title 46], to such additional class or classes of vessels and to such waters as he may designate.

(r) The authority vested in the Secretary of the Treasury by the first paragraph of section 1 of Title II of the act of June 15, 1917, ch. 30, 40 Stat. 220, as amended [section 191 of Title 50], during a national emergency proclaimed as provided in the said paragraph, (1) to make rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, and (2) to take full possession and control of such vessel for the purposes set forth in the said paragraph.

(s) The authority vested in the President by section 6 of the act of July 24, 1941, ch. 320, 55 Stat. 604, as amended [see note set out under section 5501 of Title 10, Armed Forces], to make appointments of officers below flag rank without the advice and consent of the Senate, to the extent that such authority relates, pursuant to section 11(b) of the said act, as amended [see section 5787 of Title 10, Armed Forces], to officers of the United States Coast Guard.

**Sec. 2.** The Secretary of the Treasury is hereby designated and empowered to perform without the approval, ratification, or other action of the President the following described functions to the extent that they relate to the United States Coast Guard:

(a) The authority vested in the President by Article 4(a) of the Uniform Code of Military Justice (section 1 of the act of May 5, 1950, ch. 169, 64 Stat. 110) [see section 804 of Title 10, Armed Forces], to convene a general court-martial to try any dismissed officer, upon application by the officer concerned for trial by court-martial.

(b) The authority vested in the President by Articles 4(c) and 75 of the Uniform Code of Military Justice (64 Stat. 110, 132) [see sections 804 and 875 of Title 10, Armed Forces], to reappoint a discharged officer to such commissioned rank and precedence as the former officer would have attained had he not been dismissed, and to direct the extent to which any such reappointment shall affect the promotion status of other officers.

(c) The authority vested in the President by section 10 of the act of May 5, 1950, ch. 169, 64 Stat. 146 [see sections 1161 and 6408 of Title 10, Armed Forces], to drop from the rolls any officer who has been absent without authority from his place of duty for a period of three months or more, or who, having been

found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

(d) The authority vested in the President by section 219 of the Armed Forces Reserve Act, approved July 9, 1952 (66 Stat. 487) [see section 593 of Title 10, Armed Forces], to make appointments of Reserves in commissioned grades below flag officer grades.

(e) The authority vested in the President by section 221 of the said Armed Forces Reserve Act [see section 593 of Title 10, Armed Forces], to determine the tenure in office of commissioned officers of the reserve.

(f) The authority vested in the President by section 248 of the said Armed Forces Reserve Act [see section 1162 of Title 10, Armed Forces], to effect the discharge of commissioned officers of the reserve.

(g) The authority vested in the President by section 6 of the act of February 21, 1946, ch. 34, 60 Stat. 27 [see section 6323 of Title 10, Armed Forces], as made applicable to the Coast Guard Reserve by section 755(a) of title 14 of the United States Code, in his discretion, to place upon the retired list any officer of the Coast Guard Reserve, upon his own application, who has completed more than twenty years of active service as described in the said section 6.

**Sec. 3.** All actions heretofore taken by the President with respect to the matters affected by this order and in force at the time of issuance of this order, including any regulations prescribed or approved by the President with respect to such matters, shall, except as they may be inconsistent with the provisions of this order, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

**Sec. 4.** As used in this order, the term "functions" embraces duties, powers, responsibilities, authority, or discretion, and the term "perform" may be construed to mean "exercise".

**Sec. 5.** Whenever the entire Coast Guard operates as a service in the Navy, the references to the Secretary of the Treasury in the introductory portions of sections 1 and 2 of this order shall be deemed to be references to the Secretary of the Navy.

DWIGHT D. EISENHOWER

## EXECUTIVE ORDER NO. 10661

Feb. 27, 1956, 21 F.R. 1315

### DELEGATION OF FUNCTIONS TO SECRETARY OF DEFENSE AND SECRETARY OF COMMERCE

**Section 1.** The Secretary of Defense, and, when designated by the Secretary of Defense for such purpose, the Secretary of the Army are hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority vested in the President by the first section of the act of June 26, 1946, ch. 493, 60 Stat. 311, as amended [see sections 4344 and 9344 of Title 10, Armed Forces] to designate persons from the American Republics (other than the United States) and Canada who may be permitted to receive instruction at the United States Military Academy at West Point, New York.

**Sec. 2.** The Secretary of Defense, and, when designated by the Secretary of Defense for such purpose, the Secretary of the Navy are hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the following-described authority to designate persons who may be permitted to receive instruction at the United States Naval Academy at Annapolis, Maryland:

(a) The authority vested in the President by the act of July 14, 1941, ch. 292, 55 Stat. 589, as amended [see section 6957 of Title 10, Armed Forces], with respect to persons from the American Republics (other than the United States) and Canada.

(b) The authority vested in the President by the act of June 24, 1948, ch. 616, 62 Stat. 583 [see section 6957 of Title 10, Armed Forces], with respect to Filipinos.

**Sec. 3.** The Secretary of Defense, and, when designated by the Secretary of Defense for such purpose, the Secretary of the Air Force are hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority vested in the President by the first section of the said act of June 26, 1946, as made applicable to the United States Air Force Academy by section 5 of the act of April 1, 1954, ch. 127, 68 Stat. 48 [see section 9344 of Title 10, Armed Forces], to designate persons from the American Republics (other than the United States) and Canada who may be permitted to receive instruction at the United States Air Force Academy.

**Sec. 4.** The Secretary of Commerce is hereby designated and empowered to exercise without the approval, ratification, or other action of the President, the authority vested in the President by the act of August 9, 1946, ch. 928, 60 Stat. 961 [section 1126b of Title 46], to designate persons from the American Republics (other than the United States) who may be permitted to receive instruction in the United States Merchant Marine Cadet Corps and at the United States Merchant Marine Academy at Kings Point, New York.

**Sec. 5.** No person shall be designated under the authority of this order to receive instruction except after consultation by the designating officer with the Secretary of State.

DWIGHT D. EISENHOWER

## EXECUTIVE ORDER NO. 10950

June 27, 1961, 26 F.R. 5787

### DELEGATION OF FUNCTIONS TO SECRETARY OF INTERIOR

By virtue of the authority vested in me by section 6(b) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339) [set out as a note preceding former section 21 of Title 48, Territories and Insular Possessions], and as President of the United States, I hereby designate the Secretary of the Interior as my representative to exercise the authority vested in me by section 6(b) of the act to approve selections of land made by the State of Alaska under the provisions of section 6(b) in instances in which those selections include land lying north and west of the line described in section 10(b) of the act: Provided, that no selection

by the State shall be approved pursuant to this order, in whole or in part, without the concurrence of the Secretary of Defense or his designated representative.

As the Secretary of the Interior may direct, the Under Secretary of the Interior, an Assistant Secretary of the Interior, the Director of the Bureau of Land Management, or the Operations Supervisors of the Bureau of Land Management in Alaska are severally authorized to exercise the authority vested in the Secretary by this order.

JOHN F. KENNEDY

## EXECUTIVE ORDER NO. 11012

Mar. 28, 1962, 27 F.R. 2983, as amended by Ex.Ord. No. 11230,  
June 28, 1965, 30 F.R. 8447.

### DELEGATION OF FUNCTIONS TO ADMINISTRATOR OF GENERAL SERVICES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

**Section 1.** [Superseded by Ex.Ord. No. 11230, § 2(11), June 28, 1965, 30 F.R. 8447]

**Sec. 2.** The Administrator of General Services is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1(b) of the Act of August 2, 1946, ch. 744, 60 Stat. 807 (5 U.S.C. 73b-1(b)) [see section 5724 of Title 5, Government Organization and Employees], as pertains to the establishment of the rates to be used in reimbursing civilian officers or employees of the Government on a commuted basis in lieu of the payment of actual expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of their household goods and personal effects in the case of transfers from one official station to another within the continental United States for permanent duty.

**Sec. 3.** The initial regulations to be issued by the Director of the Bureau of the Budget and by the Administrator of General Services under the authority delegated to each of them by this order shall be effective on the same date and effective as of that date the following-described Executive orders are revoked:

(a) Executive Order No. 9778 of September 10, 1946.

(b) Executive Order No. 9805 of November 25, 1946.

(c) Executive Order No. 9933 of February 27, 1948.

(d) Executive Order No. 9997 of September 8, 1948.

(e) Executive Order No. 10069 of July 14, 1949.

(f) Executive Order No. 10177 of October 27, 1950.

(g) Executive Order No. 10196 of December 20, 1950.

(h) Executive Order No. 10274 of July 18, 1951.

(i) Executive Order No. 10381 of August 6, 1952.

(j) Executive Order No. 10507 of December 10, 1953.

**Sec. 4.** Existing regulations prescribed by the Director of the Bureau of the Budget under the authority of Section 1(b) of Executive Order No. 10530, as amended and in effect immediately prior to the issuance of this order, shall remain in effect until they are superseded in pursuance of the provisions of this order.

JOHN F. KENNEDY

## EXECUTIVE ORDER NO. 11023

May 29, 1962, 27 F.R. 5131

### DELEGATION OF FUNCTIONS TO SECRETARY OF COMMERCE

By virtue of the authority vested in me by section 301 of title 3 [this section] of the United States Code, and as President of the United States, it is ordered as follows:

**Section 1.** The Secretary of Commerce is hereby designated and empowered to perform the following described functions without the approval, ratification, or other action of the President:

(a) The authority contained in section 6(b) of the Coast and Geodetic Survey Commissioned Officers Act of 1948 (62 Stat. 298; 33 U.S.C. 853e(b)) [section 853e(b) of Title 33, Navigation and Navigable Waters] to revoke the commissions of ensigns of the Coast and

Geodetic Survey who are found not fully qualified and to separate such ensigns from the commissioned service.

(b) The authority vested in the President by section 12(a) of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853j-1(a)) [section 853j-1(a) of Title 33], to make temporary appointments in the grade of ensign in the Coast and Geodetic Survey.

(c) The authority vested in the President by section 12(b) of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853j-1(b)) [section 853j-1(b) of Title 33], to

temporarily promote officers in the permanent grade of ensign in the Coast and Geodetic Survey, and to appoint such officers to the grade of lieutenant junior grade whenever vacancies exist in higher grades.

(d) The authority vested in the President by section 12(c) of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853j-1(c)) [section 853j-1(c) of Title 33], to temporarily promote any officer one grade.

(e) The authority vested in the President by section 13(b) of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853k(b)) [section 853k(b) of Title 33], to defer the retirement of an officer of the Coast and Geodetic Survey serving in a rank above that of captain who has attained the age of sixty-two years.

(f) The authority vested in the President by section 14 of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853l) [section 853l of Title 33], to retire from the active service any commissioned officer of the Coast and Geodetic Survey, upon his own application, who has completed twenty years of active service in the Coast and Geodetic Survey.

(g) The authority vested in the President by section 23(a) of the Coast and Geodetic Survey Commissioned Officers Act of 1948, as amended (75 Stat. 506; 33 U.S.C. 853t(a)) [section 853t(a) of Title 33], (1) to find that any officer appointed under section 23 is not qualified for service, (2) to revoke the commissions of officers in respect of whom such findings are made, and (3) to prescribe the regulations referred to in that section.

(h) The authority contained in section 1(1) of the Act of December 3, 1942 (56 Stat. 1038; 33 U.S.C. 854a-1(1)) [section 854a-1(1) of Title 33], to temporarily promote to higher ranks or grades, upon recommendation of the Secretary of the military department concerned, commissioned officers of the Coast and Geodetic Survey transferred to the military departments.

(i) The authority contained in section 1(2) of the Act of December 3, 1942 (56 Stat. 1038; 33 U.S.C. 854a-1(2)), [section 854a-1(2) of Title 33] to temporarily promote commissioned officers of the Coast and Geodetic Survey to fill vacancies in ranks and grades caused by transfer of commissioned officers to the service and jurisdiction of the military departments.

(j) The authority contained in section 1(3) of the Act of December 3, 1942 (56 Stat. 1038; 33 U.S.C. 854a-1(3)) [section 854a-1(3) of Title 33] to temporarily appoint

deck officers and junior engineers to the grade of ensign to fill vacancies caused by transfer of officers to the military departments.

(k) The authority vested in the President by section 16 of the Act of May 22, 1917 (40 Stat. 87; 33 U.S.C. 855) [section 855 of Title 33], to transfer to service and jurisdiction of the Department of Defense, as he may deem to be to the best interest of the country, vessels, equipment, stations, and personnel of the Coast and Geodetic Survey; but the Secretary of Commerce may effect such transfers only during the existence of a state of national emergency proclaimed by the President. Commissioned officers so transferred shall serve under their commissions in the Coast and Geodetic Survey and while so serving shall constitute a part of the active armed forces of the United States and shall be under the direct orders of, and shall be subject to the applicable laws, regulations, and orders for the government of, the armed forces to which they are transferred, respectively. The Secretary of Commerce may return such vessels, equipment, stations, and personnel to the jurisdiction of the Department of Commerce, but in time of national emergency such return shall be effected only with the concurrence of the Secretary of Defense.

(l) The authority vested in the President by section 8 of the Act of August 6, 1947 (61 Stat. 788; 33 U.S.C. 883h) [section 883h of Title 33] to employ public vessels, and to give instructions for regulating their conduct, to carry out the provisions of the Act of August 6, 1947; but the employment by the Secretary of Commerce of vessels, except those of the Department of Commerce or of any subordinate entity thereof, shall require the concurrence of the head of the department or other executive agency having custody or control of the vessel.

Sec. 2. Upon receipt by Secretary of Commerce from the President or from the President's representative of information showing that the Senate has confirmed nominees of the President for appointment as commissioned officers of the Coast and Geodetic Survey, and without any further action on the part of the President, (1) the Secretary of the Commerce or an officer of the Department of Commerce designated by the Secretary may, upon completion of statutory requirements for such appointments, tender offers of appointment to the nominees and upon acceptance such persons shall be deemed to be appointed accordingly, (2) the Secretary of Commerce, in the name of the President, shall issue to each such person a commission evidencing the appointment of such person accordingly, and (3) the commissions of such

persons shall be deemed to have been signed by the President. The effective date specified in any commission so issued shall be deemed, for all purposes, to be the date of the appointment evidenced by such commission.

**Sec. 3.** In connection with making appointments or promotions under authority delegated to him by subsections (b), (c), (d), (h), (i), and (j) of section 1 of this order, the Secretary of Commerce shall issue to each person appointed or promoted by him thereunder a certificate evidencing the appointment or promotion of such person. Such certificate may be issued in the name of the President.

**Sec. 4.** Any requirement of any provision of law that commissions of officers under the direction and control of the Secretary of Commerce be signed by the President before the seal of the Department of Commerce may be affixed thereto shall, in the case of officers appointed under the procedure set forth in section 2 of this order and in the case of officers appointed or promoted under authority delegated by subsections (b), (c), (d), (h), (i), and (j) of section 1 of this order, be deemed to be satisfied by signature of the commission or certificate by the Secretary of Commerce, before the departmental seal is affixed thereto.

**Sec. 5.** The Secretary of Commerce is hereby authorized to accept, in the name of the President, the resignation of a commis-

sioned officer, either permanent or temporary, of the Coast and Geodetic Survey.

**Sec. 6.** The authority delegated by the provisions of subsections (b), (c), (d), (h), (i), and (j) of section 1 of this order shall be deemed to include the authority to terminate any appointment or promotion made under the provisions of law referred to in those subsections.

**Sec. 7.** All actions heretofore taken by the President with respect to the matters affected by this order and in force at the time of issuance of this order, including any regulations prescribed or approved by the President with respect to such matters shall, except as they may be inconsistent with the provisions of this order, remain in effect until amended, modified or revoked pursuant to the authority conferred by this order. The following are hereby superseded: (1) Letter of the President to the Secretary of Commerce, dated April 23, 1929, and relating to the general subject of section 2 of this order, and (2) letter of the Secretary to the President, dated July 1, 1919, and directed to the Secretary of Commerce, relating to the general subject of section 5 of this order.

**Sec. 8.** As used in this order the term "functions" embraces duties, powers, responsibilities, authority or discretion, and the term "perform" may be construed to mean "exercise".

