

RGD:LU:NS:jh

cc: Files
Gauf ✓
Siegel

OCT 26 1973

MEMORANDUM FOR THE HONORABLE FRED F. FIELDING
Deputy Counsel to the President

Re: United States Constitution - Amendment 25

This is in response to your memorandum of October 19.

You refer to section 2 of the 25th Amendment which provides that whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President "who shall take office upon confirmation" by a majority vote of both Houses of Congress. You ask whether the nominee becomes fully qualified and assumes full power as Vice President immediately upon confirmation, or whether "this nomination and confirmation is effective only upon the taking of an oath." I gather that your precise question is whether the nominee would be fully qualified to take action as Vice President "upon confirmation," or whether the taking of an oath is a condition to his being so qualified.

Although there are no precedents regarding Vice Presidents, the situation involving a President affords, we think, an apt analogy. Section 1 of the 20th Amendment to the United States Constitution provides that the President's and Vice President's terms begin when those of their predecessors expire at noon on January 20. It is clear that the President and Vice President thus assume their office at that time. In other words, there is no hiatus either in the presidential or vice presidential office even though the taking of the oath may be delayed for a short period. But until these officers take the required oath, it is questionable that they can execute the functions of their respective offices. The language of the Constitution--"Before he (the President) enter on the Execution of his office, he shall take the . . . Oath"--suggests that the President already is in office when he takes the oath required by Article II, section 1, clause 8, of the Constitution. It has been said that the taking of the oath is the President's first official duty but not a "necessary step in his assumption of office." Corwin, The President, Office and Powers, 1787-1957, p. 59 (1957 Ed.). For example,

as Corwin points out, Washington became President on March 4, 1789, although he did not take the oath until the following April 30. For example, when James Monroe succeeded himself on Sunday, March 4, 1821, he was not sworn in until Monday, March 5, 1821. Fincher, The President of the United States (1955 Ed.), p. 62. But it does not necessarily follow that the President can, in the words of the Constitution, "enter on the execution of his office" before he takes the oath.

Although the Vice President does not take the same oath as the President (prescribed by Article II, section 1), but rather the oath prescribed by 5 U.S.C. 3331 (see also, Article VI, clause 3, United States Constitution), it seems to us that the result would be the same. It should be noted that the statutory oath includes the following language--"I will well and faithfully discharge the duties of the office on which I am about to enter." This suggests that no duties can be performed until the oath is taken. Upon his confirmation by both Houses of Congress, the Vice President would immediately take office. But as Corwin points out in the case of the President, similarly the taking of the oath by the Vice President is his first official duty after taking office. Accordingly, it appears to us that as promptly as possible after confirmation, the Vice President should take his oath of office.

We have examined the legislative history of the 25th Amendment, and so far as we can ascertain, it sheds no light on the question.

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel