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PRESIDENTIAL SUCCESSION AND THE AUTHORITY
TO RELEASE NUCLEAR WEAPONS

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PREFACE

This paper deals with the problem of how the release of nuclear weapons could be authorized if an enemy nuclear strike were to kill, disable, or make unavailable the President and his current legal successors provided by the Presidential Succession Act of 1947. Although the primary emphasis is on the President's power to authorize general or selective release of nuclear weapons for retaliation, a discussion of the constitutional and statutory provisions governing presidential succession has been included in order that the reader will understand how the President's authority devolves under different conditions already taken care of by statute and how his release authority might devolve under conditions of nuclear attack.

This paper is divided into two parts. Part I deals with the constitutional and statutory provisions that govern presidential succession and how they might apply in different contingencies, and Part II deals with the problem of the President's authority to release or withhold nuclear weapons for use by his military commanders under hypothetical circumstances that approach "worst cases."

The bibliography contains only the sources actually used; it is therefore of course not comprehensive. The authors of this paper were assisted through informal interviews with several helpful officials in the executive and legislative branches, as well as by a leading academic authority on presidential succession. Responsibility for all views expressed remains with the authors.

CONTENTS

Preface	ii
Part I CONSTITUTIONAL AND STATUTORY PROVISIONS	1
A. Introduction	1
B. The Presidential Succession Act of 1947	1
1. Narrative Account of the Act's Passage	1
2. Issues and Resolution	3
3. Conclusions	5
C. Developments Between 1947 and 1963	6
1. Nuclear Attack and Continuity of Government	7
a. Legislative Proposals	7
b. Issues and Resolution	9
2. Presidential Disability	9
D. The Twenty-Fifth Amendment: 1963-1967	10
1. Origins and Legislative History	10
2. Issues and Resolution	12
3. Conclusions	13
E. Applications of Current Laws	13
1. Relatively Clear Contingency	14
2. Relatively Unclear Contingency	15
3. Conclusion	16
Part II AUTHORIZING THE RELEASE OF NUCLEAR WEAPONS	17
A. Introduction	17
B. Kinds of Presidential Authority Applicable to Decision on Release	18
1. Broadly Construed War and Emergency Powers	19
2. Military Command	20
3. Voice of the People	23
4. Presidential Delegation Ad Hoc	23
C. Trying to Ensure a Presidential Successor for Release Authority	24
1. Line of Presidential Succession	24

2. Chain of Military Command	27
3. Presidential Preference	28
D. Current Arrangements and Understandings	30
E. Conclusions	31
Appendix A Historical Background on Succession	34
A. Presidential Succession Through Death	35
1. The Act of 1792	35
2. From Washington to Chester Alan Arthur	35
3. The Act of 1886	36
4. From Grover Cleveland to Harry S Truman	37
B. Succession Through Disability	38
1. Constitutional Provision	38
2. The Disabilities of Presidents Garfield and Wilson	38
Bibliography	40
A. Books	41
B. Articles	41
C. US Government Reports and Documents.....	42

PART I

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. INTRODUCTION

The question of who should succeed to the Presidency in case of the death of the President or of both the President and the Vice President has attracted intermittent attention ever since the Constitutional Convention of 1787. It was the intention of the framers of the Constitution that Congress determine a solution to the problem of who should succeed to the Presidency after the Vice President. According to Article II, Section 1, Clause 5, of the Constitution:

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 the 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.

Exercising this constitutional mandate, Congress has passed three presidential succession laws: the Act of March 1, 1792; the Act of January 19, 1886; and the Act of July 18, 1947. In Part I of this paper the present succession law (Act of 1947) and other developments since the end of World War II are discussed and analyzed. The Appendix to this paper briefly summarizes the relevant historical background prior to the passage of the present law.

B. THE PRESIDENTIAL SUCCESSION ACT OF 1947

1. Narrative Account of the Act's Passage

The death of President Franklin D. Roosevelt and the succession of Harry S. Truman to the Presidency in April 1945 served to focus

attention on the constitutional and statutory provisions (the Act of 1886) governing presidential succession.¹ On June 19, 1945, President Truman sent a special message to Congress asking it to re-examine the presidential succession issue. It was Truman's realization that he had the power to appoint his own potential successor, by nominating a replacement for Secretary of State Edward R. Stettinius, that prompted him to ask Congress to change the law in order that an elected official would rank ahead of the Cabinet members on the succession list. Truman recommended that the Speaker of the House of Representatives (hereafter referred to as Speaker), followed by the President pro tempore of the Senate (hereafter referred to as President pro tempore), be placed at the top of the succession list after the Vice President. Should neither presiding legislative officer be available, the ranking Cabinet member would then act as President. It was also President Truman's expressed desire that no successor "...should serve longer than until the next Congressional election or until a special election called for the purpose of electing a new President and Vice President."²

Although initial congressional and editorial reaction to Truman's plan was generally favorable, Congress as a whole was slow to take official action. The House of Representatives voted fairly quickly to accept Truman's recommendations on changing the order of succession,³ but the Senate did not follow suit that year. The

1. This act provided that presidential powers and duties devolved on the Vice President; the next persons in the line of succession were the Cabinet members in the order of the creation of their posts, beginning with the secretaries of State, Treasury, and War.

2. Public Papers of the Presidents of the United States, Harry S Truman, 1945 (Washington, D.C.: US Government Printing Office, 1961), p. 130.

3. The House bill omitted Truman's suggestion for calling a special election on the grounds that it might possibly be unconstitutional.

President again prodded Congress in his first State of the Union message early in 1946 by renewing his request for legislative revision of the succession law. The Senate passed a resolution calling for the creation of a joint committee to study all aspects of the problem of presidential succession, but the House failed to concur.

Early in 1947, President Truman wrote a letter to the Speaker and the President pro tempore once again strongly urging Congress to take action on the succession issue. Several days later, Senator Kenneth S. Wherry offered a bill consonant with President Truman's request. After the Senate Committee on Rules and Administration held brief hearings on this and other bills relating to the question of succession, the Wherry bill was debated on the floor of the Senate, where it passed on June 29, 1947, by a vote of 50-35. The House discussed the bill only briefly, and it passed there by an overwhelming majority. President Truman signed it into law on July 18, 1947, as PL 80-199 (61 Stat. 380).

2. Issues and Resolution

President Truman seems to have been motivated in part by his concern over the lack of qualifications for the Presidency of his legal potential successor, Secretary of State Stettinius. According to Truman, "Stettinius...had never been a candidate for any elective office, and it was my feeling that any man who stepped into the presidency should have held at least some office to which he had been elected by a vote of the people."⁴ Furthermore, as has been mentioned, Truman realized that in naming a replacement for Stettinius he would be naming his own potential successor--"...a power...no President ought to possess."⁵ He considered his plan more democratic than the existing law of 1886.

⁴ Harry S Truman, Year of Decision (Garden City, New York: Doubleday and Company, Inc., 1955), p. 22.

⁵ Ibid., p. 487.

Congress, in discussing Truman's proposal and the other bills and resolutions on the subject, generally confined itself merely to outlining their provisions; it did not seriously address itself to the legal and constitutional questions that were raised. Most of the substantive debate centered on the question of whether the Speaker and the President pro tempore would be legally eligible to act as President in the event that both the Presidency and the Vice Presidency were vacated. The Constitution empowers Congress to decide "what Officer" shall act as President, but there was considerable doubt as to whether the two senior legislative leaders were "Officers" in the constitutional sense of the word. If they were, then there would be a conflict with the constitutional provision that no member of Congress may simultaneously hold two offices; if they were not, then their qualification to act as President would be in doubt. It was this issue that captured Congressional attention during the largely superficial discussion of the whole succession problem.