JOHN F. KENNEDY

## EXECUTIVE ORDER NO. 11110

June 5, 1963, 28 F.R. 5605

### AMENDMENT OF EXECUTIVE ORDER NO. 10289, RELATING TO PERFORMANCE OF CERTAIN FUNCTIONS OF DEPARTMENT OF THE TREASURY

By virtue of the authority vested in me by section 301 of title 3 of the United States Code [this section], it is ordered as follows:

**Section 1.** Executive Order No. 10289 of September 19, 1951, as amended [set out as a note under this section], is hereby further amended—

(a) By adding at the end of paragraph 1 thereof the following subparagraph (j):

"(j) The authority vested in the President by paragraph (b) of section 43 of the Act of May 12, 1933, as amended (31 U.S.C. 821(b)) [section 821(b) of Title 31, Money and Finance], to issue silver certificates against any silver bullion, silver, or standard silver dollars in the Treasury not then held for redemption

of any outstanding silver certificates, to prescribe the denominations of such silver certificates, and to coin standard silver dollars and subsidiary silver currency for their redemption," and

(b) By revoking subparagraphs (b) and (c) of paragraph 2 thereof.

**Sec. 2.** The amendments made by this Order shall not affect any act done, or any right accruing or accrued or any suit or proceeding had or commenced in any civil or criminal cause prior to the date of this Order but all such liabilities shall continue and may be enforced as if said amendments had not been made.

JOHN F. KENNEDY





## SUBCHAPTER I—COMMISSIONS, OATHS, AND RECORDS

### § 2901. Commission of an officer

The President may make out and deliver, after adjournment of the Senate, the commission of an officer whose appointment has been confirmed by the Senate.

### § 2902. Commission; where recorded

(a) Except as provided by subsections (b) and (c) of this section, the Secretary of State shall make out and record, and affix the seal of the United States to, the commission of an officer appointed by the President. The seal of the United States may not be affixed to the commission before the commission has been signed by the President.

(b) The commission of an officer in the civil service or uniformed services under the control of the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Defense, the Secretary of a military department, the Secretary of the Interior, or the Secretary of the Treasury shall be made out and recorded in the department in which he is to serve under the seal of that department. The departmental seal may not be affixed to the commission before the commission has been signed by the President.

(c) The commissions of judicial officers and United States attorneys and marshals, appointed by the President, by and with the advice and consent of the Senate, and other commissions which before August 8, 1888, were prepared at the Department of State on the requisition of the Attorney General, shall be made out and recorded in the Department of Justice under the seal of that department and countersigned by the Attorney General. The departmental seal may not be affixed to the commission before the commission has been signed by the President.

### § 2903. Oath; authority to administer

(a) The oath of office required by section 3331 of this title may be administered by an individual authorized by the laws of the United States or local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered.

(b) An employee of an Executive agency designated in writing by the head of the Executive agency, or the Secretary of a military department with respect to an employee of his department, may administer—

(1) the oath of office required by section 3331 of this title, incident to entrance into the executive branch; or

(2) any other oath required by law in connection with employment in the executive branch.

(c) An oath authorized or required under the laws of the United States may be administered by—

(1) the Vice President; or

(2) an individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered.

### § 2904. Oath; administered without fees

An employee of an Executive agency who is authorized to administer the oath of office required by section 3331 of this title, or any other oath required by law in connection with employment in the executive branch, may not charge or receive a fee or pay for administering the oath.

#### **§ 2905. Oath; renewal**

(a) An employee of an Executive agency or an individual employed by the government of the District of Columbia who, on original appointment, subscribed to the oath of office required by section 3331 of this title is not required to renew the oath because of a change in status so long as his service is continuous in the agency in which he is employed, unless, in the opinion of the head of the Executive agency, the Secretary of a military department with respect to an employee of his department, or the Commissioners of the District of Columbia, the public interest so requires.

(b) An individual who, on appointment as an employee of a House of Congress, subscribed to the oath of office required by section 3331 of this title is not required to renew the oath so long as his service as an employee of that House of Congress is continuous.

#### **§ 2906. Oath; custody**

The oath of office taken by an individual under section 3331 of this title shall be delivered by him to, and preserved by, the House of Congress, agency, or court to which the office pertains.



THE WHITE HOUSE

WASHINGTON

Dear Mr. Speaker:

In accordance with the provisions of § 3 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am presently unable to discharge the powers and duties of the Office of President of the United States. Pursuant to those provisions, the Vice President, Albert Gore, Jr., shall discharge those powers and duties as Acting President during the period of my disability.

Sincerely,

The Honorable Thomas S. Foley  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

Dear Mr. President:

In accordance with the provisions of § 3 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am presently unable to discharge the powers and duties of the Office of President of the United States. Pursuant to those provisions, the Vice President, Albert Gore, Jr., shall discharge those powers and duties as Acting President during the period of my disability.

Sincerely,

The Honorable Robert C. Byrd  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510



THE WHITE HOUSE

WASHINGTON

Dear Mr. Speaker:

In accordance with the provisions of § 3 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am able to discharge the powers and duties of the Office of President of the United States.

Sincerely,

The Honorable Thomas S. Foley  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

Dear Mr. President:

In accordance with the provisions of § 3 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am able to discharge the powers and duties of the Office of President of the United States.

Sincerely,

The Honorable Robert C. Byrd  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510





## WASHINGTON

In accordance with the provisions of § 4 of the Twenty-Fifth Amendment to the United States Constitution, we hereby transmit to you our written declaration that the President of the United States, William J. Clinton, is presently unable to discharge the powers and duties of his office. Pursuant to these provisions, the Vice President, Albert Gore, Jr., shall discharge those powers and duties as Acting President.

Albert Gore, Jr.

The Honorable Thomas S. Foley  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

## WASHINGTON

WASHINGTON

Dear Mr. President:

In accordance with the provisions of § 4 of the Twenty-Fifth Amendment to the United States Constitution, we hereby transmit to you our written declaration that the President of the United States, William J. Clinton, is presently unable to discharge the powers and duties of his office. Pursuant to these provisions, the Vice President, Albert Gore, Jr., shall discharge those powers and duties as Acting President.

Sincerely,

Albert Gore, Jr.

The Honorable Robert C. Byrd  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510



THE WHITE HOUSE

WASHINGTON

Dear Mr. Speaker:

In accordance with the provisions of § 4 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am able to discharge the powers and duties of the Office of President of the United States and that I am resuming those powers and duties.

Sincerely,

The Honorable Thomas S. Foley  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

Dear Mr. President:

In accordance with the provisions of § 4 of the Twenty-Fifth Amendment to the United States Constitution, I hereby transmit to you my written declaration that I am able to discharge the powers and duties of the Office of President of the United States and that I am resuming those powers and duties.

Sincerely,

The Honorable Robert C. Byrd  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510



The Honorable Robert C. Byrd  
President pro tempore  
of the Senate  
Washington, D.C. 20510

Dear Mr. President:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity.

Not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President Albert Gore, Jr., shall discharge those powers and duties in my stead commending with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this office.

Sincerely,

---

William J. Clinton



The Honorable Thomas S. Foley  
Speaker of the  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity.

Not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President Albert Gore, Jr., shall discharge those powers and duties in my stead commending with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this office.

Sincerely,

---

William J. Clinton



The Honorable Robert C. Byrd  
President pro tempore  
of the Senate  
Washington, D.C. 20510

Dear Mr. President:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,

The Honorable Thomas S. Foley  
Speaker of the  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

Following up on my letter to you of this date,  
please be advised I am able to resume the  
discharge of the Constitutional powers and  
duties of the Office of the President of the  
United States. I have informed the Vice  
President of my determination and my resumption  
of those powers and duties.

Sincerely,





3 APR 1981

ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

DISABILITY OF THE PRESIDENT AND SUCCESSION TO HIS DUTIES

PURSUANT TO THE PROVISIONS OF ART. II, SEC. 1, CL. 5, OF THE CONSTITUTION, IN CASE OF THE "INABILITY" OF THE PRESIDENT "TO DISCHARGE THE POWERS AND DUTIES OF [HIS] OFFICE," THOSE POWERS SHALL DEVOLVE ON THE VICE PRESIDENT. [THE FULL TEXT OF THIS PROVISION IS ATTACHED HERETO AS APPENDIX 1.]

PURSUANT TO THE PROVISIONS OF SECTION 1 OF THE 25TH AMENDMENT, "IN CASE OF THE REMOVAL OF THE PRESIDENT FROM OFFICE OR OF HIS DEATH OR RESIGNATION, THE VICE PRESIDENT SHALL BECOME PRESIDENT." [THE FULL TEXT OF THE 25TH AMENDMENT IS ATTACHED HERETO AS APPENDIX 2].

PURSUANT TO SECTION 3 OF THE 25TH AMENDMENT, "WHENEVER THE PRESIDENT TRANSMITS 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." [THE PROVISIONS OF SECTION 3 HAVE NEVER BEEN IMPLEMENTED.]

PURSUANT TO SECTION 4 OF THE 25TH AMENDMENT, "WHENEVER THE VICE PRESIDENT AND A MAJORITY OF EITHER THE PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS OR OF SUCH OTHER BODY AS CONGRESS MAY BY LAW PROVIDE, TRANSMIT TO THE PRESIDENT PRO TEMPORE OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES THEIR WRITTEN DECLARATION THAT THE PRESIDENT IS UNABLE TO DISCHARGE THE POWERS AND DUTIES OF HIS OFFICE, THE VICE PRESIDENT SHALL IMMEDIATELY ASSUME THE POWERS AND DUTIES OF THE OFFICE AS ACTING PRESIDENT." [THE PROVISIONS OF SECTION 4 HAVE NEVER BEEN IMPLEMENTED.] CONGRESS HAS NOT DESIGNATED ANY "OTHER BODY" TO EXERCISE THE AUTHORITY SPECIFIED IN SECTION 4. THEREFORE, THE OPERABLE LANGUAGE WOULD BE "THE VICE PRESIDENT AND A MAJORITY OF . . . THE PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS."

IF THE POWERS AND DUTIES OF THE PRESIDENCY ARE ASSUMED BY THE VICE PRESIDENT UNDER SECTION 3, THE PRESIDENT RESUMES HIS FULL POWERS BY TRANSMITTING A DECLARATION THAT HE IS ABLE TO DISCHARGE HIS DUTIES. THE SAME IS TRUE UNDER SECTION 4, EXCEPT THAT IN SUCH A CASE A MECHANISM IS PROVIDED FOR THE VICE PRESIDENT, THE CABINET AND THE CONGRESS TO OVERRIDE THE PRESIDENT. IN CASE OF SUCH A DISAGREEMENT OVER THE PRESIDENT'S DISABILITY UNDER SECTION 4, THE VICE PRESIDENT REMAINS ACTING PRESIDENT UNTIL THE ISSUE IS RESOLVED.

SECTION 19 OF TITLE 3 OF THE U.S. CODE [THE FULL TEXT OF WHICH IS ATTACHED AS APPENDIX 3] SETS FORTH THE STATUTORY LINE OF SUCCESSION FOR THE DEVOLUTION OF PRESIDENTIAL POWERS AFTER THE VICE PRESIDENT, AS AUTHORIZED BY ART. II, SEC. 1, CL. 5. THE STATUTE PROVIDES THAT THE SPECIFIED ORDER OF SUCCESSION APPLIES UPON DEATH, RESIGNATION, REMOVAL FROM OFFICE OR "INABILITY" OF AN INDIVIDUAL ACTING AS PRESIDENT. SECTION 19 SPECIFIES THAT THE "POWERS AND DUTIES OF THE OFFICE OF THE PRESIDENT", IF THERE IS NO VICE PRESIDENT ABLE TO DISCHARGE THEM, DEVOLVE FIRST UPON THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, THEN UPON THE PRESIDENT PRO TEMPORE OF THE SENATE, THEN (IN THE ORDER SPECIFIED) UPON THE SECRETARY OF STATE, SECRETARY OF TREASURY, SECRETARY OF DEFENSE, ATTORNEY GENERAL, SECRETARY OF INTERIOR, SECRETARY OF AGRICULTURE, SECRETARY OF COMMERCE, SECRETARY OF LABOR, SECRETARY OF HEALTH AND HUMAN SERVICES, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, SECRETARY OF TRANSPORTATION, SECRETARY OF ENERGY, AND SECRETARY OF EDUCATION.

The following additional considerations may be important in certain circumstances:

1. The Vice President does not have to take a new oath of office upon assuming the powers and duties of the President in the case of a President's inability to act. The Vice President assumes only the powers and duties of the President and the designation "Acting President" in these circumstances and does not become



President. The legislative history of the 25th Amendment and the actual language of the Amendment support this conclusion. The answer seems to be different and more complex in the case of the subsequent officers in the line of succession. Title 3, Section 19, treats the Legislative Branch successors somewhat differently than those in the Executive Branch. The technicalities of succession to temporary presidential authority are not considered herein beyond the Vice Presidential level.

2. The written declarations of disability and recovery specified in sections 3 and 4 of the 25th Amendment may consist of short letters framed in the constitutional terminology.
3. The phrase the "principal officers of the Executive Departments" in the 25th Amendment includes only those Cabinet members specified in Title 3, Section 19. Other "cabinet-level" officials might arguably be embraced but the far stronger position is that they are not.
4. The "transmittal" of the declarations contemplated by the 25th Amendment is the operative event to effect the transfer of authority rather than the receipt of the declaration by the addressees. Arguments in favor of the latter circumstance as the operative event are

not persuasive. Transmittal should be made both to the offices of the addressees and to them personally.

5. A single declaration with all the necessary signatures would not appear to be necessary under Section 4 of the 25th Amendment. While this would be the preferable course if all signatures were available, counterpart declarations would be an adequate alternative.
6. Under Section 4, actual physical signatures on the declarations would not appear to be necessary if, for example, the critical official was out of town or on board an aircraft. He could authorize another to affix his name. The imperatives of the situation would govern the approach taken, but if a prompt transfer of authority is necessary, the fastest genuine expression of endorsement would be appropriate.
7. Under Section 3, a voluntary Presidential declaration of disability should be signed personally by him if possible but a reliable manifestation of his understanding and assent should suffice. In cases of doubt regarding his capacity to understand and assent, the section 4 procedure should be used.

Theodore B. Olson





ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

3 APR 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Presidential Succession and Delegation in Cases  
of Disability

As a result of the recent assassination attempt on President Reagan, this Office has researched several issues that relate to presidential succession and the delegation of presidential power in the event of a temporary disability of the President. This memorandum sets forth our conclusions on the relevant legal issues.

I. Presidential Succession

The Twenty-Fifth Amendment to the United States Constitution establishes a mechanism for presidential succession in the event that the President becomes unable to perform his constitutional duties. Succession may take place in two ways. First, if the President is able and willing to do so, he may provide for the temporary assumption of the powers and duties of his office by the Vice President by "transmit[ting] to the President pro tempore of the Senate and the Speaker of the House his written declaration that he is unable to discharge the powers and duties of the President." See U.S. Const., Amend. XXV, § 3. When the President transmits such a declaration, his powers and duties devolve upon the Vice President as Acting President <sup>1/</sup> until the President transmits an additional written declaration stating that he has become able to perform his responsibilities.

<sup>1/</sup> There appears to be no requirement that the Vice President resign from his position as Vice President or take the President's oath of office to serve as "Acting President." As a general rule, an official who is "acting" in a certain capacity need not vacate the office previously held or take the oath of office ordinarily taken by the person whose duties he has temporarily assumed. This conclusion is supported by Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 215, 232 (1965); Hearings on Presidential Inability and Vice Presidential Vacancy Before the House Comm. on the Judiciary, 89th Cong., 1st Sess. 87 (1965). See also J. Ferrick, The Twenty-Fifth Amendment 199 (1976). The rule as to resignation and/or taking the President's oath appears to be different for those officials further down the line of succession. See 3 U.S.C. § 19. This memorandum does not address the issues involved in the devolution of powers beyond the position of Vice President.

Second, if the President is unable or unwilling to transmit a declaration of his inability to perform his duties, the Vice President will become Acting President 2/ if the Vice President and a majority of the "principal officers of the executive departments" transmit to the President pro tempore of the Senate and the Speaker of the House a written declaration that the President is unable to discharge the powers and duties of his office. See U.S. Const., Amend. XXV, § 4. The term "principal officers of the executive departments" is intended to mean "the Cabinet," although the term "Cabinet" has no precise legal definition. 3/

2/ The Vice President will evidently continue to exercise the duties of Vice President while he serves as Acting President. The Vice President would, however, lose his title as President of the Senate. See 111 Cong. Rec. 3270 (1965) (Sen. Saltonstall); J. Ferrick, The Twenty-Fifth Amendment 199 (1965).

