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### Memorandum to Attorney General Edwin Meese Regarding Presidential Succession Under 3 U.S.C. § 19

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U.S. Department of Justice  
Office of Legal Counsel

Office of the  
Assistant Attorney General

Washington, D.C. 20530

AUG 9 1985

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: Presidential Succession under 3 U.S.C. § 19

This memorandum is intended to provide you with a description of the operation of presidential succession under 3 U.S.C. § 19. Section 19 sets forth the statutory line of succession for the devolution of presidential powers and duties after the Vice President. The statute provides that the specified order of succession applies upon the death, resignation, removal from office, inability, or failure to qualify of the President and Vice President. Section 19 specifies that the powers and duties of the office of 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 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, and Secretary of Education. Each of these successors is entitled to "act as President," if there are no more senior successors alive, qualified, and able to act as President. See § 19(a)(1), (b), (d)(1). However, in order to be eligible to act as President, each successor must meet the constitutional age and citizenship requirements for the Presidency, and may not be under impeachment. § 19(e). In addition, a Cabinet officer must have been confirmed in that office by the Senate in order to be eligible. Id. Prior to taking the presidential oath of office, 1/ the Speaker and the President

1/ Although not explicit in the terms of the statute, section 19 appears to contemplate that a congressional or Cabinet officer who acts as President will take the presidential oath, whether he assumes the Presidency because of a vacancy or because of a disability. Section 19 does not distinguish between situations in which the offices of the President and

(Continued)

pro tempore must resign their offices and from Congress. § 19(a)(1), (b). The taking of the presidential oath by a Cabinet officer constitutes his resignation from his Cabinet post. § 19(d)(3). 2/

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1/ (Continued)

Vice President are vacant, and situations in which a disability prevents a President or Vice President from discharging the duties of the office of President. In both cases the next successor "acts" as President until expiration of the current presidential term, or until qualification of, or removal of the disability of, a prior-entitled officer under the terms of the statute. Although as a general rule an officer who is acting in a certain capacity need not take the oath of office ordinarily taken by the person whose duties he has temporarily assumed, the legislative history of section 19 suggests that Congress assumed that a congressional or Cabinet officer who acts as President would take the presidential oath. See 93 Cong. Rec. 7698 (1947); 91 Cong. Rec. 7026-27 (1945). The taking of the oath is, in fact, the mechanism by which a Cabinet officer is deemed to have resigned his Cabinet position. 3 U.S.C. § 19(d)(3).

2/ Effectively, then, a congressional or Cabinet successor must relinquish all official duties and responsibilities once he begins to act as President under section 19. This conclusion applies whether that individual acts as President because of vacancies in the offices of President and Vice President, or because of disability of one or both of those officers. The terms of 3 U.S.C. § 19(a)(1) & (b), governing succession by the Speaker of the House and the President pro tempore, are unequivocal, and require resignation whenever either officer "acts as President." The terms of section 19(d)(3), with respect to Cabinet officers, are somewhat different, providing only that the taking of the presidential oath constitutes resignation from the Cabinet office. However, the legislative history of 3 U.S.C. § 19 appears to contemplate that a Cabinet officer will take the presidential oath whenever he acts as President. Moreover, that legislative history does not suggest that Congress believed Cabinet officers should be treated differently from congressional officers with respect to resignation from other official duties. See 93 Cong. Rec. 7770-72 (1947); id. 7698-99; H.R. Rep. No. 817, 80th Cong., 1st Sess. 5-6 (1947). Thus, a statutory successor who acts as President during a period of presidential disability would not return to his former office once the President recovered from the disability, but would rather be a private citizen.

Congress's authority to enact a line of succession beyond the Vice President rests on Art. II, § 1, cl. 6 of the Constitution, which provides that --

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.

(Emphasis added.). Both prior and subsequent to passage of section 19 in 1947, questions have been raised as to whether the Speaker and President pro tempore are "Officers" within the meaning of this provision, and therefore eligible to be placed in the presidential line of succession.

