

MEMORANDUM
PRESIDENT'S AUTHORITY TO DELEGATE FUNCTIONS
JAN 24 1980

<Attorney>

Public Law 673, 81st Cong., 2nd Sess., (Title III, sec. 301-303) authorizes the President to provide for the performance of certain functions of the President by other officers of the Government. Section 301 confers upon the President general authorization to delegate functions to 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. Such functions which the President may delegate under this section are those which are vested in the President by law or those which the officer is required or authorized by law to perform only with the approval, ratification or other action of the President.

Section 302 deals with the scope of the delegation of the functions. This section provides as follows:

"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." (Added Oct. 31, 1951, ch. 655, Section 10, 65 Stat. 712). (Emphasis supplied)

Two questions are raised.

(1) What are the "inherent" rights of the President for delegating the performance of functions vested in him by law as these words are used in sec. 302, or otherwise and

(2) To the extent that the performance of certain functions are not delegable, may the President by Executive Order or other direction authorize the Vice President to perform rights which exist in the President.

I

The term "inherent" as used in the Act is not defined. The reports of the Congress do not shed any light on what was intended by inclusion of the word "inherent" into the Act. It is apparent, however, from the reports that the purpose of this Bill was to permit the President to delegate many time consuming and laborious functions so as to free his time for more important matters. It was estimated the President was required to execute approximately four hundred duties. The Congress felt that the President could delegate a substantial part of these and have his heavy burden lightened. The Senate Report, however, recognized that the Bill could not, because of legal obstacles, eliminate all of the burdens of the President. As the Senate Report noted (S.R. No. 1867, 81st Cong., 2d Sess., p. 3):

"The bill cannot, therefore, eliminate nor is it intended to wholly relieve the burdens of the President in this work area. In the first place, the President cannot delegate many functions because delegation would be inappropriate due to their character. In other cases the President may feel it essential that he perform the function due to the importance of the function or due to special circumstances. In short, much of the workload of the President, is inherent in the office and cannot be alleviated by the enactment of general legislation. The proposal is merely an important step in the right direction. * *

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In its conclusion the committee stated that the subject Bill will help "to improve administration of the Executive Branch of the

Government by easing the mounting problems of the Chief Executive through the elimination of part of the heavy workload now vested in him." (Emphasis supplied)

In the House Report (H.R. No. 1139, 81st Cong., 1st Sess.) the following is said:

"* * * Corresponding authority is conferred upon the President by the bill in respect of functions which are under the terms of other law authorized to be performed only with or subjects to the approval, ratification, or other action of the President. However, it should be understood that the functions, as set out in this bill, refer to those vested in the President by statutory authority, rather than those reposing in the President by virtue of his authority under the Constitution of the United States.

"In order to preserve the present right of the President to delegate the actual performance of functions vested in him by law, the bill provides that the provisions thereof shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of such functions. The bill further provides that nothing therein shall be deemed to require express authorization in any case in which an official performing a Presidential function would be presumed in law to have acted by authority or direction of the President.

NEED FOR THE BILL

"The effective discharge of the hundreds of duties and responsibilities imposed upon the President by law would be virtually impossible were it not for the general and inherent right of the President to delegate the actual performance of functions vested in him by law." /1/

In none of the Reports of the Congress referred to above is there any definition of the inherent right of the President to delegate the performance of functions vested in him, but both Reports, as well as the Act, recognize that the President has such an inherent right. (See also, Debates in the House, Cong. Rec., pp. 11391-11396).

Generally, it may be said that the inherent rights or implied powers of the President are all those vast powers which are reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of government.

Section 1 of Article II of the Constitution provides that "the executive Power shall be vested in a President of the United States of America." This clause constitutes a grant of all the executive powers of which the Government is capable (cf. Myers v. United States, 272 U. S. 52; Works of Alexander Hamilton (Lodge ed), Vol. 4, pp. 388-389).

We must remember that we do not have a parliamentary form of Government. Rather we have a tripartite system which contemplates an executive fully exercising his independent powers. For that purpose sec. 1 of Article II must be given a liberal construction as will confer upon the Chief Executive ready power to deal both with day to day problems as well as with emergencies that arise.