3/ See S. Rep. No. 66, 89th Cong., 1st Sess. 3 (1966). We believe that the "principal officers of the Executive departments," for purposes of the Twenty-Fifth Amendment, include the Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, and Secretary of Education. That conclusion is supported by the legislative history. See 111 Cong. Rec. 7938 (1965) (Rep. Waggoner); id. at 7941 (Rep. Poff); id. at 7944-45 (Rep. Webster); id. at 7952, 7954 (Rep. Gilbert). See also J. Ferrick, supra, at 202-203. See also 5 U.S.C. 101. As a practical matter, and in order to avoid any doubt regarding the sufficiency of any given declaration, it would be desirable to obtain the assent of a sufficient number of officials to satisfy any definition of the term "principal officers of the executive departments."

There is some indication that acting heads of departments may participate in the presidential disability determination. Although the legislative history is conflicting, the House Judiciary Committee's report supports this conclusion, see H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1966), as do the Senate debates, see 111 Cong. Rec. 15380 (June 30, 1965) (Sen. Kennedy); id. at 12385 (July 6, 1965) (Sen. Javits); and a leading commentator on the Amendment reaches the same conclusion. See J. Ferrick, The Twenty-Fifth Amendment 203 (1976). Contra, 111 Cong. Rec. 3284 (Feb. 19, 1965) (Rep. Hart). The contrary view proceeds on the assumption that such a decision should be made only by persons whom the President personally selected for his Cabinet. Such persons are presumably intimately familiar with the President and are of relatively equal status with the other decisionmakers.

We have prepared drafts of appropriate declarations that might be utilized by the President or the appropriate officers pursuant to the provisions of sections 3 or 4 of the Twenty-Fifth Amendment. Copies of those drafts are attached.

If, during the period in which the Vice President is Acting President, pursuant to the provisions of Section 4 of the Twenty-Fifth Amendment, the President submits to the President pro tempore of the Senate and the Speaker of the House a written declaration that no inability exists, he will resume the powers of his office unless, within four days, the Vice President and a majority of the Cabinet heads transmit an additional written declaration stating that the President is unable to discharge his powers and duties. At that point, Congress must decide the issue within specified time limits. See U.S. Const., Amend. XXV, cl. 4. 4/

4/ Under the Amendment, we believe that there is no requirement that the requisite written declarations of disability be personally signed by the Vice President and a majority of the heads of executive departments. The only requirements are that their assent to the declaration be established in a reliable fashion and that they direct that their names be added to the document. Moreover, the Vice President and the Cabinet heads may send separate declarations if necessary. See Hearings on Presidential Inability and Vice Presidential Vacancy Before the House Comm. on the Judiciary, 89th Cong., 1st Sess. 79-80 (1965). Finally, we believe that under both sections 3 and 4 of the Amendment, the transfer of authority to the Vice President takes effect "immediately" when the declaration is transmitted or sent, and is not delayed until receipt of the document by the President pro tempore of the Senate and the Speaker of the House. Although the question is not free from doubt, the language and the history of the Amendment tend to support this conclusion. See S. Rep. No. 66, 89th Cong., 1st Sess. 12 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 13 (1965). But see H.R. Rep. No. 564, 89th Cong., 1st Sess. 3 (Statement of Managers on the Part of the House to the effect that "after receipt of the President's written declaration of his inability . . . such powers and duties would then be discharged by the Vice President as Acting President"). The better construction would allow the devolution of powers "immediately" (the word used in section 4 of the Twenty-Fifth Amendment) upon transmittal. No meaningful purpose would be served by awaiting the arrival of the document. The alternative construction allows a more rapid transition of presidential power when the national interests require it.

\* See S. Rep. 66, p. 12 - *immediate transfer in writing of presidential powers upon receipt of document, the VP becomes Acting President*  
H.R. Rep. 203, p. 13, *both*  
it appears in the language

## II. Presidential Delegation

Under circumstances in which it is not considered necessary or appropriate to invoke the provisions of the Twenty-Fifth Amendment, it may nonetheless be desirable for the President to delegate certain powers to other officials, including the Vice President. Under statute, see 3 U.S.C. § 3011, and under the Constitution, see Myers v. United States, 272 U.S. 52, 117 (1926), the President has broad authority to delegate functions vested in him by law. At the same time the Constitution and certain statutory provisions impose limits on the President's power to confer his authority on subordinate officials. The nature and extent of those limits are considered in this section.

### A. Constitutional Limitations on the President's Power to Delegate his Functions.

As early as 1855, Attorney General Cushing articulated the general rule that the functions vested in the President by the Constitution are not delegable and must be performed by him. 7 Op. A.G. 453, 464-65 (1853). The Attorney General opined:

Thus it may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States, not another man, the Attorney General or anybody else, by delegation of the President.

So he, and he alone, is the supreme commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President.

So he appoints and removes ambassadors and other officers of the United States, in the cases and

with the qualifications indicated by the Constitution.

So he approves or disapproves of bills which have passed both Houses of Congress: that is a personal act of the President, like the vote of a Senator or a Representative in Congress, not capable of performance by a Head of Department or any other person.

A study prepared by this Office in the 1950's reaches the same conclusions. This study and our research suggest that the following are nondelegable functions of the President:

1. The power to nominate and appoint the officers of the United States to the extent provided in Article II, § 2, cl. 2 of the Constitution.
2. The power to approve or return legislation pursuant to Art. I, § 7, cl. 2 and 3, and the power to call Congress into special session or to adjourn it according to Article II, § 3.
3. The power to make treaties by and with the advice and consent of the Senate. Article II, § 2, cl. 2. It should be noted, however, that the power to negotiate treaties and the power to enter into Executive agreements may be delegated. See 7 Op. A.G., supra, at 465.
4. The power to grant pardons.
5. The power to remove purely executive Presidential appointees. This power is vested in the President as an incident of his appointment power. Myers v. United States, 272 U.S. 52, 119 (1926).
6. The power to issue Executive Orders. Only the President can issue formal Executive orders and Proclamations. He can, however, delegate the power to issue many orders which cover substantially the same subject matter as Executive orders and Proclamations as long as they are not so named.
7. The powers of the President as Commander-in-Chief of the Army and Navy. Article II, § 2, cl. 1. In view of Article I, § 8, cl. 12 and 13, which state that Congress shall have the power to raise and support the Army and to provide and maintain a Navy, many of the



*Chain* President's powers as Commander-in-Chief are statutory in part. To conclude that the President may not delegate his ultimate constitutional responsibilities as Commander-in-Chief is not to suggest that he is the only officer of the Government who may make military decisions in time of emergency, when immediate response may be necessary. The President may make formal or informal arrangements with his civilian and military subordinates, in order to ensure that the ~~claim~~ of command will function swiftly and effectively in time of crisis. Of course, every military officer must be subordinate to the President.

B. Statutory Limitations on the President's Power to Delegate his Functions.

The foregoing discussion sets forth the general rule that the President may not delegate inherent powers that are conferred on him by the Constitution. On the other hand, he may generally delegate powers that have been conferred on him by Congress. Congress has so provided in 3 U.S.C. § 301, which states:

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

Congress has further provided, in 3 U.S.C. § 302, that:

The authority conferred by this chapter shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

As a result of these statutes, the President is authorized to delegate any power vested in him by statute unless the statute "affirmatively prohibit[s] delegation." In our view, a statute should be construed as an "affirmative" prohibition of delegation only if it prohibits delegation expressly or by unmistakable implication. The purpose of sections 301 and 302 is to facilitate the functioning of the Executive by specifically authorizing delegation in the great majority of cases. To this end, section 301 states a general rule in favor of delegation. In light of the breadth of this general rule, the exception in section 302 should be narrowly construed. The same inference can be drawn from the fact that Congress took care in section 302 not to derogate from any "existing or inherent right of the President to delegate the performance of functions vested in him by law."

Statutes which do expressly or by unmistakable implication prohibit delegation are subject to the possible constitutional objection that the power to delegate is inherent in the Executive and may not be restricted by Congress. The issue is a difficult one and has never been resolved in court. In our view, the wiser course is to comply with any clear congressional intention to prohibit delegation, in order to avoid testing the limits of this constitutional question, unless circumstances imperatively require delegation.

In the brief time we have had to review the matter, we have discovered only a very few statutes that expressly or by unmistakable implication prohibit delegation. What follows is a description of categories of statutes that fall or may fall within this general class.

## 1. Statutes Explicitly Prohibiting Delegation

The clearest cases are those in which the statute explicitly prohibits delegation. An example is found in the Export Administration Act of 1979, 50 U.S.C. § 2403(e)(Supp. III 1979), which provides that:

The President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may consider appropriate, except that no authority under this Act may be delegated to, or exercised by, any official of any department or agency the head of which is not appointed by the President, by and with the advice and consent of the Senate. The President may not delegate or transfer his power, authority, and discretion to overrule or modify any recommendation or decision made by the Secretary [of Commerce], the Secretary of Defense, or the Secretary of State pursuant to the provisions of this Act.

## 2. Statutes Conferring Nondelegable Functions

An unmistakable congressional intent to prohibit delegation may also be inferred from statutes that impose on the President a duty or power to exercise a nondelegable function. For example, it is commonly thought that only the President may issue an Executive Order or Proclamation. Statutes that authorize the President to take an action, but require him to act by way of Executive Order or Proclamation, can therefore be read as precluding delegation. An example is found in 22 U.S.C. § 441(a):

Whenever the President ... shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time by proclamation, name other states as and when they become involved in the war.

### 3. Statutes Implicitly Prohibiting Delegation

A broad range of statutes confer powers on the President but do not state in terms or in the legislative history whether those powers are delegable. In some instances, the character or importance of the powers in question, or other special circumstances, may constitute a sufficient indication of a legislative intent to prohibit delegation.

In the brief time available, we have been unable to reach any firm conclusions regarding particular statutes in this category. In general, it would appear that statutory powers that have been exercised by the President himself on a consistent and longstanding basis are more likely than others to be held nondelegable. An example might be the President's statutory power to enter into or terminate trade agreements with certain nations under 19 U.S.C. § 1351.

A second special circumstance that can give rise to an inference of nondelegability occurs when Congress gives authority to an agency but subjects that authority to a requirement of presidential approval. In this circumstance, it can be argued that a delegation of the President's approval authority back to the agency would subvert the evident legislative intent to assure review by someone outside the agency, while a delegation to anyone else would conflict with the congressional intent to centralize primary administrative responsibility in the agency. For an example of such a statute, see § 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 l(k). 5/

### III. Delegable Functions

All remaining functions of the President may be delegated to subordinate officers. Many statutes explicitly authorize delegation. See, e.g., 22 U.S.C. § 2381 (delegation of certain foreign affairs powers). In the absence of specific authorization, the general delegation statute, 5 U.S.C. §§ 301, 302, explicitly authorizes delegation except where precluded by statute. It is beyond the scope of this memorandum to describe the full

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5/ We emphasize that the above examples are entirely tentative; It may well be that, upon further examination of the statutes and their legislative histories, this Office would conclude that Congress did not intend to prohibit delegation.

extent of the presidential powers and responsibilities that may be delegated. 6/ In general, powers which may be delegated include those of approval, authorization, and assignment; powers to establish and convene certain administrative commissions, to designate responsible officers, and to make certain factual determinations; powers to direct that certain actions be taken, to fix compensation of officers, to prescribe certain rules and regulations, and to make recommendations or reports.

It bears repetition that the President may not delegate his power to delegate his own functions. This is, in our view, a function that is constitutionally vested in the President personally. The President may delegate his powers if he is capable of a conscious decision to do so. If, however, he is incapable of such a decision, delegation cannot occur. If such a situation continues for a substantial period of time, it would appear desirable to initiate procedures for presidential succession under the Twenty-Fifth Amendment. 7/

#### IV. Form and Method of Delegation

Whenever a presidential function or power is delegable, it may be delegated to the head of any department or agency in the Executive Branch, or any official thereof, if the official is appointed with the advice and consent of the Senate. 3 U.S.C. § 301. By statute, such a delegation is ordinarily accomplished through the preparation and publication of a written order or memorandum. The relevant document is normally signed by the President personally; but there is no express statutory requirement

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6/ For a description of the President's general authority, see President's Council on Executive Organization, The Powers and Responsibilities of the President (1970).

7/ It might be possible for the President to delegate his powers contingent upon the occurrence of a specified event such as a certification by the President's personal physician that the President is temporarily incapable of making a conscious decision. We would emphasize, however, that this procedure should not be used if its effect is contrary to the intent of the procedures for presidential succession contained in the Twenty-Fifth Amendment.

to that effect. In our opinion, the relevant statutory requirements are satisfied as long as the President actually makes the delegation in question and causes an appropriate written memorial to be prepared and published. He need not sign the document by his own hand. See United States v. Fletcher, 148 U.S. 84 (1893); 7 Op. Att'y Gen. 453, 472-73 (1855); 22 Op. Att'y Gen. 82 (1898). Moreover, the statute does not purport to restrict the President's constitutional power to delegate his powers and functions. See 3 U.S.C. § 302. We believe that a President may determine in an exigent circumstance that it is necessary to delegate a power or function without immediate compliance with the normal formal requisites (i.e., publication of a written document). Such a delegation is effective if it is necessary to enable the President to discharge his constitutional duty.

Theodore B. Olson  
Office of Legal Counsel





ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

3 APR 1961

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Prior Presidential Disabilities

This is a summary of prior Presidential disabilities and the resulting effect on Presidential authority. 1/

1. James Madison suffered from a severe fever in the summer of 1813 in the midst of disputes with Congress on how to pay for the War of 1812. I. Brant, James Madison: 1812-1836, at 184-94 (1961). Daniel Webster reported at one point that Madison was too weak to read resolutions brought to his bedside. Id. at 186-87. Both Houses of Congress became "engrossed" for over a month in speculation on the succession, 2/ since the Vice President was aged and there was a vacancy in the position of President pro tempore of the Senate. J. Feerick, The Twenty-Fifth Amendment 4-5 (1976) (Feerick). Madison recovered, however, and no legislation was passed nor were formal arrangements for the delegation or transfer of power implemented.

1/ Material consulted included the New York Times, S. Rep. No. 66, 89th Cong., 1st Sess. (1965) and hearings held in 1958. Presidential Inability: Hearings on S.J. Res. 100, S.J. Res. 133, S.J. Res. 134, S.J. Res. 141, S.J. Res. 143, S.J. Res. 144, S. 238, and S. 3113 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. (1958) [hereinafter cited as 1958 Hearings]. A list of articles on presidential inability can be found in the 1958 Hearings, at 41-42.

2/ The first succession act was passed in 1792. Act of March 1, 1792, §§ 9-11, 1 Stat. 239. Unsuccessful efforts to change this statute occurred in 1820, 1856 and 1881.



2. William Henry Harrison was inaugurated on March 4, 1841 and died of pneumonia on April 4, 1841. His illness was so short that the question of inability apparently did not arise. 3/

3. James A. Garfield was wounded on July 2, 1881 by an assassin and died 80 days later on September 19, 1881. Vice President Chester A. Arthur did not act in his stead. Arthur refused to do so because of a fear, shared by many constitutional scholars of the time, that once he had assumed the powers and duties of the office, they would "devolve on the Vice President" permanently, leaving him unable to turn the reins back to the President. U.S. Const., art. II, sec. 1, cl. 6. See S. Rep. No. 66, at 26. Although the entire Cabinet believed Garfield to be unable to carry out his duties, 4/ four of them, including the Attorney General, agreed with Arthur's analysis. Secretary of State James G. Blaine was in fact criticized for attempting to usurp Presidential powers during Garfield's lengthy illness. 1958 Hearings, at 149-50. 5/

4. Grover Cleveland had two major operations for cancer of the mouth in July, 1893. He told almost no one, including Vice President Adlai Stevenson. The two operations took place on a friend's yacht, with Cleveland unconscious and strapped

3/ When Harrison died, Secretary of State Daniel Webster questioned whether the Constitution meant that Vice President John Tyler became "Acting President," rather than the President. Tyler disagreed and took the oath as President, thus establishing the "Tyler precedent" that the Vice President does succeed to the office of the President when the prior occupant dies.

The deaths of Zachary Taylor (July 9, 1850) and Abraham Lincoln (April 15, 1865) were apparently so swift that their Vice Presidents (Millard Fillmore, Andrew Johnson) assumed control without trouble.