An interesting issue, considered tangential at the time but of direct concern here, came up several times between 1945 and 1947 while presidential succession was under consideration. That issue concerned the problem of determining the succession in the contingency of a nuclear attack during which everyone on the statutory succession list was killed. In May 1946, Congressman James Trimble of Arkansas introduced a resolution intended to cover such a contingency. Trimble's resolution provided for the ranking surviving military officers to select an interim civilian President, who would then call together the state governors to select from among themselves a President and Vice President. The resolution also called for state legislatures to fill from among their members any vacancies in each state's congressional delegation. Congressman Trimble's resolution received no consideration by Congress.

During the perfunctory hearings held by the Senate Committee on Rules and Administration in March 1947, several senators briefly mentioned the failure of the proposed succession law to cover the contingency of a nuclear attack killing everyone on the succession

list. Although it seemed to be agreed that this was a subject warranting further consideration and that, as Senator Theodore Green of Rhode Island put it, "...there ought to be a way of determining that, no matter what happens, there ought to be somebody who would take over automatically without a hitch,"⁶ no provision for this contingency was explicitly examined during the committee's discussion of Senator Wherry's bill, which formed the basis for the subsequent act as passed into law.

During the debate of the Wherry bill on the floor of the Senate on June 27, 1947, Senator Alexander Wiley of Wisconsin raised the matter of nuclear attack and presidential succession. He offered an amendment that would have added to the succession list, after the Cabinet officers, "...the highest ranking of those military or naval officers of the United States who are on active duty, are not under disability to discharge the powers and duties of the office of President, and are eligible to the office of the President under the Constitution."⁷ In explaining his amendment, Senator Wiley pointed out that the bill did not cover the contingency of everyone on the bill's succession list being killed. Although Senator Wherry agreed in principle with this proposed amendment to his bill, he thought it was unnecessary and said: "...it is my humble opinion that in the event civil government should be entirely obliterated there would be a military government, and it is my opinion that the highest-ranking officer, whoever he might be, would be the one who would take over the administration of affairs."⁸ Without further discussion, the Senate rejected the amendment on a voice vote.

3. Conclusions

The Presidential Succession Act of 1947, with its subsequent amendments taking into account the more recently added Cabinet posts,

6. U.S. Senate, Committee on Rules and Administration, Succession to the Presidency, Hearings before the Senate Committee on Rules and Administration, on S. Con. Res. 1, 80th Cong., 1st Sess., 1947, p. 13.

7. Congressional Record, Vol. 93, Part 6, p. 7785.

8. Ibid.

remains in effect today. As it stands, this act provides the following line of succession in case of the "Removal, Death, Resignation, or Inability, both of the President and Vice President": the Speaker of the House of Representatives; the President pro tempore of the Senate; the Secretaries of State, Treasury, and Defense;⁹ the Attorney General; the Postmaster General; the Secretaries of the Interior, Agriculture, Commerce, and Labor; the Secretary of Health, Education, and Welfare; the Secretary of Housing and Urban Development; and the Secretary of Transportation.

According to the provisions of the Act, the Speaker and the President pro tempore must resign both their congressional positions and their seats in Congress in order to act as President. In contrast, should a Cabinet officer be called upon to act as President, he does not formally resign his position; the taking of the oath of office of the Presidency is said to constitute his resignation from his Cabinet position. It should also be pointed out that the ranking legislative officers would serve out the remainder of the term as President (except in cases in which such service is based upon the failure of a President and Vice President to qualify or the disability of the President and Vice President.) Cabinet officers, according to this law, function as Acting President only until a President, Vice President, Speaker, or President pro tempore became able to act. If a lower-ranking Cabinet officer succeeds to the Presidency, he would not, however, be displaced by subsequent qualification of a higher-ranking Cabinet officer. Thus, as was President Truman's intention, only an elected official would be able to act as President for the remainder of the presidential term, not just temporarily.

C. DEVELOPMENTS BETWEEN 1947 AND 1963

Although the 1947 Presidential Succession Act is still in effect, Congress has considered the question of succession from time to time,

9. Note that the Secretary of Defense, who is first in the chain of military command under the President as Commander in Chief of the armed forces, is sixth in the line of succession to the presidential powers and duties, including the Commander in Chief power.

particularly during periods of crisis--during the illnesses of President Dwight D. Eisenhower and immediately following the assassination of President John F. Kennedy. Though congressional interest in the subject of presidential succession was limited, two issues were given some attention. One was the effect of nuclear attack on the continuity of government, and the other was presidential disability.

1. Nuclear Attack and Continuity of Government

Congress as a whole did not concern itself with the contingency of everyone on the succession list being killed in a nuclear attack. Since the passage of the 1947 law, it appears that only Congressman Chet Holifield and the late Senators William Knowland and Estes Kefauver have seriously addressed themselves to this critical problem.

a. Legislative Proposals. On February 20, 1950, Congressman Holifield introduced a bill in the House "...proposing that a commission be created to investigate the measures which can be taken to insure the continuous operation of the U.S. government in the event of a nuclear attack by a foreign power."¹⁰ The commission was to investigate the possibility of an alternate seat for the government and "...appropriate measures for selecting the successor of any President, Vice President, or Member of Congress who might become unable to perform his duties as a result of attack."¹¹ On May 14, 1951, Congressman Holifield introduced a similar proposal. Neither of these resolutions was reported out of the House Judiciary Committee.

During four successive sessions of Congress, from 1951 through 1954, Senator Knowland introduced resolutions for a constitutional amendment authorizing the governors of each state to make temporary appointments to the House of Representatives in the event that the House membership was reduced by a nuclear attack. In 1954, the

10. Congressional Record, Vol. 86, Part 13, p. A1242.

11. Ibid.

Senate passed Knowland's resolution by a vote of 70-1, but the House of Representatives took no parallel action. The same year, Congressman Holifield introduced a joint resolution in the House to provide for filling vacancies in the House in case of an enemy attack, but his proposal died in the Judiciary Committee. In 1955, Holifield and Kefauver sponsored similar resolutions on filling House vacancies. Senator Kefauver pointed out that the House of Representatives was the least favored branch of government so far as succession was concerned. A law provided for presidential succession. State governors could name individuals to fill vacancies in the Senate. The Chief Executive or his successor could reconstitute the judiciary by appointments. But the Constitution required special elections to fill vacancies occurring in the House of Representatives, and such elections could entail long delays.¹² Senator Kefauver's resolution passed the Senate on May 19, 1955, but it died after referral to the House. No action was taken on Congressman Holifield's resolution by the House Judiciary Committee.

The problems of nuclear attack and continuity of government were given little attention until after the assassination of President Kennedy in November 1963. Soon thereafter Congressman Holifield introduced a joint resolution calling for the creation of a joint committee to investigate and study "...the problems of Presidential succession and continuity of Government."¹³ Holifield believed that the existing law was totally inadequate for wartime and especially for the contingency of an enemy nuclear attack. Congressman Holifield's proposal seems to have been given no further consideration by the House. Despite his urging that "...these problems will not be solved by ignoring them, by sweeping them under the rug, by letting someone else worry about them,"¹⁴ nothing happened.