This comprehensive executive power to act must be taken as having sprung from all the available clauses of the Constitution which expressly confer power upon the President. In addition to sec. 1, Article II, which provides that the executive power shall be vested in the President, the Constitution requires that the President will "faithfully execute the Office of the President" and will to the best of his ability "preserve, protect and defend the Constitution of the United States" (Sec. 1); that "he shall be Commander-in-Chief of the Army and Navy of the United States" (Sec. 2); that he shall be the sole organ of the Nation in its external relations (Secs. 2 and 3); and that "he shall take Care that the Laws be faithfully executed" (Sec. 3).

In passing upon the question before us we must also remember as

Chief Justice Marshall said, that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that "(I)ts means are adequalls to its ends" (McCulloch v. Maryland, 4 Wheat. 311, 41k, 424 (1819).

In terms of hard-headed practicalities, the President obviously could not physically perform the various functions that are conferred on him by the Constitution. The President must of necessity act through his heads of the Departments and other persons (see 7 Op. A.G. 453). Their official acts promulgated in the regular course of business, are presumptively his acts (see Runkle v. United States, 122 U.S. 543). In Williams v. United States, 1 How, 290, the Court said (p. 296):

"***The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st, Because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable--may, impossible."

In Myers v. United States, 272 .S. 52, 117, Chief Justice Taft speaking for the Court said as follows:

"The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court (Citing cases) As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

This is the general rule which the Court has applied in sustaining the delegation by the Preesident of the exercise of his executive authority. /2/

The exception to the general rule is contained in this succinct statement in Willoughby's "Constitution" (Vol. II, p. 1160):

"where, however, from the nature of the case, or by express constitutional or statutory declaration, the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else."

Thus in Runkle v. United States, 122 U.S. 543, involving dismissal of a major from the army, a matter which required confirmation or disapproval of the President, the court held the power was of a judicial character which could not be delegated. The President could call others to assist him in making an examination of the court martial, but "his judgment when pronounced must be his own judgment and not that of another." (122 U.S. at p. 557). See too, United States v. Puge, 137 U.S. 673, 680-681; United States v. Fletcher, 148 U.S. 84, 88-91; Ex Parte Field, 9 Fed. Cas. 1 (1862); 7 Op. A.G. supra, at pp. 465-466.

Subject to these limitations, it would appear that the President could delegate certain functions to the Vice President unless the latter is ineligible to exercise these powers under the Constitution or laws of the United States.

There is no express provision in the Constitution which would preclude the Vice President from exercising those powers of the President which do not require the latter's personal, individual

judgment.

There are two provisions in the Constitution which should be considered in this connection. The first in Article II, Section 1 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 * * *".

We need not reach the question as to what constitutes "inability to discharge the Powers and Duties of the said Office" in any given case.

As matter stand, we do not have such a case here.

The Executive Order could be drafted delegating functions to the Vice President indicating that the President not only has the ability to discharge the powers and duties of the Office but in fact will continue to exercise the most important powers and duties of his Office. This could be made plain if the Executive Order would provide in substance that:

1. Presidential functions that may not be delegated because of Constitutional or statutory restrictions are not delegated.

2. Functions which have heretofore been delegated to other officers of the Government are not delegated.

3. With respect to any Presidential function that may not be delegated because of Constitutional or statutory restrictions the Vice President should be required to submit any proposed action to the President for his consideration and decision, and the Vice President should be directed to take such action in the matter as the President shall direct.

4. The Vice President could make such inquiries as he may deem proper to determine whether the laws of the United States are being faithfully executed by the appropriate officers of the Government, including, but not limited to, heads of departments and agencies, and should be directed to report to the President from time to time in that regard. The Vice President should be directed to ascertain the President's will or decision as to the action to be taken concerning any such matter, and should notify the appropriate Government officer or officers accordingly. Such notification should be in writing and should recite that the action indicated is in accordance with the decision of the President.

5. All formal orders or other documents issued by the Vice President under or pursuant to the proposed order should be published in the Federal Register, and any Executive Order or proclamation of the President amended, modified, or revoked by any such order or document of the Vice President should be identified in the Vice President's order by number, date, and subject matter.

6. The right should be reserved to the President to perform at any time any of the functions delegated to the Vice President by the order.

