

June 22, 1961

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MEMORANDUM FOR THE ATTORNEY GENERAL

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Re: Delegation of Presidential Powers
to the Vice President.

You have inquired as to the extent the President might, in the event of his absence from the country or for other reasons, delegate to the Vice President certain of his powers as President. In a memorandum for the Vice President dated March 9, 1961, (attached hereto) I stated that the range of powers which the President might so delegate "would seem to be coextensive with the scope of the President's power of delegation." While I believe this conclusion to be correct, I think it wise to proceed with some caution.

As you know, the Vice President occupies a unique position under the Constitution, and there has been no judicial test of a delegation of Presidential functions to the Vice President, or the extent to which he may properly be regarded as an officer within the executive branch. There is a good deal of judicial authority relating to the delegation of Presidential powers, but this authority deals with delegations to the heads of executive departments and to officers appointed with the advice and consent of the Senate. While I do not believe the lack of judicial precedent or the Constitutional position of the Vice President would stand in the way of an increasing participation by him under delegations made to him by the President, there is perhaps some reason to proceed on a case to case basis, thus testing its political acceptability, rather than through a general delegation of a variety of functions.

In recent years, notably beginning with Vice President Wallace, there has been an increasing collection of precedents in which executive powers have been conferred upon the Vice President. President Roosevelt made Wallace Chairman of the

Economic Defense Board and of a successor organization, the Board of Economic Warfare. In 1949, Congress, at the request of President Truman, made the Vice President a statutory member of the National Security Council. (50 U.S.C. 402(a)). It later made the Vice President a member of the National Aeronautics and Space Council. (42 U.S.C. 4271). Eisenhower named Nixon Chairman of the President's Committee on Government Contracts, and, as you know, President Kennedy has conferred a similar function upon Vice President Johnson. In addition, both Nixon and Johnson have executed significant duties in the field of foreign affairs.

The creation of such assignments has tended to increase the identification of the Vice President with the executive branch and the general acceptability of a delegation of executive functions to him. I am unable to see why these precedents would not justify further delegations in the circumstances which you describe. At the same time, there are obviously certain Presidential powers which, even though legally delegable, should for political reasons be exercised only by the President.

In addition, there are certain powers of the President, vested in him by the Constitution, which have long been considered nondelegable. These limitations extend to the Vice President in common with others. The most important of these involve: (1) nominations of persons requiring the confirmation of the Senate, or withdrawal of such nominations; (2) approval, veto, or memorandum of disapproval of legislation; (3) transmission of treaties to the Senate and proclamations of ratification; (4) the exercise of executive clemency; (5) acceptance of resignations from presidential appointees or orders removing them from office; (6) commissions for ambassadors and ministers, etc., and authorizations to the Secretary of State to appoint foreign service officers or to the Postmaster General to commission Postmasters; (7) promotions and tours of duty of officers of the Armed Forces; and (8) the issuance of most types of Executive orders.

Unless the statutory authority requires the President to act personally--which is very rarely the case--I believe

other powers may be delegated, and I believe, where appropriate, these powers may be delegated to the Vice President. I would, for example, see no objection to a delegation from the President to the Vice President to sign proclamations which do not have legal effect, or even to approve international agreements not requiring Senate ratification. I am sure there are a variety of other functions which with equal propriety could be delegated to him, but it would be necessary to examine each specific proposal for delegation against the Constitution and the relevant statutes.

Finally, I would like to note that a separate problem is raised by the President's inability to act himself, even though such inability results from sickness. I am sending you a more detailed memorandum on this subject. The problem is not one of delegation, but whether or not the Vice President succeeds permanently to the Presidency in such event. Very briefly, the difficulty lies in the dispute among constitutional experts as to whether, in the event of Presidential inability (Art. II, Section 1, clause 5), the Vice President is vested with the "office of President" or merely with the "powers of the Presidency." Most scholars take the latter view, and see no difficulty in the Vice President acting for the President in the event of Presidential inability, and would support an arrangement similar to that entered into by President Eisenhower and Vice President Nixon as being within the terms of the Constitution. A minority who take the former view hold that it is impossible to authorize the Vice President to exercise the President's non-delegable functions without making him President, and thus cast doubt on the constitutional ability of the President to resume office after the period of inability. It is the existence of this latter view which argues for a constitutional amendment on the subject of Presidential inability.

I see no impropriety in the President's making an arrangement, similar to that made by the past administration, with Vice President Johnson. I think it would be desirable to take squarely the position that we view the exercise of Presidential powers by the Vice President as merely the exercise of powers and not an entering into the office of the President. We could at the same time support an appropriate constitutional amendment

to remove all possible doubt. I believe, however, that it would be unwise for the President to attempt to invest any of the non-delegable powers in the Vice President in any event other than a literal physical inability to act. The extent to which he vested delegable powers from time to time in the Vice President would be basically a matter of political judgment.

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Office of Legal Counsel

Attachment