



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

January 26, 2026

Donald Sherman
Chief Counsel & Vice President
CREW
foia@citizensforethics.org

Re: FOIA Tracking No. FY25-191; CREW v. DOJ, D.D.C. No. 25-1318

Dear Mr. Sherman:

This letter responds to your March 18, 2025 Freedom of Information Act (“FOIA”) request to the Office of Legal Counsel (“OLC”), in which you sought “opinions, memoranda, or analyses issued by [OLC] concerning Section 1 of the Twenty-Second Amendment.” Pursuant to 28 C.F.R. § 16.5(b), your request is being processed in the simple track, and as you know, the request is also a subject of the above-captioned litigation.

We have completed our search of OLC files and have identified several documents that may be responsive to your request. Although some of the documents are still under review for responsiveness and applicable exemptions, at this time we are able to provide three documents. The records are enclosed in full without redaction.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For any further assistance and to discuss any aspect of your request, your counsel may contact Stephanie Johnson at Stephanie.Johnson5@usdoj.gov. Additionally, you may contact the Office of Government Information Services (“OGIS”) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Although your request is the subject of litigation and administrative appeals are normally not acted upon in that circumstance, I am required by regulation and statute to inform you of your right to an administrative appeal. You may administratively appeal by writing to the

Director, Office of Information Policy (“OIP”), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP’s FOIA STAR portal by creating an account following the instructions on OIP’s website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

Sincerely,



Jared Kaprove
FOIA and Records Management Attorney

Enclosures

cc: Stephanie Johnson, Assistant U.S. Attorney
Office of the United States Attorney for the District of Columbia

October 20, 1955

Memorandum on the Construction of
Article II, Section 1, Clause 5 of the
Constitution of the United States

The purpose of this memorandum is to consider the meaning of Article II, Section 1, Clause 5, of the Constitution insofar as it treats with the devolution of Presidential powers and duties from the President to the Vice President under certain circumstances. The clause in its entirety provides:

“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.”¹

This provision of the Constitution, being ambiguous, has been the subject of much learned debate and while there is general agreement as to the proper construction of the clause in certain situations, there remain a number of important and unresolved questions which require consideration.²

At the outset it is important to define the scope of the clause and the circumstances under which it has applicability. There is no dispute but that it presupposes a factual situation where both a President and Vice President have been duly elected, qualified and entered upon the normal discharge of their duties.³ It is also clear that it deals with only four situations, removal, death, resignation, or inability of the President, which, if found to exist, cause the powers and duties of the Presidential office to devolve upon the Vice President. It is also recognized, as one authority has pointed out, that “[t]he presumption is that the President is not removed from office, is not dead, has not resigned, and is not in a condition of inability. The burden of proof rests on any person who asserts the contrary.”⁴

¹ This memorandum is not concerned with the provision where there is a disability on the part of both the President and the Vice President except as it may be relevant to the construction of the first part of the clause.

² Attached as an Appendix is a list of references consulted.

³ Compare the Twentieth Amendment.

⁴ Prof. Theodore W. Dwight, in one of four Articles on “Presidential Inability” printed in the November, 1881 issue of the North American review, p.439. The other three articles, to which reference will be made, are by Ex-Senator Lyman Trumbull, Judge Thomas N. Cooley, and Benjamin F. Butler.

Three of the above conditions which will cause a devolution of authority to the Vice President are susceptible of ready determination. Death is readily established, and whether a President has been removed by impeachment for conviction of treason or high crimes⁵ or has resigned⁶ could be determined by documentary evidence. These three conditions have another factor in common; when they occur there would be a vacancy in the Office of the President and except possibly in the case of resignation⁷, no possibility of a President seeking to resume his office. As a result, it is now well settled that on the death of the President, the Vice President succeeds to the powers and duties of the President's office for the remainder of the unexpired term. By usage, it is also now established that when the President dies the Vice President becomes President of the United States, although it is highly doubtful that the founding fathers anticipated that result.⁸ While there has never been a case of removal or resignation of a President⁹ the same considerations suggest that here, too, no serious problems would be encountered. Accordingly, this memorandum is addressed primarily to the meaning of the fourth condition, the meaning of Presidential inability.