12. Sen. Rep. No. 229, 84th Cong., 1st. Sess. (1954).

13. Congressional Record, Vol. 109, Part 19, p. 24579.

14. Congressional Record, Vol. 109, Part 19, p. 24580.

b. Issues and Resolution. Congressional consideration of the proposals to provide for continuity of government in case of nuclear attack was so superficial that it is difficult even to identify any basic positions. With the exception of Congressman Holifield and Senators Knowland and Kefauver, no one in Congress appears to have thought it worthwhile to study the problem of reconstituting the House of Representatives after an attack. Perhaps at that time a Soviet nuclear attack on the United States was considered so improbable that it was deemed unnecessary to think about ensuring the continuity of the government. According to Senator John C. Stennis, the only man to vote against Senator Kefauver's proposed amendment in 1954, the enactment of such legislation would be likely to create in the general public a fear that nuclear war was imminent. Perhaps another reason for the general lack of interest was a feeling in the House that the Senate was interfering in its affairs.

2. Presidential Disability

During the latter half of the 1950's, Congress confined its attention to the problem of presidential disability. Following President Eisenhower's heart attack in 1955, his ileitis operation in 1956, and his mild stroke in 1957, he asked the Justice Department to study the critical problem of presidential disability or inability, but no agreement was forthcoming on some of the critical issues involved. While Eisenhower and his principal advisers in the executive branch were wrestling with the problem of presidential inability, Congress made a few gestures toward solving this problem on its own initiative. The House of Representatives began to look into some of the problems in 1955, but lack of consensus precluded its Judiciary Committee from offering any recommendations. Both the Senate and the House lightly considered the question of determining procedures to follow in case of presidential inability. Two separate bills were passed in early 1957, but no coordination between the two Houses followed.

Since Congress seemed to be unable to solve the problem of presidential disability, President Eisenhower himself finally worked out

an agreement with Vice President Richard M. Nixon to cover any future cases in which the President might become disabled. With the concurrence of the Vice President and the Attorney General, President Eisenhower authorized publication of a letter of agreement on March 3, 1958.¹⁵ It made these provisions:

(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.

With the Eisenhower letter as a precedent, President John F. Kennedy and Vice President Lyndon B. Johnson made a similar agreement. A statement released on August 10, 1961, was identical to that drawn up by Eisenhower and Nixon, except that the Vice President, when acting under Paragraph (2), was specifically committed to consult with the Cabinet if the President was prevented from communicating his disability to the Vice President.

D. THE TWENTY-FIFTH AMENDMENT: 1963 TO 1967

1. Origins and Legislative History

Within a few weeks after the assassination of President Kennedy on November 22, 1963, constitutional authorities and others were again raising questions relating to the order of succession in the event of presidential death or disability. There was some concern

15. The New York Times, March 4, 1958, p. 1.

that President Johnson's heart condition might flare up again, especially under the heavy burdens of presidential duties.

President Johnson and Speaker John W. McCormack, his successor-apparent under the act of 1947, verbally agreed to follow the example set by the letters of agreement first of Eisenhower and Nixon and then of Kennedy and Johnson. There was the complication that the act of 1947 required McCormack to resign his position as Speaker and his seat in the House of Representatives in order to act as President if Johnson became disabled--even if this were for only a short time. And if Johnson recovered, McCormack would not be able to resume the speakership or even his seat in the House.

Various proposals introduced in both houses of Congress ranged from having two Vice Presidents to revising the succession list. Congress was reluctant, however, to consider seriously any proposal to change the existing succession line: no one wanted to offend either Speaker McCormack or President pro tempore Carl F. Hayden. Hence, Congress generally confined itself to considering the matter of presidential disability.

Senator Birch Bayh of Indiana soon became the moving force behind congressional action in dealing with the problem, and his resolution (Senate Joint Resolution 139) eventually provided the basis for the subsequent Twenty-Fifth Amendment to the Constitution. Congressional hearings in both the Senate and the House in 1964 addressed themselves to the question of presidential inability. Many legislative proposals were introduced to deal with this serious problem. Numerous constitutional and other legal authorities both in and out of government were called to testify before the congressional committees. During the summer of 1964, Senator Bayh's Constitutional Amendments Subcommittee (of the Senate Judiciary Committee) favorably reported out S. J. Res. 139--with an amendment striking out proposed changes in the succession law. Although the Senate passed S. J. Res. 139, the House took no action during that session of Congress. Early in the next session, joint resolutions identical to Senator Bayh's resolution, which had been approved by the Senate during the previous

session, were introduced in both the Senate and the House. They proposed a Constitutional Amendment to deal with presidential succession and inability.

In a message to Congress on January 28, 1965, President Johnson strongly endorsed these resolutions and urged Congress to approve them "forthwith," calling attention to the need for ensuring that the Vice Presidency would always be filled. The Senate passed S. J. Res. 1 by a vote of 72-0 shortly thereafter. After the House Judiciary Committee held hearings on presidential inability, the House of Representatives adopted S. J. Res. 1. Thereupon, the resolution went to conference; the House approved the conference report on June 30, 1965; and the Senate gave its approval a week later. The amendment then went to the states for ratification; it was ratified and became the Twenty-Fifth Amendment to the Constitution on February 23, 1967.

2. Issues and Resolution

The tragedy of Kennedy's assassination caused Congress to focus on some of the weaknesses and ambiguities in the laws governing presidential succession and disability. The main worry of Congress and particularly of Senator Bayh was the kind of situation that had prevailed between 1963 and 1965: a President (the former Vice President), no active Vice President, and no way to provide for the selection of a Vice President under the existing laws. Bayh and others also felt that the Speaker and the President pro tempore had such heavy and time-consuming responsibilities that they could never be properly prepared to assume presidential powers and duties; thus, they preferred that the chain of presidential succession should be confined to the executive branch.¹⁶ Another very important issue was how exactly to determine and declare presidential disability.¹⁶

Senator Bayh's joint resolution attempted to resolve some of these critical problems and issues. After almost two years of discussion,

16. Birch Bayh, One Heartbeat Away: Presidential Disability and Succession (Indianapolis, Indiana: Bobbs-Merrill, 1968), p. 32.

Congress agreed that his proposal provided the best means for handling these problems. Bayh's proposed change in the succession law was deleted, primarily because no one wanted to offend Speaker McCormack or President pro tempore Hayden.

3. Conclusions

The Twenty-Fifth Amendment provides the following: (1) in case of the removal of the President from office or his death or resignation, the Vice President shall become President; (2) in the case of a vacancy in the office of the Vice President, the President nominates a Vice President who shall take office upon confirmation by a majority vote of both houses; (3) in the event of presidential disability, the President shall transmit a written declaration to the Speaker and the President pro tempore, whereupon the Vice President serves as Acting President until the President notifies both the Speaker and the President pro tempore that he is no longer disabled; (4) the Vice President may also notify the Congress, as in (3) above, that the President is disabled. ~~He must, however, do this with the concurrence of a majority of either the Cabinet officers or of such a body as Congress may by law provide.~~ Similarly complicated procedures are outlined in the amendment for determining the end of presidential disability.

E. APPLICATIONS OF CURRENT LAWS

The Presidential Succession Act of 1947, as amended, and the Twenty-Fifth Amendment to the Constitution together form the current legal basis for dealing with questions of presidential succession. Since neither law has been put to a practical test, it is difficult to judge exactly how either would operate. The following two sections briefly analyze what is likely to happen under conditions of a nuclear attack targeted specifically against the national leadership of the United States.