4/ Garfield was able to conduct only one minor piece of business -- the signing of an extradition paper.

5/ Arthur, who succeeded Garfield, suffered from an increasingly debilitating kidney disease while in office. Although he gradually reduced his schedule, he does not appear to have become completely incapacitated.

to a chair propped against the mast. Ferrick, supra, at 11-12. The complete secrecy was due to fears that the country might suffer an economic panic if it knew the President had cancer. The truth was apparently suppressed until 1917. 6/

5. William McKinley was wounded on Friday, September 6, 1901. He underwent emergency surgery and his doctors issued optimistic statements about his recovery. So positive was the outlook that Vice-President Theodore Roosevelt and the Cabinet members who had gathered in Buffalo over the weekend began to disperse. M. Leech, In the Days of McKinley 598-99 (1959). "[T]he Vice-President was so firmly convinced that the emergency was over that he went to join his family at a camp in the Adirondacks, twelve miles from telegraph or telephone." Id. When McKinley began to fail, a guide was sent up into the mountains to fetch Roosevelt. Although he rushed back, Roosevelt arrived to take the oath of office twelve hours after McKinley's death on September 14.

6. Woodrow Wilson was incapacitated from a stroke for about eight months of his second term. At no time did Vice President Thomas R. Marshall attempt to take over. See 1958 Hearings, at 19. The hesitation was due to a fear that such action would be viewed as an effort to oust Wilson permanently. When he recovered, Wilson forced Secretary of State Lansing, who had called Cabinet meetings and suggested that Marshall take over as Acting President, to resign, charging him with disloyalty. Id.

7. Franklin Roosevelt was in declining health during his last year in office; and died on April 12, 1945. Vice President Harry S. Truman had had only two conversations with Roosevelt since the inauguration, neither dealing with disability. Perhaps as a reaction to this, Truman supported a new succession statute, Act of June 25, 1948, 62 Stat. 677 (1948).

8. Dwight D. Eisenhower suffered three major illnesses while in office - a heart attack (1955), ileitis (1956) and a "mild" stroke (1957). From the first, Vice President Richard

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6/ It was the death of Cleveland's first Vice President, Thomas A. Hendricks, in 1885, while Congress was out of session, which accelerated passage of the Presidential Succession Act, 24 Stat. 1 (1886).

Nixon consulted with the Cabinet and developed a procedure for relaying important matters to the President. A White House request for an opinion on the temporary delegation of presidential power was not acted upon because Attorney General Brownell felt there were sufficient legal arrangements in place to handle day-to-day operations.

Eisenhower was very troubled by the implications of the disability problem during each of his illnesses. He asked the Department of Justice to study the problem and recommend a solution, urged Congress to act, and entered into an informal agreement with Mr. Nixon. Ferrick, supra at 20-22. The agreement provided that:

1. In the event of inability the President would -- if possible -- so inform the Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

S. Rep. No. 66, at 27. 7/ Although Congress did hold hearings,

7/ See also N.Y. Times, March 4, 1958, at 1, col. 2. Presidents Kennedy and Johnson entered into similar agreements with their vice-presidents. S. Rep. No. 66, at 27; N.Y. Times, Jan. 28, 1965, at 13, col. 1. The Johnson-Humphrey agreement was identical to the Eisenhower-Nixon agreement. The Kennedy agreement differed only in that it urged the Vice-President to consult with the Cabinet and the Attorney General "as a matter of wisdom and sound judgment." Id.

hearings, no permanent action was taken. 8/

9. Lyndon B. Johnson was hospitalized four times, the first time being for a major bout with the flu (January 23-27, 1965). 9/ In October, 1965 Johnson was hospitalized for gall bladder surgery. 10/ He was anesthetized for three to four hours, after which Press Secretary Moyers announced that Johnson was again able to make Presidential decisions. 11/

The same pattern was repeated in November, 1967 when Johnson underwent simultaneous surgery for a polyp on his vocal cord and repair of a ventral hernia. He was anesthetized for about an hour and a half. Note was made of the agreement that could make Humphrey "Acting President" and columnist Tom Wicker urged that the 25th Amendment be ratified.

In December, 1968, Johnson was again hospitalized for the flu. The papers, however, said little other than that he worked on government papers on one day of his stay.

10. Richard M. Nixon was hospitalized from July 12-20, 1973 for viral pneumonia. The President's press office said that he would be able to do necessary work and that he was not sick enough to require the Vice President to make special arrangements. In an interview, Vice President Spiro T. Agnew

8/ See 1958 Hearings and Hearings before the Special Subcommittee to Study Presidential Disability of the House Committee on the Judiciary, 84th Cong., 2d Sess. (1956).

9/ At the time, Vice President Hubert H. Humphrey stated that there had been discussions of when he would take over and a copy of the Johnson-Humphrey accord was made available to the press on January 28. See n.7 and text.

10/ The accord was again noted by the press and columnist Arthur Krock urged the states to ratify the Twenty-Fifth Amendment.

11/ Citing recent history, Johnson had urged Congress to act on the disability problem in his State of the Union address in January, 1965. The proposed Twenty-Fifth Amendment was sent to the states in July, 1965.

said that there was no agreement between the President and him on what to do in the event of Nixon's disability and that the issue had never been discussed.

Although there were persistent rumors about Nixon's health during the months prior to his resignation, the only White House announcement was an acknowledgement that the President suffered from phlebitis. The operation on his leg did not occur until September 23, 1974, after his resignation.

11. Jimmy Carter's scheduled surgery for hemorrhoids in late December, 1978 was cancelled. Preparations for the Vice President to assume power under section 3 of the Twenty-Fifth Amendment were also cancelled.

Larry L. Simms  
Acting Assistant Attorney General  
Office of Legal Counsel



THE WHITE HOUSE

WASHINGTON

August 21, 1975

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,<sup>1</sup> 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 Ford's nomination and confirmation as Vice President and once upon Ford's 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.

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<sup>1</sup> 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.

### 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 Ford's 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 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 \_\_\_\_\_

## Procedures for Use in the Event of Presidential Inability

*Announcement of Procedures Agreed Upon  
by President Johnson and Vice President Humphrey.  
October 5, 1965*

The following procedures, which are identical to the procedures adopted by President Eisenhower and Vice President Nixon as well as President Kennedy and Vice President Johnson, have been agreed upon by President Johnson and Vice President Humphrey:

(1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

40 ¶ Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability. *March 3, 1958*

THE PRESIDENT and the Vice President have 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 Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

NOTE: This is the text of agreement as set forth in a White House news release of this date.

matters when our information is so faulty, so incomplete.

[23.] Q. Mr. President, in connection with the Berlin crisis, there has been quite a bit of speculation about one or more summit conferences. Would you tell us what your attitude is at this time toward summit negotiations?

THE PRESIDENT. Well, the attitude which I have held and still hold is that no summit between East and West is useful unless the groundwork has been laid beforehand which will insure some success. As far as a summit of Western leaders, I think that if it should prove important in coordinating our policy on any matter, Berlin, I think that that meeting should be held and would be prepared to do so.

[24.] Q. Mr. President, during the foreign aid debate, there has been some concern expressed by legislators based upon the reports from Montevideo that some of the Latin American nations are not, apparently, eager to institute the self-help measures which you've made a condition of your program, and that the administration may not insist upon those conditions. Do you intend to insist upon those conditions?

THE PRESIDENT. We're prepared to make a major effort in this regard and we're hopeful that other countries who also have high living standards will do so. But of course it would be completely useless unless an effort were made by all concerned. One of the proposals which have been made in Montevideo which is of particular interest is that under the aegis of the Inter-American Bank, that a study by independent experts be made of each country's economic planning and progress and commitment, and it seems to me that this is a great basis for a hemispheric effort. We're not interested in making the contributions which I think we have to make unless we feel that they're going to improve the life of the people. And, therefore, there's a responsibility on us all, for us to contribute to the success of this goal and for the countries involved to make sure that this effort helps the people, because otherwise the effort will fail and those societies will inevitably be wiped away—unless some real progress is made.

Reporter: Thank you, Mr. President.

NOTE: The President's fifteenth news conference was held in the State Department Auditorium at 10 o'clock on Thursday morning, August 10, 1961.

### 319 White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability. *August 10, 1961*

THE PRESIDENT and the Vice President have agreed to adhere to procedures identical to those which former President Eisenhower and Vice President Nixon adopted with regard to any questions of Presidential inability. Those procedures are as follows:

(1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

After consultation with the Attorney General, it is the understanding of the President and the Vice President that these procedures reflect the correct interpretation to be given to Article II, Section 1, clause 5 of the Constitution. This was also the view of the prior Administration and is supported by the great majority of constitutional scholars.

The relevant constitutional provision is:

"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."

Under this provision, upon a proper determination of Presidential inability, the Vice President succeeds temporarily to the powers and duties of the Presidency until such time as the President is enabled to act again. Unlike the case of removal, death, or resignation, the Vice President does not permanently become President.

Under the arrangement quoted above, the Vice President agrees to serve as Acting President "after such consultation as seems to him appropriate under the circumstances." There is no provision of the Constitution or of law prescribing any procedure of consultation, but the President and Vice President felt, as a matter of wisdom and sound judgment, that the Vice President would wish to have the support of the Cabinet as to the necessity and desirability of discharging the powers and duties of the Presidency as Acting President as well as legal advice from the Attorney General that the circumstances would, under the Constitution, justify his doing so. The understanding between the President and the Vice President authorizes the Vice President to consult with these officials with a free mind that this is what the President intended in the event of a crisis.

Prior to the Eisenhower-Nixon arrangement, there were no similar understandings of a public nature. For this reason, prior Vice Presidents have hesitated to take any initiative during the period when the President was disabled. Obviously, this is a risk which cannot be taken in these times, and it is for that reason that President Kennedy and Vice President Johnson have agreed to follow the precedent established by the past Administration.

NOTE: The Attorney General's opinion upon the construction to be given to the Presidential inability clause of the Constitution was submitted to the President in a letter dated August 2 (27 pp., Government Printing Office, 1961).



THE WHITE HOUSE  
WASHINGTON

December 23, 1963

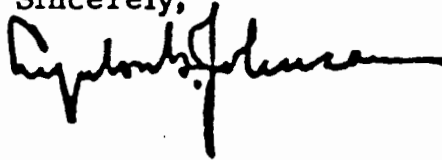
Dear Mr. Speaker: *of House of Representatives*

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.

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,



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

Agreed: \_\_\_\_\_



Date: \_\_\_\_\_


17/12/63



OFFICE OF THE VICE PRESIDENT  
WASHINGTON

March 21, 1978

MEMORANDUM TO: Michael Berman

FROM: Robert Torricelli 

RE: Presidential Succession and the Ambiguities  
of the Twenty-Fifth Amendment

INTRODUCTION

Serious ambiguities in the Twenty-Fifth Amendment create the need for a statement of definitions and principles. Without the President and Vice President concluding such a joint statement, serious problems of interpretation could arise in a number of circumstances.

It appears that no attention has been given to these potential difficulties. This memorandum seeks to identify the Constitution's ambiguities, outline previous Administration's solutions and propose an advisable course of action.

A) Previous President/Vice President Agreements on Succession and Disability

There are five documented instances where written agreements have been signed on this issue. Since the public release of such understandings has been a recent development, it is possible that other Administrations dealt with this problem as well.

Procedural understandings relating to Presidential succession can be divided into two categories:

1. Written agreements before the Twenty-Fifth Amendment

The purpose of these signed memoranda was to establish a procedure for Presidential succession in the event of a Presidential disability. The first in a modern series of such accords was drafted in 1957. The Eisenhower/Nixon Administration feared the uncertainties of leadership that arose during the critical illnesses of Presidents Garfield and Wilson.

Succeeding Administrations continued the Eisenhower precedent. Similar agreements were entered into by Kennedy/Johnson, Johnson/McCormick and Johnson/Humphrey.

2. Written Agreements after the Twenty-Fifth Amendment

The Johnson/Humphrey agreement remained in effect after the Constitution was amended in 1967. The Nixon Administration made no public acknowledgement of any similar understanding. In 1975, however, the President's Counsel proposed to President Ford that he enter into such an accord with Vice President Rockefeller. The Counsel's Office advised President Ford that, despite the passage of the Twenty-Fifth Amendment, serious questions regarding succession still persisted.\*

B) Summary of Previous Written Agreements

Each of the prior agreements can be easily characterized. Power was specifically granted to the Vice President to assume the position of "Acting President" if the President should become disabled and unable to communicate his condition. The power to reassume the office was always vested entirely in the President. Since the Kennedy/Johnson memorandum in 1961 each succeeding document provided that the Vice President consult with the "appropriate" persons before initiating the succession process. Each of these agreements appears to have been adequate at the time. The enactment of the Twenty-Fifth Amendment, however, raises additional procedural and definitional problems due to the complex process of succession that it establishes.

C) Possible Problems of Interpretation of the Twenty-Fifth Amendment

Potential conflicts arising out of the use of this amendment appear in three major instances. It was these same potential problems that prompted the Counsel's Office memorandum to President Ford.

1. Section 3 of the Amendment provides for the President temporarily removing himself from office due to a disability. Only the President's own actions are required. Upon the transmittal of an appropriate written statement to the Congressional leadership, the Vice President becomes "Acting President".

\* I am awaiting your authorization before researching the eventual disposition of this advice.

The area of concern is the means by which the President reassumes the Office of President. If the President voluntarily removes himself from office he can reassume office at will. No concurrent opinions as to his mental or physical condition are required. Other members of the government would be without recourse under the provisions of the Amendment if they disagreed with the President as to his condition.

2. Section 4 of the Amendment provides for those instances when the President is unable or unwilling to declare his disability. In such a situation the Cabinet and Vice President, by majority vote, are entitled to appoint the Vice President as Acting President. When the President considers himself well enough to reassume the Presidency he may do so. If the Vice President and a majority of the Cabinet do not feel that the President is sufficiently able, they may challenge his resumption of office. The challenge must be made within four days of the President's attempted resumption of office and the Congress must vote upon the challenge within twenty-one days.

The actual language of the Amendment does not reveal who presides as President during the twenty-one day challenge period. The legislative history of the amendment strongly suggests that the Vice President continues as Acting President. The possibility of a period of uncertainty as to the nation's leadership would continue, however, until the matter was litigated.

3. Both Sections 3 and 4 refer to the "disabilities" of the President. It is not clear what types of illnesses or impairments were intended to be included as "disabilities" for purposes of this amendment. The Ford Administration seemed to conclude that both the language and the legislative history of the amendment were unclear as to any definition. It is uncertain, therefore, under what conditions each of these procedures for a shift in executory power arise and when they revert. Once again, the potential difficulty is the uncertain status of executive leadership while the definition of these terms is litigated.

D) Recommendations

The specific contents of any written agreement between the President and Vice President must include the following:

1. A stipulation of the procedures which will be followed before the President reassumes office after removing himself under Section 3. While such an agreement would not have a sufficient force of law to prevent a disabled President from resuming office, it is necessary. International fears about the possible resumption of office by a disabled President could be quelled by the release of such a document during the period of disability. The fact that such an understanding is in force could be extremely useful in preserving a clear continuum of leadership and reassuring any doubts. As previously stated, such a document might not succeed in preventing a resumption of power, but it would lessen speculation and doubt during the disability period.
2. An expression by the President and Vice President as to their interpretation of Section 4 is also necessary. If a President's resumption of office under Section 4 is challenged, tremendous uncertainty would result. A statement that makes it clear that the Vice President was intended to continue in office during the Congress' deliberations would be of great value. While the legislative history of the amendment suggests the eventual determination, a mutual expression would be of considerable use in both answering the public's fears and in aiding the eventual outcome of the litigation.
3. Definitional problems are certain to arise whenever Section 3 or 4 of the Amendment is used. It appears that the public, the Congress, and the courts will have little to rely on in interpreting the legislative intent. There is even a question as to whether mental or emotional illnesses were contemplated. The record of the hearings reveals no definitions of "disability", "unable", "no inability" and "Acting President". The process for determining the legal definitions of these terms might be lengthy. Serious questions as to the status of the nation's leadership could arise. A signed statement of definitions would certainly not be any more controlling in this context than in others. However, the public release of such

a previously concluded agreement would greatly add to the stability of the nation. Such a statement, for example, need only list those instances considered to be disabling. The history of President/Vice President agreements reveals considerable fear that a Vice President would hesitate to assume power if there was doubt as to the existence of the necessary circumstances. A memorandum to this effect would eliminate some of this apprehension while reassuring the public about the continuum of leadership.