I. What Constitutes Inability in the Constitutional Sense?

There is substantial unanimity of opinion as to the tests to be applied in determining when an inability in the Constitutional sense exists. Ex-Senator Trumbull, in considering the question, said:

⁵ Removal is governed by Article II, Section 4, of the Constitution, and would be evidenced by some formal document containing the order of removal.

⁶ Congress has provided by statute that a written instrument containing a declaration of resignation, subscribed by the President, and delivered to the Secretary of State, will be considered the only evidence of resignation. Act of June 25, 1948, 62 Stat. 672, 3 U.S.C. 20.

⁷ For example, since the Constitution is silent as to what constitutes acceptance of a resignation or at what point it becomes irrevocable, it is conceivable that a situation might arise leaving the proper occupant of the President's Office in doubt.

⁸ This point is discussed, *infra*, under Part III. Vice Presidents have succeeded to the office of President seven times. All took the Presidential oath of office and were popularly recognized as Presidents of the United States.

⁹ On several occasions, Vice Presidents have resigned but no Vice President has been removed.

“Before he [the Vice President] can properly act, there must be some occasion for his action - some urgent duty to perform to which the President is unable, from mental or physical causes, to give attention. *** But how is the Vice-President to know of their existence [referring to circumstances amounting to disability] in any case? In the absence of legislation he can only know, so as to act upon them, when they become so open, notorious, and indisputable as to be recognized by all as existing. *** So in the case of inability, the fact must be so notorious that there can be no reasonable doubt about it, nor that an urgency exists requiring immediate action on important matters, before the Vice-President would be warranted in assuming the duties of President.” North American Review, Nov. 1881, pp. 420-21.

In this same series of articles, Mr. Cooley stated that the inability “provision was inserted for contingencies so important as to render the devolution of the President’s powers upon some other officer an absolute necessity.” *Ibid.* pp. 422-3. Mr. Butler observed: “But it would be his [the Vice President’s] pleasure, if not his duty, to wait until some emergency arose where Presidential action was necessary for the safety of the Government or its citizens before he would consent to act; but in any emergency it would be his imperative duty to act . . .” *Ibid.* p. 436. And Mr. Dwight put it this way: “If there be mere physical inability, the case would seem to be free from real difficulty. If the President’s hand be, for example, disabled so that he cannot sign official papers, it would be ridiculous to say there was a constitutional ‘inability’. The real test of inability is, whether he has intellect enough to preside over the transaction. One who signs in his name, and in his presence, at his request, may fairly be regarded as his instrument, and the act done be regarded as his act.” *Ibid.* p. 438. Finally, Ruth Silva, in her exhaustive study entitled “Presidential Disability”, concludes:

“The determining consideration in each case is not only whether the President is actually unable to exercise his powers but also whether there is any public business which requires his personal attention. It seems to be rather generally agreed that a mere inability, however severe or extended, does not constitute an inability in the constitutional sense unless the urgency of public affairs calls for action. In time of serious national emergency, for example, an illness of a few days may jeopardize the public interest more than an illness of several months at another time. The situation is not likely to be the same in any two cases of presidential inability.’

It is beyond the scope of this memorandum to speculate as to the facts which must exist in order that there would be a constitutional inability. It would seem that, as in other matters, so here the founding fathers provided a flexible provision to meet all exigencies and that any attempt on their part to have placed a rigid definition on “inability” might have proven disastrous. Thus during the Constitutional Convention, the question was put without answer:

What is the extent of the term ‘disability’ (later changed to inability), and who is to be the judge of it?”¹⁰

To determine the existence of a constitutional inability, two questions, in the order named, must be asked. Is there an emergency, popularly recognized as such, requiring action that only the President can take, action which cannot be postponed, and which if not taken would result in substantial injury to the country? If so, is the President, either from physical or mental reasons, unable to discharge his responsibilities or incapable of making his wishes known so that some other person can carry out his directions? In my opinion, if a situation arises requiring an affirmative answer to these two questions, then, and only then, has inability in the Constitutional sense been established.

II. Who Determines When a Constitutional Inability Exists?

When inability in fact exists, the Constitution provides that the powers and duties of the Presidential office “shall devolve on the Vice President.” But the Constitution is silent as to who, if anybody, has the responsibility of determining when the state of facts exists. One opinion is that the Vice President, as the person charged by the Constitution with the responsibility to assume the Presidential functions, is for that reason the person to decide when he must act.¹¹ Others have suggested that the question is judicial and that the Courts should decide it, or alternatively, that the matter is legislative and should be decided by the Congress.¹²

The arguments which may be advanced against any one of these individuals or groups making the decision alone, together with the criteria heretofore discussed in connection with determining when inability exists, suggest to us the solution to this problem.