1. Relatively Clear Contingency

In a fairly clear example, it is assumed that an enemy nuclear attack on Washington kills the President, the Vice President, the Speaker of the House of Representatives, the President pro tempore of the Senate, and some but not all Cabinet members. In such a contingency, the Succession Law of 1947 stipulates that the ranking surviving Cabinet member would temporarily act as President until such time as either a Speaker or a President pro tempore could qualify to act as President. The election of a new Speaker or President pro tempore would depend on whether Congress was in session and if (whether it was or was not in session) enough members of either House survived to constitute a quorum. In this example, it is assumed that the nuclear strike occurs when most members of Congress are away from Washington. Under such circumstances, Congress could conceivably reconvene at some other location within a few days. Under the rules of each chamber, a majority is required to elect a new presiding officer. Thus, it is possible that the Senate and the House could be in a "race" to elect their respective presiding officers, because the first one so elected would then, under the 1947 act, succeed to the Presidency for the remainder of the deceased President's term.

In the above example, in which several Cabinet members survive the nuclear strike, it should be emphasized that a lower-ranking Cabinet member acting as President could only be replaced by a new President, Vice President, Speaker, or President pro tempore, not by a higher-ranking Cabinet member. For example, if the Secretary of Agriculture became Acting President, he could not be supplanted by the Secretary of the Treasury, should he suddenly turn up. The elaborate succession plans that exist to reconstitute the various federal departments and agencies do not directly affect the presidential succession. Although the Deputy Secretary of Defense, for example, undoubtedly succeeds to the position of Secretary of Defense in case of the latter's death or disability, the deputy is not legally entitled to take the Secretary's place on the presidential succession list.

2. Relatively Unclear Contingency

For a not so clear example, it is assumed that the nuclear strike on Washington kills everyone on the current succession list. It is further assumed that enough Senators and Representatives are killed to prevent each House from convening a quorum. Under such a contingency, it appears that the selection of an Acting President would have to await the election of new presiding officers by reconstituted Houses of Congress. In actual operation in such a case, presidential power is likely to devolve on a new President pro tempore of the Senate rather than on a new Speaker of the House of Representatives. The reason for this is that the Constitution empowers state governors to appoint replacements to serve out vacancies in senatorial terms, whereas vacancies in the House of Representatives must be filled through special elections in each district affected. Under the various state electoral laws, it could take weeks or months before new Representatives could be elected, but--especially if adequate pre-planning had been carried out--the state governors could probably act fast enough to ensure that a new Senate was convened somewhere within a few days. When the newly elected President pro tempore became Acting President, the Act of 1947 would authorize him to continue to act for the remainder of the presidential term, and under the Twenty-Fifth Amendment he would be able to name his own Vice President.

One other type of complication comes to mind that although not directly germane to this constitutional and statutory discussion bears on it. Suppose, for example, that the President had de facto delegated in advance to the Secretary of Defense the authority to order or withhold nuclear retaliation in the event that an enemy attack killed the President. Suppose further that a nuclear attack killed the President, the Vice President, and all the other legal successors except the Secretary of Defense and the Speaker of the House. The Speaker would clearly have succeeded to the powers and duties of the Presidency. However, in the chaotic conditions produced by the attack, the Secretary might very well be unable to establish

DELEGATED 15

communication with him. The Secretary would then have to decide whether to (a) do nothing, because his delegated authority would not have survived the deceased President, or, (b) order a nuclear retaliation anyhow. This may seem to be a rather "far out" example, but matters very seldom go according to plan in real life, and there are undoubtedly examples of confusion that are much "farther out" than this one.

3. Conclusion

Key | The primary conclusion to be drawn from this discussion is that both the Constitution and the present succession law are sufficiently ambiguous that in the case of a nuclear attack specifically directed against the national leadership of the United States there is little assurance that the legal Presidency would survive. And even if the Presidency could be legally reconstituted, this might occur after weeks or even months of confusion in the midst of catastrophe.

One logical solution to the inadequacy of the current arrangements is fraught with difficult political and legal complications. That solution is for Congress to amend the Succession Act of 1947 by adding to the list individuals likely to survive a devastating nuclear attack on Washington alone. The list of people could include deputy secretaries or under secretaries of federal departments, Supreme Court Justices and other federal court judges, military officers, and ambassadors. While state governors could also be included on this list, this would require a loose interpretation of the Constitution because governors are not officers of the United States in the constitutional sense of the term.

Finally, some mention should probably be made of the recurring idea that at least one person on the succession list should always be away from the Washington area. This proposal appeals to logic, but it could look politically appalling to any national administration. Full logic would suggest that the rotating absentee from Washington should fly around in an airplane, but even steps considerably short of that would tend to convey an image of Armageddon that no President is likely to want to convey except at a time of extreme crisis, such as the Cuban crisis of October 1962--and perhaps not even then.

Justification to release nuclear weapons?

PART II

AUTHORIZING THE RELEASE OF NUCLEAR WEAPONS

A. INTRODUCTION

The focus in this Part will be on the President's power to authorize general or selective release of nuclear weapons for use by military commanders. The treatment is restricted to the question of who can succeed to that power in case the President is dead, disabled, or unavailable. It will not consider the equally important question of what could be the nature of the decisions required from the successor.

It may seem at first that if the President were officially to delegate the authority required to release nuclear weapons, the problem would become greatly simplified because constitutional and statutory legality might recede somewhat in relevance and because some flexibility would thus be introduced. The effect might not, however, be so clear. For example, what if in a nuclear emergency it is not known whether the President has died or become disabled? And what if the person to whom the President has delegated this authority is himself not available--due to his own death, disability or for other reasons? Does he have legally or administratively designated successors whom the President had in mind when he delegated to their principal and through whom, therefore, the release authority would pass? Or does the authority move to some other chain entirely if the principal is not available? And can the necessary steps be taken in the five to fifteen minutes during which a decision to retaliate with nuclear weapons may have to be reached, one way or the other?

Obviously the problem becomes more difficult if the President has not pre-delegated his authority. In that case, constitutional and legal considerations may figure prominently in planning, because they

can help determine what kind of presidential authority one is talking about and therefore the terms of succession to it. Is the authority in question that inhering in the President as head of state? Head of government? Commander in Chief of the Armed Forces? Sole agent by law? Or what?

It may be superfluous to note that what any given President does about this whole question depends strongly on his individual approach to the problem, and different Presidents may well adopt different approaches. The new national administration is rounding out its first year in office. If the related questions of presidential succession in emergency and pre-delegation of presidential authority to release nuclear weapons have not yet arisen for definitive consideration, they seem bound to do so before long.

B. KINDS OF PRESIDENTIAL AUTHORITY APPLICABLE TO DECISION ON RELEASE

Every schoolboy learns that the founding fathers deliberately built a separation of powers (legislative-executive-judicial) into the structure of the federal government; but Richard E. Neustadt, a distinguished Harvard political scientist, has suggested that the government has become over the years one of "separated institutions sharing powers." The sharing is exemplified in the management and direction of the armed forces. The Constitution empowers Congress "to declare War," "to raise and support Armies," and "to provide and maintain a Navy." But it also states that "the President shall be Commander in Chief of the Army and Navy of the United States," and--especially in the past hundred years--the courts have generally given a broad interpretation to the President's powers in his role as commander in chief.