E) Conclusion

The Twenty-Fifth Amendment seems to have created almost as many questions as it has answered. The timing of modern events will not allow for the uncertainty that arises from a long process of legal interpretation. The nation and the world must never be put in a position of having to speculate as to the nation's leadership. From a legal vantage point there may be no way of protecting against a certain degree of uncertainty. However, the public's perception about the immediate right to exercise power can be influenced and reinforced by the proper written agreement.

An agreement of this nature can be withheld from the public and released only when necessary to address the anticipated situation. Alternatively, the agreement could be released upon its signing as most recent Administrations have done. A public acknowledgement has two advantages. First, it evidences the close and trusting relationship between the President and the Vice President. Second, it serves to show the Administration's concern about every contingency surrounding the continuum of leadership. The impact of this reassurance would seem to be considerable on both the domestic and international scene.

The need for an agreement of this type might not appear as necessary today as it did when the President was disabled in 1957 or 1965, however, such documents have a way of being used by succeeding Administrations. By continuing the use of such safeguards, we will be enhancing the chance of their future use while protecting ourselves against remote circumstances.

I would recommend that you raise these issues with the Vice President and then offer an outline of the major issues to the President's Counsel.

cc: Marilyn Haft





Bob - copy for you.

MEMORANDUM FOR: MIKE BERMAN

FROM: FRANK WIGGINS

RE: The 25th Amendment and Beyond

What follows addresses two categories of problems associated with succession to the Presidency. I take up first problems surrounding the mechanics of the Amendment and, in part II, broader concerns.

I. Gaps in the operation of the 25th Amendment

A. Description, brief history and some general thoughts on the value of a letter of understanding.

The 25th Amendment provides two mechanisms for temporarily vesting the Vice President with Presidential powers:

1. The President may declare himself unable to discharge his duties, and act which deeds Presidential power to the Vice President until the President issues a countermanding statement asserting that his inability is at an end.

2. The Vice President and a majority of the cabinet may declare that the President is unable to discharge his duties. This action also devolves Presidential powers upon the Vice President until the President issues a writing indicating that he believes himself able to perform. If, upon the issuance of such a Presidential declaration, the V.P. and a majority of the cabinet disagree with the President's appraisal they may put the question of fitness to a resolution by the Congress. This step is effected by the issuance of a letter within four days of the President's avowal of fitness which triggers a 21-day (somewhat longer if Congress is not in session) period during which the Congress can, by the vote of a 2/3 majority, uphold the Vice President and cabinet. Should that congressional action not be forthcoming, the President will then resume his office. 1/

It was suggested by the Counsel to the President during the Ford Administration that certain of the mechanics of this process should be clarified in a letter of agreement running between the President and Vice President Rockefeller. That suggestion did not mature into an agreement but does raise a possibility which ought to at least be considered.

Agreement between the principals clarifying matters left uncertain by the terms of the 25th Amendment will prove of little or no legal significance. The powers and procedures given expression in the Amendment are not subject to alteration through negotiation. Similarly, the reading given the Amendment by those to whom the powers devolve and procedures apply is not really germane to the meaning intended by those who gave the measure force through the ratification process. Those conclusions are not, however, very responsive to the question of the advisability of an articulation of understanding; hard core legalism misses the mark.

Litigation and the consequent niceties of courtly analysis could grow out of the circumstances which call for application of the Amendment -- for example, as challenges to the legality of actions undertaken by a party exercising power under the authority of the thing -- but the most important and surely most immediate focus must rest on encouraging the abatement of anxiety and confusion which will inevitably accompany any occasion for employing the Amendment. It is, then, efficacy in portraying a sense of legitimacy in troubled times which ought to be the standard by which perfecting an agreement should be judged.

Cast that way, it would seem wise to pursue agreement where uncertainties, even small ones, are likely to be decreased or eliminated thereby in the first moments of the Amendment's application. It remains important that any accord be not only pacifying but also consonant with predictions of legal outcomes, but insofar as both ambitions can be accommodated the former is surely ascendant. With that standard in head, I turn to specific areas which might be clarified.

#### B. Defining "Inability"

The most obviously troublesome provision of the Amendment is the use of the indefinite phrase "unable to discharge the powers and duties of his office" to describe the appropriate occasion for involuntary removal of the President from his position. The primary focus of the Ford Administration's suggestion for agreement encouraged more precise definition. I am not persuaded that an attempt at a more refined formulation would be productive.

The chief difficulty with such an attempt is the ominous portent of an under-inclusive description. A pre-existing accord which pretended to be exhaustive would only exacerbate difficulties if it omitted an arguably disqualifying condition which became the ground for an exercise of the Amendment. And the likelihood of being under-inclusive in any definition seems

great. Once one gets beyond a comatose state, or perhaps, massive paralysis, defining inability is likely to necessitate some reference to the urgency of surrounding circumstances. There was suggestion in the hearings preceeding congressional action on the Joint Resolution which was ratified as the 25th Amendment, for example, that the period of convalescence following President Eisenhower's heart attack did not significantly disrupt the government largely because nothing much was happening, whereas the period of similarly constricted activity during the Wilson Administration had much broader impact because of the pendency of the decision on participation in the League of Nations. Even were one to conclude that reference to outside events could somehow be elided, charting disabling occurrences would have a chance at sufficient breadth only if it took the form of a schedule of capabilities necessary to conduct of presidential duties. And measuring those capabilities against the huge number of combinations of affliction which might come into play would be a difficult, exhausting and somewhat macabre affair. When one shifts from physical disability to mental problems both of the difficulties which I've suggested above escalate to the level of near impossibility. Though I have not consulted with anyone claiming expertise on this particular question my own experience in the application of statutes authorizing civil commitment for mentally disordered individuals -- an analogous endeavor from the vantage of formulating standards -- persuades me that doing an adequately good job is beyond the range of the disciplines involved.

The Ford memorandum, and some of the discussion prior to ratification, suggests a third variety of disabling event denoted as neither physical or mental but "(the) result of outside events, e.g., a mechanical inability to communicate." At least as prominently here as when one is dealing with physical or mental difficulties, the range of possible instances for the invocation of the Amendment is so great as to make ready description very difficult.

Though I think it unarguable that the trauma almost certain to be linked to ouster of a President would be mitigated if the Vice President and Cabinet could point back to an agreement, the difficulties in forming a pact which would substantially foreclose the risks of omission, overcome that value. The Senate Report which accompanied the Amendment to the floor noted that the mechanisms recommended were not "mechanical or procedural solution(s) (to) provide a complete answer" but depended "upon public opinion with a possession of 'constitutional morality.'" I think that invocation of that mood is about as precise as one can be.

C. Matters of Time

There are two questions involving the timing of transition in the Presidential power which do not raise such intractible definitional questions. Both revolve around the process of disputing the re-assumption of power by a President who contends that his period of disability has passed. Recall that the Vice President and Cabinet may take four days following transmittal of the Presidential letter asserting fitness to challenge that conclusion and, thereby, put the matter before the Congress. Congress then has twenty-one days (or somewhat longer if not in session) to resolve the matter. The Ford White House thought there to be sufficient ambiguity in the Amendment's response to the question of who was to have Presidential authority during the four days and the subsequent 21 days to recommend clarification by agreement.

The matter of the 21 days, the time during which Congress must vote to uphold the assertion of unfitness, does not seem doubtful at all. The structure of the language of the Amendment runs as follows:

"When the President transmits (his avowal of fitness) he shall resume (office) unless the V.P. and (Cabinet) transmit (their conclusion to the contrary) ... thereupon Congress shall decide."

The resumption is made conditional upon the absence of action by the Vice President and Cabinet; if such action is forthcoming resumption must await the Congressional decision.

Support for this reading goes beyond syntax; the Senate Report <sup>2</sup> is unequivocal -- "the intent ... is that the Vice President is to continue to exercise the powers and duties of the office ... until a determination on the President's inability is made by Congress" -- the conclusion was endorsed by, inter alia, Senator Bayh and Representative Cellar, the floor managers of the Resolution, and logic would dictate that when substantial question has been raised as to the President's abilities he ought not to be moved back into power until the Congress has resolved those questions.

Thus, I think that a letter of agreement on the matter of who presides during the 21-day period is simply unnecessary. Such an agreement would not, however, do any harm and just might provide some balm should occasion for its invocation arise.

The matter of the four days is less clear. Here the structure of the Amendment's language is not so helpful because the "unless" condition to resumption is itself qualified by the four-day period. One could read the language to provide either for immediate resumption defeasible by the maturing of the condition or to support resumption only after the unless condition could not be fulfilled, resumption after the four days for challenging action had passed. The latter construction makes more sense if continuity is a primary value. Passing the sceptre unnecessarily often, particularly in an atmosphere of some discord, is probably not to be preferred. Senator Bayh endorsed this reading on the Senate floor 3 as did Congressman Cellar in the House. 4 But some uncertainty is raised by Senator Dirksen's wondering on the question -- both in his dissenting position in the Committee Report and again on the floor -- and in a confusing exchange in the Senate occasioned by an amendment to this timing provision offered by Senator Hruska. 5

Though I am fairly confident that a court would adopt the reading leaving control in the Vice President until the four day period had elapsed and doubt, in all events, that it would ever be necessary for the Vice President and Cabinet to defer the issuance of their challenge letter for such a protracted period, it may be advisable to remove all doubts by dealing with the matter in a letter of agreement. The impediment to this course is that the President may well be disinclined to commit himself to it. One can easily hypothesize circumstances in which a President would think it advisable to immediately resume power without the specter of a waiting period imposed by a recalcitrant Vice President. Because this may prove a touchy question, I think that before drafting the language of an agreement the matter should be raised with the President's people. If this question is coupled with the relatively more clear-cut business of the twenty-one days and the voting matter discussed below perhaps the package can be characterized as nothing more than an abundantly cautious step to remove all vestiges of doubt about fairly certain matters.

D. Voting Problems

A third variety of mechanical question raised by the Amendment centers on the two voting processes which it embodies. It was passingly suggested in the Ford memorandum that there is some ambiguity to the description of the congressional vote. The history seems to me quite clearly to indicate that two-thirds means two-thirds of those present and voting, a quorum having been assempled and the two chambers voting separately. Moreover, an agreement between the President and the Vice President purporting to establish rules for the Congress would be out of line.

The only genuine uncertainty which I see in the business of voting concerns the vote of the Cabinet. Because that body has no statutory or other official recognition, rules for voting on other matters are not available for analogy. The history is somewhat two-sided on how one counts a majority in the Cabinet. In explaining the Committee amendment which had exchanged the phrase "heads of the executive departments" for the eventually ratified language "the principal officer in each of the executive departments," the House Report notes that, "in case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inavility determination." 6 This suggests that a majority would necessarily consist of the expressions of more than one-half of the executive departments through some spokesperson. On the Senate floor, however, Senator Bayh read the measure differently:

MR. HART. Is it the understanding of the Senate, in taking this action, that the Under Secretary, in the event of a vacancy in the office of Secretary, shall be empowered as would the Secretary himself, in participating in the decision with respect to ability or disability?

MR. BAYH: It is the opinion of the junion Senator from Indiana that it is not.

MR. HART: This would reduce it by as many Under Secretaries as may be involved in the situation with respect to those who would participate in the Cabinet decision. Is that correct?

The point pressed by Senator Hart was that the decision on disability could end up in the hands of a very small group. While neither construction leads to the contretemps which you suggested -- the situation in which a disability decision could not be reached because fewer than half of the Cabinet members are able to participate -- it might well be appropriate to supply clarification through agreement.

I am not persuaded that there is either a "right" answer or a preferable position on this question. Unless you have powerful feelings in one direction or the other, this might be something to give the White House people in trade for the four day provision.

## II. Beyond the 25th Amendment

There is a second sort of question raised by the problems of Presidential inability which is really beyond the purport of the 25th Amendment. What is to happen if both the President and the Vice President are unable to function? Though the enquiry was not lost on the Congress neither was there any attempt to deal with the problem.

A very weak statutory response is available. The Succession to the Presidency Act, codified at 3 U.S.C. 19, provides that, "if by reason of ... inability ... there is neither a President nor a Vice President to discharge the powers and duties of the Office of the President, then the Speaker of the House ... shall ... act as President ... until the removal of the disability of one of the individuals." There are two overarching difficulties with reading this language as an escape mechanism. First, it necessarily contemplates a determination of Presidential -- and perhaps Vice Presidential -- inability which is at odds with the 25th Amendment procedure. This is so because of the role of the Vice President in the Amendment. Quite as crushingly, there are no procedures articulated for the decision, even were it constitutionally permissible. This second flaw might conceivably be remedied by statute, but even putting aside the problems of conflict with the 25th Amendment, the wisdom and legality of dealing with the matter of removal for inability by legislation is very questionable. 8



In addition to the problem of how to provide for an incapacitated Vice President, there are hard questions of what any such provision should contain. I am persuaded -- and Marilyn concurs with this -- that the Speaker and the Cabinet ought to make the decision to oust the Vice President. Obviously the President should be consulted in the circumstances of a sound President, but making some act by the President a part of the procedure will foil the process if both the Vice President and the President are incapacitated. And the provision should apply as well to a situation in which the Vice President is dead and the President is either unable or unwilling to make an appointment under § 2 of the 25th Amendment. Here, as in the case of allegations of Presidential inability, there ought to be a resumption/challenge mechanism but here both the Vice President who is being supplanted and the President, who has a right to fill a vacancy in that office, should be permitted to make the challenge. Something along the following lines seems to meet, though rather clumsily, those ambitions:

If the Speaker of the House of Representatives (1) and a majority of the principal officers of the executive departments (2) (or of such other body as Congress may by law provide) (3) evidence by a signed declaration their determination that, by reason of either death (4) or inability, the Vice President is unable to discharge the powers and duties of his office or if the Vice President transmits to the Speaker of the House of Representatives and the President a written declaration of such inability (5) ... The Speaker of the House of Representatives may, after appropriate consultation with the President, (6) assume and discharge such powers and duties as Acting Vice President.

If, thereafter, either the President or the Vice President transmits to the Acting Vice President, the President's pro tempore of the Senate and the \_\_\_\_\_ of the House of Representatives (7) a declaration that powers and duties of the Vice President ought no longer to be discharged by the Acting Vice President (8) the Acting Vice President will be relieved of those powers and duties four days after such declaration unless, within that time, the Acting Vice President and a majority of the principal officers of the

executive departments (or such other body as Congress may by law provide) transmit to the President pro tempore of the Senate and the \_\_\_\_\_ of the House of Representatives \_\_\_\_\_ a written declaration of their contrary conclusion. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if the Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of each House that the Acting Vice President ought to continue discharging the powers and duties of Vice President, he shall continue so to discharge them; otherwise his powers and duties as Acting Vice President shall be at an end.

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Before turning to questions of implementing such a plan, a few further words of explication may be helpful.

MY COMMENTS TRACK THE NUMBERS IN THE TEXT.

1. If both the President and Vice President are dead, neither this nor the inability provisions of the 25th Amendment apply, and the Speaker takes over. That argues for the Speaker's place in this proposal for, should the 25th Amendment disability provision be employed on top of this suggestion, he would, symmetrically, be the Acting President. There may be some small doubt about the availability of that sequence. The 25th Amendment calls for the participation of the Vice President in relieving the President and under this scheme there could be a (disabled) Vice President with the Acting Vice President/Speaker purporting to play the Vice Presidential part. This variance could be cured by express provision if the new procedure takes the form of a constitutional amendment, otherwise I see no remediation other than the application of good sense.
2. This is modeled after the 25th Amendment and, unless paranoia generated by the possibility of a Cabinet-Congress coup moves you, seems sensible for the same reasons as in that measure.