While a state of inability in the Constitutional sense will ultimately be evidenced by Vice Presidential action, as long as there remains any substantial question as to whether a Constitutional inability exists, a Vice President would certainly be most reluctant, if he did not categorically refuse, to assume that the powers and duties of the Presidential office had devolved upon him. As previously stated, there are two factors to be taken into consideration in determining when a Constitutional inability exists, the need for Presidential action and Presidential inability to act. While conceivably the question of Presidential inability to act might be judicial in nature, the courts would not appear to be an appropriate forum for determining the

¹⁰ Mr. Dickinson, 2 Farrand, Records of the Federal Convention, p. 427.

¹¹ See, e.g. Butler, North American Review, Nov. 1881, pp. 433-435.

¹² See, e.g. 2 Burgess, Political Science and Constitutional Law, p. 240; 2 Tucker, Constitution, p. 711-714. Corwin, supra, p. 62.

existence of an emergency requiring Presidential action.¹³ Conversely, while Congress by appropriate action might determine that a situation existed requiring Presidential action, Congress would not seem to be the appropriate forum for determining whether the President was able to discharge his powers and duties.¹⁴

The President, of course, might be in the best position to recognize the existence of an emergency requiring his action and his inability to act. Such determinations by the President, should he be able to make them, would be entitled to great weight and might even be decisive of the matter. However, a situation might arise when he would be unable to participate in the decision.

From what has been said, it follows that no one person or group of person can appropriately make the determination. In a sense, the matter is self-determining. When the tests for determining what constitutes Constitutional inability are met there will be general agreement, without formal action on anyone's part that the Vice President must assume the responsibilities of the Office of President. As ex-Senator Trumbull said:

“There are some things of which everybody takes notice and which it is never necessary to prove; among them are public matters affecting the government of the country. . . . So in case of ‘inability’ the fact must be so notorious that there can be no reasonable doubt about it, nor that an emergency exists requiring immediate action on important matters, before the Vice-President would be warranted in assuming the duties of President.

“When such a case arises the people will not only acquiesce in the discharge of the presidential duties by the Vice-President, but will demand that he exercise them. . . . It is questionable whether any law can be framed placing this question of ‘inability’ in a better position than the constitution has left it. The degree of proof required to satisfy the public mind cannot be previously defined. This is a people's government, and can only be maintained by the will of the people. . . .

¹³ See, e.g., National Savings & Trust Co. V. Brownell, 222 F.2d 395 (CADDC), cert. den. 349 U.S. 955, holding, in accordance with a long line of decisions, that the Courts will not determine when a state of emergency exists or has terminated.

¹⁴ Moreover, Congress might not be in Session, and there is a serious question whether it could convene itself in special session and take action. See Constitution, Art. I, Section 4, Clause 2; Art. II, Section 3; Twentieth Amendment, Section 2.

“They take notice of public matters affecting the Government of the country, of who is President, of his health, or ‘inability,’ and the accession of another to the duties of the President Any Vice President who should assume to take those duties in a doubtful case when the exigency did not unquestionably require it, would be treated as a usurper by all patriotic citizens. Peaceful succession to the Presidency under our system of Government must always depend on a sound public opinion supported by the good sense, and the intelligence of the people, and there it is safest to leave it.”¹⁵

III. In What Capacity and For How Long Does the Vice-President Exercise the Powers and Duties of the President’s Office?

When Constitutional inability exists, the powers and duties of the Presidential office devolve on the Vice-President by operation of law.¹⁶ So long as the inability exists, it is clear that the Vice President has all the powers and duties of the President’s office, and conversely, the disabled President is without authority to exercise those powers and duties. Should the disability continue until the expiration of the term of office, it would be of little moment whether the Vice President had become President, Acting President or merely authorized to exercise the office of the President.

¹⁵ North American Review, Nov. 1881, pp. 420-422.

¹⁶ The word “devolve” implies a result without the intervention of any voluntary actor. of. Seattle-First Nat. Bank v. United States, 44 F. Supp. 603, 608 (E.D. Wash. 1942).