The first question here is ~~whether the~~ President's authority to release nuclear weapons falls within either of the following elements of his commander in chief's role: (1) war and emergency powers generally, or (2) specific military command of the forces. The distinction is neither trivial nor legalistic, since it could help determine which among alternative chains of succession appears most logical, effective, and legal.

1. Broadly Construed War and Emergency Powers

The evolution of what have come to be known as the President's "war powers" began in 1861 when President Lincoln merged the constitutional commander in chief clause and the clause that declares that the President "shall take Care that the Laws be faithfully executed." Since that time, and especially during World Wars I and II, the President in time of war or other national emergency has assumed extensive powers not specifically granted to him either by the Constitution or by acts of Congress. The President's power to wage war or deal with an emergency includes wide discretionary authority that permits him to take whatever actions he deems necessary for the management of domestic resources to support the war or emergency effort and for the successful operation of the armed forces. Thus, governmental controls over credit, prices, wages, labor relations, communications, transportation and governmental acquisition of property and resources have been construed as inherent war powers of the President, as has the expansion of the armed forces through volunteers and their preparation for and movement into battle.

In applying these war and emergency powers, Presidents have taken actions that in normal times would almost surely have required legislation by Congress--or even constitutional amendment. Thus, the presidential war powers appear to be a category of actions that constitutionally or by statute inhere in Congress; they are so clearly outside the purview of the President in normal times that a constitutional amendment would be required for him, not Congress, to assume responsibility for them. The release of nuclear weapons for use would not appear to fall within the category of actions that normally inhere in Congress and that therefore the President would assume under his war powers.

If, however, the broad war and emergency powers are perceived to provide the authority to release nuclear weapons, then the issue of how these powers devolve in the case of death or disability becomes central. Because most presidential uses of the war and emergency powers have involved basically civil and war-supporting measures, the

chain of strictly military command succession would not appear to be the logical one. Rather, the Presidential Succession Act of 1947 would seem to apply: succession would run through the Vice President, Speaker, President pro tempore, and Cabinet members.

2. Military Command

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In the Army, Navy, or Air Force, the chain of command is highly structured and clear to everyone. At higher military organizational levels, where joint operations occur, the chain of command has often had to be clarified--for example, in the Pacific campaigns of World War II. In Washington, where civil and military authority are combined, there have been ambiguities in the chain of command since the early years of the republic.

One fact has remained incontestable: the President is Commander in Chief because the Constitution says that he is. If he wants to actually take to the field, as Washington and Madison did, or if, like Lincoln, he wants to direct from the capital the deployments and employment of forces, without responsible professional advice, he can do so. It is just below the presidential level that problems have characteristically arisen, partly because at that level "civilian" functions of command have appeared to be most appropriately handled by the secretaries of the military services (or, later, the Secretary of Defense), while the military operational attributes of command have naturally tended to be vested in the senior military professionals.

Much, though not all, that was historically ambiguous in the chain of command was clarified by the passage of the Department of Defense Reorganization Act of 1958, a law to which President Eisenhower is said to have devoted more personal attention than any measure in his eight years in office. It provides in effect that the chain of military command runs from the President through the Secretary of Defense to those individual military professionals who direct the unified and specified commands, including the Strategic Air Command. The nation's senior military professionals, the corporate Joint Chiefs of Staff (including their Chairman), are not explicitly in this statutory chain of command, but three circumstances emphasize

their central importance: (1) by law (the National Security Act of 1947, as amended) they are the principal military advisers to the President, the National Security Council, and the Secretary of Defense; (2) by Department of Defense directive, the Secretary of Defense has said that he will use the Joint Chiefs as his channel of command communication to the unified and specified military commands; and (3) many in Congress and among the American public perceive the Joint Chiefs as being at the apex of the nation's military command structure.

The Secretary of Defense is as surely in the chain of national command as is the military Commander in Chief in Europe, in the Pacific, and of the Strategic Air Command. It is sometimes argued that the secretary is also Deputy Commander in Chief to the President, but this position seems untenable constitutionally and would certainly not appear to follow in any legal sense from his being first in the military chain of command after the President. It is also sometimes argued that the Deputy Secretary of Defense is third in the military chain of command--i.e., after the President and the Secretary of Defense. Military organizational practice does treat any deputy as substantially an alter ego of his commander and above all it provides for a deputy to succeed his commander if the latter becomes a casualty, but no functioning military commander thinks of his deputy, as long as he is a deputy, as being in the chain of command, which runs straight from commander to commander.

The above observations on military command have three main applications in regard to the problem of authorizing the release of nuclear weapons in case of the death, disability, or unavailability of the President. First, if it is held that the President's release authority is an attribute of the Presidency, perhaps in its commander in chief aspect, then the Secretary of Defense, despite his position right behind the President in the chain of military command, would not be the first but the sixth to succeed to the release authority, i.e., after the Vice President, Speaker, President pro tempore, Secretary of State, and Secretary of the Treasury. Second, even if

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it is held that the President's authority to release nuclear weapons devolves through the chain of military command in case the President cannot make the decision, the Joint Chiefs of Staff could not legally succeed to it; the decision would pass first to the Secretary of Defense (and his designated successors?) and then to the Commander of the Strategic Air Command (and his?). And third, if the President makes some kind of contingent delegation of his release authority to the Secretary of Defense without specifying any further transferral of the authority in case the secretary is unable to exercise it, the inability of the secretary for any reason would result in the release authority passing to the deputy secretary.

Department of Defense succession arrangements are not necessarily inconsistent with anything concluded in the paragraphs above, but they address themselves to the rather different subject of succession within the department to the job of senior defense authority at the seat of government. There is no presumption or suggestion that this succession applies or ought to apply to the possible devolution of the authority to release nuclear weapons.

No chain of military command appears to be handily applicable to the problem of releasing nuclear weapons if the President is unavailable for any reason. The chain in the Reorganization Act of 1958 and the Department of Defense succession provisions both have their uses, but neither is germane to the central question of nuclear release authority. If, however, a President wants to delegate directly to some person in the Department of Defense--for example, the Secretary of Defense--he would be well advised to make clear what he wants to happen if his designee is not available. Otherwise, since the chains of command are familiar to military and civilian officials, well-oiled wheels could start to turn in ways that the President had not anticipated and might not have wanted.

The preceding few pages have concluded that neither the President's war and emergency powers nor his position at the head of the chain of military command appears to be directly applicable to the devolution of his authority to release nuclear weapons for use. They have further

concluded that precedent, military usage, and common sense all suggest that, in any event, succession to the President's war and emergency powers and to his primacy in the chain of command would occur through the presidential succession list in the act of 1947.

3. Voice of the People

Two characteristics of a decision to release nuclear weapons for strategic retaliation suggest that it is of a kind unique in historical experience. The first is its unparalleled awesomeness: 100 million to 200 million lives could depend on it. The second is that, under certain not unlikely circumstances, it could prove necessary to arrive at the decision in five to fifteen minutes.

The President's authority to release or withhold nuclear weapons thus involves a decision of such moment and urgency that it seems clearly to derive from two fundamental principles that underlie the Constitution and the whole structure of government that has flowed from it: (1) the unique incarnation in the President of the directly expressed will of all the people of all the states, and (2) the superiority of the civil power over the military. Thus what is involved is a strong civilian stress on the most profound manifestation of the presidential office. This almost mystical trust is not one that can be presumed to flow down through an administrative military chain of command; other things being equal, in case of the President's death, disability, or unavailability, it would devolve according to the Constitution (especially the 25th Amendment) and the laws (especially the Presidential Succession Act of 1947).