3. The parenthetical phrase makes sense only in a constitutional amendment and there only to parallel the 25th Amendment. In either an agreement or a statute the language should be deleted.
4. The provision for declaration of death, though odd, is included to provide for a Vice President to invoke the disability provision of the 25th Amendment. The difficulty here is that there is a distinct tension with the President's 25th Amendment right to appoint a Vice President when the office is vacant. My sop --- and it is little more than that --- is to insist on consultation. (Text at (6)). One must assume that neither the Cabinet nor, if the interjection were contested by the President, the Congress would go along with the Speaker were there some good reason for deferral of appointment by the President.
5. Voluntary action by the Vice President ought to be included.
6. I don't suppose that this requirement has any but a symbolic import. Surely in the case of a dead Vice President the Speaker and the Cabinet would talk with the President before trying to give him an Acting Vice President. The word "appropriate" is included to permit truncated or even non-extant consultation where it would prove unavailing or impossible.
7. Since I have not insisted, as the Succession to the Presidency Act does, that the Speaker resign before becoming Acting Vice President -- and, perhaps, such provision should be made -- it is not clear that there will be a Speaker or Acting Speaker in the House. Who best will serve as a receptacle for the various notices?
8. This is a much looser standard than the "unable due to death or inability" by which the Speaker and Cabinet are to make their decision. The greater latitude is in recognition that one may be dealing with a President -- perhaps reinstated after a period of 25th Amendment disability -- who is now ready to appoint a Vice President. It also seems to me that, given the difficulties of defining inability, it makes scant difference how one verbalizes the basis for what will, in all events, be a political judgment.

As to the question of mechanics, it strikes me, for reasons previously stated, that only a constitutional amendment will be effective in establishing such a procedure. Given the time required for that step, however, little injury could be done by first articulating the process in a letter of agreement running between the President, Vice President and (though his participation would not be obligatory) the Speaker. Such a step could be integrated with the clarification agreement discussed in Part I.

## FOOTNOTES

- 1/ The full text of the amendment is appended.
- 2/ S. Rept. 89-66, 89th Cong., 1st Sess., (1965) at p.3. Excepting their respective introductory passages, the House Report (H. Rept. 89-203, 89th Cong., 1st Sess. (1965)) is identical. Though in the discussion that follows I cite to the customary historic sources to adduce meaning for equivocal language in the Amendment, two cautionary statements are in order. The history of a constitutional Amendment properly includes the deliberations surrounding the ratification process at the state level as well as that in Congress. I have not consulted any of that broader history. Indeed my survey of the congressional history has not been exhaustive. My lack of rigor stems from my feeling that the questions here raised will not be resolved in a court but in elevated political circles and in public opinion.
- 3/ 111 Cong. Record 3285.
- 4/ id at 7939. The position is further buttressed, albeit in a somewhat backhanded fashion, by the comments of Rep. Love who had introduced a Resolution which made explicit the conclusion that the Vice President was to be in charge during the challenge period. Though his language was not approved by the Committee, he indicated, on the floor, that he read the language adopted as reaching the same result. id at 7958-9.
- 5/ id at 3274.
- 6/ H. Rept. at 3. This language appears in the introductory explanation of Committee amendments and is not present in the Senate Report.
- 7/ The Constitution provides that "Congress may be law provide for the case of ... inability ... both of the President and Vice President, declaring what officer shall then act as President..." Art. II, Sec. 1, Clause 5. The word "both" was seized on by proponents to argue that a "mere statute" would not work to provide for succession in the event of a

## Footnotes Continued

of a Presidential disability. (See, e.g., S. Rept. at 8-9). This literal reading would equally debar legislation providing for replacement of a disabled Vice President. Even more persuasive are the sentiment expressed during discussion of the 25th Amendment that a statutory remedy would always be clouded by uncertainty and that matters going so clearly to the legitimacy of the country's leadership should not be susceptible to congressional alteration.



# Calendar No. 62

89TH CONGRESS }  
1st Session }

SENATE }

REPORT  
No. 66

## PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

FEBRUARY 10, 1965.—Ordered to be printed

Mr. BAYH, from the Committee on the Judiciary, submitted  
the following

### REPORT

together with

### INDIVIDUAL VIEWS

[To accompany S. J. Res. 1]

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 1), proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, reports favorably thereon with amendments and recommends that the resolution as amended be agreed to.

### AMENDMENTS

On page 2, in line 14, strike "If the President declares in writing" and insert in lieu thereof: "Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration".

On page 2, strike the entire text of section 4, and insert in lieu thereof the following:

Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmit to the President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

#### PRESIDENTIAL INABILITY

On page 3, in lines 1 and 2, strike the word "Congress" and insert in lieu thereof the following:

President of the Senate and the Speaker of the House of Representatives

On page 3, in line 5, strike the word "heads" and insert in lieu thereof the following: "principal officers".

On page 3, in line 9, strike the words "will immediately" and insert in lieu thereof "shall immediately proceed to".

#### PURPOSE OF AMENDMENTS

The text of Senate Joint Resolution 1, as introduced, requires, under certain contingencies, for a written declaration to be made by the President, under section 3, and by the Vice President and principal officers of the executive departments under section 4, and by the President, the Vice President and principal officers of the executive departments under section 5. It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.

The committee is concerned about the possibility that such written declaration might be transmitted during a period in which Congress was not in session. In this event the committee feels that transmittal of such written declaration to the presiding officers of both Houses, the President of the Senate and the Speaker of the House of Representatives, would be sufficient transmittal under the terms of this amendment.

It is the opinion of the committee that, under the language of section 5, Congress is empowered to reconvene in special session to consider any disability question arising under this section. Furthermore, under the language of this section, the President of the Senate and the Speaker of the House of Representatives would be required to call a special session of the Congress to consider the question of presidential inability whenever the President's ability to perform the powers and duties of his office are questioned under the terms of section 5. However, nothing contained in this proposed amendment should be construed to limit the power of the President from exercising his existing constitutional authority to call for a special session of the Congress.

It is further understood by the committee that should the President of the Senate and the Speaker of the House of Representatives not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment.

It is the judgment of the committee that the language "principal officers of the executive departments" more adequately conveys the intended meaning of sections 4 and 5, that only those members of the President's official Cabinet were to participate in any decision of disability referred to under these sections. This language finds precedent under article II, section 2, clause 1, of the Constitution. The pertinent language there reads as follows:

he may require the Opinion, in writing, of the principal Officer in each of the executive Departments,



In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise:

(1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented?

(2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?

Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.

However, the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination. The language, as amended, reads as follows:

Thereupon Congress shall immediately proceed to decide the issue.

It was the opinion of the committee that the words "Thereupon", "shall", and "immediately" were sufficiently strong to indicate the necessity for prompt action.

Precedence for the use of the word "immediately" and the interpretation thereof may be found in the use of this same word, "immediately" in the 12th amendment to the Constitution. In the 12th amendment, in the event no candidate for President receives a majority of the electoral votes, the House of Representatives "shall choose immediately,". The committee was of the opinion that the same sense of urgency attendant to the use of the word "immediately" in the 12th amendment when Congress was in fact deciding who would be the President of the United States should be attendant in proceedings in which the Congress was deciding whether the President of the United States should be removed from his office because of his inability to perform the powers and duties thereof.

The committee is concerned that congressional action under the terms of section 5 should be taken under the greatest sense of urgency. However, because of the complexities involved in determining different types of disability, it is felt unwise to prescribe any specific time limitation to congressional deliberation thereupon. Indeed, the committee feels that Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.

The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section 5 would be pursued under rules prescribed, or to be prescribed, by the Congress itself.

## PRESIDENTIAL INABILITY

## PURPOSE OF THE RESOLUTION AS AMENDED

The purpose of Senate Joint Resolution 1, as amended, is to provide for continuity in the office of the Chief Executive [in the event that the President becomes unable to exercise the powers and duties of the office] and further, to provide for the filling of vacancies in the office of the Vice President whenever such vacancies may occur.

## STATEMENT

*The constitutional provisions*

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the Office of the Vice President. Article II, section 1, clause 5 reads as follows:

In Case of the Removal of the President from Office, or at 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.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President: and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

*The inability clause and the Tyler precedent*

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the

question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all became President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability, North American Review," vol. 133, p. 442 (1919).)

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the

office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5 of the Constitution which provides that:

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's

wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants of the President. It has been reported by a Presidential secretary of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

President Kennedy entered into a similar agreement with Vice President Johnson as did President Johnson with Speaker John McCormack and Vice President Hubert Humphrey. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

#### THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The

clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience with the Constitution the inability clause remains an untested provision of uncertain application.

#### METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5 of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication Congress does not have the authority to legislate with regard to the

situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18 gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Acting Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

#### *Filling of vacancies in the Office of the President*

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass:

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the office. Although much deliberation ensued regarding the official functions of the office, little thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice-Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

#### THE NEED FOR CHANGE

The death of President Kennedy and the accession of President Johnson in 1963 pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.



As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice-Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However, the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6 which states that—

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.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4, provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22 can be, the President of the Senate.

One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become

familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice-Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

#### ANALYSIS

##### *Inability*

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5 of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 1 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3, 4, and 5 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President.

By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted 4 to 3 that the President was fit and able to perform his Office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his Office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed

in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days. Once the declaration of the President stating no inability exists has been transmitted to the President of the Senate and the Speaker of the House of Representatives, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6, of the Constitution relating to impeachments.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

#### *Vacancies*

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he had been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy, there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

#### CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It seeks to concisely clarify the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The committee approved this proposal after its subcommittee heard testimony and received written statements from many distinguished students on the subject. Last year the subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, and for the fact that 76 Senators have sponsored Senate Joint Resolution 1, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

#### RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 1 and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

#### COMMITTEE AMENDMENTS TO SENATE JOINT RESOLUTION 1 SHOWING OMISSIONS, NEW MATTER AND RETAINED WORDING

The committee amendments to the Senate joint resolution are shown as follows: Provisions of the resolution as introduced which are omitted are enclosed in black brackets, new matter is printed in italics, provisions in which no change is proposed are shown in roman.

#### "Article—

SEC. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 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.

SEC. 3. [If the President declares in writing] *Whenever the President transmits to the President 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, such powers and duties shall be discharged by the Vice President as Acting President.*

SEC. 4. [If the President does not so declare, and the] *Whenever the Vice President, [with the written concurrence of] and a majority of the [heads] principal officers of the executive departments or such other body as Congress may by law provide, transmit[s] to the [Congress his] President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.*

SEC. 5. *Whenever the President transmits to the [Congress] President of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the [heads] principal officers of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress [will] shall immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.*

## INDIVIDUAL VIEWS OF SENATOR EVERETT MCKINLEY DIRKSEN

When the Congress considers amendments to the Constitution, it deals not with the problems of today, or yesterday, or tomorrow, but in terms of the grand sweep of our Nation's history and future. The Constitution is the basic charter of our Government. It is appropriate to keep its function separate from the various laws we derive from it, laws that are designed to meet specific problems as they may arise. The Constitution must meet the test of time. It can do this only if it provides the means by which the Congress may meet the needs of the moment, not the solution to specific problems.

The questions of Presidential succession and Presidential inability are not new to the Senate. It has been wrestling with them for many years. Time and again it has tried its hand at contriving an amendment to the Constitution to deal with the problems. But each time when the Senate almost reaches a conclusion as to language for the amendment it becomes aware that its labors have been so narrowly directed to the problems arising out of particular events that it has failed to think and write in the broad fundamental concepts which are necessary to a constitutional amendment. And then, because it realizes the dangers of a job half done, it does nothing at all.

Congress cannot go along that way any further. It must deal with the problems of Presidential succession and Presidential inability by a constitutional amendment. It is necessary that the pertinent provision of the Constitution dealing with vacancy or inability, article II, section 1, that 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 the 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.

be amended to clarify whether the devolution is of the Office of the President or only of his powers and duties. Presumably it is the former in the case of death or resignation and the latter in case of inability. Be that as it may, it has been the uncertainty of construction of this language that in the past has prevented Vice Presidents from assuming authority during the periods of disability of various Presidents. Next, it is essential that the Constitution provide a means of dealing with the other matters encompassed in Senate Joint Resolution 1. But the amendment should not deal with details. They can be handled by statute and rightly should be.

This solution was well laid out before this committee last year and 2 years ago by the then Deputy Attorney General of the United States, Mr. Katzenbach. His entire statement in the 1963 hearings, incorporated again in the 1964 hearings, should be read by everyone who is considering this problem. Let me only emphasize his concluding thoughts:

Apart from the wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The changes are that supplemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future—not covered by Senate Joint Resolution 28<sup>1</sup>—where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35<sup>1</sup> makes this possible; Senate Joint Resolution 28<sup>1</sup> does not.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures. We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35,<sup>1</sup> which treats the contingency of inability differently from situations such as death, removal, or resignation, which states that the Vice President in case of Presidential inability succeeds only to the powers and duties of the Office as Acting President and not to the Office itself, and which declares that the commencement and termination of any inability may be determined by such methods as Congress by law shall provide. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding.

Senate Joint Resolution 35, referred to by Mr. Katzenbach, now the Attorney General, and modified in accordance with his suggestions reads as follows:

Article—

In case of the removal of the President from office or of his death or resignation, the said office shall devolve on the Vice President, in case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed. The Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice

<sup>1</sup>55th Cong.



President, declaring what officer shall then be President, or in case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in case of inability, until the inability shall be earlier removed. The commencement and termination of any inability may be determined by such method as Congress shall by law provide.

I, therefore, propose that we adopt as a constitutional amendment this proposal which not only bears the imprimatur of the two distinguished men who were then Members of the Senate, Senator Kefauver and Senator Keating, but which was so persuasively supported by the Attorney General. He has confirmed to me that he still holds those views. And in his testimony this year he said only that he would not insist on the preference he had expressed in the past.

But such a constitutional amendment would be only the beginning. We must then prepare specific legislation to establish the mechanics and the details of Presidential succession and inability. It could be in much the same language as that proposed by the Senator from Indiana for a constitutional amendment.

This course of action has one advantage above all others. It removes the fear that we may embed in the Constitution procedures which may not turn out to be workable. If they are in a statute we can change them. If they become a part of the Constitution, it would take another constitutional amendment to change them.

Indeed the events of the past few days have created a presumption and perhaps a conclusive presumption that a constitutional amendment in the form reported will be ill advised. In testimony before the Committee on the Judiciary of the other body, the Attorney General has given further indication of doubts he holds about the adequacy of the language of Senate Joint Resolution 1. Is section 3 permitting the President to declare his inability if he transmits a declaration in writing to the Senate and the House to be used when the President is having a tooth pulled? Is it to be used when he is out of the country on a visit to Mexico or to a NATO meeting, or perhaps when he is in the air at any time? If so, then we have imposed in the Constitution a very cumbersome procedure for him to take back his powers and duties. We have provided the same mechanics for an inability of a few minutes, or a few hours, as we have for long periods of illness.

Then, too, as has been suggested by those who have studied Senate Joint Resolution 1 in the form reported by the committee, there are many things which are not covered by the detailed language of this amendment which perhaps should be covered if we are going into such detail instead of adopting broad constitutional language which can be applied by statute to situations as they may arise. If one of the purposes of the amendment is to provide to the greatest extent possible for the filling of the Office of Vice President, have we done so? What happens if the President is disabled for many months and the Vice President assumes his powers and duties as Acting President? Can he appoint a Vice President, or must that Office remain empty? Surely there is as much chance that some ill may befall the mortal who is Acting President due to the disability of the President as there

would be if he succeeded to the Presidency upon the death of the President. By moving into this area with a constitutional amendment containing such specifics dealing with the one case we may have foreclosed ourselves from dealing by statute with other parts of the problem. On the other hand the broader language of Senate Joint Resolution 35, 88th Congress, would permit us to deal with this whole problem by statute.

And, let us never forget, that it is often argued that because situations of great variety and complexity may arise at any time in the conduct of our foreign relations and in the administration of the laws which we pass, we should not too tightly or too rigidly control the exercise of discretion by those who must deal with the problems. But by writing such specifics into the Constitution as are proposed by Senate Joint Resolution 1 as reported, we are even more tightly and more rigidly binding ourselves in dealing with the details of problems of Presidential succession and inability.

We should certainly heed the wisdom of the Attorney General when he testified on the merits of the various proposals last year and the year before. And we should give thought to the implications of all the assumptions the Attorney General felt constrained to make when he testified this year. Let us see what he said:

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with longstanding precedent (see, e.g., *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing that his inability has ended. The subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail.

The fact that we give heed and thought to these suggestions does not mean that we do nothing about the problem of presidential succession and disability. Indeed, we must do something. Let us do it with the sweep of history in our mind and pen rather than the shackles of specifics.

EVERETT MCKINLEY DIRKSEN.

## INDIVIDUAL VIEWS OF SENATOR ROMAN L. HRUSKA

Agreements devised by the President and his Vice President in past administrations to cope with an inability crisis are not satisfactory solutions. Recent history has also made us very much aware of the need for filling the Office of Vice President when a vacancy arises.