We believe that, consistent with its power under Art. II, § 1, cl. 6 of the Constitution to "provide for the Case of Removal, Death, Resignation or Inability both of the President and Vice President, [by] declaring what Officer shall then act as President," Congress may, as it has done, place legislators in the line of succession. This is the position that Acting Attorney General Douglas W. McGregor expressed in a written opinion when the Presidential Succession Act of 1947 was before Congress. The House Committee on the Judiciary concurred in this conclusion, see H.R. Rep. No. 817, 80th Cong., 1st Sess. 4 (1947), and Congress acted on it. This Office revisited the question in 1963 and adhered to the position taken in 1947. See Memorandum from Assistant Attorney General Schlei, Office of Legal Counsel, to Theodore Sorensen, "Agreement Between the President and the Speaker of the House as to Procedures in the Event of Presidential Inability" (Dec. 4, 1963) at 4. As set forth in the McGregor Opinion and the Schlei Memorandum, the designation of the Speaker and the President pro tempore as presidential successors in the first succession law, passed in 1792, is persuasive evidence of the Framers' understanding of the term "Officers" as that term is used in Art. II, § 1, cl. 6. "This law [of 1792] represents a construction of Article II by an early Congress, whose views of the Constitution have long been regarded as authoritative, and reflects a long-continued acquiescence in such a construction." H. Rep. No. 817, at 4; Schlei Memorandum at 4 n. 6.

We will focus specifically in this memorandum on situations in which a statutory presidential successor (*i.e.*, one specified in section 19) may supplant another statutory presidential successor who has already begun to act as President under section 19. The possibility of such supplantation obviously creates a degree of uncertainty and instability in the succession mechanism, and could conceivably result in several changes in presidential leadership at a time when such leadership may be critical. As we outline below, supplantation could occur in two situations: (1) supplantation of a Cabinet successor by a congressional officer, in accordance with section 19(d)(2); or (2) supplantation of a more junior Cabinet (or congressional) successor by a more senior successor, if the junior successor acted arbitrarily and unreasonably in assuming office.

(1) By the terms of 3 U.S.C. § 19(d)(2), a Cabinet officer who assumes the Presidency is entitled to continue in that role for the remainder of that presidential term, or until a "qualified and prior-entitled" non-Cabinet officer is able to assume the Presidency. Clearly, a President or Vice President who had been disabled or who had failed to qualify for the Presidency would be such a "qualified and prior-entitled" individual who would assume the office of President upon removal of the disability or disqualification. The legislative history of 3 U.S.C. § 19 is also clear that a Speaker or President pro tempore would be a "qualified and prior-entitled" officer who would supplant the Cabinet officer. If, at the time the Cabinet successor began to act as President, there were no Speaker or President pro tempore, that successor would act as President until the House or Senate elected a new Speaker or President pro tempore, assuming either the Speaker or the President pro tempore chose to assume the Presidency. See 93 Cong. Rec. 7705 (1947) (colloquy between Senators Barkley and Wherry); *id.* at 7700 (remarks of Sen. Wherry); S. Rep. No. 80, 80th Cong., 1st Sess. 2 (1947); H.R. Rep. No. 817, 80th Cong., 1st Sess. 5 (1947). Thus, either the newly appointed Speaker or President pro tempore could supersede and replace the Cabinet officer who had succeeded to the Presidency. The superseding officer would then serve as Acting President for the remainder of the unexpired presidential term.

Similarly, it is possible that a Cabinet successor who has been acting as President could be supplanted by an existing Speaker or President pro tempore at any time. Under section 19, both the Speaker and the President pro tempore may, in their discretion, refuse to resign from their legislative positions, and by so refusing disable themselves, during the period of their refusal, from succeeding to the

Presidency. In the event of such a refusal the most senior Cabinet officer available under section 19 would succeed, but would be subject to divestment by the subsequent resignation and assumption of office by either a qualified Speaker or a qualified President pro tempore.