4. Presidential Delegation Ad Hoc

Of course other things may not be equal; they seldom are. The President's conception of his trust could cause him to consider establishing advance arrangements designed to ensure that a decision will be reached, one way or the other, on nuclear weapons release in the contingency of his death, disability, or unavailability. In fact, there is a case, in his own terms, for his doing so, even if his basic inclination is to guard his personal control over the release

authority very closely. The explanation for this apparent paradox is that if the President does not express how he would want the authority to devolve if he is not available, it could--given the characteristics of large bureaucratic organizations--actually devolve in a way very much contrary to his preference or conviction.

Ambiguity often serves a President's political purposes, but ambiguity is the enemy of planning, and military men believe strongly in planning. If they are given the explicit guidance they want, if they get "the word," they will faithfully adjust to it, whatever it is. If they and their civilian superiors and counterparts do not receive guidance, they will not necessarily invent it, but as action-oriented men they are not likely to sit around like lumps of coal.

C. TRYING TO ENSURE A PRESIDENTIAL SUCCESSOR FOR RELEASE AUTHORITY

This section will focus on the problem of trying to ensure a decision on the release of nuclear weapons under circumstances that approach "worst cases." The exposition will touch in turn on three areas of potential action: measures relating generally to (1) the prescribed chain of Presidential succession, (2) the prescribed chain of military command, and (3) Presidential preference regardless of these chains or others.

1. Line of Presidential Succession

If past and current understandings continue in the absence of any presidential pre-delegation of authority, the chain of presidential succession provided in the act of 1947 will remain the most important guideline (or constraint) for the procedures governing the release of nuclear weapons. In short, since it is understood by all that the President alone can release such weapons, the key questions become: Who is President? Is he in communication with those in the military chain of command who need his authorization before "executing" their nuclear forces? What is his decision?

Perhaps the worst case imaginable from the viewpoint of command and control is one involving a nuclear strike on Washington (perhaps on Washington only) in which the President and all his successors

designated in the Act of 1947 would have been killed; it could come so mysteriously and swiftly--say from an unidentified submarine just off the Atlantic coast--that time would not have permitted a decision to retaliate, even if the nationality of the aggressor were known.

What would happen in such a case? On available evidence, nothing would happen. Those who believe that somehow we would muddle through, or that "the military would take over," or whatever, are not facing the issue. The military authorities are geared for the receipt of release authority from a President, and if there is no President--de jure or de facto--there is a presumption that these authorities would not act. The presumption may be questioned; maybe they would if they could, since every military commander learns early that self-defense in the protection of the integrity of his command is his solemn duty. This possibility may disturb some citizens; but at the other, passive end of the spectrum, there is a possibility that may disturb other citizens. It is that a given President could decide that, in this worst case, he would positively not want retaliation to occur, and so would decide to live with current arrangements on release authority. If so, he must make sure that all of his legal successors understand his position, because one or two of them might survive the localized strike.

The most obvious measure to ameliorate the worst case situation is for Congress to change or add to the succession list. This action would not necessarily be simple, because of a variety of constitutional, legal, domestic, foreign, and even personal considerations. A logical move would be to include on the list some individuals not likely to be in Washington--for example, state governors in the order of the populations of their states, or in the order that their states ratified the Constitution or were admitted to the union, or on some other basis. Another logical variation designed to increase the chances of a presidential successor surviving in Washington itself would be to add deputy or under secretaries to the list, at least in those departments primarily engaged in foreign and military affairs. Finally, there appears to be no legal reason why a senior military officer, such as

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the Chairman of the Joint Chiefs of Staff, could not be included on the list; as an "officer of the United States" his constitutional eligibility for succession is clearer than that of state governors, who do not fall into that category.

Another measure that has attracted interest from time to time is to ensure formally that at least one presidential successor is always away from the Washington area and in communication with the appropriate military command and control authority or installation. For this rotational chore to be tolerable to the legal successors, the whole Cabinet would have to be involved. The Speaker and President pro tempore would probably not participate because of their pressing legislative duties. For this rotational scheme to be effective, every Cabinet member would have to be fully abreast of the President's thinking and actions in the national security field. Even if these arrangements could be made, their very existence would almost surely become public knowledge sooner or later, and it is questionable whether a President would want that to happen.

A variation on the worst case could be a situation in which the nuclear strike on Washington has not necessarily killed the President and all his legal successors; rather, in the prevailing chaos and horror nothing is clear one way or another. The President, like some or all of his legal successors, may be alive, disabled, or dead. Somehow this total confusion has a flavor of likelihood about it. How, under these conditions, could the military authorities go about trying to secure a rapid presidential decision on nuclear release?

One way would be to establish beforehand a "polling" arrangement whereby the military authorities would first try to reach the President for a decision, then, if he were unavailable, institute a pre-arranged conference call to all of the legal successors simultaneously. The senior successor responding to the call could then decide. Insofar as adherence to strict legality is important, this idea will probably not suffice: the maker of the decision--for example the Secretary of State--would not be acting President in the case that the President himself, the Speaker, or the President pro tempore had survived but

could not be reached. Besides, the "polling" would consume precious time even if the communications system were operating well.

Nevertheless, the 25th Amendment to the Constitution suggests a kind of model in its provision that the President can declare his own disability to Congress in order that the Vice President can act as President for the duration of the disability. On the basis of that model, the President could instruct his successors and the military authorities that if, in the event of a nuclear strike on Washington, these authorities cannot reach him for x-minutes, then they are to institute the prearranged conference call. In effect, the President would be providing in advance for an instance of his presumed disability.

The reference here in the 25th Amendment is largely illustrative and by no means indicates that the proposed plan would be legal in strictly constitutional terms. Still, since it would use the legal chain of succession, there might be a case for holding that it constituted a proper exercise of the President's broad war and emergency powers; Lincoln's actions in 1861 were, for the times, no less independent and vigorous.

2. Chain of Military Command

It has been concluded above that the chain of military command in the Defense Reorganization Act of 1958 is not applicable per se to devolution of the President's authority to release nuclear weapons. It has also been argued that the Department of Defense succession arrangements do not apply per se, but rather are intended to ensure that someone can act in senior defense positions for purposes that do not include the release of nuclear weapons for use.

Even with such limitations, the chains or lists appearing in both of these contexts still merit further discussion. Since intimate knowledge of military and international affairs is essential in making a decision to release nuclear weapons, many of the civilian and military officials on these lists would appear to make better candidates for succession to a nuclear release decision than would the

See SACFUT's powers in CRS authority.

secretary of a department primarily oriented to domestic concerns. However, while the military Commander in Chief in Alaska, for example, may, as head of a unified command, be very high in the chain of national military command; he is not as likely to be attuned to the President's perspectives as are any number of high civilian and military officials in Washington who work in the foreign or military policy areas. Finally, even in Washington, relative placement on the chains or lists does not necessarily reflect knowledgeability.

Despite these qualifications, it remains true that the individuals who appear in the chain of command and in DOD succession arrangements do include many who combine military knowledge with closeness to the President's perspectives. If, therefore, a President wished to look into the pros and cons of a carefully circumscribed and contingent pre-delegation of his nuclear release authority, his attention might well fall on these two sources--not necessarily by or for themselves, but as "inputs" to introduce into his whole process of determining an appropriate devolution of that authority.