It is abundantly clear that, rather than continue these informal agreements, the only sound approach is the adoption of a constitutional amendment.

The hearings, which have been held on this important subject in recent years and in which this Senator has had the opportunity to participate, have led me to prefer a different approach than the present one. As in other legislative matters, the finished product requires the refinement of individual preferences. In the spirit of this simple reality, I shall support the proposed amendment. It is my earnest hope that the Congress and the State legislatures will approve and ratify it promptly. There is, however, one amendment which I would urge, as discussed at a later point.

There are two major reasons for my acceptance of the proposed amendment.

The first is the urgent need for a solution. Differences of opinion in Congress have deprived us of a solution for far too long. It is time that these constitutional shortcomings be met.

Secondly, the proposed language approaches the product which would have resulted under the proposal which I had urged, so that this amendment is acceptable.

Nevertheless, it is in order to state the bases of my earlier preference and the preference of three Attorneys General.

The proposed amendment would distinguish the inability situation from the three other contingencies of permanent nature; death, resignation, and removal from office, and would recognize that, in the first instance, the Vice President becomes Acting President only.

At this point, we encounter the first major difference of opinion. Some would advocate spelling out the procedure for determining inability within the language of the proposed amendment. I disagree with the method of locking into the Constitution those procedures deemed appropriate today but which, in the light of greater knowledge and experience may be found wanting tomorrow.

The preferred course would be for the amendment to authorize the Congress to establish an appropriate procedure by law. This practice parallels the situation of Presidential succession, wherein the power is delineated by the Constitution but the detail is left for later determination.

I would also add one fundamental limitation to the process.

I refer to the doctrine of separation of powers. The maintenance of the three distinct branches of Government, coequal in character, has long been accepted as one of the most important safeguards for the preservation of the Republic.

The executive branch should determine the presence of and termination of the inability of the President. It is my view that a method which would involve neither the judicial nor the legislative branch of the Government would be the better course.

The determination of Presidential inability and its termination is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his Office.

Injecting Congress into the factual question of inability does create a secondary impeachment procedure, although limited, in which the conduct of the President would not be the test.

The impeachment trial of President Andrew Johnson affords a clear illustration of the dangers presented when Congress performs a judicial function. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers which exist when Congress is called upon to consider where to place the mantle of the presidential powers.

An additional compelling argument for restricting this authority to the executive branch is that this determination must be made with a minimum of delay. Although this objection has been alleviated in the present language, the executive branch is clearly best equipped to respond promptly as well as effectively in the face of such a crisis.

Obviously, such a decision must rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or other extraneous factors. Those possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.

We must be mindful that the President is chosen by the people of the entire Nation. It is their wish and their right that he serve as President for the term for which he was chosen. Every sensible and sympathetic construction favoring his continued performance of presidential duties should be accorded him. Indeed, were error to be committed, it should be in favor of his continuation in office or, were it interrupted by a disability, by his resumption of the office at the earliest possible moment upon recovery. The members of the executive branch are best situated to protect that interest.

What briefly has been developed is the basis of my view that Congress should not be injected into the decisionmaking process in cases of presidential inability or recovery.

Considerable reference has been made in the discussion of Senate Joint Resolution 1 to the 76 cosponsors of the proposed resolution. Cosponsorship of a proposal does not mean acceptance of detail and the exact text. I am certain that cosponsors do not consider themselves bound by a proposal as introduced. Cosponsorship does not indicate a desire to proceed without hearings, deliberation, and amendments in committee as well as on the floor of the Senate. Refinements made by the committee on this measure illustrate that whether a proposal has a single sponsor or 99 cosponsors, it must be examined in detail before it is considered by the Senate with a view to change by amendment or substitution.

The refinements that have been made on the original language of Senate Joint Resolution 1 will clarify the detailed procedure to be followed in a case of disability.

The role of Congress is narrow. It is as an appeal open to the President from the decision of the Vice President and the members of the Cabinet. It will be brought into the matter only in those limited circumstances where the Vice President, with a majority of the principal officers of the executive departments, and the President disagree on the question of inability. It is important to note that Congress will not have the power to initiate a challenge of the President's ability.

The procedure by which Congress shall act is properly left to later determination within rules of each branch thereof. A point of possible conflict is resolved in the understanding that Congress shall act as separate bodies and within their respective rules.

The language that " \* \* \* Congress shall immediately proceed to decide the issue" leaves to Congress the determination of what, in light of the circumstances then existing, must be examined in deciding the issue. Thus, the matter will be examined on the evidence available. It is desirable that the matter be examined with a sympathetic eye toward the President who, after all, is the choice of the electorate.

It is apparent that Senate Joint Resolution 1 does have aspects which alleviate the dangers attendant to a crisis in presidential inability. Nevertheless, it is felt by this member of the committee that caution and restraint will be demanded should this inability measure be called into application.

A time does arrive, however, when we must fill the vacuum. The points which I have emphasized and previously insisted upon are important; but having a solution at this point is more than important, it is urgent. For this reason, I support Senate Joint Resolution 1 and urge its passage. I hope that it will be given expeditious approval by the other body and early ratification by the required number of States.

#### PROPOSED AMENDMENT

Section 5 gives the majority of the Cabinet and the Vice President only 2 days in which to challenge the President's declaration that his inability has terminated.

This is not enough time considering the gravity of the situation and the circumstances which might exist.

In the discharge of their duties, members of the Cabinet often travel widely. There are also long periods of time in which they may not have had an opportunity to observe and visit with the President so as to judge whether he has recovered sufficiently to resume his duties. Such periods of inaccessibility might even be longer, in the event of the President's illness.

The 2-day period should be extended to properly allow for these factors. I urge amendment of this point to provide additional time.

ROMAN L. HRUSKA.

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PRESIDENTIAL INABILITY AND VACANCIES IN THE  
OFFICE OF THE VICE PRESIDENT

MARCH 24, 1965.—Referred to the House Calendar and ordered to be printed

Mr. McCULLOCH, from the Committee on the Judiciary, submitted  
the following

REPORT

[To accompany H.J. Res. 1]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution do pass.

The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 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.

"SEC. 3. Whenever the President transmits 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 a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 4. Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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."

#### PURPOSE OF THE AMENDMENT

The principal purpose of the amendment is to distinguish between inability voluntarily declared by the President himself and inability declared without his consent. In the former case, the President can resume his duties by making a simple declaration that the inability has ceased; in the latter, the measure provides procedures for promptly determining the presence or absence of inability when that issue is present.

The amendment makes no changes in sections 1 and 2 of the constitutional amendment proposed by House Joint Resolution 1 as introduced; it does make changes in sections 3 and 4 and it eliminates section 5 by merging the substance of that section with that of section 4.

The changes made by the amendment in section 3 clarify the procedure and clarify the consequences when the President himself declares his inability to discharge the powers and duties of his office. There are two: First, the amendment indicates the officials to whom the President's written declaration of inability shall be transmitted, namely the President pro tempore of the Senate and the Speaker of the House of Representatives. The committee deemed it desirable to add this specification which was absent from the joint resolution as introduced. Second, the amendment makes clear that, in case of such voluntary self-disqualification by the President, the President's subsequent transmittal to the same officials of a written declaration to the contrary, i.e., a written declaration that no inability exists, terminates the Vice President's exercise of the Presidential powers and duties, and that the President shall thereupon resume them. In short, it is the intent of the committee that voluntary self-disqualification by the President shall be terminated by the President's own declaration that no inability exists, without further ado. To permit the Vice President and the Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Sections 4 and 5 of the amendment proposed by House Joint Resolution 1, as introduced, dealt respectively with the devolution upon the Vice President, as Acting President, of the President's powers and



duties pursuant to a declaration of his inability made by the Vice President and other officials, and with the procedure upon subsequent declaration by the President that no inability exists.

The amendment places the substance of former section 5 into section 4, in order to emphasize the committee's intent that the procedure provided by former section 5 relates only to cases in which Presidential inability has been declared by others than the President. Two identical changes are made in former sections 4 and 5. First, the term "principal officers of the executive departments" is substituted for the term "heads of the executive departments" to make it clearer that only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. The substituted language follows more closely article II, section 2, of the Constitution, which provides that the President may require the opinion in light "of the principal officers in each of the executive departments \* \* \*." The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.

The second change made in former sections 4 and 5 is to specify the President pro tempore of the Senate and the Speaker of the House of Representatives as the congressional officials to whom declaration concerning Presidential inability shall be transmitted, as is done in section 3.

The language of former section 5 of House Joint Resolution 1 is further amended to make clear that if Congress is not in session at the time of receipt by the President pro tempore of the Senate and the Speaker of the House of Representatives of a written declaration by the Vice President and a majority of the principal officers of the executive departments contradicting a Presidential declaration that no inability exists, Congress shall immediately assemble for the purpose of deciding the issue. Finally, the language of former section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.

The committee deems it essential in the interest of stability of government to limit to the smallest possible period the time during which the vital issue of the executive power can remain in doubt. Under the bill, following a Presidential declaration that the disability previously declared by others no longer exists, a challenge to such declaration must be made within 2 days of its receipt by the heads of the Houses of Congress and must be finally determined within the following 10 days. Otherwise the President, having declared himself able, will resume his powers and duties. An unlimited power in Congress might afford an irresistible temptation to temporize with respect to restoring the President's powers. In this highly charged area there is no room for equivocation or delay.

## STATEMENT

For its report herein the committee adopts in substantial measure the report of the Senate Committee on the Judiciary to accompany Senate Joint Resolution 1, namely, Senate Report No. 66, 89th Congress, 1st session:

*The constitutional provisions*

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the Executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the office of the Vice President. Article II, section 1, clause 5, reads as follows:

In Case of the Removal of the President from Office, or at 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.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers of duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

*The inability clause and the Tyler precedent*

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all became President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability," North American Review, vol. 133, p. 442 (1919).)

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5, of the Constitution which provides that:

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler, and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants to the President. It has been reported by a Presidential secretary

of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President 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 so communicating with the Vice President, the Vice President, 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.

President Kennedy entered into a similar agreement with Vice President Johnson as did President Johnson with Speaker John McCormack and Vice President Hubert Humphrey. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

#### THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives

of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of Executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience with the Constitution the inability clause remains an untested provision of uncertain application.

#### METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the Presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5, of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication Congress does not have the authority to legislate with regard to the situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18, gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Acting Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

#### *Filling of vacancies in the office of the President*

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice, and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass.

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the Office. Although much deliberation ensued regarding the official functions of the office, little



thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a recurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice-Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

#### THE URGENCY OF AMENDMENT

The death of President Kennedy and the accession of President Johnson in 1963 pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice-Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional



amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However, the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6, which states that—

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.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4, provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers, including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22, can be the President of the Senate.

One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to

the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

#### ANALYSIS

##### *Inability*

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5, of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 1 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3 and 4 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President. By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

The amendment to section 3 makes certain that in cases in which a President himself declares his inability, the period of his disability would be terminated by a simple Presidential notice to both Houses

of Congress. To permit the Vice President and Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and the Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Section 4 of the proposed constitutional amendment deals with the most difficult problem of inability—the factual determination of whether or not inability exists. It provides that whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able to perform his office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his office? If the vote were the other way and the Vice President were installed as Acting President,

what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

The second paragraph of section 4 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days. Once the declaration of the President stating no inability exists has been transmitted to the President of the Senate and the Speaker of the House of Representatives, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If within 10 days the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume after the expiration of 10 days the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6, of the Constitution relating to impeachments. The committee contemplates that votes taken pursuant to the provisions of the proposed constitutional amendment will be conducted in accordance with the rules of the House and Senate, respectively, and that record votes may be taken when in conformity with such rules.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

#### *Vacancies*

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he has been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out.

For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a major voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

The committee recommends adoption of the joint resolution as amended.

COMMITTEE AMENDMENTS TO HOUSE JOINT RESOLUTION 1 SHOWING  
OMISSIONS, NEW MATTER, AND RETAINED WORDING

The committee amendments to the House joint resolution are shown as follows: Provisions of the resolution as introduced which are omitted are enclosed in black brackets, new matter is printed in italic, provisions in which no change is proposed are shown in roman.

Article—

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 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.

SEC. 3. [If the President declares in writing] *Whenever the President transmits 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 a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.*

SEC. 4. [If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his] *Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is*

unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

[SEC. 5.] *Thereafter, when [ever] the President transmits to the [Congress] President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, [with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his] and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall [immediately] decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.*

## ADDITIONAL VIEWS OF REPRESENTATIVE EDWARD HUTCHINSON

House Joint Resolution 1, as reported, would ratify the Tyler precedent of succession to the office of President by the Vice President upon the death of the President; it would provide for filling a vacancy in the office of Vice President; and it would incorporate into the Constitution a detailed procedure for the transfer of Executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office.

### THE TYLER PRECEDENT

No reasonable question any longer exists about the constitutional succession to the office of President by the Vice President upon the death of the President. Vice President Tyler's claim to the office as well as its powers and duties, upon the death of President W. H. Harrison in 1841, has without exception been asserted on every subsequent like occasion. The country would not now accept any different construction of the constitutional provision, nor would any different construction be warranted. There is no disagreement over section 1 of House Joint Resolution 1. It makes clear that whenever a vacancy in the office of President occurs, whether by removal, death or resignation, the Vice President will assume the office as well as its powers and duties.

### FILLING A VICE-PRESIDENTIAL VACANCY

Section 2 of House Joint Resolution 1 would empower and direct the President to nominate a Vice President when that office is vacant, and the citizen so nominated would take office when confirmed by a majority vote of both Houses of Congress.

While it is generally assumed each House would act separately, the language employed requires a majority vote of both Houses, not each House, to confirm. If, sometime in the future, pressure is brought to bear for congressional confirmation in joint convention, as some proponents of this measure now advocate, the language of section 2 may be construed to require only a majority of both Houses combined, in that way diluting the vote of Senators. In my opinion, this possibility would be lessened if the language directed the majority vote in each House instead of a majority vote of both Houses.

Although the section is silent on the point, it is expected that the majority vote required, so long as each House acts separately, is a majority of the votes cast in each House, a quorum being present. There is no requirement for a record vote, but one-fifth of those present could require it. A secret ballot could not be ordered over their objections.

Procedure for confirmation of nominations by the President by both Houses is unique in our experience. All other appointments are



submitted only to the Senate, for advice and consent. A good case could be made for submission of this nomination to the Senate alone. After all, the sole constitutional duty of the Vice President remains that of President of the Senate; and within the purview of the Constitution, the President, by nominating a Vice President, is choosing their Presiding Officer. Senate approval of his nominee, as in the case of other Presidential appointments, certainly would have been thought sufficient in earlier periods of our history, and may be sufficient today.

The case for Senate action alone also can be buttressed by an analogy. In those cases where a Vice President is not elected, because of a failure of a majority of the electoral vote, the Constitution directs the Senate to elect one from the candidates who received the two highest numbers.

Finally, in the case for Senate confirmation alone, it may be observed that our constitutional processes for the selection of our Presidents and Vice Presidents are Federal in nature. Presidential electors, chosen in each State in such manner as the legislature may direct, meet in their respective States and there cast the votes to which their State is entitled. The Senate, too, is a body Federal in nature. Each State has an equal vote in the Senate. The Senate represents the States in our legislative branch. It would be wholly consistent with the preservation of the Federal structure if the Senate were vested with power either to elect a Vice President to fill a vacancy, or to advise and consent to the nomination of the President for that purpose.

Thus far in our history there has been a vacancy in the office of Vice President during a part of 16 different terms. One vacancy was caused by resignation of the Vice President. Seven died in office and the other eight succeeded to the Presidency upon the death of the President.

On those occasions when the Vice President's office becomes vacant through removal, death, or resignation, it is possible that some division in Congress might occur over confirmation of a President's nomination of a successor. But on those occasions when a vacancy is due to a Vice President's succession to the Presidency, and the new President, so recently a Vice President himself, is called upon to nominate another, the temper of the country and of the Congress is likely to be such as to make congressional confirmation of the appointment pro forma. Under such circumstances, how meaningful really is the function of congressional confirmation? The new President might as well be empowered to appoint a new Vice President outright.