However, the Presidential inability might be removed before the term of office expired.¹⁷ In such a case, does the Constitution contemplate that the President would resume his office, or, notwithstanding that the inability has ceased, does the office vest permanently in the Vice President so as to make him President for the remainder of the term? The Constitution does not supply the answer, and on this point the authorities are divided. While the question is not free from doubt and can be authoritatively determined, the absence of a Constitutional Amendment, perhaps only when an actual case arises,¹⁸ the authorities and arguments are more persuasive that the Vice President would not accede to the office of the President permanently but would exercise only the powers and duties of the office until the President is able to resume his duties.

As stated earlier, in relevant part the Constitutional clause provides:

“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, . . .”

Those who contend that the Vice President’s tenure is permanent until the end of the term advance the following arguments to support the conclusion:

- (1) that grammatically the antecedent of “the same” in the succession clause is “Office;”¹⁹
- (2) that the term “devolve” in law ordinarily contemplates no possibility of return;²⁰

¹⁷ As in the case of determining when inability exists, there is the problem of determining when it ceases to exist. In my opinion, the need for Presidential action would no longer be relevant, the sole question being whether he was able to discharge his duties. It is also my opinion that that question would be determined in the same manner as the existence of inability, i.e., by popular recognition.

¹⁸ As Ex-Senator Trumbull observed: “the Constitution. . . should, if possible, receive a definite and fixed construction, so that when it [inability] does arrive, the people of this Republic may be spared a controversy as to the person entitled to the chief magistracy - a controversy which among other peoples has brought upon mankind more wars and greater desolation than any other cause.” *North American Review*, Nov. 1881, p. 417.

¹⁹ See, e.g. Corwin, *The President, Office & Powers*, p. 66. But Corwin does not subscribe to the conclusion that in case of inability the accession is permanent, see p. 67 seq.

²⁰ See e.g. Dwight, *North American Review*, Nov. 1881, p. 445.

(3) that a construction should not be placed on the clause which would result in the President's office being occupied on a temporary basis with the possible consequence of fluctuations in policy, depending on the individual who occupied the office;²¹ and

(4) that precedents in cases of death dictate that the same result would follow in cases of inability since otherwise the clause would be given inconsistent constructions.²²

These arguments, however, may be persuasively met. Of primary significance is the history of the evolution of the succession clause. It is abundantly clear that the founding fathers did not contemplate or intend that the Vice President should succeed to the Office of the President or that he should exercise Presidential power for the remainder of the term if the Presidential inability was removed.

The first draft of the succession clause at the Constitutional Convention by the Committee of Detail provided:

²¹ Id. at 445.

²² Corwin, supra, at p. 67, recognizes and rejects this argument as does Norwill in his Usage of the American Constitution, pp. 58-66.

“In Case of his [the President’s] removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.”²³

On September 4, 1787, the Committee adopted an amendment to provide that a Vice President, as distinguished from a President of the Senate, should be made the heir apparent.²⁴ This draft read as follows:

“He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery, and in case of his 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.”

It is significant that this draft provided that the Vice President would discharge the functions only until a successor was chosen or until the President’s inability be removed.^{24(a)}

On September 7, the Convention separately considered and adopted a clause to declare what officer should act as President in the event of the death, resignation or inability of both the President and the Vice President. It provided:

²³ Ferrand, The Records of the Federal Convention of 1787, Vol.2. This history of the clause is set forth in detail in Chapter I of Silva, Presidential Succession. And see also, Davis, “Inability of the President, Sen. Doc. 308, 65th Cong., 3d Sess., 1913.

²⁴ Ibid. Vol. 2, pp. 495; 499.

^{24(a)} There appears to be no explanation for the inclusion of the word “absence” in this draft or for its elimination in the final draft.

“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.”^{24(b)}

On September 12, the two clauses were consolidated by the Committee on Style. In consolidating the two clauses, the present language evolved and the clause limiting tenure was used only once instead of twice and was placed at the end of the provision which dealt with the authority of Congress to designate a successor. There is no evidence, however, that the draftsmen intended this change to be substantive and to make the Vice President’s succession permanent. The Committee on Style had no such authority and no member of the Convention expressed such an intent. Rather, as Silva, in her study entitled “Presidential Succession”, concludes (p.8):

“The evolution of the clause and the remarks made in the Convention show that the framers of the Constitution intended a Vice President or an officer designated by Congress merely to act as President until the President’s disability should be removed, or until another President could be elected. The language used in the various drafts of the clause clearly indicates that a successor was not to inherit the higher office.”²⁵

^{24(b)} Ibid. Vol. 2, p. 532.