Making some use of these chains would tend to attach an aura of legal propriety to the President's action, because it would rest on legal and formalized administrative procedures that are well understood in the national security community. Perhaps more important, as a contingent delegation to release nuclear weapons it would involve a legal and universally acknowledged authority of the President (i.e., delegation in general) with respect to an action that everyone perceives as being in his sole power to delegate or withhold (i.e., the nuclear release).

3. Presidential Preference

So far this section on "Trying to Ensure a Presidential Successor for Release Authority" has built on two major points: (1) that the line of presidential succession in the act of 1947 is central to the existing official arrangements, and (2) that if a President decides to depart from that status quo by contingent pre-delegation through another list, he might consider including on it some of the officials who figure in the military chain of command and on the Department of Defense succession list.

But as soon as the President moves away from the statutory presidential succession list, he enters an area where the legality of whatever he may do will be unclear. Therefore, if he decides to effect a rational, contingent pre-delegation, he may as well try to arrange for the authority to devolve in the way that his judgment persuades him is most sound. 10/1

Different Presidents would undoubtedly arrive at different decisions on this matter, and the same President could be of two minds at different times. For example, President Truman fought so hard to place the Speaker and the President pro tempore right after the Vice President in the line of presidential succession that it is possible that he might have wished to have the release authority devolve straight down the 1947 succession list at least through those two legislators. And yet he considered General George C. Marshall to be the greatest living American; and whether the latter was serving him as Army Chief of Staff, Secretary of State, or Secretary of Defense, Truman might have placed him first on the release authority list after the Vice President--and perhaps even before the Vice President if the President's death was in doubt rather than certain. Regardless of any chain of command, it can be suggested that President Eisenhower would probably have preferred to have Secretary of State John Foster Dulles rather than Secretary of Defense Charles E. Wilson make a nuclear release decision under conditions of major disaster.

Assuming that the President decides upon a contingent pre-delegation and further decides whom he wants to succeed to the authority and in what order, the problem would still be far from settled. Some questions remain:

- a. In the complex command and control release procedures, does everyone who has to understand actually understand?
- b. Is it certain that obvious potential frustrations have been (or can be) neutralized? For example, if the President directs that the order go from Vice President to Secretary of State, are the Speaker of the House and the Secretary of Defense sure to stand aside if it is clear that the President and Vice President are both dead? (The Speaker would be de facto President of the United States and the Secretary

of Defense might consider himself Deputy Commander in Chief.)

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c. Is it certain that less obvious potential frustrations have been (or can be) neutralized? For example, if the release authority is supposed to devolve at the top from the Vice President to the Secretary of State to the Secretary of Defense, and if the Vice President and the Secretary of State are dead, disabled, or unavailable on the occasion of a prearranged "polling" procedure by the military authorities, what happens if the Under Secretary of State speaks for his secretary, thus shutting out the Secretary of Defense?

d. A full public disclosure of the President's detailed decision on contingent pre-delegation might help alleviate difficulties such as those illustrated above, but is it likely that a President would agree to such disclosure?

D. CURRENT ARRANGEMENTS AND UNDERSTANDINGS

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If any President, including the incumbent, has ever issued a contingent pre-delegation of his authority to release nuclear weapons for strategic retaliation, it has been one of the most closely guarded secrets in government. The very secrecy means that any contemplated devolution might not ensue at all or, even if it did, could fail to function effectively.

Some conjectures are possible, drawing on common sense and press reports that resulted from vigorous reportorial digging. During the presidential campaign of 1964, statements by the Republican candidate, Senator Barry M. Goldwater, caused a flurry of articles on nuclear pre-delegation to appear in Time, U.S. News & World Report, and The New York Times. Correspondents Jack Raymond and Hanson Baldwin of the Times wrote stories that included several references to allegedly existing pre-delegation arrangements.¹ The reports received no official confirmation or denial, then or later.

The stories first recalled that on October 2, 1958, the then commander of the North American Air Defense Command, General Earle E. Partridge, had stated publicly that he was the only military commander

1. The New York Times, September 23, 1964, pp. 1, 32, and 33; September 24, 1964, p. 50; and September 27, 1964, Section IV, p. 4.

authorized to fire a nuclear weapon in combat without specific presidential release. Under clearly specified conditions, the pre-delegation of such air defense authority is hardly surprising; when identified enemy aircraft (or missiles) are enroute to their targets in North America, shooting them down with defensive nuclear weapons would scarcely be provocative.

Next, the stories strongly implied that by the early 1960's certain senior military commanders--notably the US Commander in Chief in Europe, who is also the Supreme Allied Commander in Europe--had received a presidential pre-delegation of authority to release and use tactical nuclear weapons in carefully defined circumstances. The definition of the circumstances might conceivably have included some or all of the following: (a) a massive rather than a "probing" Soviet attack; (b) first use of nuclear weapons by the Soviets in that attack; (c) attack threatening to overrun allied forces; (d) detonation of allied nuclear weapons only on or over allied territory; (e) limitations on size of allied nuclear weapons to be used, on ground bursts, on nearness of bursts to population centers, or on other criteria; and (f) breakdown at the critical time of relevant communications with Washington because of factors that could include the death or disability of the President and his successors.

Except for General Partridge's statement of 1958, all of the above discussion is derived from informed press accounts. It is possible, indeed it should perhaps be assumed, that as of now there exists no presidential pre-delegation of any aspect of the authority to release nuclear weapons. In any event, the focus of this paper is on the release authority necessary to execute strategic retaliation, and no one seems ever to have claimed that the President has contingently pre-delegated that aspect of his authority. -Kef

E. CONCLUSIONS

1. The President's authority to release nuclear weapons for use would appear not to devolve along the line of succession to his traditional war and emergency powers per se, nor downward through the military chain of command.

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2. Rather, that authority appears to inhere in the Presidency as the ultimate expression of the popular will; the relevant line of succession is that provided in the act of 1947: Vice President, Speaker of the House, President pro tempore of the Senate, and Cabinet members in the order in which their posts were created.

3. Using that line of succession as a basis, it is possible to devise measures that would increase the likelihood of an effective succession for the purpose of ensuring a decision on retaliation in the event of an enemy first strike on the capital. Among them are the following:

a. At all times keep at least one well-briefed presidential successor out of the Washington area or, if this is unacceptable, do so in times of major crisis.

b. Ask Congress to expand the presidential succession list or to change it so as to include on it officials who are not likely to be in Washington (e.g., state governors) or who are knowledgeable about military and foreign policy (e.g., Under or Deputy Secretaries of State and Defense).

c. Whether the 1947 list is changed or not, have the President in effect anticipate his possible disability by providing that, in case of an enemy nuclear attack on Washington, the military authorities seeking a decision on nuclear release will "poll" those on the succession list according to an established rapid-fire timetable until they reach a successor who will then make a decision.

d. Determine whether or not departmental succession lists are relevant in this context--e.g., decide whether the Under Secretary of State would, if he were available and the Secretary of State were not, succeed to the nuclear release decision before it passed to the Secretary of the Treasury.

4. The President may decide to draw on his general power of delegation in order to provide that the nuclear release decision devolve through the best-informed responsible officials in case of his death, disability, or unavailability--almost regardless of the formal chain of succession to the Presidency itself as set forth in

the act of 1947. Whom he would place where in such a de facto succession to the decision would depend overwhelmingly on the personal perspectives of the President vis-a-vis the particular individuals among his principal advisers, but it seems logical to assume that ranking officials in the Departments of State and Defense would figure prominently. If the President should elect to take such a course, he would be opting for effectiveness over ambiguity, and there is a case for holding that he should further promote potential effectiveness by publicly announcing his detailed decision, thus tending to ensure full understanding of it.

APPENDIX A

HISTORICAL BACKGROUND ON SUCCESSION

A. PRESIDENTIAL SUCCESSION THROUGH DEATH

1. The Act of 1792

According to the Constitution, Congress has the responsibility for deciding who shall act as President in the event that there is a dual vacancy in the Presidency and the Vice Presidency. After some deliberation, Congress passed a law in President Washington's first term providing that if both the President and the Vice President died or were for other reasons not able to act as President, then the duties of the Presidency would devolve first on the President pro tempore of the Senate and then on the Speaker of the House of Representatives. At the same time, this law provided that a special election was to be called for filling the double vacancies. This law (Act of March 1, 1792; 1 Stat. 241) governed presidential succession for the next 94 years.

2. From Washington to Chester Alan Arthur

The first President to die in office was William Henry Harrison, who succumbed to pneumonia exactly one month after his inauguration in 1841. The constitutional provision on the succession of the Vice President was not entirely clear on whether the Vice President was actually to become President, or whether he was only to exercise the "Power and Duties" of the Presidency as Vice President until a new Chief Executive could be chosen--perhaps in a special election. Harrison's Vice President, John Tyler, moved quickly and vigorously to assert the stronger construction of the Constitution, and the right of the Vice President to become President has not in practice been seriously challenged since (even though most scholars agree that the founding fathers almost surely intended otherwise).

When Vice President Andrew Johnson succeeded to the Presidency upon the assassination of Abraham Lincoln, the heir-apparent to the country's highest office became, in accordance with the 1792 law, the Senate's President pro tempore. In early 1867 Senator Benjamin F. Wade of Ohio was elected to that office. Wade, architect of the punitive reconstruction of the South, was a leader of the "radical Republicans" who were starting impeachment proceedings against President Johnson and who were eventually to come within one vote of convicting him; their zeal to remove the President was largely motivated by the knowledge that, if they were successful, one of their number would replace him in the White House.

By the time that James A. Garfield became President in 1881, three Presidents who had died in office had been succeeded without any great problems by their Vice Presidents. But after Garfield was shot in Washington's Union Station on July 2 of that year, he lingered between life and death for two and a half months. His Vice President, Chester Alan Arthur, refused to entertain suggestions that he "act" as President, and the whole machinery of government was in danger of stumbling to a dead halt. When Arthur did succeed Garfield upon the latter's death, he tried, in his first annual message to Congress and later on as well, to persuade the legislators to take action on the subject of presidential succession, but nothing came of it--perhaps in part because the man first in line to replace Republican President Arthur under the existing law was the Senate President pro tempore, David Davis, a Democrat--a status quo quite congenial to the Democratic majority in the Senate.

3. The Act of 1886

In 1885 Arthur was succeeded by Grover Cleveland, the first Democrat elected to the White House in 28 years. Before the year was over, Vice President Thomas A. Hendricks died; and this time Congress did respond to the President's request that the provisions of the 1792 law be examined with a view to change. The new law (24 Stat. 1) of January 19, 1886, provided that "in case of removal,

death, resignation, or inability of both the President and Vice President," members of the Cabinet eligible for the Presidency under the terms of the Constitution would, in a prescribed order of succession, "act as President until the disability of a President or Vice President is removed or a President shall be elected."

The order prescribed for the Cabinet members was that in which the department were established: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, and Secretary of the Interior. As new cabinet departments were created in later years, their secretaries were added to the list: the Secretary of Agriculture in 1889 and the Secretaries of Commerce and Labor in 1913. It should be noted that the President pro tempore of the Senate and the Speaker of the House of Representatives were not included in the succession list, in part because of the possibility, which had been very real in the recent past, that a deceased or disabled President might be succeeded by a Senator or Representative of the opposition party. Thus, it was felt that continuity of administration and policy would be maintained under the law of 1886.

4. From Grover Cleveland to Harry S Truman

Thus the law of 1792 on presidential succession was replaced in 1886 by a second law. Not until 1947 was Congress to legislate in this area again. During the intervening 61 years, the most disquieting crisis for the Presidency was caused by President Woodrow Wilson's long illness; but his elected Vice President, Thomas R. Marshall, was in good health, and so the crisis was one of presidential disability rather than succession in the event of the President's death. Two Vice Presidents who became President served out their first terms with the Act of 1886 in effect, and thus their Secretaries of State would have succeeded them if they had died in office: since Theodore Roosevelt's Secretary of State during his critical period was John Hay, and Calvin Coolidge's was Charles Evans Hughes, no one was likely to become over-alarmed by

contemplating either of these two distinguished Americans as Chief Executive.

B. SUCCESSION THROUGH DISABILITY

1. Constitutional Provision

The references in the Constitution to presidential succession on account of disability appear in Article II, Section I, Clause 5.

Key expressions were to cause much trouble in the years ahead:

"...Inability to discharge the Powers and Duties of the said Office..." as a reason for succession, and "...until the Disability be removed, or a President shall be elected" as a reason for cancellation of the succession.

Legal scholars, legislators, and several Presidents have all pointed to the ambiguities in this language of the Constitution. Among the questions raised are the following: Who has the right to decide if a President has become unable to discharge the powers and duties of his office? Does the Vice President succeed only to the President's powers and duties if such a finding is established? If he actually becomes President, are there then two Presidents if the disabled President recovers? Is the election referred to in the last clause of the constitutional provision the regular quadrennial election or a special one? If the latter, who has the right to call it?

2. The Disabilities of Presidents Garfield and Wilson

During President Garfield's severe disability for 11 weeks in 1881, he performed only one official act: the signing of an extradition paper. Vice President Arthur's reluctance to act as President may in retrospect appear indecisive, but grave constitutional issues were involved, including the question of whether Garfield could legally re-assume the Presidency if he recovered. Besides, the Senate was controlled by the Democrats; the Cabinet was divided on what to do; Arthur was very unpopular with important elements of his own Republican party; and, in any event, he did not

want to give the impression of lusting for presidential power. Unfortunately, when Congress later passed the Act of 1886 on presidential succession, it did not even touch on the question of "inability" or "disability."

The most severe governmental crisis resulting from presidential disability lasted from September 1919, when President Woodrow Wilson suffered a stroke while on a whistle-stop tour around the country in support of the League of Nations, until he left office on March 4, 1921. During this entire period the President was more or less incapacitated, and during part of it he was manifestly unable to perform any presidential duties; for example, during the first few weeks of his illness, 28 bills became law because of Wilson's failure to take action on them within ten days while Congress is in session, as the Constitution requires.

Because of the length and severity of the President's incapacity and for other reasons, Congress looked more actively than it ever had before into the issue of establishing a determination of presidential disability or inability, so that the Vice President could at least exercise the "Powers and Duties" of the Presidency. Nothing came of these enquiries, however, again largely because of the constitutional difficulties that were not answered by any of the proposed solutions. Besides, Vice President Marshall struck no one, including himself, as particularly well-qualified to discharge the duties of the nation's highest office. The attitude of the stricken President was of no help, either; when Secretary of State Robert Lansing began calling meetings of the Cabinet to discuss public business, Wilson proved healthy enough to fire him for the impertinence.

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