7. As used in the order, the term "function" should be defined to embrace any duty, power, responsibility, authority, or discretion vested in the President or other officer concerned, and the term "performed" should be defined to mean "exercised."

8. The order should continue in effect until amended, modified, or revoked by further order of the President.

From these provisions, it would be manifest that the delegation by the President to the Vice President of the various functions recited in such Executive Order would not violate Article II, Section I of the Constitution.

Second, the Constitution provides that the Vice President shall be "The President of the Senate, but shall have no Vote, unless they be equally divided".

Would exercise by the Vice President of the functions delegated to him by the Executive Order be inconsistent with his functions as President of the Senate?

It would not. The Vice President may properly exercise both

functions without any conflict. Moreover, the Constitution contemplates that the Senate may function even in the absence of the Vice President. It declares in Article I, Section 3 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 the President of the United States".

Since there are no legal precedents either supporting or rejecting the authority of the President to delegate his powers to the Vice President, we may properly consider historical precedents. Vice Presidents Coolidge, Garner and Wallace were invited into the Cabinet and attended its meetings with regularity. Wallace was also operating Chairman of various emergency agencies, coordinating their administration under policies and directives issued by the President. "His direction of certain defense and war agencies was a revolutionary departure for the vice-presidency, and still remains unimitated, unless the announcement in April 1953 that Vice President Nixon would be chairman of a commission to enforce federal antidiscrimination policies in public contracts is the prelude to this body's developing into an active, significant agency. The list of appointments given to Wallace is imposing. Vice President Wallace was assigned to the Economic Defense Board (established July 30, 1941, reorganized and renamed the Board of Economic Warfare after Pearl Harbor), the Supply Priorities and Allocations Board (formed August 28, 1941, dissolved into the War Production Board, without Wallace, January 1942), and the Advisory Committee on Atomic Energy (set up October 1941, and included the Vice President until his term of office expired in January 1945)." (Williams, "The American Vice Presidency, New Look" p. 26).

While Washington consulted with Adams on diplomatic matters, the latter refused to go ahead in order to negotiate a commercial treaty with England in 1794. Adams took the position "he was required by the Constitution to preside over the Senate" and questioned the propriety of leaving the country "since he was charged by the Constitution with the duty of taking over the first office in an emergency." Jefferson took the same position as Vice President when Adams requested him to go abroad to further the aims of peace (Williams, *ibid.*, p. 24). More recently, Vice Presidents have engaged in foreign missions upon request of the President. In 1936 Garner went to Mexico as a good-will ambassador. In 1944 Wallace left on a good-will mission to the Far East. "Particularly in the mission to China, Wallace made decisions for the President and made recommendations to him that * * * came to be the mooted postwar China policy" (Williams, *ibid.* p. 25). In addition to Wallace, Barkley and Nixon have made official foreign trips (Williams, *ibid.* p. 25; See too, Rossiter, "Reform of Vice Presidency," 63 *Pol. Sci. Q.* 383, 388-389, 398-399).

The next question is whether Title 3, Section 302 expressly or impliedly forbids the President from delegating to the Vice President powers not requiring the exercise of a personal judgment. There is no express prohibition. Nor may we imply one in view of the language used. Title 3, Section 301, which deals with general authorization to delegate functions of the President vested "by law", limits the delegation expressly to persons appointed by and with the advice of the Senate. Section 302 which deals with the inherent right of the President to delegate contains no such express limitation. From the explicit treatment in Section 301 and the significant omission of similar language in Section 302, we may reasonably conclude that Congress had no intention of barring the President from delegating his powers to any person, including the Vice President, so long as the latter was not disabled by law from exercising the powers delegated. And this conclusion is consistent as well with the Senate and House Reports, discussed above, which stress the need of permitting delegation of certain matters "which now make an unwarranted demand upon the time of the President" and which provide "a workable and expeditious method for placing the responsibility for the discharge of

appropriate functions in other officers of the Government" (H.R. 1139, 81st Cong., 1st Sess., p. 3).

There are many practical considerations which would also sustain the limited delegation of Presidential authority suggested.