Consider the terrible pressures that will immediately come to bear on a newly elevated President to choose a Vice President. No time is specified within which the nomination must be made, but it would be a mistake to believe the new President could relieve the pressure by putting the matter off. As soon as he enters the presidential stage, the new President will see prospective Vice Presidents and their supporters in the wings. In addition to all of the other cares, duties, and responsibilities thrust upon him, he will also have to deal with those who aspire to the second highest office of the land—the largest plum within his hands.

A better solution to the problem of succession to the office of Vice President would be to provide that the holder of some other office in



the administration should automatically succeed to the Vice-Presidency.

It is hard enough for the country to go through the sad experience of a change of administration at the time of the death of a President, when the succession is automatic. That is the situation now and as it has been. Since 1792 there has always been a known successor to the office of President when there was no Vice President. But upon the ratification of this proposed amendment, there will be an air of uncertainty, at least for the time during which it takes a new President to nominate and obtain confirmation of his choice—and this uncertainty will be experienced at a time when the country can least bear it.

#### PRESIDENTIAL INABILITY

House Joint Resolution 1 would incorporate into the Constitution a detailed procedure for the transfer of Executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office. Such transfer can occur with the President's consent or over his protest. The language of the resolution offers no hint that the determination of inability shall be based on medical or psychiatric evidence. Instead, the determination will be a political one; and here lies a danger in the proposal.

Words written into the Constitution in the past are now found to have vested powers to extents and in ways not intended by their authors. We should be extremely careful, lest we unwittingly provide tools of power we would ourselves oppose.

Do the provisions of section 4 of this resolution in effect create a new way in which a President might be removed from office? Might it be possible for a Vice President, sometime in the future, to form a cabal with a majority of the President's Cabinet and seize power from him? Are we, by incorporating these words into the Constitution, providing the machinery by which the stability of the office of President might be undermined? All it takes, under section 4, is for the Vice President and a majority of the Cabinet to file their written declaration of the President's inability with the President pro tempore of the Senate and the Speaker of the House, and the Vice President becomes Acting President. Then the President, dislodged by this maneuver from his awesome powers, is put in the position of having to win back his position by persuading Congress of his fitness. Here again the decision will be a political one. There is no suggestion that medical or psychiatric evidence even be considered. And, if an unpopular President should fail to find support among at least a third of the Senators and Representatives in Congress, he would continue in name only, shorn of his powers and duties. He could apparently make repeated attempts to regain the powers of his office until his term expires. Would these circumstances lend stability to the country or undermine it?

On the other hand, suppose an unpopular President is upheld by the Congress with more than one-third, but less than a majority of the Members sustaining his contention of ability to serve. Is it not possible the same cabal might try again? The President would break it up, if possible, by changes in his Cabinet, providing he could win the advice and consent of the Senate for his new appointees, but under such circumstances he might not obtain confirmation of his

Cabinet changes. Would these circumstances tend to lend stability to the Government or undermine it?

Other assumptions might be made to illustrate further how the machinery we now offer the country might sometime be used by men ambitious for power.

We should keep in mind that we are fashioning tools which could be used to unsettle the stability of our Government while we mean to promote it.

Section 4 is certainly not intended to provide the tools for power to evil men. Its drafters had in mind an altogether different situation. They suppose an ill President, physically unable to give his consent for the assumption of power by the Vice President. Under these circumstances some alternative to his consent must be devised if the Government is to carry on. Thereafter, when the President has recovered sufficiently to resume his duties, or thinks he has, the drafters wanted to be sure of machinery whereby he could recover his powers from a Vice President and Cabinet who might disagree with his own assessment of recovery.

Supporters of this proposal call the power of public opinion to their defense and say a Vice President and Cabinet would not dare seize power from a President physically and mentally able, nor withhold power from him once recovered. - But public opinion can be molded, and some Presidents in our history have been most unpopular in office, and probably there will be some in the future.

There is no definition of inability or disability in the proposed amendment, nor is there any provision for the definition of this term. If there has existed an uncertainty of congressional power to define it under existing constitutional provisions, it is clear Congress will be without power to define an inability after House Joint Resolution 1 is incorporated into the Constitution.

The proposal will leave to the President in section 3, and to the Vice President and Cabinet majority in section 4, complete power to treat any condition or circumstance they choose as a disability. It is even conceivable, though I hope not likely, that some President might declare himself unable, and state no reason therefor (since no reason is required by the language) in order to avoid responsibility for some unpopular act, devolving the powers of his office upon the Vice President for the time being to accomplish that purpose. After ratification of House Joint Resolution 1, the Congress definitely cannot define by law what constitutes Presidential disability. I think a good case can be made to vest that power of definition in Congress. Here would be another check and balance in our system, built in to guard against abuse of power.

It was suggested in the hearings that the President might declare his inability because of absence from the country. It seems unlikely that he would do so because he would want to go abroad with full powers of his office, as Presidents have done in the past. But members should know that in the minds of some, the language of this proposal will permit a future President to relieve himself of the burdens of his office, at will, by a declaration of inability due to absence.

The provisions of House Joint Resolution 1 leave many questions unresolved. For example, it does not address itself to the problem of what happens if an Acting President suffers an inability. It overlooks

the possibility of a Presidential inability at a time when there is no Vice President, which might occur soon after a new President succeeded to office and before he nominated a new Vice President. How could the machinery of section 4 work then? Under the language of that section, it would appear essential that there be a Vice President to trigger the machinery of that section.

In my opinion it would be better to work out the answers to these problems and others before submitting this proposed amendment for ratification. There is no real urgency. We now have a Vice President, and an executive understanding between him and the President on the matter of Presidential disability. We should not rush this proposal on its way until it is as perfect as we can make it. These other problems will remain unsolved and those who are concerned about a certainty of succession and ability will continue to press for further amendments.

It will be tragic if we have unwittingly deprived Congress of power to move into any breach in the structure here being fashioned.

Respectfully submitted.

EDWARD HUTCHINSON.

DISSENTING VIEWS OF REPRESENTATIVE CHARLES McC.  
MATHIAS, JR.

I dissent from the views of the majority of the committee with respect to the grant of power to the President to nominate his heir. I oppose such power as being in conflict with the basic principles of the Republic and the philosophy of the Constitution which tends to disperse, rather than to centralize, power.

The Presidency has always been considered an elective office, but it will not be purely elective if this amendment is adopted.

The Constitutional Convention, as we know it through Madison's Journal, would surely have rejected an appointed Vice President on grounds of principle alone. Modern conditions, while compelling, do not dictate that we abandon principle when we provide a modern method of succession.

The Constitution seeks means to interpose legal safeguards between the weakness, the temptations, and the evil of men and the opportunity to injure the state. We do the same in private life when we ask an honest debtor to execute a mortgage or an honorable man to state his promise or covenant in writing.

By permitting the President to name a Vice President, House Joint Resolution 1 operates on the opposite principle, assuming that a President will always be enlightened and disinterested in naming a Vice President. While this optimism reflects well on the 20th Century's opinion of itself in contrast to the pragmatic 18th century estimate of human frailty, it may not be a prudent basis for constitutional law.

Congressional confirmation of a vice-presidential nominee would be only a mild check and, in my judgment, would be a mere formality in a period of national emotional stress. Most of us who were here in the last dark days of November 1963 would confirm that almost any such request made by President Johnson would have been favorably received by the Congress in our desire to support and stabilize his administration.

Giving the President exclusive power to nominate a Vice President has been justified by a false analogy to the broad discretion allowed modern presidential nominees to express a preference for their running mates. But a presidential nominee and an incumbent President are very different men—even if they inhabit the same mortal frame—and they may be moved by very different motives. A President secure in the White House will have undergone a metamorphosis from his earlier self, insecurely and temporarily occupying the presidential suite at the Blackstone or the Mark Hopkins during the climax of a national convention.

If the presidential nominee really is allowed a personal choice of running mates, he will seek a candidate to complement his own candidacy and to strengthen the ticket. He will want an attractive, vigorous, and patently able associate. The electability of the vice-

presidential candidate is a form of accountability for the head of the ticket. By way of example, recall the probable motives of Senator John F. Kennedy in choosing Lyndon B. Johnson for his running mate and consider whether the same motives would have been decisive with President John F. Kennedy.

Furthermore, the analogy used to justify this amendment would crystallize contemporary political custom into organic law. Current practice at national political conventions and conventions themselves are the creatures of custom only. Customs can and should change as social, political and technological changes affect our way of living. The Constitution cannot and should not be so flexible.

The public today is all too ready to impugn the motives of a President dealing with his Vice President. It is hinted that a President is constantly tempted to relegate the Vice President to a subordinate role in political life. If such motives are credible in daily governmental relations, how much more would they be present in the selection of an heir and successor.

Couple this consideration to the provisions of House Joint Resolution 1 with respect to Presidential inability and the considerations that might move a President to nominate a respectable, but pallid, Vice President. If the heir apparent is to gain certain powers of deposition as well as natural succession, a President may indeed hesitate in seeking a vigorous and aggressive Vice President. Such a danger would not have escaped examination by the framers of the Constitution and should be considered by those who propose to amend it.

CHARLES McC. MATHIAS, Jr.

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## PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

JUNE 29, 1965.—Ordered to be printed

Mr. CELLER, from the committee of conference, submitted the  
following

### CONFERENCE REPORT

[To accompany S.J. Res. 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the joint resolution (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

#### ARTICLE —

*SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.*

*SEC. 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.*

*SEC. 3. Whenever the President transmits 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.*

*SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress*

may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by 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 the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

And the House agree to the same.

EMANUEL CELLER,  
BYRON G. ROGERS,  
JAMES C. CORMAN,  
WILLIAM M. McCULLOCH,  
RICHARD H. POFF,  
*Managers on the Part of the House.*  
BIRCH E. BAYH, Jr.,  
JAMES O. EASTLAND,  
SAM J. ERVIN, Jr.,  
EVERETT M. DIRSEN,  
ROMAN L. HRUSKA,  
*Managers on the Part of the Senate.*



## STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House passed House Joint Resolution 1 and then substituted the provisions it had adopted by striking out all after the enacting clause and inserting all of its provisions in Senate Joint Resolution 1. The Senate insisted upon its version and requested a conference; the House then agreed to the conference. The conference report recommends that the Senate recede from its disagreement to the House amendment and agree to the same with an amendment, the amendment being to insert in lieu of the matter inserted by the House amendment the matter agreed to by the conferees and that the House agree thereto.

In substance, the conference report contains substantially the language of the House amendment with a few exceptions.

Sections 1 and 2 of the proposed constitutional amendment were not in disagreement. However, in sections 3 and 4, the Senate provided that the transmittal of the notification of a President's inability be to the President of the Senate and the Speaker of the House of Representatives. The House version provided that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives. The conference report provides that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives.

In section 3, the Senate provided that after receipt of the President's written declaration of his inability that such powers and duties would then be discharged by the Vice President as Acting President. The House version provided the same provision except it added the clause "and until he transmits a written declaration to the contrary". The conference report adopts the House language with one minor change for purposes of clarification by adding the phrase "to them", meaning the President pro tempore of the Senate and the Speaker of the House.

The first paragraph of section 4, outside of adopting the language of the House designating the recipient of the letter of transmittal be the President pro tempore of the Senate and the Speaker of the House of Representatives, minor change in language was made for purposes of clarification.

In the Senate version there was a specific section; namely, section 5, dealing with the procedure that when the President sent to the Congress his written declaration that he was no longer disabled he could

resume the powers and duties of his office unless the Vice President and a majority of the principal officers of the executive departments, or such other body as the Congress might by law provide, transmit within 7 days to the designated officers of the Congress their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon, the Congress would immediately proceed to decide the issue. It further provided that if the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President would continue to discharge the same as Acting President; otherwise, the President would resume the powers and duties of his office.

The House version combined sections 4 and 5 into one section, now section 4. Under the House version, the Vice President had 2 days in which to decide whether or not to send a letter stating that he and a majority of the officers of the executive departments, or such other body as Congress may by law provide, that the President is unable to discharge the powers and duties of his office. The conference report provides that the period of time for the transmittal of the letter must be within 4 days.

The Senate provision did not provide for the convening of the Congress to decide this issue if it was not in session; the House provided that the Congress must convene for this specific purpose of deciding the issue within 48 hours after the receipt of the written declaration that the President is still disabled. The conference report adopts the language of the House.

The Senate provision placed no time limitation on the Congress for determining whether or not the President was still disabled. The House version provided that determination by the Congress must be made within 10 days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide. The conference report adopts the principle of limiting the period of time within which the Congress must determine the issue, and while the House original version was 10 days and the Senate version an unlimited period of time, the report requires a final determination within 21 days. The 21-day period, if the Congress is in session, runs from the date of receipt of the letter. It further provides that if the Congress is not in session the 21-day period runs from the time that the Congress convenes.

A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.

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WILLIAM M. MCCULLOCH,  
RICHARD H. POFF,  
*Managers on the Part of the House.*



# PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

JUNE 30, 1965.—Ordered to be printed

Mr. CELLER, from the committee of conference, submitted the  
following

## 2A CONFERENCE REPORT

[To accompany S.J. Res. 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the joint resolution (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency in cases where the President is unable to discharge the powers and duties of his office, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

*That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:*

### "ARTICLE —

"SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"SEC. 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.

"SEC. 3. Whenever the President transmits 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.

"SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by 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 the same as Acting President; otherwise, the President shall resume the powers and duties of his office."

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In the Senate version there was a specific section; namely, section 5, dealing with the procedure that when the President sent to the Congress his written declaration that he was no longer disabled he could resume the powers and duties of his office unless the Vice President



and a majority of the principal officers of the executive departments, or such other body as the Congress might by law provide, transmit within 7 days to the designated officers of the Congress their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon, the Congress would immediately proceed to decide the issue. It further provided that if the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President would continue to discharge the same as Acting President; otherwise, the President would resume the powers and duties of his office.

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JAMES C. CORMAN,  
WILLIAM M. MCCULLOCH,  
RICHARD H. POFF,  
*Managers on the Part of the House.*

○





THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. Speaker:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

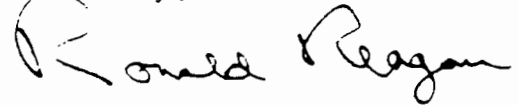
After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all,

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is fluid and cursive, with a large, stylized "R" at the beginning.

The Honorable Thomas P. O'Neill, Jr.  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

July 13, 1985

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Sincerely,

A handwritten signature in dark ink, reading "Ronald Reagan". The signature is written in a cursive, flowing style with a large, prominent "R" at the beginning.

The Honorable Strom Thurmond  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. Speaker:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

The Honorable Thomas P. O'Neill, Jr.  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

July 13, 1985

Dear Mr. President:

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The Honorable Strom Thurmond  
President Pro Tempore  
United States Senate  
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

July 11, 1986

MEMORANDUM FOR THE FILE

FROM: DIANNNA G. HOLLAND *ag*

SUBJECT: July 13, 1985, Letter from the President  
to the Speaker of the House of Representatives  
and the President Pro Tempore of the Senate

With regard to the above referenced letter, the reference to a long-standing arrangement between the President and the Vice President is not an agreement that was ever put in writing; however, Fred Fielding (Counsel to the President) told me that the President and the Vice President reaffirmed a discussion that they had after the assassination attempt with regard to the transfer of power. This reaffirmation was done in Mr. Fielding's presence shortly before the July 13 event. He further indicated that the concern with regard to invoking Section 3 in 1985 was that the President wanted to ensure that future Presidents would not be bound by the precedent of invoking Section 3 for such a short period of time. The explanation was included in the July 13 letter in order to explain the President's position that he did not want the situation to set a precedent which could possibly include, for example, having a tooth removed.



NOT USED

THE WHITE HOUSE

WASHINGTON

January 5, 1987

Dear Mr. Speaker:

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

As I have indicated in the past in similar circumstances, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

*L. General*  
I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all.

Sincerely,

The Honorable  
Speaker of the  
House of Representatives  
Washington, D.C. 20515

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Sincerely,

The Honorable Strom Thurmond  
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of the Senate  
Washington, D.C. 20510

ok



Not Used

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WASHINGTON

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Unable to read on orig.

... - ...

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Sincerely,

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President pro tempore  
of the Senate  
Washington, D.C. 20510



NOT USED

THE WHITE HOUSE

WASHINGTON

July 31, 1987

Dear Mr. Speaker:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,

The Honorable Jim Wright  
Speaker of the  
House of Representatives  
Washington, D.C. 20515

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THE WHITE HOUSE

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President pro tempore  
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