²⁵ Trumbull states: “As an original question, it would seem clear, from the language of the Constitution, that its framers never intended any person to be President except the person whom the people elected to that office. They provided that, in certain specified cases, another officer might perform the duties of the President, without regard to his eligibility to the office.” Hamilton, in the Federalist, observed “that. . .the Vice President may occasionally become a substitute for the President. . .” No. 53. See also the excellent discussion in Davis, Inability of the President, supra, and particularly the conclusions at pp. 11-12.

While some authorities contend that the antecedent of “the same” is the “said office” it can be as persuasively and more consistently argued that it refers back to the “Powers and Duties of the said Office.”²⁶ Certainly in a case of ambiguity, the intention of the framers is entitled to greater weight than a strict grammatical construction.²⁷

Reference to other clauses of the Constitution treating with inability and related matters confirms the conclusion that only the powers and duties of the Office would devolve on the Vice President.

Article I, Section 3, Clause 5 of the Constitution provides:

“The Senate shall choose 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.”

Certainly this language, which is comparable to that originally used in the succession clause and which obviously refers to it when it speaks of “exercise the Office” (since ordinary absence is treated separately), is clear indication that the founding fathers did not contemplate a permanent succession until the end of the term or even that the Vice President would occupy the Office of President.

The Twelfth Amendment, which was considered by many of the same people who had participated in the Constitutional Convention, clearly states that the Vice President would only act as President in the case of constitutional inability of the President. It provides in relevant part:

“And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.”²⁸

²⁶ See, e.g. Horwill, *Usages of the American Constitution*, pp. 58-63; Davis, *Inability of the President*, *supra*, p. 12.

²⁷ See, for a discussion of the consequences flowing from a literal construction, Lewis R. Works, *Vice-Presidency of the United States*, 38 *American Law Review*, p. 500; Oliver P. Field, *Vice Presidency of the United States*, 56 *American Law Review* 365, 382.

²⁸ The interchanging use of the terms “inability” and “disability” lead me to conclude that the framers gave the same meaning to both and the authorities agree. See e.g. Dwight, *North American Review*, Nov. 1881, p. 433.

Finally, it is significantly that the Twentieth Amendment provides only one instance in which the Vice President shall “become President,” and then only if “at the time fixed for the beginning of the term of the President, the President elect shall have died.” This is the only case where the Constitution expressly states that the Vice President is to become President, and the rest of the Amendment reverts to the usual consequence and provides that the Vice President will act as President in certain circumstances not previously covered and then only temporarily.²⁹

The Presidency of the United States is an elective office. The Constitution provides that the President “shall hold his Office during the Term of four Years” and his compensation “shall neither be increased nor diminished during the Period for which he shall have been elected.”³⁰ He may be removed from office “on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors.”³¹

²⁹ The Twentieth Amendment in relevant part provides: “If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.”

The Twenty-second Amendment sheds no light on the problem. In relevant part it provides:

“no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.” (Emphasis added)

It is clear that Congress in proposing this language was not attempting to interpret the succession clause, the Twentieth Amendment or any other provision of the Constitution. Rather Congress, with its attention focused on the length of time a person could exercise Presidential powers, was covering any possible interpretation of these clauses so that in no event could a Vice President exercise the powers and duties of the office of President for more than ten years less one day. See H. Rept. No. 17, 80th Cong., 1st Sess., to accompany H.R. Res. 27, which ultimately became the Twenty-second Amendment; Sen. Rept. No. 34, 80th Cong., 1st Sess., 93 Cong. Rec. 1681, 1862, 1938.

³⁰ Article II, Section 1, Clauses 1 and 6.

³¹ Article II, Section 4.

Considering these facts, together with the history of the succession clause and the related provisions of the Constitution dealing with inability and similar questions, it is my opinion that the proper construction of the inability clause only permits the Vice President to act as President and discharge his powers and duties until the President to act as President and discharge his powers and duties until the President is capable of resuming the responsibilities. It is my further opinion that this construction, which most clearly coincides with the intent of the framers of the Constitution, would be sustained by the Courts should a case or controversy presenting the question be adjudicated by them.³²

³² Should two individuals claim to be President, a Court, if it did not view the matter as political and beyond its competence, cf. Luther v. Borden, 7 How. 1, might be compelled to rule on the validity of appointments or other official acts.