1. The structure of the Executive branch of the Government has grown so large and intricate that every means should be sought to lighten the workload of the President if we are to expect him to give adequate attention to matters that are most vital to the nation. Thus, even in the normal course of events, the limited delegation of authority suggested would be warranted from the viewpoint of good governmental administration. Its character is not changed nor should greater significance be attached to it because of temporary illness of the President.

2. The President has recognized the desirability of training the Vice President for any eventuality.

3. Cooperation with the legislative branch of the government and with foreign nations would be made more effective if the Vice President had an intimate working knowledge of departments and agencies in the Executive Branch.

4. The Vice President has already been occupying an important position in the formulation of governmental policy. This would be expanded, not altered, by the proposed Executive Order.

The President has made the Vice President a full-scale participant in formulating and executing major administration policy at cabinet meetings -- a step without precedent in presidential history. Also, the Vice President, at the request of the President, has presided at cabinet meetings in the President's absence. Congress has added the Vice President as a statutory member of the National Security Council; and when absent, the President who is official chairman of this Committee has delegated his functions to the Vice President. As the President's special representative, the Vice President has also engaged in good-will tours of Latin America and of the Far and Middle East.

Such delegations of authority have advanced the country's welfare through administration of the government at the maximum efficiency. An Executive Order providing substantially the delegation discussed would be merely another step in this direction. The proposed delegations would be well within the President's inherent rights under Title 3, Section 302.

The second question raised is whether an Executive Order would be valid if it provided as follows:

"with respect to any Presidential function that may not be delegated because of Constitutional or statutory restrictions, the Vice President shall submit any proposed action in regard thereto to the President for his consideration and decision; and the Vice President shall take such action in the matter as the President shall direct. The order or other document of the Vice President giving effect to such direction of the President shall recite the fact that the President has considered the action in question and that such action is taken in accordance with the instructions and at the direction of the President.

In this area as in others the President cannot be expected to do all or even a part of the large amount of preliminary review and investigation entailed in reaching a decision which the Constitution or statutory restrictions require him personally to make. The provision quoted above would do no more. Under it, the President would reserve the right to have the proposed action submitted to him for his consideration and his decision. The President would reserve the right to require the Vice President to take such action in the matter as the President shall direct. Moreover, the order or other document of the Vice President giving effect to the direction of the President would be required to recite the fact that such action is taken "with the instructions and at the direction of the President".

Thus, in every way the President would retain and would exercise the primary and immediate responsibility and decision in those cases where the Constitution and statutory authority may require that his functions be discharged in that manner. The determination would be the President's in these cases, not that of the Vice President, and this is decisive of the question raised.

/1/ This Report also declared:

"The Attorney General, in connection with an extended review of executive theory and practice, has said that 'in general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President' (7 A.G. Op. 453). Yet this right of delegation has not heretofore been clearly established or defined by judicial decision, and there are intimations in various rulings that it does not extend to matters which involve the exercise of judgment or discretion, although the futility of attempting to apply such a distinction even to the head of a department was recognized by the Attorney General in 35 A.G. Op. 19, and the right of department heads to act for the President in matters which relate to the business of their respective departments has been upheld by the courts in a number of cases.

"The net result, in respect of any given statutory Presidential function, tends to be uncertainty as to whether performance thereof may be delegated. At the best this requires a time consuming and laborious exploration to arrive at a conclusion that the function may properly be delegated. At the worst such exploration reveals that the function, however, inconsequential, must continue to be performed by the President. These facts operate to require the President to perform functions which at the present time do not have any reasonable claim upon his time or attention. * * *"

/2/ See e.g. *Wilcox v. Jackson*, 13 Pet. 498, 513; successive acts of Congress authorized the President to erect fortifications and other things. This power was held properly executed by the Secretary of War.

Williams v. United States, 1 How. 290, 296. An Act of Congress prohibited the advancing of public money in any case whatever, except under the "especial direction of the President." Yet, under the general; direction of the President, this power was held to be properly executed by the Secretary of the Treasury.

French v. Weeks, 259 U.S. 326. Approval of findings of the Final Classification Board placing officers in certain classifications may be exercised by the Secretary of War on behalf of the President.

Russell v. United States, 261 U.S. 514, 523. "Executive power, in the main, must of necessity be exercised by the President through the various departments." This case involved a delegation to the Secretary of the Navy to cancel shipbuilding contracts.