

Responses by John Harrison to Questions for the Record Regarding the Senate Judiciary Committee
Hearing on June 18, 2025

Question: Article II vests the executive power in the single person of the President of the United States of America. Would our constitutional system be able to properly function if the one person vested to wield the executive power is incapacitated, and if not, why not?

The constitutional system cannot function effectively without a person who is empowered to exercise the powers, and perform the duties, of President, and is able to do so. Some important functions, such as making treaties, can be performed only by the President personally. Bills can become law without the President's signature, but the process of presidential review of bills contemplated by Article I, section 7 requires that someone be able to conduct that review. The need for a person who can perform the President's functions is the reason the original Constitution addresses presidential inability in Article II, and the reason the 25th Amendment sets up a procedure by which to determine whether presidential inability has arisen.

Question: If Section 4 of the 25th Amendment is not invoked promptly in the situation where there is an incapacitated President, what sorts of continuity of government issues could that potentially create?

The answer to that question depends in part on whether section 4 of the 25th Amendments sets out necessary conditions for the next person in line of the presidency to act as President, or sets out only a sufficient condition. Article II provides for the Vice President or another officer designated by statute to exercise the powers and duties of the President when the President is unable to do so. Section 4 does not change that rule, but adds a procedure through which to determine whether the President is unable to carry out the office. If the procedure in section 4 is a necessary condition for someone other than the President to act as President, then if the President is disabled and the section 4 process has not operated, no one will be able to act as President. That situation would present a grave continuity of government problem. If the Section 4 process is a sufficient but not a necessary condition for someone other than the President to act as President, then if the President is disabled and the section 4 process has not been invoked, the situation would be as it was before the 25th Amendment was adopted. As the country's experience before the amendment demonstrates, for example in the disabilities of President Garfield and President Wilson, the situation in which the President is in fact disabled but no one is clearly identified as acting President poses severe continuity of government problems.

- **Follow up:** Invocation of Section 4 requires the Vice President to act – they are a necessary party. If the President were incapacitated, and the Vice President were to then become incapacitated themselves, what would happen? Would we be stuck with an incapacitated President?

Again, the answer to that question depends in part on whether the section 4 process is the exclusive means by which an acting President can be identified, or only one such means. If the section 4 process is the only way in which an acting President can be identified in case of possible disability, then if the Vice President is incapacitated, no one can be identified as acting President. If the section 4 process is a sufficient but not a necessary way to identify an acting President, then if the Vice President is incapacitated, the situation is as it was before the 25th Amendment. As my previous answer indicates, the amendment was adopted because uncertainty as to presidential succession is a grave problem.

Question: If an executive decision is made in the President's name, but without his direction, would that decision be invalid as a rule, or could such a decision become valid post hoc if the President later acquiesces to that decision?

The legal effect of a document to which the President's signature was affixed by autopen without the President's direction that it be so affixed depends on the rules that govern the validity of documents that appear to be, but are not, genuine official documents. Sometimes a document that reasonably appears to be what it purports to be is treated as authentic, even if it is not. I do not know how principles of that kind would apply to a document bearing an unauthorized facsimile of the President's signature that was affixed with the White House autopen.

As to possible later presidential acquiescence in an unauthorized use of the autopen, I think, first, that no acquiescence short of an explicit presidential endorsement of the earlier use of the autopen could serve to render the document legally binding. Second, I am not sure whether a later, explicit endorsement of the unauthorized use of the autopen would relate back to the time at which the President's signature was affixed, even if the endorsement came during the President's term of office. I think that an endorsement given by a former President would be ineffective, because a former President no longer holds the powers of the office. Either the current President or a former President, however, might state that an earlier affixation of his signature by autopen was in fact pursuant to his direction. Such a statement would be evidence that the use of the autopen was proper, and that the document in question was valid ab initio.

- **Follow up:** Would Presidential silence be sufficient acquiescence in that scenario?

As stated, I think that after-the-fact acquiescence that does qualify as an affirmative endorsement of the earlier act affixing the President's signature by autopen cannot render an earlier unauthorized affixation by autopen legally binding.

- **Follow up:** If we believe a President is incapacitated, how can be sure they actually acquiesced to a decision made in their name?

In light of the views expressed above, I think the possibility of subsequent endorsement of an earlier use of the autopen to affix the President's signature arises only when the current President affirmatively states that he endorses such a use. If the current President makes such an affirmative statement while unable to exercise the powers and duties of his office, the endorsement would be as valid or invalid as any other purported official act taken under those circumstances. If such an endorsement came during a period in which the President had been determined to be unable to perform his duties through the process set out in section 4 of the 25th Amendment, the endorsement would be ineffective.

Question: Can the President use the autopen in any situation where he needs to affix his signature to a document, or are there situations where the President must personally affix his signature for the action to be valid?

The only situation in which the Constitution requires that the President act by signing a document is signature of a bill that has been presented to him under Article I, section 7 of the Constitution. As I said at the hearing, I agree with the Office of Legal Counsel that the President can sign a bill by directing that a facsimile of his signature be affixed by a device such as an autopen. I do not know of any statute that authorizes the President to act by signing a document and that requires that that President sign by manually affixing his signature.

- **Follow up:** What is important is whether or not the President made the decision?

Absent an explicit requirement that the President sign by manually affixing his signature, whether he has signed a document depends on whether he personally decided that his signature be affixed to it, either by manual signature or through some indirect means like an autopen.

- **Follow up:** What procedures or means of verification could be used to augment the signature and ensure that the President did actually make a decision?

As my statement and testimony indicated, I believe that Congress has power under the Constitution to require that when the President's signature is affixed to a document by a device like an autopen, an official in the White House should create an official record of the President's decision that his signature should be so affixed. That record should be made public. I will add that Congress might wish to consider updating the statutory rules providing that when the President signs a document manually, another official, such as the Secretary of State, attest that the President has done so.