APPENDIX

Authorities Consulted

1. Corwin, The President, Office and Powers.
2. 2 Burgess, Political Science and Constitutional Law.
3. 2 Tucker, Constitution.
4. 2 Farrand, Records of the Constitutional Convention.
5. Davis, Inability of the President, Sen. Doc. 308, 66th Cong., 3rd Sess.
(Sen. Doc. Vol. 7469).
6. Field, The Vice-Presidency of the United States, 56 American Law Review, 365.
7. Norwill, The Usages of the American Constitution. (Library of Congress JE 268, H6).
8. 2 Story, Constitution of the United States 5th ed. p. 321.
9. Works, Succession of the Vice-President, 38 American Law Review 500.
10. Lavery, Presidential "Inability", 8 American Bar Association Journal, p. 13.
11. Silva, Presidential Succession.
(Library of Cong. JE 609, 55, 1951)
(This is the single most comprehensive study)
12. Four Articles on "Presidential Inability", North American Review,
Nov. 1881, p. 418 seq.
13. Match & Shoup, History of the Vice Presidency of the United States.
(Library of Congress E 176, H35).
14. Rossiter, The Reform of the Vice-Presidency, 63 Pol. Sci. Quarterly, 383.
15. II Elliot's Debates.
16. VIII Richardson, Messages and Papers of the President, p. 65.

~~Under Seal~~

cc: Files
7
Mr. Katzenbach
Mr. Siegel
Mrs. Copeland ✓

- 4 Byron R. White
- 4 Deputy Attorney General
- 4 Nicholas deB. Katzenbach
- 4 Assistant Attorney General
- 4 Office of Legal Counsel
- 4 S.J. Res. 15 - A Joint Resolution proposing
an amendment to the Constitution to repeal
the twenty-second article of amendment to
the Constitution.

4 JUN 6 1961
To Deputies
6/6

This will refer to your memoranda of May 18, 1961, in the above.

This Resolution proposes to amend the Constitution repealing Amendment 22 to the Constitution which places a limit on the number of terms a President may serve.

Amendment 22 was adopted in 1951. Although the resolution which proposed the amendment originated in the House the main debate on it when approved in the House in 1947 was confined to a single day (Cong. Rec. Feb. 6, pp. 841-872). In the Senate, where debate was more extended, it centered not only upon the limitation of the term but also upon the method of ratification and other proposed amendments relating to tenure and election of the President (Brown, "The Term of Office of the President," 41 Am. Pol. Sci. Rev. 447, 450-451 (1947)).

Those who sponsored and supported the amendment claimed that it would establish a safeguard and bulwark against creation of dictatorship and the despotism of any one man. Unlike the position taken in 1928 when it was believed that Coolidge might run for a third term, the principal demand in 1947 for setting the time-limit on the term of the President came from Republicans in Congress. Also reversing their position in prior years, the Democrats offered strongest opposition to the proposal. They claimed that it constituted a slur on the memory of President Franklin D. Roosevelt; that it might deprive the country of a great leader in a most serious emergency; and that the choice of whether to place the future of the nation in the hands of the incumbent President for another term should be left to the voters at the time when the crisis was before them requiring their decision.

The Third-Term issue has been the subject of considerable debate in many periods of our history. 1/ Statements of numerous Presidents dealing with the matter from the time of the founding of the country have been given varying interpretations. 2/ No point would be served in reviewing the ground now that the tradition has been broken.

Those who presently seek a repeal of Amendment 22 advance several arguments:

1. That the constitutional limitation may be fatal in a world crisis, and that in this thermonuclear age we can not afford to take such a risk;
2. That the limitation tends to diminish the President's power to influence Congressional legislation during the last years of his office;
3. That it increases the difficulty in attracting and retaining men of high caliber for major executive positions.

In July of 1959 the Senate Subcommittee on Constitutional Amendments took testimony on the proposal to repeal the ban on Presidential third terms. Testifying before the Subcommittee, former President Truman described it as a "bad amendment" that ought to be repealed. 3/ In his opinion Americans should have the right to elect anyone President to as many terms as they wished.