Supplantation by a congressional successor could only occur once under the terms of section 19. The law provides that, unlike Cabinet officers, a Speaker of the House or President pro tempore of the Senate who assumes the Presidency shall continue in that capacity for the remainder of the unexpired presidential term. 3 U.S.C. § 19(c). Therefore, if there were vacancies in both congressional offices and the Senate elected a new President pro tempore before the House elected a new Speaker, the President pro tempore could act as President for the remainder of the unexpired presidential term. There are only two instances in which the Speaker or President pro tempore is required to step down under the terms of section 19:

- ° when the President-elect or Vice President-elect becomes qualified, if the assumption of presidential authority was founded on the failure of both the President-elect and the Vice President-elect to satisfy one or more of the basic qualifications for those offices (3 U.S.C. § 19(c)(1)); or
- ° when the disability of the President or Vice President is removed, if the assumption of authority was founded on the inability of either the President or Vice President to act (3 U.S.C. § 19(c)(2)).

(2) Section 19 treats competing rights of Cabinet successors slightly differently. After a Cabinet member has been sworn in as President, "the removal of the disability" or "the ability to qualify" of a more senior Cabinet officer would not terminate the Presidency of the Cabinet officer who had assumed the office. 3 U.S.C. § 19(d)(2). Consequently, a lower ranking Cabinet officer who had become Acting President would be authorized to continue in office if the higher ranking Cabinet officer had been under a disability or had otherwise failed to qualify for the Presidency when the lower ranking Cabinet officer assumed office.

The authority of the lower ranking Cabinet officer to assume the Presidency, however, is predicated on his factual determination, using appropriate legal standards and all reasonably available information, that all higher ranking officers are

actually under a disability, or have failed to qualify for the office of President. It is possible that in particular circumstances this determination may be factually erroneous, and that a higher ranking successor was, at the time the lower ranking Cabinet officer assumed the Presidency, able to assume the duties and responsibilities of the President. For example, a lower ranking Cabinet officer may receive erroneous information that a certain higher ranking officer had died, when in fact the more senior officer was alive, or the lower ranking officer could be informed that a more senior officer was incommunicado, when in fact the more senior officer had been in communication with other groups or potential successors.

The fact that the determination made by the lower ranking officer may later be discovered to be based on erroneous facts would not necessarily mean that the officer could be displaced by a higher ranking Cabinet officer. The responsibility of any potential successor is to satisfy himself that all possible efforts have been made to ascertain the actual status of all higher ranking successors, given the exigencies of the particular situation. If a potential Cabinet successor has fulfilled this responsibility, we do not believe he could be displaced by a higher ranking Cabinet officer.

It is possible, although we hope unlikely, that the lower ranking officer in the order of succession might act arbitrarily, contrary to his responsibility to make a reasonable, good faith determination as to his eligibility to act as President, and might assume the Presidency even though he had reason to believe that higher ranking officers were able to assume the duties of the Presidency, or prior to ascertaining the location and status of all higher ranking successors with as much certainty as possible under the circumstances. In that event, we would conclude that the higher ranking officer was entitled to assume the Presidency. 3/

3/ Our conclusion would apply equally to the situation in which the President pro tempore of the Senate assumes the Presidency on the basis of an arbitrary or unreasonable conclusion that the Speaker of the House is under an inability or disability to qualify for the office of President.

To summarize, certain general conclusions can be drawn about the operation of 3 U.S.C. § 19:

- A President-elect or Vice President-elect who did not qualify, or a President or Vice President who lacked the ability to act, will have primary claim to the office of President over any other official who may be acting as President, upon proper qualification or removal of the disability.
- In the absence of the President and Vice President, a Speaker of the House may assume the office of President at any time in place of any Cabinet officer who may have assumed the Presidency.
- In the absence of the President, Vice President, and Speaker, the President pro tempore may assume the Presidency at any time in place of any Cabinet officer who may have assumed the Presidency. The President pro tempore cannot be replaced as President by the Speaker unless the assumption of the Presidency by the President pro tempore was based on an arbitrary or unreasonable determination.
- A newly elected Speaker of the House or President pro tempore of the Senate may not unseat a former Speaker or President pro tempore who has properly assumed the Presidency.
- A Cabinet officer who assumes the Presidency may be replaced by the Speaker or President pro tempore.
- A Cabinet officer who has assumed the Presidency may be replaced by another Cabinet officer of higher rank on the succession list only if the assumption of the Presidency by the first Cabinet officer was based on an arbitrary or unreasonable determination.

We hope this analysis has been useful to you. Please let us know if we can be of further assistance.

Ralph W. Tarr  
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Office of Legal Counsel