In a letter to the Subcommittee declining to testify, former Attorney General Rogers opposed repeal of the amendment upon the ground that it had not had a fair test. Mr. Rogers noted that the amendment had been in effect only a little more than seven years and called that "too short a period of time fairly to test its efficacy." 4/

44/ #FNI
1/ Corwin, The President - Office and Powers, 35-38, 331-339 (1957); Stein, The Third-Term Tradition (1946); Rodell, Democracy and the Third Term (1940); Thornton, The Third Term Issue (1939); Ickes, The Third Term Bugaboo (1940); Moss, Two-Term Precedent (1940).

44/ #FNI
2/ See e.g., Debates as to whether the third-term tradition barred Coolidge from running in 1928. (Cong. Rec. Feb. 7, 1928, p. 2608-2628, 2780-2791) The latter, it will be recalled, finally adhered to his decision not to run, when he was not drafted as it is claimed he expected to be. (Corwin, supra 335).

44/ #FNI
3/ N.Y. Times, July 27, 1959, pp. 1, 15.

44/ #FNI
4/ N.Y. Times, July 27, 1959, p. 15 column 1.

On June 12, 1959, Senator Kefauver wrote to Mr. Rogers making this argument in favor of repeal: /5/

10 "It would seem axiomatic to me that the American people would never wish to continue a President in office beyond two terms except in time of crisis. Yet, it is just in such time of crisis that they would be inhibited by the 22nd Amendment from re-electing a successful leader. It would then be too late to effect repeal of the limitation. No amount of 'experience' under the limitation can demonstrate its efficacy or, conversely, its harm. Its harm can be demonstrated only in a time of crisis, and then it is too late to remedy the situation."

On the whole the contentions favoring repeal seem to us to have the better of the argument. Nevertheless, it seems to us that the proposal to repeal the existing ban on a third term is essentially a matter of policy to be determined by the Attorney General after consultation with the President.

44 / ~~##~~ FNS

5/ Dept. of Justice File No. 236398-01.

RGK:WHR:NS
236398-01

cc: FILES
Mr. Siegel
Mrs. Copeland
DAG's Office

20530

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

*To Hoffmann
6/5*

Dear Senator:

This is in response to your request for the views of the Department of Justice on S.J. Res. 21, a joint resolution "Proposing an amendment to the Constitution of the United States relating to the term of office of President and Vice President of the United States."

Section 1 of the amendment would provide that the term of office of the President and the Vice President of the United States shall be six years, and that no person shall be eligible for more than one term as President or Vice President. Section 1 would also provide that a person who has been elected as Vice President for any term shall be eligible for election as President for a later term. Moreover, a Vice President, who succeeded to the office of President, would be eligible for election as President for a later term. The amendment would take effect on the first day of February following ratification, but would be inapplicable to the incumbents of the offices of President and Vice President who are serving at that time./

It will be recalled that the tenure of the presidential office posed one of the more difficult problems for the Constitutional Convention of 1787. The framers of the Constitution, after consideration of differing tenure proposals, fixed a four-year term of office for the President, and left him eligible for re-election.

For nearly one hundred and fifty years the two-term precedent established by President Washington was followed by his successors. After this tradition was departed from by the election of Franklin D. Roosevelt in 1940 for a third term and again in 1944 by his election for a fourth term, Congress proposed the Twenty-second Amendment to the Constitution limiting a President to two elected terms, and this amendment was ratified in 1951.

It is to be noted that the Twenty-second Amendment has been in effect less than twenty years--which we believe is too short a period of time fairly to test its efficacy. It would seem desirable, therefore, to defer any action concerning a further change with respect to the term of the President until the Nation has had greater experience with it.

Apart from that, it may be noted that proposals for a six-year term with no re-eligibility to a second term, have been advanced and debated many times in our history. More than a half century ago, in the 70th Congress, Senator Borah opposed such a proposal upon the ground that if the incumbent President is pursuing a course of action detrimental to the Nation's welfare the amendment would continue him in office for two more years, whereas if he proved to be a good and effective President, the proposal would make his continued service impossible. 48 Cong. Rec. 11355. Senator Borah's comments seem to be equally germane today.

For the foregoing reasons, the Department of Justice is unable to recommend adoption of the proposed amendment.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General